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The International Claims Trade

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Investments are mobile in the twenty-first century international economy. They are seldom held for their duration by a single owner from a single country. They change hands and they do so for a variety of reasons, often in the course of a dispute. But the scholarship addressing what happens when international investments and legal claims against sovereigns regarding those investments change hands appears only at the margins. The practice of buying and selling claims or claims trading is well known and institutionalized in some areas of domestic litigation. For cross-border investment disputes against sovereigns, however, many of the cases discussing claims trading seek to disguise themselves as addressing other legal issues, leading to a haphazard series of doctrines that tends to obscure the trade. The heightened visibility of all forms of external funding for claims against sovereigns has created challenges for tribunals and courts and for claimants who seek to recover on their investments. This Article analyzes the law of the international claims trade and asks what that law ought to look like in light of the theories and purposes of the international investment regime. Contrary to the popular view, it makes the case for these secondary market players and

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then analyzes what should be done about them. It assesses the doctrines advanced by arbitral tribunals and by domestic courts at various stages of international investment dispute settlement involving a traded claim against a sovereign. The Article argues that, often, tribunals and courts are getting it wrong. In doing so, they obscure critical questions about why we have investment law and to what degree claims against sovereigns ought to be marketable. Drawing lessons from domestic law, the Article articulates a positive function for the international claims trade—one that investment law ought to accommodate. Finally, it proposes a way forward for states as they develop new investment instruments.

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INTRODUCTION

In summer 2012, the Argentinian Navy ship, the *Libertad*, docked at a port in Ghana in its usual course as part of a training operation. Ironically given its name, the *Libertad* would be detained a few days later, prevented from refueling, until Argentina paid twenty million dollars to

a hedge fund called NML Capital.[1] NML had sought an injunction in the Ghanaian courts to recover on the sum it was owed from Argentina following lengthy proceedings elsewhere adjudicating Argentina's fiscal emergency several years before. And with that, the *Libertad* crew was sent home and the state asset— the warship— seized.

Robust enforcement efforts against sovereigns by sophisticated actors are the product of an elaborate legal safety net for cross-border investments. International investment law provides recourse to investors for harms states may cause to these foreign investments.[2] Countries around the world have created international investment instruments to facilitate such dispute resolution with stunning speed.[3] With these instruments has come an understudied secondary market for claims against states. As the business of international investment law grows, new players are getting in the game. Financial firms have commodified the investment litigation market—and what has occurred so far is likely to be just the tip of the iceberg.

The business of investment law is multifaceted. In the last ten years, scholars and practitioners have taken up the study of third-party funding of investment claims in which third parties provide financial support to would-be claimants.[4] But another side to investment claim commodification is the claims *trade*—the sale or transfer of an

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1 *See* Jacob Goldstein, *Why a Hedge Fund Seized an Argentine Navy Ship in Ghana*, NPR: PLANET MONEY (Oct. 22, 2012, 10:13 AM), https://www.npr.org/sections/money/2012/10/22/163384810/why-a-hedge-fund-seized-an-argentine-navy-ship-in-ghana [https://perma.cc/C6SW-2Z2Q]; Agustino Fontevecchia, *The Real Story of How a Hedge Fund Detained a Vessel in Ghana and Even Went for Argentina's 'Air Force One,'* FORBES (Oct. 5, 2012, 6:50 PM), https://www.forbes.com/sites/afontevecchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/#4e7dece25aa3 [https://perma.cc/5D72-SBDQ]; *see also* Thomas E. Robins, *The Peculiar Case of the ARA* Libertad*: Provisional Measures and Prejudice to the Arbitral Tribunal's Final Result*, 20 HARV. NEGOT. L. REV. 265 (2015) (describing in detail the several legal proceedings surrounding the hedge fund's action).

2 For discussions of the investment law regime, see, e.g., M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (3d ed. 2010); THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE (Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales eds., 2014); R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY (2005).

3 *See generally* KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (2010).

4 *See generally* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2d ed. 2017).

investment, a claim to relief under an investment instrument, or an investment arbitration award to another party. Evidence suggests the international claims trade may be even bigger and more consequential than other types of arrangements supporting investment litigation and may be destined to grow exponentially as states rethink their investment instruments and reduce avenues to recovery (such as in the new United States-Mexico-Canada free trade agreement).[5]

This Article looks at what the law has to say about the buying and selling of investment claims. I use the term "claims trading" to capture the practice of assigning, selling, or otherwise transferring rights in a contract, claim, or arbitral award to a third party that will seek to enforce those rights against a defendant state.[6] By breaking down the legal

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5 United States-Mexico-Canada Agreement, Can.-Mex.-U.S., arts. 14.D.2, 14.D.3, Nov. 30, 2018, OFF. U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [https://perma.cc/7WU9-8SSM] (not yet in force) (reducing the investor-state dispute settlement mechanism to a very limited set of possible claims compared with its predecessor, the North American Free Trade Agreement).

6 As discussed further below, adjudicators and commentators use a variety of terms to describe a trade. Among them are "assignment," "transfer," "purchase" and "sale." For cases using "transfer," see, e.g., ST-AD GmbH (Germany) v. Bulg., PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, ¶ 100 (Perm. Ct. Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3113.pdf [https://perma.cc/A9MS-HANB]; Société Générale v. Dom. Rep., LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, ¶ 55 (London Ct. Int'l Arb. 2008), https://www.italaw.com/sites/default/files/case-documents/ita0798.pdf [https://perma.cc/TY5F-EF86]; Amco Asia Corp. v. Indon., ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 37 (Sept. 25, 1983), 23 I.L.M. 351 (1984); Fakes v. Turk., ICSID Case No. ARB/07/20, Award, ¶ 32 (July 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf [https://perma.cc/E3U6-YACQ]; Cementownia "Nowa Huta" S.A. v. Turk., ICSID Case No. ARB(AF)/06/2, Award, ¶ 11 (Sept. 17, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0138.pdf [https://perma.cc/W7CH-8QUR]. For cases adopting "assignment," see, e.g., African Holding Co. of Am., Inc. v. Dem. Rep. Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité [Decision on Jurisdiction and Admissibility], ¶ 84 (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0016.pdf [https://perma.cc/8N39-L8NV] (adopting in French, "la cession"); Mihaly Int'l Corp. v. Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶ 15 (Mar. 15, 2002), 17 ICSID Rev. 142 (2002); Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, ¶ 1 (June 26, 2003), 7 ICSID Rep. 442 (2003); Gemplus S.A. v. United Mexican States, ICSID Case No. ARB(AF)/04/3, Award, ¶ 59 (June 16, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0357.pdf [https://perma.cc/2KYC-MMAF]; Casado v. Chile, ICSID Case No. ARB/98/2, Award, ¶ 44 (Sept. 13, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7630.pdf [https://perma.cc/9FSD-4JD7]; Teinver S.A. v. Arg., ICSID Case No. ARB/09/1, Award, ¶ 217 (July 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9235.pdf

building blocks of the international claims trade, the Article evaluates the utility of the practice and its contributions to the development of international investment law.

Law condones litigation finance in many contexts.[7] Claims trading, among other methods, provides a means for parties to cope with the high costs of litigation by relieving them of potentially weighty expenditures involved in securing and enforcing an arbitral award.[8] The practice is relatively common in domestic litigation, particularly in lengthy bankruptcy proceedings in the United States.[9] But in cross-border

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[https://perma.cc/3N9M-EHSA]. For cases adopting "sale" or "purchase," see, e.g., Eur. Cement Inv. & Trade S.A. v. Turk., ICSID Case No. ARB(AF)/07/2, Award, ¶ 25 (Aug. 13, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0311.pdf [https://perma.cc/5M8L-UUV3]; El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 9 (Apr. 27, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf [https://perma.cc/8YRQ-HRGB]; Daimler Fin. Servs. AG v. Arg., ICSID Case No. ARB/05/1, Award, ¶ 31 (Aug. 22, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1082.pdf [https://perma.cc/55NN-HERW]. The literature is just as disparate which explains why no study has taken stock of these transactions in a comprehensive way. For a few that come closest, and which are now rather outdated, see Hanno Wehland, *The Transfer of Investments and Rights of Investors Under International Investment Agreements—Some Unresolved Issues*, 30 ARB. INT'L 565 (2014); William Lawton Kirtley, *The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes*, 10 J. WORLD INV. & TRADE 427 (2009); Stephen Jagusch & Anthony Sinclair, *The Impact of Third Parties on International Arbitration—Issues of Assignment*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 291 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

7 *See, e.g.*, Jamie Ellis & Emily Slater, *Litigation Finance in Bankruptcy: Unlocking Value for Creditors*, 36 AM. BANKR. INST. J. 34 (2017); Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761 (2017); David R. Glickman, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043 (2016); Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?*, 63 DEPAUL L. REV. 305 (2014) [hereinafter DeStefano, *Common Interest*]; Michele DeStefano, *Compliance and Claim Funding: Testing the Borders of Lawyers' Monopoly and the Unauthorized Practice of Law*, 82 FORDHAM L. REV. 2961 (2014) [hereinafter DeStefano, *Compliance*]; Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010).

8 LISE JOHNSON ET AL., COLUMBIA CTR. ON SUSTAINABLE INV., COSTS AND BENEFITS OF INVESTMENT TREATIES: PRACTICAL CONSIDERATIONS FOR STATES (2018); *The Cost of Investment Arbitration: UNCITRAL, ICSID Proceedings and Third-Party Funding*, ACERIS L. (Dec. 27, 2017), https://www.acerislaw.com/cost-investment-arbitration-uncitral-icsid-proceedings-third-party-funding [https://perma.cc/RGS8-Q3KF]; DIANA ROSERT, INT'L INST. FOR SUSTAINABLE DEV., THE STAKES ARE HIGH: A REVIEW OF THE FINANCIAL COSTS OF INVESTMENT TREATY ARBITRATION (2014).

9 JEFFREY N. RICH & ERIC T. MOSER, PRACTICAL LAW FIN., BANKRUPTCY CLAIMS TRADING: BASIC CONCEPTS (2013); Adam J. Levitin, *Bankruptcy Markets: Making Sense of Claims Trading*, 4

investment litigation, the commercialization of the industry and the participation of new actors have precipitated concern, principally that claims trading encourages strategic behavior inconsistent with the aims of international investment law. Some tribunals have dismissed traded claims on that basis.[10] Even though nothing in the law expressly prohibits claims trading, the practice has come under fire for its marketizing effect. When tribunals and courts have permitted the purchase and subsequent enforcement of a claim or award, commentators have widely criticized these decisions.[11]

This Article asks what investment law would look like if it took claims trading seriously. What would the institutionalization of a market for claims look like? Could it ensure full consideration of the claims of individual investors and small claims, unlike the current system which privileges corporations with greater means? As sovereigns assess the risk of entering into contracts and treaties, is the international claims trade disrupting that risk assessment? Ought claims and awards be fungible?

To undertake this examination requires an analysis of claims trading doctrines—the legal frameworks used by tribunals and courts to determine whether a trade should be permitted.[12] These doctrines are highly variable and haphazard in their treatment of the trade. Claims trading doctrines assign labels to the practice based on the function of the

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BROOK. J. CORP. FIN. & COM. L. 67 (2009); Daylene Crudo, *Claims Trading: Managing the Confusion*, 14 AM. BANKR. INST. J. 29 (1995).

10 *See infra* Section III.A.

11 *See infra* Section III.B.

12 The three doctrines I identify in this Article are based on a survey of the more than forty known investment arbitration cases that engage in an analysis about a trade. These cases are publicly reported by one or more of the databases that track international investment law cases. I have named the doctrines to capture a salient element of the analysis, but the categories are necessarily imperfect in part because the set is limited and cannot capture the full range of investment cases, and in part because arbitrators in evaluating claims trades are often creating their reasoning from whole cloth. I have identified what I see as three trends. Likewise, the application of the word "doctrine" overstates somewhat given the limited set and the suggestion in using the term that international investment law is a system of its own. The word also connotes a precedential application of case law, which is debated in international investment dispute settlement. *See, e.g.*, Jan Paulsson, *The Role of Precedent in Investment Arbitration*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 699 (Katia Yannaca-Small ed., 2010); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357 (2007).

trade such as "treaty shopping,"[13] "assignment,"[14] or "abuse of process."[15] These labels themselves have legal import. The application of a label is often determinative of the court or tribunal's treatment of the trade.[16]

Thus, one contribution of this Article is to offer a descriptive account of claims trading and claims trading doctrines, filling a notable gap in the literature.[17] It sets out the publicly known cases involving a trade and catalogues what tribunals and courts are saying. While the concept of the international claims trade is not new, its legal possibilities remain unexplored. The intent of this Article is two-fold: first, it provides an image of how the marketization of international claims occurs and what kinds of conflicts are being generated. It examines how arguments

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13 *E.g.*, Cementownia "Nowa Huta" S.A. v. Turk., ICSID Case No. ARB(AF)/06/2, Award, ¶ 117 (Sept. 17, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0138.pdf [https://perma.cc/W7CH-8QUR]. For a full treatment of treaty shopping, which includes activity beyond claims trading, see JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW (2016).

14 *E.g.*, Mihaly Int'l Corp. v. Sri Lanka, ICSID Case No. ARB/00/2, Award, ¶ 15 (Mar. 15, 2002), 17 ICSID Rev. 142 (2002); African Holding Co. of Am., Inc. v. Dem. Rep. Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité [Decision on Jurisdiction and Admissibility], ¶ 57 (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0016.pdf [https://perma.cc/8N39-L8NV].

15 *E.g.*, ST-AD GmbH (Germany) v. Bulg., PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, ¶ 148 (Perm. Ct. Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3113.pdf [https://perma.cc/A9MS-HANB]. Below I discuss the concept in much greater detail, but I note that the idea of "abuse of process" in enforcement proceedings can have a different meaning from what is described in this Article in the pre-arbitration stage. *See* Renato Nazzini, *Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context*, 66 AM. J. COMP. L. 603, 621–22 (2018) ("The abuse of process doctrine is most commonly applied in circumstances in which there has been previous litigation between the same parties and one of them seeks to bring a claim or raise a defense in later proceedings which could and should have been raised in the earlier proceedings.").

16 As discussed below, tribunals tend to select a label and use that as a frame for decisionmaking. For example, the "assignment" label often means that the tribunal will reject the trade. The "abuse of process" label likewise may signal dismissal, whereas the "treaty shopping" label is more variable. *See infra* Section II.A.

17 None of the cases discussed herein has been left out of the literature, but the scholarly commentary on them has either not discussed the trade or treated it according to the label provided by the tribunal. There are robust discussions about treaty shopping generally, e.g., BAUMGARTNER, *supra* note 13, and of abuse of process as a principle of law, e.g., Stephan W. Schill & Heather L. Bray, *Good Faith Limitations on Protected Investments and Corporate Structuring*, *in* GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 88 (Andrew D. Mitchell, M. Sornarajah & Tania Voon eds., 2015).

in favor of and against claims trading play out. It is partly a doctrinal restatement in which I organize the claims trading case law into coherent categories and acknowledge the distinctions among the trends in that case law. Second, my analysis also includes a policy evaluation in which I review the state reactions to the practice and recommend a way forward.

By providing a map as to what is happening doctrinally, the Article sets a blueprint for future buyers and sellers, and for adjudicators. It concludes that disparate doctrines make a questionable strategy for evaluating claims trading. As a normative matter, the variability in the doctrines obscures critical questions about to what degree claims ought to be marketable. I argue that claims trading is not at odds with investment law. In fact, claims trading might actually facilitate the achievement of some investment law aims.[18] In that sense, this Article makes the case for the traders, but it also gives policymakers guidance as to how they can manage claims trading in response to public concerns.

An examination of the international claims trade is vitally important at this moment for at least four reasons. First, until a deeper examination is undertaken, adjudicators are likely to maintain their practice of trying to fit trades into convenient existing categories like square pegs into round holes. The prevailing perception is that claims trading is only predatory or unscrupulous; hence, the tendency is to deny jurisdiction or otherwise reject the claim on that basis. However, in addition to being lawful, claims trading could be a valuable way for under-resourced individual claims holders to recover rightfully.[19] There may be policy

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[18] Identifying investment law's aims is challenging given the range of views. *See, e.g.*, M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 81 (2015); SORNARAJAH, *supra* note 2, at 83–88; Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES (2d ed. 2015); VANDEVELDE, *supra* note 3; RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012); STANDARDS OF INVESTMENT PROTECTION (August Reinisch ed., 2008). A stated objective of most investment treaties is to promote foreign investment. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, OFF. U.S. TRADE REPRESENTATIVE [hereinafter U.S. Model BIT], https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/Z8DG-AQED].

