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CRITICAL ANALYSIS OF INVESTMENT ARBITRATION THROUGH THE LENS OF SYSTEMS THEORY

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This paper deploys Niklas Luhmann's theory of closed/autopoietic systems to functionally analyse the role played by the legal argumentation of international investment tribunals in allowing the international investment law system to evolve and continue its autopoiesis. In this sense, the question that this paper attempts to answer is: for what problem, in terms of investment law's ability to continue (and to continue to evolve and become ever more complex) as an autopoietic system, is the legal argumentation of investment tribunals a solution? The tentative answer this work suggests is that investment tribunal's legal argumentation serves to the international investment system to further its evolution in response to the irritations of its environment, as well as to routinely identify errors in order to maintain sufficient levels of consistency and variety. This is, to vary in response to changes that take place in other functional/international legal systems (such as international human rights and environmental law). This is exemplified by recent decisions where investment tribunals have admitted jurisdiction to hear counterclaims brought by respondent States for violations of human rights (Urbaser v. Argentina) and environmental damages (Burlington v. Ecuador). This trend is likely to continue and shows that the investment tribunals are ready to hear counterclaims when dealing with investor wrongdoings (David Aven v. Costa Rica), which, in turn, will further the autopoietic evolution of the investment system.