[19] The *Abaclat* case in which more than 60,000 individual investors sought to recover from Argentina is a good representative example of a potential case. Abaclat v. Arg., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf [https://perma.cc/U9PG-7PSH].

justifications to proceed in either direction. Without a closer analysis, tribunals and commentators have little guidance on how to manage these assertions.

A similar analysis is needed for post-arbitration trades. The international claims trade involves not just investment claims yet to be litigated but also arbitral awards to be enforced. Trades have received considerable negative public attention where a meritorious arbitral award is sold for enforcement against a respondent state, often a developing country.[20] In those instances, critics have termed the third parties that acquire the award "vulture funds"—suggesting that they are going after the developing country like a vulture after its prey.[21] The same legal questions arise in the post-arbitration context: Can a commercial actor assign an interest in an arbitral award just as it might assign an investment or a claim? At what points in time may a putative claimant do so? What legal regime governs such assignments? Neither courts nor policymakers have readily confronted these questions. Instead, observers frequently comment on the risk of overly aggressive enforcement by hedge funds seeking to recover fully on the value of the award. These observers see this practice as detrimental to the ability of developing countries to pay for social welfare programs and public services.[22]

In this way, the evolution of international claims trading implicates debates about transfers of wealth and the purpose of foreign investment protection. This Article takes up two normative concerns. The first relates to concepts of social justice. Apart from whether investment law is designed to enhance social justice, a question on which commentators have differing views,[23] we might consider the possible value added by a

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20 *See, e.g.*, Teresa Cheng & Adrian Lai, *Lessons Learned from the FG Hemisphere vs DRC and Huatianlong Case*, INT'L COUNCIL COM. ARB. 1–2 (Dec. 9, 2011), https://www.arbitration-icca.org/media/4/13523372058325/media1132342764462706-lessons_learned_from_the_fg_hemisphere_vs_drc_and_huatianlong_case.pdf [https://perma.cc/Q33C-39SU]; Hayley Hathaway, *Stop the Vulture Culture: The Real Life Story of Vulture Funds*, JUBILEE USA NETWORK: BLOG DEBT (May 13, 2010), https://jubileeusa.typepad.com/blog_the_debt/2010/05/stop-the-vulture-culture-the-real-life-story-of-vulture-funds-1.html [https://perma.cc/38LX-VAEJ].

21 Cecilia Nahón, *The Case Against "Vulture Funds,"* AM. Q., Summer 2015 https://www.americasquarterly.org/content/case-against-vulture-funds [https://perma.cc/YC96-SH9M].

22 *Id.*; *see also* Hathaway, *supra* note 20.

23 *See infra* Section III.B.

trade. To undertake this analysis, more information is needed. For example, who are the buyers and the sellers, and what leads them to make a trade? We have some preliminary information that I take up below. My second concern is related to the first: I seek to understand whether claims trading achieves a meaningful transfer of wealth.[24] Central to both analyses is a query about whether the international community can still buy into investment treaty protections and on what bases.[25] This Article is the first to draw from the comprehensive set of relevant tribunal and domestic court decisions to reach preliminary answers to these questions.

The second reason this analysis is needed is that tribunals, courts, and scholars are avoiding confronting the consequences of the marketization of the field while that marketization is only continuing to grow.[26] A now-decade-old survey of corporate counsel found that one in five interviewed corporations realized value from a claim or arbitral award by selling or assigning it.[27] In another study, counsel suggested they frequently consider selling an award or claim because it makes their work easier.[28] At least one interviewee explained that third-party buyers were often better equipped to secure enforcement.[29] While other types of

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[24] *See, e.g.*, Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 627 (1998) (discussing how one of the goals of investment law is increased prosperity).

[25] To understand the critical views, see, e.g., THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel et al. eds., 2010); Antonios Tzanakopoulos, *Denunciation of the ICSID Convention Under the General International Law of Treaties*, *in* INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION? 75 (Rainer Hofmann & Christian J. Tams eds., 2011); Leon E. Trakman, *The ICSID Under Siege*, 45 CORNELL INT'L L.J. 603 (2012); Jason Webb Yackee, *Toward a Minimalist System of International Investment Law?*, 32 SUFFOLK TRANSNAT'L L. REV. 303 (2009).

[26] This study reviews all publicly known cases engaging with claims trades. Twice as many cases were reported since 2009 as for all of investment arbitrations prior to 2009. Arbitral institutions do not publish statistics on these trades; in many instances, they likely do not know of the trade themselves.

[27] SCH. INT'L ARBITRATION, QUEEN MARY UNIV. LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2008, at 2 (2008), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf [https://perma.cc/TMZ9-8QS4].

[28] SCH. INT'L ARBITRATION, QUEEN MARY UNIV. LONDON, CORPORATE CHOICES IN INTERNATIONAL ARBITRATION: INDUSTRY PERSPECTIVES 20 (2013), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/pwc-international-arbitration-study2013.pdf [https://perma.cc/E65D-MM38].

[29] *Id.*

funding arrangements continue to be prevalent, trading awards in the enforcement stage is on the rise.[30]

Third, there is a further, sociolegal story to be told from this practice that relates to the globalization of U.S. legal practice, and the diffusion of legal claims. What is a common practice in U.S. litigation and other common law countries has now become increasingly common in the international market.[31] The difference is that the U.S. market for claims has, in some areas of law, become accepted, managed, and institutionalized, whereas in investment law, those administrative pieces have not emerged. Disputes over claims trading in investment law first commanded attention beginning roughly ten years ago.[32] At that time, investment trades received a chilly reception in the public sphere. More recently, the claims trade has increased in regularity, although it remains difficult to detect.[33] The globalizing effect of the U.S. practice on the business side has yet to be matched by the legal development side.

Fourth, this Article has important implications for debates over how to draft state contracts, treaties, and procedural rules. Many countries are developing new models for investment arrangements, drawing inspiration from historical practice.[34] But those past treaties' silence has

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30 *Id.*

31 Some countries permit litigation funding, and the concept of factoring (selling the amounts due and payable to a firm for a lesser amount to get paid faster) in corporate law is likewise common. *See, e.g.*, Michelle M. Harner, *The Search for an Unbiased Fiduciary in Corporate Reorganizations*, 86 NOTRE DAME L. REV. 469, 499 (2011) (discussing alternative bankruptcy systems); George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 J.L. ECON. & POL'Y 451 (2012).

32 Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 335 (2006); Suzanne Siu, *The Sovereign-Commercial Hybrid: Chinese Minerals for Infrastructure Financing in the Democratic Republic of the Congo*, 48 COLUM. J. TRANSNAT'L L. 599, 601 (2010).

33 Efforts to develop rules for third-party funding that would require disclosure have not included claims trading as a necessary disclosure. *See ICSID Rules and Regulations Amendment Process*, INT'L CTR. SETTLEMENT INV. DISPS. [hereinafter *ICSID Rule Amendment Process*], https://icsid.worldbank.org/en/amendments [https://perma.cc/GQN2-V5SL]. Similar criticisms have been made of claims trading in bankruptcy. *See* Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609 (2009).

34 *See Speech: Commissioner Malmström Lays Out EU Plans for a Multilateral Investment Court*, EUR. COMMISSION (Nov. 22, 2018), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1943 [https://perma.cc/RAL3-CS56]; U.S.-CHINA ECON. & SEC. REVIEW COMM'N, POLICY CONSIDERATIONS FOR NEGOTIATING A U.S.-CHINA BILATERAL INVESTMENT TREATY (2016),

created the flawed doctrinal variability highlighted in this Article. My examination of the unsettled case law illuminates how replicating past practice will only invite greater disorder among tribunals and unpredictability for litigants.

Further, as a result of the increased media attention, several states have sought to restrict the rights of certain claims purchasers by passing legislation that inhibits enforcement of certain types of arbitral awards.[35] This Article concludes that such legislation is a questionable strategy for reconceptualizing sovereign obligations under investment instruments. I argue that clearer boundaries ought to be drawn in investment instruments for greater predictability for all parties prior to any dispute. States ought to be cognizant of the risks of claims trading as well as its benefits. They ought to be able to guard against abuses of the system while still encouraging investment and supporting enforcement of arbitral awards. By contrast, curtailing claims trading in the post-award stage poses two risks: first, that those states become shelters for governments in default of their obligations and, second, that those states act in conflict with other legal obligations.[36]

The Article proceeds in four Parts. Part I explains the international claims trade and how it is different from other types of trends such as third-party funding or claims insurance. It compares the claims trade practice in cross-border investment disputes with those in other areas of litigation. Part II argues that courts and international investment tribunals are confusing claims trades. Adjudicators clearly have concerns about the practice but they do not articulate them well. This Part describes the doctrines that tribunals and courts have applied. Part III contends that institutional actors and commentators are missing the broader landscape and the purposes behind the claims trade. This Part demonstrates that the present prevailing view rejecting claims trading offends normative theories of the means and ends of international investment law. Part IV then proposes ways that policymakers can

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https://www.uscc.gov/Research/policy-considerations-negotiating-us-china-bilateral-investment-treaty [https://perma.cc/9N6S-99SN]; Bob Bryan, *Trump Is Launching Negotiations with Japan to Create a New Trade Agreement*, BUS. INSIDER (Sept. 26, 2018, 4:36 PM), https://markets.businessinsider.com/news/stocks/trump-us-japan-trade-deal-negotiations-2018-9-1027568444?utm=newsbreak [https://perma.cc/RG84-QXUU].

35 *See infra* Section III.A.

36 I take up this point *infra* Section III.B.

address the problematic landscape. It discusses the doctrinal and ideological support for these proposals, and articulates and responds to potential objections.

I. THE COMMODIFICATION OF INVESTMENT CLAIMS

Investor-state dispute settlement refers to the arbitration process through which a foreign investor may seek recovery where that investor believes that the host state harmed its investment in certain ways.[37] Most often, the investor's cause of action arises under a bilateral or plurilateral investment treaty agreed between the investor's home state and the state hosting its investment.[38] In other words, investment treaties provide private actors the ability to bring a claim against the state before an independent arbitral tribunal and possibly recover damages where the tribunal finds that the host state breached the treaty to the detriment of the investment in question.

The most straightforward investment claims come from investors who themselves set up the original investment in the host state. Some claims do not change hands at all. If a problem arises in the course of that investment experience, the investor brings a claim under the dispute settlement provision of the relevant treaty or agreement. An arbitral tribunal will be constituted and adjudicate the investor's claim that the state breached the treaty. Often where states lose, those states pay the investor.[39] As the popularity of investor-state dispute settlement has grown, however, a broader range of claims has come to the fore.[40] Those claims have included some from large groups of individual bondholders and from investors on the verge of insolvency.[41] Increasingly, in the

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[37] For an overview of investment law principles and process, see BISHOP, CRAWFORD & REISMAN, *supra* note 2.

[38] For simplicity, I focus on treaty claims. Experienced investment scholars and practitioners will be well aware of other types of investment disputes.

[39] *See* Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115 (2019).

[40] DIANA ROSERT & SERGEY RIPINSKY, UNITED NATIONS CONFERENCE ON TRADE & DEV., INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2017, at 4–24 (2018) (highlighting innovative legal issues and types of claims).

[41] *See, e.g.*, Abaclat v. Arg., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf [https://perma.cc/U9PG-7PSH].

absence of any treaty prohibition, investors are selling or otherwise transferring those claims before or after the arbitration to a third party.

There are multiple scenarios according to which claims could trade hands. An uncomplicated example could involve a company that sells its contract rights in an investment or a deed to some land that constitutes its investment to another company long before any dispute arises. The new company may be of the same nationality of incorporation as the original company and simply acquires the investment. At the other end of the spectrum could be a company that creates or is involved in creating a shell company of another nationality. The original company sells its investment to the shell solely for the purpose of gaining access to an investment treaty. Somewhere in between these two examples may be a company or individual that is unable to pursue the arbitration to its conclusion for financial or other reasons. A hedge fund comes along and offers that investor some cash in exchange for the rights to its investment. The hedge fund then pursues arbitration against the state. Still another possibility is that the original investor completes and wins the arbitration, but the losing state refuses to pay. In those circumstances, the winning investor would need to pursue the losing state's assets around the world to recover. That arduous process may be beyond the abilities of some investors, so a hedge fund may purchase the arbitral award and then seek to enforce it against the state just as if the original investor were doing so.

Commentators and courts have used many names in addition to "trade" to describe such transactions. Among them are transfers,[42]

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[42] *See, e.g.*, ST-AD GmbH (Germany) v. Bulg., PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction (Perm. Ct. Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3113.pdf [https://perma.cc/A9MS-HANB]; Société Générale v. Dom. Rep., LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (London Ct. Int'l Arb. 2008), https://www.italaw.com/sites/default/files/case-documents/ita0798.pdf [https://perma.cc/TY5F-EF86]; Amco Asia Corp. v. Indon., ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983), 23 I.L.M. 351 (1984); Fakes v. Turk., ICSID Case No. ARB/07/20, Award (July 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf [https://perma.cc/E3U6-YACQ]; Wehland, *supra* note 6; Kirtley, *supra* note 6.

assignments,[43] sales,[44] and successions in interest.[45] I will use "claims trading" to refer to these transactions regardless of the term used by a particular tribunal or court. The phenomenon is the same, but the mechanisms vary.[46]

The puzzle that has emerged from this commodification trend is whether such trading is or should be allowed. Tribunals and courts have taken different positions on the question. Treaties are silent, as are many contracts, with respect to the trade itself. Tribunals and courts have turned to other treaty provisions by extension to understand and sometimes prohibit relief from a traded claim. Even where an adjudicator has permitted the traded claim to go forward, strong statements from the public have criticized that choice.[47] This Part situates claims trading among strategic litigation choices and compares the international claims trade with the longstanding prominence of claims trading in areas of domestic litigation such as bankruptcy.

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[43] *See, e.g.*, African Holding Co. of Am., Inc. v. Dem. Rep. Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité [Decision on Jurisdiction and Admissibility] (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0016.pdf [https://perma.cc/8N39-L8NV]; Mihaly Int'l Corp. v. Sri Lanka, ICSID Case No. ARB/00/2, Award (Mar. 15, 2002), 17 ICSID Rev. 142 (2002); Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), 7 ICSID Rep. 442 (2003); INVESTOR-STATE LAWGUIDE, www.investorstatelawguide.com [https://perma.cc/DE4H-53HE] (the research service categorizes these cases under this heading); Jagusch & Sinclair, *supra* note 6, at 296.

[44] *See, e.g.*, Eur. Cement Inv. & Trade S.A. v. Turk., ICSID Case No. ARB(AF)/07/2, Award (Aug. 13, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0311.pdf [https://perma.cc/5M8L-UUV3]; Daimler Fin. Servs. AG v. Arg., ICSID Case No. ARB/05/1, Award (Aug. 22, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1082.pdf [https://perma.cc/55NN-HERW].

[45] *See, e.g.*, PSEG Global Inc. v. Turk., ICSID Case No. ARB/02/5, Decision on Jurisdiction (June 4, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0694.pdf [https://perma.cc/8MLG-NTD7]; Wintershall Aktiengesellschaft v. Arg., ICSID Case No. ARB/04/14, Award (Dec. 8, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0907.pdf [https://perma.cc/3GUU-9VSY].

[46] In one conversation with an attorney who maintains a robust practice on the part of investors, counsel noted that finding the right vehicle for a trade is often more difficult than the trade itself (e.g., how to structure it, term it, write it, etc.). Interview with investment counsel (Fall 2018) (notes on file with the author).

[47] *See, e.g.*, Hathaway, *supra* note 20.

A. *International Arbitration's Secondary Markets*

The international litigation business now includes, among other mechanisms: third-party funding, claims insurance, and claims trading.[48] Each purports to support a potential litigant using different methods.

In third-party funding, the third party is not buying the claim from the claimant. Rather, the claimant receives advance funds from the third-party to pay for the arbitration.[49] In domestic litigation, the practice is also known as claim funding or litigation finance.[50] The American Bar Association defines "litigation finance" as "the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties . . . ."[51] If the claimant prevails, the funder receives a percentage of the proceeds or settlement in return. In other words, in these scenarios, no transfer or assignment of the claim takes place. The owner remains the original investor. Nevertheless, the funder often contributes to the decisionmaking involved with the arbitration or litigation and may be seemingly in control despite not owning the claim. Typically, in third-party financing, a separate contract is executed, distinct from the underlying contract to the claim, that gives the funder certain rights of

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[48] Other similar concepts might include factoring in corporate finance, discussed *supra* note 31.

[49] *See generally* Joshua Hunt, *What Litigation Finance Is Really About*, NEW YORKER (Sept. 1, 2016), https://www.newyorker.com/business/currency/what-litigation-finance-is-really-about [https://perma.cc/M39J-46QG].

[50] *See* Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 195–96 (2014); David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1076–77 (2013); THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (Christopher Hodges et al. eds., 2010); NIEUWVELD & SAHANI, *supra* note 4.

[51] AM. BAR ASS'N COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 1 (2012) [hereinafter ABA REPORT], https://lowellmilkeninstitute.law.ucla.edu/wp-content/uploads/2019/02/ABA-White-Paper-on-Litigation-Finance.pdf [https://perma.cc/5LTS-WLRF]; *see also* Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. 98, 100–02 (2015). Michele DeStefano has noted that domestic claim funding is also referred to as litigation funding, alternative litigation funding, third-party funding, and litigation finance, among other labels. DeStefano, *Compliance*, *supra* note 7, at 2963 n.11; *see also* DeStefano, *Common Interest*, *supra* note 7, at 305 ("Commercial claim funding, where funders invest in business disputes in exchange for a percentage of any eventual settlement or judgment, is a growing industry in the United States.").

recovery connected to any final award in the claimant's favor.[52] In some instances, a third-party funder has become the owner of the claim, such as after a certain period of time or after a financial threshold is reached.[53] Funders use various arrangements and these practices are frequently changing.[54]

The literature on third-party funding has evolved in the last fifteen years.[55] Many scholars have analyzed whether claim funding should be allowed in the United States and have identified problems associated with allowing claim funding.[56] Some U.S. states prohibit such practices as champerty or maintenance, but more than half permit funding in some form.[57] In international investment arbitration, third-party funding is now the subject of review and possible regulation by international investment institutions.[58]

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[52] DeStefano, *Common Interest*, *supra* note 7, at 307, 317–19; Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460 n.6 (2012) (reviewing also recent cases and legislation).

[53] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1323–24 (2011).

[54] As one arbitration institution representative put it: "We can try to keep track of or regulate these arrangements, but to the extent we seek to limit them in response to outside criticism, the funders will simply find other ways to run their business. We are constantly behind their innovative and strategic litigation finance practices." Interview with arbitration institution representative (Jan. 2019) (notes on file with the author).

[55] ABA REPORT, *supra* note 51, at 39 ("Because of this demand, and because of the complexity of regulation in various jurisdictions, the specific form of ALF transactions will undoubtedly continue to evolve."). Today, two views dominate: those that consider third-party funding to be prohibited entirely and those that consider permitting third-party funding so long as relevant information is disclosed. For trends in litigation funding, see Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 754–59, 788–97 (discussing both traditional and emerging law firm models); see also Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 620–21 (2007); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 652 (2005); Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673, 673 (2011).

[56] *See, e.g.*, Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that Has a Place in the United States Market*, 53 VILL. L. REV. 83, 109–10 (2008); Richmond, *supra* note 55, at 650–52. *But see* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (contending that claim funding should be allowed); Steinitz, *supra* note 52.

[57] DeStefano, *Common Interest*, *supra* note 7, at 307.

[58] *ICSID Rule Amendment Process*, *supra* note 33, at 37, 58, 127–28. For an overview of the subject, see NIEUWVELD & SAHANI, *supra* note 50.

Claims insurance or litigation insurance is another increasingly common practice in domestic litigation.[59] Also known as "litigation cost protection," this form of support provides certain litigation expenses if the case results in a defense verdict.[60] The academic literature is thin on claims insurance, but U.S. states appear to be beginning to think about how to regulate, or whether to permit the practice, and whether it may be distinguished from the claim funding discussed above.[61]

Claims trading is the most underexamined of the practices discussed here as they relate to international disputes. Most of the cases involving the international claims trade that are publicly known are disputes before arbitral tribunals addressing claims that were traded before the commencement of the arbitration. A smaller set of cases addresses trades during an arbitration. In these pre-arbitration and during-arbitration cases, tribunals are tasked with evaluating the traded claim in accordance with the rules of the investment instrument, whether a bilateral investment treaty or other source.[62] Another small group of publicly known cases take up trades of arbitral awards for enforcement purposes.[63] The latter have received the most public attention and disapproval. In the post-arbitration cases, typically domestic courts are tasked with applying the law of the state of enforcement.[64]

With respect to substance, as noted above, trades involve, among other possibilities, an assignment of an entire contract, certain rights under a contract, or an interest in an award rendered in the assignor's

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59 *See* David Hechler, *A New Kind of Litigation Funding: This One Has a Twist—It's a Type of Insurance*, CORP. COUNSEL BUS. J. (Aug. 31, 2017), https://ccbjournal.com/articles/new-kind-litigation-funding-one-has-twist---its-type-insurance [https://perma.cc/J9CC-KAW4]; Jim Ash, *Litigation Insurance Costs May Be Passed to Clients*, FLA. B. (Feb. 15, 2018), https://www.floridabar.org/the-florida-bar-news/litigation-insurance-costs-may-be-passed-to-clients [https://perma.cc/LM76-9GTD].

60 Karen M. Kroll, *Litigation Cost Insurance Covers Losing Plaintiffs' Expenses*, A.B.A. J. (June 1, 2017, 1:30 AM) http://www.abajournal.com/magazine/article/litigation_cost_insurance [https://perma.cc/9Q8U-JFCW].

61 Ash, *supra* note 59.

62 *See infra* Section II.A.

63 *See infra* Section II.B.

64 For an explanation as to how the Convention works, see N.Y. ARB. CONVENTION, http://www.newyorkconvention.org [https://perma.cc/RDN9-XHJ9]; see also NEW YORK CONVENTION: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958 COMMENTARY 3 (Reinmar Wolff ed., 2012).

favor. The precise content of what is bought and sold prior to a dispute may have a bearing on the potential claimant's access to dispute settlement. For example, some investors may sell the entirety of their investment but not the arbitral clause in a relevant contract thereby limiting the buyer's ability to bring a claim against the state. This study examines those specific transfers of contract or assignment of receivables or debts, novation, subrogation, or stipulation in favor of a third party in the course of an international investment dispute, regardless of form.[65] Trades may involve any jurisdiction or number of jurisdictions in the world, arise out of any investment treaty, and occur at any stage of the recovery cycle. Tribunals and courts apply three doctrines that I set out in Part II irrespective of the transnational instrument under which the claim is brought or the facts under consideration. The doctrines engage with these features in differing ways.

Finally, the players make a difference. Certain state respondents with access to increased resources are likely able to carry out greater investigation into these matters and make arguments to direct the tribunal's subsequent labeling and legal conclusions.[66] Respondents therefore also play a significant role in directing the doctrine applied by the tribunals, especially in the early cases.[67] As shown below, the doctrinal territory is obscured further by repeat arbitrators and their references to past cases.[68]

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[65] Neither should one confuse claims trading with cases in which the assignment constituted the investment under the tribunal's consideration. *See, e.g.*, Alps Fin. & Trade AG v. Slovk., Award ¶¶ 229, 238 (UNCITRAL 2011), https://www.italaw.com/sites/default/files/case-documents/ita0027.pdf [https://perma.cc/H7AK-KH3U] (the claimant's "investment" was the acquisition by way of assignment of certain receivables from a private Slovak company; the tribunal found that the assignment did not satisfy the criteria of an "investment").

[66] Samples, *supra* note 39, at 144, 161.

[67] Accessing respondent filings is even more difficult than locating arbitral awards. There are not enough submissions publicly available to be able to draw conclusions about trends in respondent argumentation.

[68] Although there is no binding precedent in international investment arbitration, arbitrators often refer to prior arbitral awards addressing similar topics. Paulsson, *supra* note 12, at 700.

B. *Other Forms of Claims Trading*

Although largely unstudied in investment arbitration, claims trading is common in other areas of public and private law. For example, in general commercial litigation, corporate finance, and patent law, secondary markets proliferate. Those areas benefit from reasonably developed doctrines or administrative systems to manage the trade. In international commercial arbitration, typically domestic law will indicate whether assignment of the contractual right is permitted.[69] These laws tend to vary.[70] Another adjacent area of claims trading is claims trading in international settlement commissions' proceedings. Some hedge funds have purchased claims arising out of the foreign claims settlement commission against Cuba, for example, and aggregated them to be able to recover on those claims.[71] Claims trading also occurs in sovereign debt litigation which sometimes intersects with investment disputes as discussed in greater detail below. The area of claims trading law most well

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[69] *See generally* Daniel Girsberger & Christian Hausmaninger, *Assignment of Rights and Agreement to Arbitrate*, 8 ARB. INT'L 121 (1992) (discussing domestic law approaches and conflict of law issues).

[70] For example, in Switzerland, "[t]he determination of whether the arbitration agreement was assignable and has validly been assigned is above all a question of interpretation of the agreement." JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 244 (Stephen V. Berti & Annette Ponti trans., 2007). In France, by contrast, "case law refers to material rules specific to international arbitration rather than the conflict of laws approach." *Id.* at 244. In China,

> [i]t is generally accepted that when a claim or a debt is assigned, the arbitration agreement attached thereto is also assigned. The assignee becomes bound by the arbitration agreement unless it can prove that it was unaware of the existence of the arbitration agreement or expressly rejected it at the time of the assignment.

Xing Xiusong, *Arbitration Clause Not Binding on Insurer by Way of Subrogation*, INT'L L. OFFICE (Oct. 14, 2010), https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/China/Global-Law-Office/Arbitration-clause-not-binding-on-insurer-by-way-of-subrogation [https://perma.cc/S5MD-ALDP].

[71] *See, e.g.*, U.S. DEP'T OF TREASURY, NOTICE REGARDING THE TRANSFER OF CLAIMS AGAINST CUBA CERTIFIED BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION (2008), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/fcsc.pdf [https://perma.cc/A8TV-QA5E] (noting that federal regulations "prohibit all persons subject to U.S. jurisdiction from dealing in property in which Cuba or a Cuban national has or has had an interest, unless authorized pursuant to a general or specific license").

known and most developed is U.S. bankruptcy, which may offer lessons for the investment regime.

While the international claims trade is relatively opaque, in U.S. bankruptcy, the practice of trading claims is reasonably transparent. In bankruptcy, however, the U.S. Congress and the federal bankruptcy courts play a role in regulating the practice.[72] The payment process through which a global corporation must settle its debts often lasts several years, requiring dozens of court proceedings to adjudicate disputes that arise at every step. To circumvent this long and potentially dissatisfactory process, a creditor may find it more advantageous to sell its claim or interest in the outstanding contract to a professional bankruptcy claims trader—an entity willing to stand in that creditor's shoes—most often as an assignee of the original creditor's contract without any obligation to perform given that performance has already been completed. Like in international disputes, the buyer gambles, wagering that it will receive more at the conclusion of the bankruptcy proceedings than it paid for the claim. The seller, like the original investor in an investment dispute, is spared having to endure a lengthy wait and possibility of little to no recovery.

Bankruptcy claims traders are highly sophisticated actors. They study the target and the bankruptcy circumstance carefully before buying.[73] Typical sellers are corporations, pension funds, and insurance companies, while typical buyers are hedge funds and investment banks.[74] Like in investment, claims are traded at all stages of a debtor's Chapter 11 case.[75]

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[72] When a company files for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code, indicating that its debts exceed its assets beyond repair, its creditors benefit from the opportunity to have their outstanding claims against the company satisfied. Each creditor is assigned a priority status based on a set of predefined criteria, such as under what conditions the company owes the creditor money. Those debts are then paid out from the debtor's remaining assets to creditors based on each creditor's level of priority. In other words, creditors with higher priority receive closer to 100 cents on their dollar as compared to those less fortunately situated. *See generally* CHARLES J. TABB & RALPH BRUBAKER, BANKRUPTCY LAW PRINCIPLES, POLICIES, AND PRACTICE (4th ed. 2015).

[73] Mark J. Roe, *Three Ages of Bankruptcy*, 7 HARV. BUS. L. REV. 187, 208 (2017).

[74] JEFFREY N. RICH & ERIC T. MOSER, PRACTICAL LAW CO., BANKRUPTCY CLAIMS TRADING: BASIC CONCEPTS 2 (2013).

[75] They are most often traded in one of the three ways: through a claims purchase agreement, assignment of a claim agreement, or a purchase and sale agreement. *Id.* The framing of the transfer instrument is neither standardized nor material in most instances, although in one high profile case,

In contrast with the limited data on investment trades, the increased transparency in bankruptcy has facilitated scholarly analysis. The literature on U.S. bankruptcy claims trading is robust, critical, and constructive.[76] On the one hand, commentators have viewed the practice as useful to debtors and creditors—a means of efficient resolution of claims. For claims buyers, claims trading provides numerous investment opportunities.[77] On the other hand, claims trading has been subject to critique for what some view as negative consequences for both debt holders and insolvent companies.[78] These critics see the trade as exploitative and as a quick way to monetize pre-petition claims. Despite that trading is regulated by the bankruptcy court, some observers have found this oversight to be too little for what is now a multibillion-dollar market.[79]

The international investment claims trade resembles the bankruptcy claims trade in market terms, but the regulatory system looks very different in each sphere.[80] For one, the bankruptcy court is managing the process of the trade in the course of a collective administrative

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a transferee was found to be not subject to certain counterclaims and defenses so long as it was a "purchaser" rather than an "assignee" of the claim. *See* Enron Corp. v. Springfield Assocs., LLC (*In re* Enron Corp.), 379 B.R. 425, 435–36 (Bankr. S.D.N.Y. 2007).

[76] *See, e.g.*, Patricia A. Redmond & Jessica Gabel Cino, *You Get What You Paid For*, 36 AM. BANKR. INST. J. 34, 34 (2017) (describing claims trading as now "part and parcel to the practice"); Adam J. Levitin, *Bankruptcy Markets: Making Sense of Claims Trading*, 4 BROOK. J. CORP. FIN. & COM. L. 67, 77 (2009); Crudo, *supra* note 9, at 29 (describing claims trading as a "convoluted business" and describing how it "can turn ugly"); *see also* Chaim J. Fortgang & Thomas Moers Mayer, *Trading Claims and Taking Control of Corporations in Chapter 11*, 12 CARDOZO L. REV. 1, 8 (1990); Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L.J. 648, 669 (2010); Douglas G. Baird, *The Bankruptcy Exchange*, 4 BROOK. J. CORP. FIN. & COM. L. 23, 37 (2009); Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1614 (2009); Mike Spector & Tom McGinty, *Bankruptcy Court Is Latest Battleground for Traders*, WALL ST. J. (Sept. 6, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703309704575413643530508422 [https://perma.cc/3SCK-QZQM].

[77] Bruce S. Nathan & Scott Cargill, *Purchasing Claims Free and Clear of a Debtor's Defenses: The Conflicting Views of the Third and Ninth Circuits*, 35 AM. BANKR. INST. J. 32, 32 (2016).

[78] *See, e.g.*, Redmond & Cino, *supra* note 76, at 34 (describing how claims trading is also "a thorny process fraught with risk," particularly of fraud); Josef S. Athanas, Matthew L. Warren & Emil P. Khatchatourian, *Bankruptcy Needs to Get Its Priorities Straight: A Proposal for Limiting the Leverage of Unsecured Creditors' Committees when Unsecured Creditors are "Out-of-the-Money,"* 26 AM. BANKR. INST. L. REV. 93, 93 (2018).

[79] Nathan & Cargill, *supra* note 77, at 32.

[80] I return to lessons that may be learned from bankruptcy, and ways in which the fields differ, *infra* Part IV. The goals of each regime share similarities but differ in several respects.

redistribution whereas the investment tribunal or court is adjudicating the merits of a substantive claim to relief for a wrong allegedly committed by the respondent state. These adjudications have given rise to different outcomes through the application of three different doctrines to which the Article next turns.

II. MISGUIDED CLAIMS TRADE DECISIONS

This Part describes how courts and investment tribunals have interpreted claims trading when faced with a scenario of a trade that the respondent state argues renders the claim illegitimate. It offers a typology of cases in which tribunals and courts have either dismissed complaints on the basis of jurisdictional rules and prudential arguments or allowed the complaint to proceed despite the trade. Looking at the collection of relevant cases generally, these tribunals and courts make two noteworthy analytical moves: First, they construe the investment instrument to cover only certain investments—those that either maintain hands or maintain constant ownership at particular points in time that the adjudicators consider to be important. Second, they often examine the purpose behind the trade, reading an intent requirement into the relevant treaty.

A. *Pre-Arbitration Claims Trade Doctrines*

The following discussion is an effort to catalogue how tribunals have treated pre-arbitration claims trading. It allows those devising new treaty language and those disputing traded claims to predict better how tribunals will apply their terms with respect to the trade. This Section describes the problem with the current pre-arbitration claims trade doctrines and demonstrates how each suffers from legal shortcomings often arising from a misguided view that international investment law ought to protect state rights more than investor rights. It is not to suggest that these cases ought to have reached different results. Indeed, many of these claims may have been rightfully dismissed or advanced. Rather, this Section illustrates how claims trading doctrines empower tribunals to skirt important inquiries.

The three doctrines of pre-arbitration claims trade that I present are, first, the exclusionary standing doctrine, which has evolved from the

concept of treaty shopping;[81] second, the abuse of process doctrine; and, third, the state consent doctrine.[82] A tribunal's evaluation of the trade is typically incidental to the facts giving rise to the claim, but by applying these doctrines, tribunals are prioritizing secondary principles over the plain meaning of the applicable legal instruments.

1. Exclusionary Standing Doctrine

The first doctrine that is commonly used by tribunals is what I will call the "exclusionary standing doctrine." According to this doctrine, as part of its evaluation of the claim, a tribunal considers whether the trade puts the claim in tension with basic jurisdictional requirements of the dispute—specifically whether the claim involves an "investment" by an "investor."

In general, to bring a claim under a typical investment instrument such as a bilateral investment treaty, the claimant must have made an investment as defined by the treaty and must qualify as an investor as defined by the treaty. Questions about whether a claimant has made an investment or is an investor consistent with the treaty are common jurisdictional questions in investment law as they constitute the basis for the tribunal's jurisdiction *ratione personae* (the international law analogue for its personal jurisdiction) and its jurisdiction *ratione materiae* (its subject matter jurisdiction).[83] Many cases are dismissed on these bases apart from any claims trade that may have occurred.[84] Among

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[81] For an overview of treaty shopping, see BAUMGARTNER, *supra* note 13 (defining treaty shopping as strategically changing or invoking a nationality; also noting that nowhere in international law is treaty shopping prohibited, even if policy considerations arise).

[82] Many tribunals engage with all three doctrines or some combination of more than one. My treatment is focused on the dominant theory guiding the tribunal's decision. Undoubtedly, each doctrine as I have labeled it has some relationship to the others; what varies from case to case is the strength of the frame advanced in the decisionmaking.

[83] DOLZER & SCHREUER, *supra* note 18, at 245–53.

[84] Treaty shopping is broader than just claims trading, however. *Id.* at 53; *see also* Manuel Casas, *Nationalities of Convenience, Personal Jurisdiction, and Access to Investor-State Dispute Settlement*, 49 N.Y.U. J. INT'L L. & POL. 63 (2016); Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225 (2015); Lucas Bento, *Time to Join the "BIT Club"? Promoting and Protecting Brazilian Investments Abroad*, 24 AM. REV. INT'L ARB. 271, 319–20 (2013). The term is also commonly used in the international tax literature. *See, e.g.*, Omri Marian, *Unilateral Responses to Tax Treaty Abuse:*

cases considering claims that have been subject to a trade, tribunals sometimes query whether a traded investment or claim concerning an investment still qualifies as an investment.[85] Likewise, those tribunals also consider whether the claim was owned before or after the trade by an individual or entity that qualifies under the treaty as an investor.[86]

To be sure, nothing in the text of most treaties makes express reference to a trade in its definition of these jurisdictional terms.[87] Despite the lack of any feasible facial challenge, respondent states have argued that the trade is disqualifying because the trade alters the qualities of the original investment or investor such that it no longer meets the definitions of those terms. For example, in *Millicom International Operations B.V. v. Republic of Senegal*, the original concession in question granted by the government of Senegal involved shareholdings by certain individuals and companies in the Netherlands.[88] Thereafter, those individuals and entities transferred some of their shares to others; in the process, ownership of the local (in Senegal) subsidiary changed hands. Senegal argued that the transfer meant that Millicom lacked standing to bring an arbitration because it had not "made all or part of the investment" and therefore could not qualify as an investor.[89] In that case,

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A Functional Approach, 41 BROOK. J. INT'L L. 1157, 1157 (2016); Simone M. Haug, *The United States Policy of Stringent Anti-Treaty-Shopping Provisions: A Comparative Analysis*, 29 VAND. J. TRANSNAT'L L. 191 (1996); Mimi E. Gild, *Tax Treaty Shopping: Changes in the U.S. Approach to Limitation on Benefits Provisions in Developing Country Treaties*, 30 VA. J. INT'L L. 553 (1990).

85 An elaboration of the meaning of "investment" has emerged in investment case law. *See, e.g.*, Salini Construtorri S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 6 ICSID Rep. 398 (2004). Many tribunals have relied upon the discussion in *Salini* to require that an investment must be of a certain minimum duration to qualify under a treaty for protection.

86 *See, e.g.*, U.S. Model BIT, *supra* note 18 (definition of "investor of a Party").

87 I have not seen a treaty that has done so, but not all treaties are publicly or readily available. "Investor" is typically defined along the lines of the definition in the U.S. Model BIT: "a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party" and "investment" likewise: "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." *Id.* at 3–4.

88 Millicom Int'l Operations B.V. v. Sen., ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal (July 16, 2010), https://www.italaw.com/sites/default/files/case-documents/italaw1247.pdf [https://perma.cc/9WB3-Q3KV].

89 *Id.* ¶¶ 82–84.

the tribunal noted that the transferred shares went from one Dutch national to another and therefore did not disrupt Millicom's standing as an investor, which required only that the entity be a Dutch national.[90]

Generally, with respect to the meaning of "investor," tribunals focus on the question of nationality—situations in which entities or individuals have sold or otherwise transferred their claim or their investment to gain access to a particular investment treaty that was not otherwise available on the basis of the entity's or individual's nationality. Arbitrators have frowned upon this practice in dicta, as have scholars, and labeled it "treaty shopping" or "nationality shopping:" shopping for protection that the investor did not otherwise have. For example, in considering whether the claimant was properly an investor, the tribunal in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay* examined the purpose behind the creation of the entity claiming to be the investor and allowed it to proceed despite a change in nationality because it did not appear to be an instance of shopping.[91]

Where there are no concerns about nationality, tribunals have had little difficulty viewing the claims purchaser as an investor within the meaning of the relevant treaty.[92] Some tribunals have acknowledged that

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[90] Although I return to consent and treat it separately, consent and nationality requirements could collapse into one another. For an extended discussion of the interplay between nationality and consent, see BRIT. INST. INT'L & COMP. L., INVESTMENT TREATY LAW: CURRENT ISSUES II, at 3 (Federico Ortino et al. eds., 2007) (noting that "nationality is perhaps at the heart of the debate over the rights and participation of private parties in international relations").

[91] Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Para., ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction (Oct. 9, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1109.pdf [https://perma.cc/XZ22-EUXT].

> A putative investor can structure its investment through a company having the nationality of a state which has an investment treaty with the host state of the planned investment. This is an example of an investment treaty performing its stated purpose; *viz.* to attract foreign capital: There cannot, however, be a restructuring of the investment in order to resort to the dispute resolution provisions of an investment treaty once a dispute has arisen. Treaty shopping is acceptable, forum shopping is not.

Id. ¶ 93.

[92] The tribunal in *Gemplus S.A. v. United Mexican States* also concluded that an assignment of shares with the assignor's retention of a right to bring a claim (already initiated) did not result in the assignor's severing of its right of standing. Gemplus S.A. v. United Mexican States, ICSID Case No. ARB(AF)/04/3, Award, ¶ 5–33 (June 16, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0357.pdf [https://perma.cc/2KYC-MMAF]; *see also* Casado v. Chile, ICSID

twenty-first century companies operating in the global economy frequently consider nationality in the context of electing how to structure their instruments and that doing so should not be necessarily disqualifying.[93] For instance, in *African Holding v. Democratic Republic of the Congo*, the tribunal determined that the trade "[neither] transform[s] the rights at issue [nor] result[s] in the novation of obligations."[94] The tribunal focused its analysis not on the nationality question but rather on rights retained by the assignee. The tribunal concluded that the transfer did not take place to gain access to international arbitration and therefore the claimant was a qualifying investor.[95] Affirming that the assignee retains the same rights that the assignor held as an investor, the tribunal described how the rights and obligations originating from the relevant contracts, including access to an investment treaty, remain unchanged upon assignment.[96]

Respondent states have claimed that a trade disqualifies a previously qualifying investment because the new claimant did not make an economic commitment to the host state as is often considered as a requirement for investments to receive state protection. To distinguish investments from ordinary commercial transactions, many bilateral investment treaties and subsequently many tribunals have required that the investor's commitment to the host state's economy be of a minimum

Case No. ARB/98/2, Award (Sept. 13, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7630.pdf [https://perma.cc/9FSD-4JD7]. *But see* Cementownia "Nowa Huta" S.A. v. Turk., ICSID Case No. ARB(AF)/06/2, Award (Sept. 17, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0138.pdf [https://perma.cc/W7CH-8QUR]; Standard Chartered Bank v. Tanz., ICSID Case No. ARB/10/12, Award (Nov. 2, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1184.pdf [https://perma.cc/MQ3P-Z6VK].

93 Sanum Invs. Ltd. v. Laos, PCA Case No. 2013-13, Award on Jurisdiction, ¶ 309 (Perm. Ct. Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf [https://perma.cc/SNE5-9YCV] (stating that "[t]he search for a convenient place of incorporation is common practice whether for fiscal reasons or for the network of investment treaties a country may have concluded").

94 African Holding Co. of Am., Inc. v. Dem. Rep. Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité [Decision on Jurisdiction and Admissibility] (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0016.pdf [https://perma.cc/8N39-L8NV] (translation by author).

95 *Id.* ¶ 84.

96 *Id.*

"certain duration."[97] This issue has only been perfunctorily addressed in the case law, despite its importance. Respondents have argued that claims purchasers have not entered into a relationship with the claimant and that investment law does not permit such an entity to activate the treaty. For example, in *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, the claimant-buyer purchased its shares in the relevant state-owned enterprise for "[t]he purely nominal purchase price" of fifty U.S. dollars.[98] With that purchase, it then claimed the right to seek over one billion U.S. dollars in dispute settlement. This led Venezuela to argue that Vannessa Ventures had not made an investment pursuant to the treaty since it had spent so little.[99]

The tribunal in *Fedax N.V. v. Republic of Venezuela* found similarly that where an investment is freely transferrable to third parties (such as a negotiable promissory note), then all rights attached to that investment, including the right to arbitrate, should also transfer.[100] That case involved a claim brought by the foreign assignee of a defaulted sovereign debt instrument.[101] Venezuela argued that acquisition of a sovereign debt instrument by way of assignment could not be considered an "investment" under the International Centre for Settlement of Investment Disputes (ICSID) Convention depriving the tribunal of jurisdiction.[102] The tribunal found that it had jurisdiction, holding that "there is nothing to prevent [the] purchase from qualifying as an

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[97] *See, e.g.*, Salini Construttori S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001), 6 ICSID Rep. 398 (2004).

[98] Vannessa Ventures Ltd., v. Venez., ICSID Case No. ARB(AF)04/6, Award, ¶ 121 (Jan. 16, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1250.pdf [https://perma.cc/7L8N-GN37].

[99] *Id.* ¶ 116.

[100] Fedax N.V. v. Venez., ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (July 11, 1997), 5 ICSID Rep. 183 (2002).

[101] *Id.*, Award, ¶¶ 16–18 (Mar. 9, 1998), 5 ICSID Rep. 200 (2002). The instruments at issue were six U.S. dollar-denominated promissory notes issued by Venezuela to a Venezuelan company in payment for services that the company had rendered. The company subsequently assigned the notes to Fedax, a Netherlands Antilles company; the precise timing is unclear. Fedax alleged that Venezuela stopped payment on the notes on May 7, 1994. Fedax filed a request for ICSID arbitration on June 17, 1996, seeking payment of the outstanding principal and interest. *Id.*

[102] *Id.*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 18–19 (July 11, 1997), 5 ICSID Rep. 183 (2002).

investment under the Convention."[103] Other tribunals have likewise considered the impact of the trade on the definition of "investment" and whether the claimant made a significant enough contribution.[104] Still others have explored whether the trade had an impact on the continuity of the investment.[105]

Often when applying the exclusionary standing doctrine, tribunals have found the trade unencumbering to their respective exercises of jurisdiction under the applicable investment treaty. One tribunal concluded there was a legal basis for a position rejecting claims trading on the basis of permissible standing rules, but that position has not been widely adopted.[106] There are, however, certain cases where tribunals have

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[103] *Id.* ¶ 29. The tribunal acknowledged that the notes were endorsed to a foreign holder, but that did not mandate a different conclusion. *Id.* ¶ 40.

[104] Fakes v. Turk., ICSID Case No. ARB/07/20, Award (July 14, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0314.pdf [https://perma.cc/E3U6-YACQ]; Standard Chartered Bank v. Tanz., ICSID Case No. ARB/10/12, Award (Nov. 2, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1184.pdf [https://perma.cc/MQ3P-Z6VK].

[105] El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf [https://perma.cc/8YRQ-HRGB] (rejecting the respondent's argument that the investor's sale of its investment represented an obstacle to its jurisdiction); *accord* African Holding Co. of Am., Inc. v. Dem. Rep. Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité [Decision on Jurisdiction and Admissibility] (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0016.pdf [https://perma.cc/8N39-L8NV]; Wintershall Aktiengesellschaft v. Arg., ICSID Case No. ARB/04/14, Award (Dec. 8, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0907.pdf [https://perma.cc/3GUU-9VSY].

[106] The tribunal in *Daimler Financial Services AG v. Argentine Republic* commented that:

> a strong argument can be made that the ICSID Convention and many BITs accord standing only to the original investor and not to any subsequent would-be purchasers . . . . The better view would seem to be that ICSID claims are at least in principle separable from their underlying investments. The Tribunal therefore rejects the Respondent's contention that the Claimant's ICSID claims (or at least those connected with the shareholding) were necessarily and automatically transferred along with the shares by operation of law. Rather, the Tribunal finds that it should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken—provided that the investor did not otherwise relinquish its right to bring an ICSID claim.

Daimler Fin. Servs. AG v. Arg., ICSID Case No. ARB/05/1, Award, ¶¶ 144–45 (Aug. 22, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1082.pdf [https://perma.cc/55NN-

either split themselves with respect to dominant doctrine—that is, where one arbitrator applied an exclusionary definition doctrine and another applied an abuse of process doctrine—or equivocated on precisely which analysis the adjudicators were carrying out.[107] These cases further confirm the confusion and haphazardness with which tribunals are approaching pre-arbitration trades. The next Section elaborates on the second of these doctrines.

2. Abuse of Process Doctrine

Another type of reasoning used by tribunals proceeds as follows: When a party makes an investment not for the purpose of engaging in commercial activity, but rather for the sole purpose of gaining access to international dispute settlement, it does not, regardless of qualifying by definition, engage in a protected bona fide transaction; rather, a claim based on the purchase of an otherwise qualifying investment solely for the purpose of commencing litigation is an abuse of process.[108] This idea persists in equal frequency as the exclusionary standing doctrine. More than one third of cases studied here apply some concept of abuse or lack of good faith. For example, in *Phoenix Action v. Czech Republic*, the purported investor was an entity created after the dispute arose and which carried out no activities except to file the claim. The Czech Republic asked the tribunal to decide whether a foreign entity could be created for the sole purpose of gaining access to a treaty. The tribunal found that a claim based on the purchase of an investment solely for commencing litigation

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HERW]. The question was whether Daimler Financial Services (DFS)—wholly owned by Daimler AG (DAG)—or DCAG (DAG's predecessor in interest) intended to transfer the ICSID claim to the parent company. The tribunal concluded that DFS enjoyed standing as a qualifying investor notwithstanding the subsequent transfer of its shareholding in the Argentine subsidiary to DCAG two years before the arbitration began.

107 Alapli Elektrik B.V. v. Turk., ICSID Case No. ARB/08/13, Award (July 16, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw4306.pdf [https://perma.cc/6ZAX-6266] (investment and abuse); Cementownia "Nowa Huta" S.A. v. Turk., ICSID Case No. ARB(AF)/06/2, Award (Sept. 17, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0138.pdf [https://perma.cc/W7CH-8QUR] (investor and abuse).

108 Phoenix Action, Ltd. v. Czech, ICSID Case No. ARB/06/5, Award, ¶ 142 (Apr. 15, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf [https://perma.cc/N9B2-37ZS].

was an abuse of process and dismissed the claim.[109] The tribunal undertook an analysis similar to that which I have labeled the exclusionary standing doctrine in that it looked at the purpose of the investment, but rather than take issue with the definition of investment or investor and whether Phoenix Action's actions qualified, it dismissed the claim on the basis that Phoenix Action had not acted in good faith.

Again, to be sure, the concept of an "abuse of process" or "abuse of right" does not typically appear in investment treaties.[110] Some scholars have taken the position that good faith is a general principle of international law and that not acting in good faith, or abuse of process, is a derogation that deprives the actor of particular rights, even treaty rights.[111] Other scholars have taken an even stronger position that acting in good faith is required under customary international law.[112] Regardless of its status as a binding norm on subjects of international law, including investors, the moments in time and circumstances to which it applies are even more unclear. It is not at all certain that such a principle could negate an otherwise unprohibited trade as some tribunals have prescribed.

Like the tribunal in *Phoenix Action*, the tribunal in *Cementownia v. Turkey* found that an assignment of a claim to gain access to international

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109 *Id.*

110 I note that the civilian concept of "abuse of right" is different from "abuse of process" and that both appear in the investment case law. I will use "abuse of process" as a general heading throughout my discussion, but I acknowledge that abuse of right may be closer to ideas of good faith that I take up later, and further analysis to break down these concepts as they are used across common and civil law arbitrators is needed. Tribunal decisions are ambiguous on this point.

111 Stephan W. Schill, *General Principles of Law and International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 133, 142–43, 156 (Tarcisio Gazzini & Eric De Brabandere eds., 2012) (discussing *Mobil Corp., Venez. Holdings, B.V. v. Venez.*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 205 (June 10, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0538.pdf [https://perma.cc/7YUG-KTJD], in particular and how that tribunal "engaged in a thorough comparative analysis" to provide a normative basis that "all legal orders know concepts framed to avoid the misuse of law").

112 Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389, 389 (2002) ("The concept of abuse of rights derives from national legal systems notwithstanding that its content may vary among states. Abuse of rights has influenced international law in areas where it is widely considered to be a part of international law, whether as a general principle of law or as part of customary international law.").

jurisdiction was an abuse of process.[113] The tribunal observed that seeking the protection of a treaty through assignment is not prohibited in international investment law. Nevertheless, where a trade was used simply to "manufacture" an international dispute out of a domestic one, it would not be permitted.[114] The tribunal concluded that the claimant could not prove that its trade was done in good faith.[115] The tribunal also commented on the manner in which Cementownia "intentionally and in bad faith abused the arbitration."[116]

In general, tribunals have distinguished between what they view as legitimate restructuring of investments to obtain treaty protection for the future from those that seek to obtain retroactively protection that was otherwise precluded due to the absence of an applicable treaty or the absence of a treaty with sufficient protection given the nature of the breach.[117] In other words, tribunals, without going so far as to say so, have

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113 Cementownia "Nowa Huta" S.A. v. Turk., ICSID Case No. ARB(AF)/06/2, Award (Sept. 17, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0138.pdf [https://perma.cc/W7CH-8QUR].

114 *Id.* ¶ 117.

115 Cementownia asserted its standing on the basis of its alleged shareholdings in two Turkish electricity corporations whose concession agreements with the Turkish Ministry of Energy were terminated in June 2003; however, Cementownia never adduced any concrete evidence substantiating the timing of its share acquisitions. *Id.*

116 *Id.* ¶ 159 (notably, the tribunal took notice of more than just the investor's trade in reaching this conclusion). In another case, *Loewen Group, Inc. v. United States*, the tribunal found that the assignment of a claim to a Canadian company by a company which was once Canadian but emerged from U.S. bankruptcy reorganization as a U.S. person did not successfully retain the link of Canadian nationality required to maintain the claim against the United States. Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), 7 ICSID Rep. 442 (2003).

117 Likewise, in the *Tokios Tokelés v. Ukraine* dispute, which did not involve a claims trade, the majority made a distinction between legitimate corporate restructuring to obtain treaty protection and an abuse of process. Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0863.pdf [https://perma.cc/4DAL-W5XH]. For an overview of the issues, see FREEDOM OF INV. ROUNDTABLE, 4TH ANNUAL CONFERENCE ON INVESTMENT TREATIES: TREATY SHOPPING AND TOOLS FOR TREATY REFORM 3–4 (2018), https://www.oecd.org/daf/inv/investment-policy/4th-Annual-Conference-on-Investment-Treaties-agenda.pdf [https://perma.cc/F5K5-7W4Y]; see also Wehland, *supra* note 6, at 573 n.43 ("The situation may be different where a transfer is based on a universal succession of rights rather than an agreement between the transferor and the transferee, such as in the event of a merger . . . ."); ST-AD GmbH (Germany) v. Bulg., PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction (Perm. Ct. Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3113.pdf [https://perma.cc/A9MS-HANB] (a host state national cannot transfer a right to go to international arbitration against his state of nationality; this is an application

examined the intent behind the trade. To make this determination, some tribunals have examined the time at which the trade occurred: whether it occurred long before the alleged breach versus whether it occurred concurrent with or subsequent to the alleged breach. In *Pac Rim Cayman LLC v. Republic of El Salvador*, the tribunal suggested that, where at the moment of a transfer "the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability," there would be an abuse of process, but if a dispute were merely a possibility, that would not constitute abuse.[118] The tribunal in *Aguas del Tunari, S.A. v. Republic of Bolivia* used a similar test. There, the majority of the tribunal decided that the "entities relied upon for ownership of the Claimant were not corporate shells set up for the purpose of obtaining

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of the general principle of *nemo dat quod non habet*); Société Générale v. Dom. Rep., LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (London Ct. Int'l Arb. 2008), https://www.italaw.com/sites/default/files/case-documents/ita0798.pdf [https://perma.cc/TY5F-EF86] (noting that one limit on the transfer of rights is that the transaction in question must be a bona fide transaction and not devised to allow a national of a state not qualifying for protection under a treaty to obtain an inappropriate jurisdictional advantage otherwise unavailable by transferring his rights after-the-fact to a qualifying national; finding that nothing suggests that this transaction took place to obtain an inappropriate jurisdictional advantage; requiring claimant to have nationality needed at time of breach); Millicom Int'l Operations B.V. v. Sen., ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal, ¶ 84 (July 16, 2010), https://www.italaw.com/sites/default/files/case-documents/italaw1247.pdf [https://perma.cc/8RWL-BMS8] (shares in the investment were held by Dutch nationals, and this predated the arbitration by several years; even if it was possible, or even likely that the choice of the subsidiaries was also made considering the protection that their domicile could afford them, this fact alone could not constitute an abusive solution; there would also need to be circumstances which would demonstrate that such choice was made unknown to the other party and under artificial conditions); MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶ 182 (May 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf [https://perma.cc/YWF3-DSWN] ("[T]o structure an investment with the aim to seek protection of a BIT is not *per se* in breach of the good faith expected of an investor. Tribunals have found that an investor would not qualify for the protection of the BIT concerned only if the nationality is changed after the dispute has arisen . . . ."); Eur. Cement Inv. & Trade S.A. v. Turk., ICSID Case No. ARB(AF)/07/2, Award, ¶ 175 (Aug. 13, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0311.pdf [https://perma.cc/5M8L-UUV3] ("If, as in *Phoenix* [*Action*], a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.").

[118] Pac Rim Cayman LLC v. El Sal., ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, ¶ 2.99 (June 1, 2012), https://www.italaw.com/sites/default/files/case-documents/ita0935.pdf [https://perma.cc/NUX2-KRLJ].

ICSID jurisdiction."[119] The dispute arose from the failed privatization of water and sewage services in the city of Cochabamba.[120] In December 1999, long prior to bringing its claim in November 2001, the foreign investor, incorporated in the Cayman Islands, "migrated" by transferring a fifty-five percent ownership stake to a Dutch company which gave it access to the Netherlands-Bolivia BIT. The tribunal found no support for an allegation of abuse or fraud.[121] The issue of precise timing was also instructive in *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*.[122] That tribunal noted that although the only business purpose of the investor's corporate restructuring was to be able to have access to investment arbitration, at the time of the restructuring, no claim had been made, and, subject to one qualification, none was in prospect at the time of the restructuring.[123]

The abuse cases have the highest rate of rejection among the three doctrines. These statistics are not surprising given the exceptionally subjective nature of the tribunal's finding. Nevertheless, some tribunals—including the very first to introduce the concept of abuse of process—

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119 Aguas del Tunari, S.A. v. Bol., ICSID Case No. ARB/03/2, Introductory Note (Oct. 21, 2005), 20 ICSID Rev. 445, 446 (2005); *see also id.*, Decision on Respondent's Objections to Jurisdiction, ¶ 330 (Oct. 21, 2005), https://www.italaw.com/sites/default/files/case-documents/italaw10957_0.pdf [https://perma.cc/72RU-USHG].

120 The privatization was based on a forty-year concession contract, and it assigned to foreign companies the exclusive rights to provide water and sewage services in Cochabamba. *Id.* ¶ 57.

121 *Id.* ¶ 245.

122 ConocoPhillips Petrozuata B.V. v. Venez., ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, ¶¶ 279–80 (Sept. 3, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1569.pdf [https://perma.cc/Q75L-HYH4].

123 *Id.* Likewise, the tribunal in *Mobil Corp., Venezuela Holdings v. Bolivarian Republic of Venezuela* considered Exxon Mobil's structure of its investments in Venezuela in the form of subsidiaries through a holding company incorporated in the Netherlands. That tribunal also held that no abuse had taken place. The tribunal concluded that it was legitimate for an investor to restructure, in which case it would have access to a BIT in case of future disputes, although it also considered that to restructure investments *only* to gain jurisdiction under a BIT for such disputes would constitute "an abusive manipulation of the system." Mobil Corp., Venez. Holdings, B.V. v. Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 205 (June 10, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0538.pdf [https://perma.cc/7YUG-KTJD].

have emphasized that claims trading is an accepted part of international investment law; it is simply that context, especially timing, matters.[124]

3. State Consent Doctrine

Tribunals also draw conclusions about the respondent state's acquiescence with the claims trade. In one early case, the state objected to the tribunal's jurisdiction on the basis that the state had not consented to arbitration with the assignee of the original investor's shares; however, the tribunal found that, by approving the transfer of shares, the state had consented to the assignment of the agreement to arbitrate since the right to invoke the arbitration clause "is attached to [the] investment" and therefore the tribunal had jurisdiction.[125]

According to one investment treatise, the right of subsequent assignees to bring a claim is limited to circumstances in which the state is made aware:

> If the host State is aware of and agrees to the assignment of rights and duties, the approval of the extension of jurisdiction . . . to the successor will be assumed. If the host State is unaware of an assignment or has resisted succession, it is less likely that a tribunal will decide that party status under the [ICSID] Convention has been transferred.[126]

In *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, for example, the arbitral tribunal held that a national of a non-

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[124] *Aguas del Tunari* was the first. *Aguas del Tunari*, Decision on Respondent's Objections to Jurisdiction, ¶ 330(d) ("[I]t is not uncommon in practice, and—absent a particular limitation—not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT . . ."); *see also* Tidewater Inc. v. Venez., ICSID Case No. ARB/10/5, Decision on Jurisdiction, ¶ 184 (Feb. 8, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1277.pdf [https://perma.cc/6YYR-CNXL] (noting that "it is a perfectly legitimate goal, and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host state").

[125] Amco Asia Corp. v. Indon., ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 31 (Sept. 25, 1983), 23 I.L.M. 351 (1984).

[126] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 185 (2d ed. 2009).

signatory to the ICSID Convention cannot bring a claim by assigning the claim to a national of an ICSID contracting state.[127] The tribunal stated that "whatever rights Mihaly (Canada) had or did not have against Sri Lanka could not have been improved by the process of assignment with or without, and especially without, the express consent of Sri Lanka."[128] To do otherwise would, according to the tribunal, call into question basic principles of privity in international agreements.[129]

Other tribunals have taken a still narrower view and concluded that the respondent state consents only at the moment when the parties agree to arbitration.[130] These tribunals seem to suggest that there is some relationship between the investor and the host state above and beyond what the treaty grants investors generally from the sending state. For the most part, however, consent appears less frequently as an express rationale in the evaluation of claims trades.

B. *Post-Arbitration Claims Trade Doctrine*

The second category of claims trading in international investment arbitration is that of trades that take place after the conclusion of the arbitration. Where a trader purchases an arbitral award, the trader will undertake to enforce the award by pursuing the losing state's assets around the world. Domestic courts then take up the enforcement litigation.

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127 Mihaly Int'l Corp. v. Sri Lanka, ICSID Case No. ARB/00/2, Award (Mar. 15, 2002), 17 ICSID Rev. 142 (2002).

128 *Id.* ¶ 24.

129 *Id.*

130 Banro Am. Res., Inc. v. Dem. Rep. Congo, ICSID Case No. ARB/98/7, Award (Sept. 1, 2000), 17 ICSID Rev. 382 (2002). The case of *Banro American Resources* implicated issues of consent as well as of definition. The tribunal found that the "juridical person party to the dispute" should have had the nationality of an ICSID contracting state when the parties consented to arbitration, i.e., on the date on which the last of the parties involved gave its consent. *Id.* ¶¶ 4–5; Vannessa Ventures Ltd., v. Venez., ICSID Case No. ARB(AF)04/6, Award (Jan. 16, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1250.pdf [https://perma.cc/7L8N-GN37]; Wintershall Aktiengesellschaft v. Arg., ICSID Case No. ARB/04/14, Award, ¶ 52 (Dec. 8, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0907.pdf [https://perma.cc/3GUU-9VSY]; PSEG Global Inc. v. Turk., ICSID Case No. ARB/02/5, Decision on Jurisdiction (June 4, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0694.pdf [https://perma.cc/8MLG-NTD7].

Some commentators have argued that "[a]ssignment of benefits of arbitral awards is a standard business practice worldwide, undertaken by companies involved in international trade and supported by credit insurers."[131] Despite this claim, there are many fewer decisions and fewer still academic articles that have examined such assignments at all—whether with extended treatment and rejection or approval—particularly as they relate to awards against sovereigns. Part of the reason for this dearth of analysis may be the fact that such assignments need not be disclosed for enforcement purposes or any other purpose by law. Thus, the post-arbitration "doctrine" is a non-doctrine—there is no clear, identifiable body of case law to which litigants can turn for guidance. I discuss lessons from the known cases in this Section.[132] In these cases, courts notably have not seen trades as detrimental to enforcement; they have largely not had occasion to examine the trade at all. What is clear, however, is that there is a widespread view among commentators that post-arbitration trades are harmful. When post-arbitration claims trading against states has hit the news, it has been subject to notable public criticism.[133]

Apart from procedural or other forms of challenges to awards, most states pay most of the time when they lose an arbitration and face an award against them.[134] Thus, claims trading of arbitral awards is more likely to occur in those minority of cases in which the respondent state is unwilling or seemingly unable to pay. Because enforcement of an award in those circumstances often requires multiple enforcement actions against the respondent state's assets all over the world, trading the award to an entity with deeper pockets may be particularly advantageous for the originally injured party. For a generous fraction of its winnings, a

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131 Konstantin Pilkov, *Assignment of Benefits of Arbitral Awards: Problematic Enforcement in Ukraine*, KLUWER ARB. BLOG (June 2, 2014), http://arbitrationblog.kluwerarbitration.com/2014/06/02/assignment-of-benefits-of-arbitral-awards-problematic-enforcement-in-ukraine [https://perma.cc/3R8W-JEVD].

132 These are all the cases known among practitioners, including based on interviews I conducted of counsel and scholars around the world, or otherwise available in U.S. courts, or available in other jurisdictions in English, French, or Spanish through structured searches of all the major arbitration databases.

133 Rupert Neate, *Privy Council Blocks 'Vulture Fund' from Collecting $100m DRC Debt*, GUARDIAN (July 18, 2012), https://www.theguardian.com/business/2012/jul/18/privy-council-vulture-fund-drc [https://perma.cc/RJG6-HDSH].

134 *See* Luke Eric Peterson, *How Many States Are Not Paying Awards Under Investment Treaties?*, IAREPORTER, May 7, 2010.

disputant can claim victory while the heavy lifting of collecting on the award against a potentially unresponsive or defaulting respondent state is left to the trader/assignee. In this way, trading an arbitral award is similar to bankruptcy claims trading: it leaves the trouble of collecting on a debt to the experienced trader.

The popularity of post-arbitral trading has grown in recent years. The rise of this practice is reflected in the establishment of clearinghouses that specialize in matchmaking between potential assignors and assignees, demonstrating that, like in U.S. bankruptcy, there is an intensifying market for the business in arbitration. One of these, ClaimTrading.com, has created an online shopping mall for such claims. According to the website,

> [a]s a registered user, [claimants seeking financial redress] will be able to pursue two types of transactions on the [company's electronic] platform: [(1)] Sale or assignment of claims, judgments and awards[; and (2)] Arrangement of funding to cover all or part of the cost of legal recovery efforts (third party litigation funding).[135]

After a claim, judgment, or award is listed, the company's "pool of investors" is able to browse the details about the claim and other qualities about the potential assignor and request more information.

The policy issues surrounding claims trading at the post-arbitration stage differ from those at the pre-arbitration stage. At the post-arbitration stage, a tribunal has found the state to have been in the wrong and all that remains is settling the payment to the winning claimant. Questions for policymakers at the post-arbitration stage reflect competing obligations on the public purse. On the other hand, what force does investment law have to encourage investment if states can wriggle out of their commitments?

The few known cases addressing post-arbitration claims trading have not yet confronted these legal or policy questions. *Blue Ridge Investments, LLC v. Republic of Argentina*[136] was the 2013 attempted enforcement in U.S. courts of an ICSID award in an investment dispute

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135 *See What We Do*, CLAIMTRADING, https://www.claimtrading.com/index/page?id=Platform [https://perma.cc/9M7P-8R2U].

136 Blue Ridge Invs., LLC v. Arg., 735 F.3d 72 (2d Cir. 2013).

captioned *CMS Gas Transmission Co. v. Argentine Republic*.[137] After the issuance of the award and an attempt to enforce it, CMS assigned the benefit of the award to Blue Ridge (a Bank of America subsidiary).[138] Blue Ridge subsequently filed a petition to confirm the award in U.S. courts in 2008. Argentina argued that as an assignee, "Petitioner lacks legal authority to seek judicial confirmation of the award" and that "only a party to the underlying arbitration can seek recognition or enforcement of the award under Article 54(2) [of the ICSID Convention]."[139] The parties later settled after Blue Ridge was able to seek the assistance of the Office of the U.S. Trade Representative to put pressure on Argentina.[140] That Blue Ridge was in a position to ask and achieve major trade pressure on Argentina through the U.S. government further demonstrates the power held by some claims buyers and a potential power differential between buyers and sellers.

The best-known case reflecting the challenges associated with post-arbitration assignment is *FG Hemisphere Associates LLC v. Democratic Republic of Congo* and its many iterations.[141] There, the trader corporation, FG Hemisphere, a fund incorporated in Delaware with no connection to the original dispute, purchased two arbitration awards against the government of the Democratic Republic of Congo (DRC) and sought to enforce those awards in multiple jurisdictions. The awards were originally held by Energoinvest, a company that had invested in the DRC

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137 CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf [https://perma.cc/8VQS-JHJP].

138 *Blue Ridge Invs., LLC*, 735 F.3d at 75.

139 Memorandum in Support of Motion by the Republic of Argentina to Dismiss the Petition at 2, 12–13, *Blue Ridge Invs., LLC*, 902 F. Supp. 2d 367 (S.D.N.Y. 2012) (No. 10 Civ. 0153 (PGG)), 2011 WL 2885071.

140 Doug Palmer, *Obama Says to Suspend Trade Benefits for Argentina*, REUTERS (Mar. 26, 2012, 12:00 PM), https://www.reuters.com/article/usa-argentina-trade/update-3-obama-says-to-suspend-trade-benefits-for-argentina-idUSL2E8EQ6IG20120326?feedType=RSS&feedName=nonCyclicalConsumerGoodsSector&rpc=43 [https://perma.cc/S3TJ-7TQP].

141 La Générale des Carriéres et des Mines v. F.G. Hemisphere Assocs. LLC [2012] UKPC 27 (finding that the state-owned corporation could not be held liable for the state's liabilities, preventing F.G. Hemisphere from enforcing its award against Gecamines' assets); Dem. Rep. Congo v. FG Hemisphere Assocs. LLC, [2011] 14 H.K.C.F.A.R. 95 (holding that states enjoy absolute immunity in Hong Kong).

in the 1980s.[142] The two awards, both from April 2003, totaled $11.7 million and $18.4 million respectively. In November 2004, Energoinvest transferred its interest in the awards to FG Hemisphere which then sought to enforce the awards in the courts of Hong Kong, Australia, and Jersey.[143] By the time the enforcement proceedings were underway, FG Hemisphere claimed more than $100 million. The DRC government sought legal and financial assistance from the African Legal Support Facility, an organization created by the African Development Bank to assist African governments specifically in their defense against so-called vulture funds.[144]

More recently, a major third-party funder announced it has sold its interest in the proceeds of an ICSID award against Argentina.[145] Burford Capital announced in March 2018 that it had made a gain of $94 million by selling its interest in *Teinver S.A. v. Argentine Republic* for $107 million in cash. The funder invested $12.8 million in the claim while arbitral proceedings were ongoing in 2010 and the original investors became insolvent.[146] The arbitral claim was filed in 2008 by three member companies of a Spanish travel group against Argentina. An award was

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142 Kathryn Crossley, *Case Analysis:* Democratic Republic of the Congo and Ors v FG Hemisphere Associates LLC, ASIAN LEGAL BUS. (June 17, 2011), https://www.legalbusinessonline.com/news-analysis/case-analysis-democratic-republic-congo-and-ors-v-fg-hemisphere-associates-llc/64049 [https://perma.cc/LS5M-XUBB]; SOVEREIGN DEBT & HUMAN RIGHTS 503 (Ilias Bantekas & Cephas Lumina eds., 2018).

143 SOVEREIGN DEBT & HUMAN RIGHTS, *supra* note 142, at 503; Cheng & Lai, *supra* note 20, at 2.

144 *See African Legal Support Facility*, AFR. DEV. BANK GROUP, http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility [https://perma.cc/DG6K-G9LR]. The "Rationale" page of the website describes how the Bank's regional member countries are "disadvantaged by the quality of legal representation" and that the "[f]ailures of the [countries] to negotiate effectively are supposed to have also led to opportunity costs estimated in billions of U.S. dollars arising from various badly drafted contracts and other financial agreements." *Rationale*, AFRICAN DEV. BANK GRP., https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/rationale [https://perma.cc/HF5T-PFUQ]. The Facility has its own website. AFR. LEGAL SUPPORT FACILITY, http://www.aflsf.org [https://perma.cc/YJB6-KKGJ].

145 Sebastian Perry, *Burford Sells Interest in Argentina Award*, GLOB. ARB. REV. (Mar. 13, 2018), https://globalarbitrationreview.com/article/1166579/burford-sells-interest-in-argentina-award [https://perma.cc/BPY5-6483].

146 Few details are known about the nature of Burford's original arrangement with the Spanish companies. That may have been an assignment while the arbitration was underway, but more likely was a funding arrangement short of an assignment.

issued in July 2017 against Argentina for more than $320 million plus interest.[147] Argentina has sought to annul the award; that application was pending at the time of the Burford sale.[148] The identity of the buyers has not been disclosed.

It is striking that the public and scholarly perception is that pre-arbitration trades are managed effectively despite the absence of law and the resultant lack of predictability for litigants. At the same time, the general perception in the public sphere and to some degree in practitioner circles is that post-arbitration trades are problematic and not managed effectively. That is, while states do little to address pre-arbitration claims trading, some states are objecting to post-arbitration trades as discussed in Part IV. The media and certain nongovernmental organizations have played a role in creating sympathy for respondents that are pursued by so-called vulture funds. In domestic bankruptcy also, hedge funds are viewed as a "villain."[149] In fact, the label "vulture fund" first arose when hedge or equity funds began to act as sovereign creditors and sought to recover from insolvent states.[150] More specifically, the perception is that these funds "refuse to participate in debt restructuring and claim the debt at its initial price."[151] Another pejorative term which is sometimes used

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147 The companies had sought $1.6 billion. Perry, *supra* note 145.

148 *Id.*

149 Michelle M. Harner, *Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives*, 16 AM. BANKR. INST. L. REV. 69, 71 & n.8 (2008) (noting a view among some commentators that "casts the . . . investor as a 'vulture'").

150 *See* Jonathan I. Blackman & Rahul Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna*, 73 LAW & CONTEMP. PROBS. 47, 49 (2010) (defining vulture funds as entities that "buy sovereign debt instruments when a country is most vulnerable, which enables the funds to purchase the debt at a deep discount from its face value and attempt to enforce the full claims"). Scholars have focused on sovereign debt restructuring and the prevalence of "vulture funds" in that context. *See, e.g.*, Lucas Wozny, Note, *National Anti-Vulture Funds Legislation: Belgium's Turn*, 2017 COLUM. BUS. L. REV. 697 (2017); Charles W. Mooney, Jr., *A Framework for a Formal Sovereign Debt Restructuring Mechanism: The Kiss Principle (Keep It Simple, Stupid) and Other Guiding Principles*, 37 MICH. J. INT'L L. 57, 105 (2015); Martin F. Schubert, *When Vultures Attack: Balancing the Right to Immunity Against Reckless Sovereigns*, 78 BROOK. L. REV. 1097, 1097 (2013); John A.E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 TEX. INT'L L.J. 221 (2014); Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUM. BUS. L. REV. 473 (2010).

151 MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 148 (Juan Pablo Bohoslavsky & Jernej Letnar Černič eds., 2014). The African Development Bank Group has estimated that such

to describe this activity is "trafficking" in claims. Although some of these terms and criticisms originated in sovereign debt litigation, as this Section has shown, the overlap in the concept of hedge funds seeking to recover from sovereigns has spillover effects on the legitimacy of claims trading in all types of investment disputes.[152]

III. THE NORMATIVE CASE FOR A NEW CLAIMS TRADE DOCTRINE

The criticisms and misgivings about the international claims trade outlined in the last Part tend to overlook the contributions trading makes or could make to investment law. No provision in investment treaties sets out a bar on trades. Thus, to prohibit a trade as some tribunals have done requires consideration of general principles or customary international law or an examination of the trade through strained jurisdictional terms. That tribunals do so threatens the legitimacy of international investment law, which, at the intersection of public and private law, seeks to govern the relations between private parties and states where contract and commercial principles such as assignment could create more efficient and reliable outcomes. This Part argues, first, that the doctrines suffer from a number of legal shortcomings, and second, that rejecting claims trading offends normative theories of the means and ends of international investment law.

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funds recover on average between three and twenty times their investment. *Vulture Funds in the Sovereign Debt Context*, AFR. DEV. BANK GROUP, https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context [https://perma.cc/97KS-9XBC].

152 There are clear intersections between sovereign debt litigation and international arbitration. *See* Jessica Beess und Chrostin, *Sovereign Debt Restructuring and Mass Claims Arbitration Before the ICSID, the* Abaclat *Case*, 53 HARV. INT'L L.J. 505 (2012); Cross, *supra* note 32, at 335; Rebecca Lowe, *Investment Arbitration Claims Could be 'Traded Like Derivatives'*, INT'L B. ASS'N (Mar. 12, 2013), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=02decc8d-bf67-4b86-a023-f2ef2aa4843b [https://perma.cc/5H6D-ELMA]. *See generally* Steven L. Schwarcz, *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 EMORY L.J. 1189 (2004); Hal S. Scott, *A Bankruptcy Procedure for Sovereign Debtors?*, 37 INT'L LAW. 103 (2003). A growing number of ICSID and other investment cases in the early 2000s dealt with defaults on sovereign bonds leading to a wide range of legal questions that scholars have undertaken to pursue. *See, e.g.*, Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 711 (2007).

A. *Seeing Past the Doctrines*

As established above, there is no textual prohibition on claims trading. Each of the doctrines analyzed here undertakes an examination of the trade in the context of other legal principles. In brief, the exclusionary standing doctrine engages the tribunal beyond its mandate; the abuse of process doctrine erroneously treats "good faith" as an independent substantive obligation on investors; and, the consent doctrine wrongly views the trade as the legal claim rather than the investment. This Section elaborates those missteps.

First, with respect to the exclusionary standing doctrine that takes up the trade as part of a jurisdictional analysis, even though this approach at least intends to operate within the four corners of the legal requirements, it still engages the tribunal beyond the scope of its mandate. The primary role of the tribunal is to evaluate whether the state breached an obligation in the treaty vis-à-vis what the claimant claims is an investment. The trade is typically incidental to the tribunal's task of evaluating whether the claimant is an investor who made an investment. The investment ought to be evaluated as required by the treaty, but the trade is rarely relevant. That is not to suggest that claimants do not have obligations or need not meet any threshold requirements. Indeed, they must meet jurisdictional requirements, which leads me to a second way the tribunal may aggrandize its mandate in applying this doctrine: with respect to timing.

The tribunal's jurisdiction is limited by the time at which the dispute arose. This is an important question given that acts or facts that have arisen before the treaty became applicable are not covered by it. The concept of jurisdiction *ratione temporis* puts the spotlight on the notion of the dispute and the question of when it started. The exclusionary standing doctrine is prone to offend the *ratione temporis* analysis by reaching back in time to the moment of the trade, rather than focusing on evaluating the investment at the time the dispute arose. By looking back at the trade, which often precedes the start of the dispute, tribunals have then created from whole cloth new principles to govern this analysis beyond that which they are tasked.

Second, with respect to the abuse of process doctrine, most commentators and practitioners would agree that customary international law requires or general principles of international law

demand that a claimant ought to behave in good faith in bringing the claim and throughout the proceedings.[153] Claimants must act with clean hands.[154] Where the bounds of the good faith obligation start and stop, however, is a matter of debate. Good faith is "inherently ambiguous, difficult to define and challenging to contextualize, and therefore carries with it the risk of being unpredictable in both its application and consequences."[155] The vagueness of the good faith or abuse concept alone makes it an inappropriate litmus test for a claims trade doctrine.[156] More problematic still, however, is that some tribunals have elevated the idea beyond the customary or general principles approach to evaluate the intent of the investor. These analyses are problematic.[157] Such an evaluation "provide[s] decision-makers with an abundance of discretion

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153 Andreas R. Ziegler & Jorun Baumgartner, *Good Faith as a General Principle of (International) Law*, *in* GOOD FAITH AND INTERNATIONAL ECONOMIC LAW 9 (Andrew D. Mitchell, M. Sornarajah & Tania Voon eds., 2015) (discussing the concept more broadly). Some tribunals have made findings in respect of investor obligations. *See, e.g.*, Al-Warraq v. Indon., Final Award (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf [https://perma.cc/RZ4A-EYAP]; Urbaser S.A. v. Arg., ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C255/DC9852_En.pdf [https://perma.cc/JL95-L6NF]; Inceysa Vallisoletana, S.L. v. El Sal., ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf [https://perma.cc/X62R-GCEF]; Biwater Gauff (Tanz.) Ltd. v. Tanz., ICSID Case No. ARB/05/22, Award, ¶ 602 (July 24, 2008), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf [https://perma.cc/2G2N-LJHB]; *see also* U.N. Charter art. 2, ¶ 2 (in reference to states); Nuclear Tests Case (New Zealand v. France), Judgment, ¶ 49 (Dec. 20, 1974), 1974 I.C.J. Rep. 457 (same); Schill & Bray, *supra* note 17, at 114 (noting that "[g]ood faith is a concept that "saturates all legal systems").

154 *See, e.g.*, Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2, Award, ¶ 126 (Nov. 1, 1999), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C156/DC544_En.pdf [https://perma.cc/Z5QK-ZPUE] (concluding that the doctrine of clean hands renders the claim inadmissible); Plama Consortium Ltd. v. Bulg., ICSID Case No. ARB/03/24, Award (Aug. 27, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf [https://perma.cc/KCP9-7D5A] (same).

155 Schill & Bray, *supra* note 17, at 88 (describing how the idea "conjures abstract and elusive ideals of morality, ethical imperatives, and ideas of fairness, justice, honesty and trustworthiness" and calling for a more concrete understanding to preserve the rule of law).

156 The tribunal in *Pac Rim Cayman LLC v. El Sal.*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (June 1, 2012), https://www.italaw.com/sites/default/files/case-documents/ita0935.pdf [https://perma.cc/H58Q-6NPD], acknowledged it as a "significant grey area." *Id.* ¶ 2.99; *see also* Wehland, *supra* note 6, at 570.

157 Schill & Bray, *supra* note 17, at 91 ("Good faith inserts flexibility into the decision-making process, allowing arbitrators to escape the tight constraints of positivistic treaty language.").

that is subject to personal valuation and biases."[158] Nothing in investment law indicates an interest in the rationale behind a traded claim. The law does not, at present, set out such a clear bar on legal opportunism, and concluding otherwise risks watering down the enforcement utility of the system.

What is most important, however, is that good faith is not itself "a source of obligation where none would otherwise exist."[159] Rather, it governs the manner in which the parties behave in the course of fulfilling their existing legal obligations. In these cases, tribunals have created obligations against trading based on what they believe to be the purpose of the investor. Further, upon closer examination, these tribunals often rely on dicta from investment tribunals that came before them, rather than other sources of law, further muddying the waters.[160]

The argument that international investment law is limited to non-traded claims because of good faith overlooks another aspect of the law. The first case to elaborate on the concept of abuse of process focused on how it is not uncommon to arrange one's investment to one's benefit.[161] In that case, the tribunal confronted the question of a trade that shifted the ownership from the Cayman Islands to the Netherlands. It held that it was *not* illegal, absent express prohibition, to structure an investment (or restructure, sell, or transfer) for the purpose of getting access to a particular treaty.[162] At best, customary international law on treaty interpretation demands that the tribunal look only to a limited set of sources, including the object and purpose of the treaty, but not the additional concerns of the adjudicator or behind a strategic decision of a claimant.[163]

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158 *Id.*

159 Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, ¶ 39 (June 11, 1998), 1998 I.C.J. Rep. 275.

160 *See, e.g.*, Sanum Invs. Ltd. v. Laos, PCA Case No. 2013-13, Award on Jurisdiction, ¶¶ 309–15 (Perm. Ct. Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf [https://perma.cc/SNE5-9YCV] (citing with approval *Phoenix Action* and *Aguas del Tunari*).

161 Aguas del Tunari, S.A. v. Bol., ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C210/DC629_En.pdf [https://perma.cc/D5H6-K6PX].

162 *Id.* ¶ 330(d).

163 If anything, investment treaties recognize that investments may change hands for funding or insurance purposes. Many provide subrogation clauses that expressly permit changes in hands for insurance purposes. Subrogation is often considered a standard clause in BITs. See, for example,

model BITs of the following states: Serbia Model Bilateral Investment Treaty art. 8 (2014), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4791/download [https://perma.cc/K6RB-JZV7]; Denmark Model Bilateral Investment Treaty (2000), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2838/download [https://perma.cc/Q4EN-EF7Z]; Model Text for the Indian Bilateral Investment Treaty (2015), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download [https://perma.cc/RJ66-SHE9]; Malaysia Model Bilateral Investment Treaty (1998), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2834/download [https://perma.cc/8NPA-NGC3]; Colombia Model Bilateral Investment Treaty art. X (2011), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3559/download [https://perma.cc/QM4M-JUV8]; United Kingdom Model Bilateral Investment Treaty art. 10 (2008), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2847/download [https://perma.cc/E3BC-JJ98]; France Model Bilateral Investment Treaty art. 9 (Feb. 14, 2006), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5874/download [https://perma.cc/4TT2-8G4Z]; Hellenic Republic Model Bilateral Investment Treaty art. 8 (2001), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2836/download [https://perma.cc/B482-P299]; Netherlands Model Investment Agreement art. 14 (Mar. 22, 2019) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download [https://perma.cc/KAT4-89PP]; Ghana Model Bilateral Investment Treaty art. 9 (2008) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2866/download [https://perma.cc/ETX2-GGUX]. Others that include either subrogation or assignment clauses achieving the same include: Agreement Between the Government of the Czech Republic and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, Czech-Indon., art. 7 (Sept. 1, 1998), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/941/download [https://perma.cc/DVS9-2KLQ]; Agreement Between the Federal Democratic Republic of Ethiopia and the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, Eth.-Kuwait, art. 8 (Sept. 14, 1996), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1169/download [https://perma.cc/BRR4-SMWN]; Agreement Between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments, Barb.-Can., art. X (May 29, 1996), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/280/download [https://perma.cc/6RJ5-TGN4]; Agreement Between the Government of Mongolia and the Government of the Republic of Singapore on the Promotion and Protection of Investments, Mong.-Sing., art. 12 (July 24, 1995), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2024/download [https://perma.cc/LW3V-N94S]; Treaty Between the Federal Republic of Germany and Sierra Leone Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Sierra Leone, art. 5 (Apr. 8, 1965), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1411/download [https://perma.cc/Z8ZF-B76C]; Agreement Between the Czech and Slovak Federal Republic and the Kingdom Og [sic] Norway on the Mutual Promotion and Protection of Investments, art. VII (May 21, 1991), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2116/download [https://perma.cc/3MF5-4Q6T].

Finally, with respect to consent, nothing about a trade interferes with a treaty obligation that would alter the state's consent.[164] Rather, the host state consented to dispute settlement so long as the treaty criteria were met. Moreover, with respect to consent and claims trading, the power of the tribunal is arguably at a minimum because the parties did not consent to empowering the tribunal to evaluate a trade. In other investment dispute contexts, states have taken the position that they need not consent in legal terms to certain innovations in investment proceedings for them to be permitted or even encouraged.[165] In other words, a host state need not consent to assignments otherwise; rather, the host state would need to prohibit such activity expressly.

The doctrines have flaws in application as well as in content. Notably, there are a number of arbitrators who have participated on panels that consistently apply one of the three doctrines when faced with a traded claim, and the influence on outcomes is apparent.[166] Apart from any individual arbitrator or court, an evaluation of the practice, the doctrines and possible responses would be incomplete without a normative analysis of whether the international claims trade actually serves a valuable purpose for the investment law regime—which I take up in the following Section.

B. *Situating Trading in Investment Law Theory*

Should claims trading be allowed? As shown above, claims trading may have both advantages and disadvantages depending on the actor or

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164 For an elaboration on the challenges associated with state consent, see Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747 (2012).

165 *See, e.g.*, *NAFTA Commission Announces New Transparency Measures*, OFF. U.S. TRADE REPRESENTATIVE (Oct. 7, 2003), https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen [https://perma.cc/Q25A-8B5E] (noting that nothing in NAFTA prohibits amicus curiae submissions in investment proceedings and therefore agreeing that they are permitted).

166 Of the sixty-nine arbitrators participating in these cases, six were engaged in more than two cases. For four of those six arbitrators, the tribunals permitted the claim to proceed in nearly all cases. (In two instances, the tribunal was inconclusive on the trade issue.) For one arbitrator, the panel outcome differed for each of the three claims trade cases in which that arbitrator was involved. And for another arbitrator, the panel outcome was to uphold in four cases, to dismiss in three, and inconclusive in one.

the context.[167] This Section demonstrates that at a theoretical level, trading is not inconsistent with any of the most commonly discussed normative theories of investment law: commercial law theory, public law theory, or private law theory. In other words, to evaluate whether claims trading is disruptive to international investment law, this Section considers first what investment law is for. The Article does not advance a new theory of investment law, nor does it prioritize any theory. Rather, it evaluates whether the commentators and adjudicators that have sought to dismiss traded claims do so with an eye to the theories regarding the field.

International investment law long pre-dates the modern network of treaties that was established in the latter half of the twentieth century. Those treaties are deeply embedded within the global expansion of European trading and investment activities that began in the seventeenth century.[168] Today, international investment law is characterized by a proliferation of and substantive and procedural expansions of investment instruments over the last thirty years. The rise of free market economics in the 1980s bolstered a movement to liberalize foreign investment regimes. The idea was to inject capital into stagnant economies and to encourage investment.[169] Like in trade law, the major recent international economic institutions have been "based on and around a normative principle of 'growing the pie' and 'raising all boats.'"[170] This neoliberal consensus has driven investment policymaking.

The impetus for investment law is widely accepted to have been "the strong drive by nationals and companies of certain states to undertake direct foreign investments in other countries and the consequent need to

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167 Even in the sovereign debt context, there may be positive elements to the engagement of vulture funds. Vulture fund contributions may "serve to strengthen creditor protections by invoking the right to hold out and by serving as a check against opportunistic defaults and overly oppressive restructuring terms." Natalie A. Turchi, Note, *Restructuring a Sovereign Bond Pari Passu Work-Around: Can Holdout Creditors Ever Have Equal Treatment?*, 83 FORDHAM L. REV. 2171, 2188 (2015).

168 KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 2 (James Crawford & John S. Bell eds., 2013).

169 DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 14 (2017) (and sources cited therein) (also discussing the impact of privatization in many closed market states and other economic trends in emerging economies informing the popularity of BITs).

170 Harlan Grant Cohen, *What Is International Trade Law For?* 2 (Inst. Int'l Law & Justice, Working Paper 2018/6, 2018).

create a stable international legal framework to facilitate and protect those investments."[171] In response to a sense that local law in some countries impeded the entry of foreign capital investment protections, investment treaties evolved to address many of the areas formerly covered by friendship, commerce, and navigation treaties with unique focus on investment. The guiding paradigm has been that for the foreign investment to flourish to the benefit of investors and host states, host states require a transparent infrastructure that approximates the international standard of rule of law and that investment treaties could achieve that.[172] Most recent characterizations of the field assume this neoliberal principle.

Thus, each of the leading schools of thought engaged in investment law reform takes as its premise that the purpose of the system of law is to increase investment. For example, the commercial law school, which tends to be associated with a capital-centric view of international investment law,[173] emphasizes insulating private interests from state interference. From this perspective, trading investment claims or awards would be consistent with enticing more investors to the system because it would maintain substantial flexibility for investors to be able to take action against the state. Investors could consider the ability to sell their claim either ex ante or ex post in the decision to invest, but so long as the system leaves that flexibility intact, proponents of the school would likely find it attractive. In other words, claims trading may lead to increases in investment as investors feel that they are further protected.

The public law school, by contrast, is highly deferential to the state. According to this view, private interests are secondary to national sovereignty and regulatory interests. From this perspective, and that of related global public interest theory, investment law provides an adjudicatory framework for reviewing the host state's exercise of public

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171 Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 659 (1990).

172 Alejandro M. Garro, *Trade and Investment Treaties, the Rule of Law, and Standards of the Administration of Justice*, 42 U. MIAMI INTER-AM. L. REV. 267, 268 (2011).

173 Julian Arato, Toward a Private Law Theory of International Investment Law (Sept. 6, 2016) (unpublished J.S.D. dissertation, Columbia University) (on file with the author).

authority.[174] Proponents of this school may see assignments as detrimental to the public purpose because, according to this view, they create frivolous litigation or limit regulatory flexibility or settlement opportunities. At present, however, there are no data to support a conclusion that traded claims increase frivolous claims or limit regulatory flexibility any more than any other claims.

Private law theorists would ask whether claims trading creates efficiencies.[175] To these commentators, if the practice is efficient, then it is worth consideration. Private law advocates may be concerned with what incentives the practice creates. Claims trading could create incentives not to settle a case, for example. It directs parties away from restoring the relationship with the state which may in turn undercut wealth by reducing the number of investments. If claims trading has that effect, private law advocates may be opposed. Otherwise, those advocates would likely take the position that contractual moves ought to be available because the treaty approximates a private law framework for engagement with the public sphere and so should enhance actors' interests accordingly. In sum, given what we know about claims trading at present, none of the three leading theories is likely to maintain strong objections to the practice.

In contrast with these leading theories, social justice theory rejects the premise that investment law's principal aim is to protect and motivate foreign investment.[176] Rather, proponents of social justice theory see the investment law system as a method for distributive justice. This perspective requires examining the investment law regime "in terms of the fairness norms we would apply to any system of governance allocating economic rights and resources across a range of settings."[177]

The question then for these advocates is: is claims trading fair? Like in bankruptcy,[178] some may see efficiency and opportunity while others

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174 ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 95 (2012) (discussing Gus Van Harten's and others' theories about global administrative law as they relate to investment law).

175 Arato, *supra* note 173, at 13.

176 *See, e.g.*, Frank J. Garcia, *Investment Treaties Are About Justice*, COLUM. FDI PERSP., Oct. 24, 2016.

177 *Id.*

178 Anthony J. Casey, *Auction Design for Claims Trading*, 22 AM. BANKR. INST. L. REV. 133, 133 (2014) ("While some laud the liquidity that is facilitated by hedge fund claims trading, others worry

may note a risk of exploitation.[179] Fairness could be viewed in terms of due process norms. As Jan Paulsson classically formulated in his review of the contractual nature of investment treaties: the dispute resolution provisions in those treaties constitute a unilateral offer for arbitration that the investor accepts by initiating the arbitration.[180] The terms of the game are defined by the states party to the investment instrument and apply equally to traded and non-traded claims.

Alternatively, fairness could be viewed in light of broader public welfare aims. To determine whether claims trading enhances or diminishes that type of fairness requires more data than are available at present. For example, it would be helpful to have more information about who is trading claims and how wealth is in fact distributed (or not) through the practice. Individuals and corporate entities buy and sell claims for several reasons. Sellers, whether sophisticated or small, seek liquidity or insulation from the risk of a lengthy, possibly unsuccessful arbitration. Buyers as speculators, often hedge funds, are sometimes secondary investors hoping to turn a profit. Others may be seeking control of the original investor or investment for long-term business reasons. If the investor is a poor individual with a bond, the hedge fund likely has made that investor almost whole. Further, with respect to settlement, the evidence is again mixed. Claims trading may make settlement of claims more difficult because the assignee has no privity with the state and no ongoing relationship to preserve. However, traded claims may also be likely to lead to settlement due to the threat of aggressive litigation on the part of the assignee.

Ultimately, states have the power to direct the future course of investment law and what its future purposes ought to be. In 2018, ICSID undertook a revision to its rules in which it has sought comments from states on wide-ranging topics including third-party funding. The publicly available comments by interested states have given an unusual glimpse into state views on various procedural matters.[181] A number of states

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that hedge fund involvement complicates and distorts an already flawed system of reorganization.").

179 *See supra* notes 76–79 and accompanying text.

180 Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INV. L.J. 232, 234 (1995).

181 *State Input*, INT'L CTR. SETTLEMENT INV. DISPS., https://icsid.worldbank.org/en/amendments/state-input [https://perma.cc/TH2D-8WAR].

made rare public statements on how investment law has evolved and what it ought to achieve in the twenty-first century. For example, Israel emphasized the importance of protecting investor rights, including the possible involvement of third-party funders to make this happen.[182] While some states are aware of the nationality complications created with new players in the arbitration market, none called for stopping the practice.[183] In speaking about the possibility of hedge funds purchasing or funding claims, many states have commented that there ought to be greater transparency to avoid conflicts with arbitrators, but that is an issue faced more often in third-party funding than in a claims trade where the trader's identity would be obvious and therefore any conflicts easily checked.[184] In the ICSID comments, some states appeared poised to support claims trading although the question was not explicitly before them.[185] On the other hand and not surprisingly given its experience,[186] Argentina noted its opposition to assignments either of the pre-

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182 *Amendment Procedure to ICSID ISDS Rules*, INT'L CTR. SETTLEMENT INV. DISPS. (Dec. 27, 2018), https://icsid.worldbank.org/en/amendments/Documents/Israel_Comments_12.27.18.pdf [https://perma.cc/L8SL-PKZJ].

183 *See, e.g.*, *ICSID Rules Amendment Process: Comments to the Proposed Amendments to the ICSID Rules Submitted on Behalf of the Hellenic Republic*, INT'L CTR. SETTLEMENT INV. DISPS. (Dec. 28, 2018), https://icsid.worldbank.org/en/amendments/Documents/Hellenic%20Republic_Comments_12.28.18.pdf [https://perma.cc/D36A-DC4H].

184 *Comments on the Proposed Amendments to the ICSID Rules Submitted by China*, INT'L CTR. SETTLEMENT INV. DISPS. (Dec. 28, 2018), https://icsid.worldbank.org/en/amendments/Documents/China_Comments_12.28.18.pdf [https://perma.cc/9V5V-GPJA].

185 *ICSID Convention Rules and Regulations Amendment Process—Australian Government Submission*, INT'L CTR. SETTLEMENT INV. DISPS. (Jan. 22, 2018), https://icsid.worldbank.org/en/amendments/Documents/Australia_Comments_1.22.19.pdf [https://perma.cc/XR8D-FAJ3] (commenting that third-party funding would allow parties to arbitrate matters that would be impossible and ensuring that access to justice is guaranteed).

186 Argentina has faced at least four traded claims. El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0268_0.pdf [https://perma.cc/8YRQ-HRGB]; Wintershall Aktiengesellschaft v. Arg., ICSID Case No. ARB/04/14, Award (Dec. 8, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0907.pdf [https://perma.cc/3GUU-9VSY]; Daimler Fin. Servs. AG v. Arg., ICSID Case No. ARB/05/1, Award (Aug. 22, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1082.pdf [https://perma.cc/55NN-HERW]; Teinver S.A. v. Arg., ICSID Case No. ARB/09/1, Award (July 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw9235.pdf [https://perma.cc/3N9M-EHSA].

arbitration claim or of the right to collect on the claim after the arbitration.[187]

In sum, states recognize that a significant number of arbitrations are now funded by parties other than the original investors.[188] They nevertheless have not taken steps to restrain claims trading. It could be that not enough states recognize the growth of the practice and that they are continuing to play catch-up with the market. Still, given that the general foundational principles behind investment instruments remain strongly supported, the instruments themselves ought to be the means for managing the claims trade.

IV. A WAY FORWARD

Some scholars have argued that tribunals and courts ought to go further to limit the international claims trade. These scholars maintain that, among other points, principles of treaty interpretation dictate that neither pre-arbitration nor post-arbitration claims ought to be freely transferable.[189] Other commentators take the policy position that a permissive regime for claims trading exposes states to unexpected claims or exploitation in the enforcement stage and therefore should be restrained on that basis. Those commentators would use existing doctrines to take an even stronger position than tribunals have to bar such trades. But prohibiting claims trading through these doctrines and other legal theories will not eliminate the practice or achieve those goals. The market for claims is not going away; it will simply become less transparent.[190] A better way is to regulate claims trading.

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187 *Comments on Proposals for Amendment of the ICSID Rules by the Argentine Republic*, INT'L CTR. SETTLEMENT INV. DISPS. (Dec. 28, 2018) https://icsid.worldbank.org/en/amendments/Documents/Argentine%20Republic_Comments_12.28.18.pdf [https://perma.cc/JAQ5-QQVJ].

188 *ICSID Rules Amendment Process Comments on Proposal for Amendments, Austria*, INT'L CTR. SETTLEMENT INV. DISPS. (Dec. 2018), https://icsid.worldbank.org/en/amendments/Documents/Rules%20Amendment-Austria%20Comments.pdf [https://perma.cc/GYE5-F5SJ].

189 For example, Wehland contends that even though investment treaties do not address the transferability of rights arising under them, "an interpretation in accordance with the principles embodied in Articles 31 and 32 of the VCLT will typically reveal that neither damages claims nor jurisdictional offers under these treaties are freely transferable." Wehland, *supra* note 6, at 574.

190 The same was said of bankruptcy claims, particularly in the area of sovereign debt. *See* Odette Lienau, *Connecting Sovereign Debt to Questions of Justice*, 110 AM. SOC'Y INT'L L. PROC. 123, 126

Any proposal to reform the claims trade system should be measured by the costs and benefits it produces for the actors on both sides. Changes to the rights that parties have can force a ripple effect across the investment spectrum. Initiatives that seek to address problems with vulture funds tend to focus on the sovereign debt aspect without consideration of the implications for arbitration.[191] Broadening the scope of those conversations may be useful, especially as suggestions made for sovereign debt litigation such as putting caps on recovery or requiring independent certification of a trade as is done in U.S. bankruptcy may have salience for international arbitration.[192] This Article is just one step toward identifying the data on the international claims trade, but more work remains to be done. Still, it is worth beginning to explore potential, proactive improvements on the existing regime. I set out three possibilities for consideration as more data are collected. These efforts may also require a change in branding. The terminology associated with the practice connotes an image of a transaction that may affect the public view and influence state policy. Before turning to my own proposals, however, it is worth reviewing how some states are responding to post-arbitration trades.

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Some developed states have taken measures to shield developing states from trades at the post-arbitration stage. In an unusual effort to prevent their own and other corporations from enforcing major claims against developing states, several states enacted laws limiting recovery by those corporations against poor states. In October 2012, the government of Jersey, a popular home to state and private assets, announced a plan to enact a law stopping claims purchasers from using Jersey courts to "sue

(2016) ("[T]he existence of a thriving secondary market in bankruptcy claims casts doubt on any argument that a more institutionalized sovereign debt restructuring system would do away with the secondary market in sovereign debt.").

191 *See, e.g.*, *What to Do About "Vulture Funds"? UNCTAD Event Highlights Challenges Ahead*, UNITED NATIONS CONF. TRADE & DEV. (Dec. 11, 2015), http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1155 [https://perma.cc/HX9X-3QTX]; EUR. PARLIAMENT COMM. ON DEV., DRAFT REPORT ON ENHANCING DEVELOPING COUNTRIES' DEBT SUSTAINABILITY (2018).

192 Pottow, *supra* note 150; Broomfield, *supra* note 150.

poor nations" that would "limit practices that could undermine debt relief efforts."[193] Belgium, whose work has been acknowledged by the European Union as a potential model in this area,[194] enacted a similar law in 2015. The Belgian law makes certain earmarked public funds unavailable to those traders seeking to attach developing state assets as part of their enforcement of an arbitral award.[195] In 2016, France enacted a law providing that:

> [n]o precautionary measure and no enforcement action against property belonging to a foreign state may be authorized by the judge . . . against a foreign State where the conditions set out in points 1 to 3 are met: (1) The foreign state was on the list of recipients of official development assistance established by the Committee for Development Assistance of the Organization for Economic Co-operation and Development when it issued the debt instrument; (2) the holder of the debt security acquired this title when the foreign State was in default on this debt security or had proposed a modification of the terms of the debt obligation; (3) The default on the debt obligation is less than forty-eight months at the time when the holder of the debt obligation seeks enforcement.[196]

Australia, the United States, and a small group of other states have considered similar legislation.[197]

One problem these states face in crafting this legislation is a risk of conflict with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") or the ICSID Convention. The New York Convention provides that each

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193 *New Law to 'Stop Vulture 'Funds' Using Jersey Courts*, BBC (Oct. 1, 2012), https://www.bbc.com/news/world-europe-jersey-19789745 [https://perma.cc/Q8FV-275T].

194 EUR. PARLIAMENT COMM. DEV., *supra* note 191.

195 *Id.*

196 Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of December 9, 2016 on Transparency, the Fight Against Corruption and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 9, 2016, art. 60 (translation by author).

197 *See* James Bai, *Stop Them Circling: Addressing Vulture Funds in Australian Law*, 35 SYDNEY L. REV. 703 (2013).

party to the Convention "shall recognize arbitral awards as binding and enforce them."[198] According to the Convention, recognition and enforcement may be refused only in certain limited circumstances that call into question the arbitral process.[199] Exceptionally, enforcement of an arbitral award may also be refused if the state finds that doing so would be contrary to the public policy of that state.[200] Thus, under the New York Convention, the courts of the several states enacting legislation to block the surrender of developing state assets would only be entitled to do so if they would construe doing so as "contrary to the public policy" of that state—a high bar.[201] More important still is that those states with such legislation in place may become shelters to respondent states that refuse to pay a fairly traded claim. Sovereigns that have lost investment disputes may choose to hide their assets in such states to protect claims traders from recovering.

Should states wish to address claims trading in the pre- or post-arbitration stages, there are better ways. One option would be to amend language in investment instruments. The greatest power to make or break a trade ought to lie not in the whims of the arbitrator, but rather in the instrument under which the dispute is brought. Amending instruments would allow states either to permit or prohibit expressly assignments at particular points in a dispute. These fixes would likely be among the easiest to implement to address this problem. They would be direct and express and track similar prohibitions or clarifications as would be used in contract law. Such a response would lessen the burden on states while still offering investors all the benefits of the relevant instrument.[202]

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198 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 330 U.N.T.S. 3.

199 *Id.* art. V.

200 *Id.*

201 *See* Eloise Henderson Bouzari, Note, *The Public Policy Exception to Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence*, 30 TEX. INT'L L.J. 205 (1995) (and sources cited therein). One could argue that the references in the text to developing states and concerns about their extended sovereign debt provide domestic courts with a public policy rationale for exclusion. In other words, these new laws could be seen as defining one public policy exception to enforcement which would be consistent with the New York Convention. They do not use that type of language, however, which leads me to conclude that legislators were not considering these laws to have that effect at the time of their passage.

202 The Secretary-General of the United Nations made a similar suggestion in 2017 to avoid investment disputes over sovereign debt instruments. The Secretary-General's Note, which focused

A more circuitous solution of the same variety would be to insert clarifications into the definition of "investment" or "investor." This fix would at least force the doctrines toward one approach: the exclusionary standing doctrine. It would also track U.S. civil litigation with respect to the nationality analysis. In U.S. law, for a case to be heard in federal court under diversity jurisdiction, the court takes account of the plaintiff and defendant's citizenships at the time of filing.[203] States could insert such a nationality calculation at a specific time such as at filing so that all prior and subsequent trades leading to changes in nationality are of no consequence. Or states could limit the definitions of "investment" or "investor" in such a way as to take account of trading.

A second option is to follow the model of U.S. bankruptcy law and institutionalize claims trading. In large part, bankruptcy manages claims trading through disclosure and some narrow judicial empowerment. Bankruptcy Rule 3001(e), as it is presently constituted, provides procedural requirements governing claims trading.[204] In some instances, a claims agent is appointed and performs research regarding the transfer.[205] That agent may seek to confirm whether the party selling the claim is the legitimate owner of the claim or whether the amount of the claim transferred is accurately represented. Further, all parties affected by the transfer are notified by the clerk of the court and afforded the opportunity to object.[206] The rules also require certain entities to disclose

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on the effects of foreign debt and other related financial obligations of states, recommended that international investment agreements "exclude investment claims related to debt restructuring disputes." Secretary-General, Note on Effects of Foreign Debt and Other Related Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, U.N. Doc. A/72/153, ¶ 69 (July 17, 2017). Such an amendment is not impossible, even if returning to the negotiating table requires political capital. Indeed, the European Union and Singapore have already updated their recent text for third-party funding purposes: the 2018 EU-Singapore Investment Protection Agreement requires disclosure of certain third-party funders. Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part, E.U.-Sing., art. 3.8, Oct. 19, 2018.

203 Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989) (noting that "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed").

204 *See* Richard E. Mikels & David Hadas, *Claims Trading: Has It Changed the World of Bankruptcy Forever?*, AM. BANKR. INST., Nov. 30–Dec. 2, 2000. The governing rule dictates how to verify and evidence a transferred claim. FED. R. BANKR. P. 3001(e).

205 *Crudo*, *supra* note 9, at 29.

206 FED. R. BANKR. P. 3001(e)(2), (4).

their identities.[207] The bankruptcy court "has the power under various sections of the Bankruptcy Code to regulate attributes of an assigned claim if the assignee uses the claim improperly" under strictly defined parameters.[208]

This second option is also second best, however. The features of the bankruptcy process are not the type of institutional features that are likely to make a significant difference in investment arbitration. And for good reason: bankruptcy and international arbitration have a number of notable differences even if they share this practice in common. For example, in bankruptcy, a court processes claims, whereas, in investment arbitration, there is a significant range of self-help and aggressive steps that an investor or trader could take to resolve the grievance. As is obvious, there is a difference between an insolvent company and a state, even if both feature a limited purse and competing demands. Similarly, the "res" is narrow in bankruptcy. In investment, it is dependent in a way on the circumstances. It is more variable. The biggest difference between the two processes is that bankruptcy is a collective process while investment arbitration seeks to resolve a singular dispute between two parties. From that perspective, an institutionalized process makes sense to manage multiple competing claims. Likewise, bankruptcy operates mostly under one body of law; arbitration does not.

Ultimately, an exact replica of the bankruptcy framework is not practical for the investment framework, but, at a minimum, institutionalization in investment arbitration could provide the arbitral tribunal with guidelines as to which claims would be permissible and would provide added transparency. As discussed above, investment institutions are amending their procedures; claims trading could be managed through those rules.[209] This approach would give tribunals guidance on what is and is not appropriate, reducing the unbounded discretion and unpredictability that litigants have experienced. Adapting the U.S. bankruptcy model to investment proceedings could be useful given the growth in the practice and the close process parallels.

Another institutionalization model that merits further study would be providing states the option to buy claims (or awards) at the price at

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[207] *Id.*; FED. R. BANKR. P. 2019(c).

[208] Ronald S. Barliant et al., *Claims Trading: Profits, Pitfalls and Strategies in Chapter 11—Do I Hear a Higher Bid?*, AM. BANKR. INST., June 12–15, 2008 (emphasis omitted).

[209] *See supra* notes 181–188 for a description of the ICSID Amendment Process.

which the investor agrees to sell them to a third party. While any respondent state could agree to such an arrangement, laws that made this express and built this option into an institutional frame would enable states to consider this more readily than in any ad hoc fashion according to which it may arise, and would operate somewhat like a statutory buy-back.[210] Such a model is not totally unprecedented; analogues may be found in the Spanish and French Civil Codes, for example.[211]

Finally, a third option would be to bring in more parties to the investment arbitration exercise than just the two litigants to help tribunals and courts consider a trade. In other words, states could consider adding more mechanisms for feedback to the system. In U.S. bankruptcy, where a municipality has declared bankruptcy and is due to undergo reorganization, some advocates have sought to create a mechanism for individual citizens to present views on the amounts of recovery or the formula for the haircut to creditors. A similar system could allow for amicus petitions from civil society in circumstances where a claim is traded in an investment dispute. This option is not particularly helpful in that it would not necessarily resolve the doctrinal murkiness from which the field suffers now; it would merely offer tribunals and courts additional considerations according to which they may evaluate trades. Thus, this third option is only a small improvement above the status quo.

Any of these amendments to the current system would endeavor to keep up with the critical juncture of legal and financial instruments that has developed. These solutions would challenge states to do more to avoid difficulties at the front end rather than depend on market forces to correct errors at the back end.

CONCLUSION

This Article has asked what it would mean for international investment law to take claims trading seriously—in other words, to treat the international claims trade as an accepted feature of international

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210 For an introduction to this idea, I thank an arbitration practitioner who provided feedback on an earlier draft of this Article. E-mail from arbitration practitioner to Kathleen Claussen, Associate Professor, University of Miami School of Law (Sept. 20, 2019, 11:29 AM) (on file with the author).

211 *See, e.g.*, C.C. arts. 1535–36 (Spain).

investment law and a part of what makes international investment law work. It has argued for a managed approach to the claims trade, one that accommodates the practice or is express as to its contours. This approach would help avoid indiscriminate doctrinal pronouncements from tribunals and courts. It would normalize the trade so it happens not in the shadow of the law, but within the four corners of discretionary litigious decisionmaking. While opponents have argued that "vulture funds" are engaged in illegitimate or even illicit activity in trading claims, careful analysis reveals that there are few contexts in which states lose, fail to pay, and may be subject to predatory treatment as those opponents suggest. But in those few remaining cases, there are other paths forward for regulating the claims trade than the paths presently pursued.

Theoretical debates—such as how investment law facilitates social justice or redistribution of wealth—can make it appear as though there are irreconcilable conflicts among claims trade trends and civil society's priorities. Yet analysis of each legal context in which claims trading has been reviewed suggests fewer conflicts in practice. Some claims trades may actually facilitate a better redistribution than no trade. Further, rather than requiring dramatic legal changes or novel theories that give certain sovereigns special treatment, protection of developing states and their outstanding debts may require only moderate limitations on assignments in treaties as would be familiar from doctrine on contracts or bankruptcy.

Litigation scholars have long argued about the merits and pitfalls of litigation funding in cross-border disputes, but never before has the international claims trade seemed so likely to expand and also to extend broadly to not just investment claims but other treaty-based and international commercial claims as well. While some states and commentators challenge this trend, on a closer look, it is apparent neither that claims trading poses a substantial risk to developing states nor that the legal options are binary. Additional research is necessary. The legal and policy communities may take still greater notice of claims trading when it has an impact on developed states in any of the several or forthcoming claims against European or North American parties, for example. Until then, tribunals are likely to continue to try to sort through the interlocking narratives on the issue.

Indisputably, the international claims trade poses challenges to legal interests, but these challenges are not insurmountable, and

accommodating the phenomenon somehow is now beginning to seem inevitable.