1. International investment law as a field of international law

INTRODUCTION

Once deemed to be an ‘exotic and highly specialised’ domain, international investment law is now moving mainstream. Due to economic globalization and the rise of foreign direct investments, the regulation of the field has become a key area of international law. Under international investment agreements (IIAs), states parties agree to provide a certain degree of protection to investors who are nationals of contracting states, or their investments. Such protection generally includes compensation in case of expropriation, fair and equitable treatment, non-discrimination and full protection and security, among others.

Most contemporary investment treaties include investor–state arbitration for the settlement of disputes that may arise between the foreign investor and the host state. Under this mechanism, foreign investors may bring claims directly against the host state before international arbitral tribunals. Investors are not required to exhaust local remedies and no longer depend on diplomatic protection to defend their interests against the host state. Investor–state arbitrations are heard by ad hoc or institutionalized arbitral tribunals whose arbitrators are selected by the disputing parties and/or appointing institutions. The internationalization of investment disputes has been conceived as an important valve for guaranteeing a neutral forum and depoliticizing investment disputes.

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Arbitral tribunals have reviewed state conduct in key sectors including but not limited to water services, cultural heritage, environmental protection and public health. Consequently, many of the recent arbitral awards have determined the boundary between two conflicting values: the legitimate sphere for state regulation in the pursuit of the public interest, on the one hand, and the protection of private interests from state interference, on the other. With awards that have reached as high as $50 billion, the field has attracted the increasing attention of states, investors and the media, as well as the public at large.

Despite its flourishing, investment treaty law and arbitration is facing a 'legitimacy crisis'. Concerns have arisen regarding the magnitude of decision-making power allocated to investment treaty tribunals. Some scholars contend that investor–state arbitration lacks democratic insight. Others lament that investor–state arbitration operates as a self-contained regime, privileging the interests of foreign investors while ‘structural[ly] disregard[ing]’ those of ‘more weakly organized and less powerful groups, and of vulnerable individuals’. There is uncertainty over the relevance or irrelevance of norms external to investment law, such as human rights law, within investment treaty arbitration. The debate has focused not so much on the question as to whether international investment agreements limit state sovereignty – at the end of the day, this is what international agreements do, limiting state sovereignty in order to

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5 See e.g. *Yukos Universal Ltd (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA227, Final Award, 18 July 2014, para. 1827.


provide states with perceivably greater benefits – but ‘over the extent to which IIAs delimit state sovereignty’ and its ability to regulate.\textsuperscript{11}

While developing countries have deemed investment treaty arbitration politically biased against them,\textsuperscript{12} emerging economies and industrialized countries alike have expressed some concerns about this mechanism.\textsuperscript{13} For instance, Bolivia, Ecuador and Venezuela sent a formal notice to the International Centre for the Settlement of Investment Disputes (ICSID) declaring their withdrawal from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).\textsuperscript{14} Brazil has never ratified the ICSID Convention, nor has it ratified any treaty that provides for investor–state arbitration.\textsuperscript{15} South Africa, India and Indonesia ‘have announced that they will not conclude any more investment treaties’.\textsuperscript{16} Ecuador has denounced all of its bilateral investment treaties (BITs).

Against this background, this chapter aims to briefly illustrate the fundamental features of international investment law and arbitration. A preliminary investigation of the field seems not only appropriate but also essential to assess whether notions such as proportionality, reasonableness and standards of review can (or do) help solve the investment regimes’ pressing challenges. The chapter proceeds as follows. First, after providing some historical background, it explores the normative framework that governs foreign direct investment. Second, it highlights the most salient features of investor–state arbitration. Third, it explores the backlash against investment treaty law and arbitration. It then concludes that this area of law remains under-theorized, and that more theoretical studies of the same are needed in order for it to develop in conformity with and contribute to international law.

\textsuperscript{14} M. Clark, ‘Venezuela’s Withdrawal from the ICSID Convention’, \textit{Association for International Arbitration Bulletin}, October 2012, 2.
\textsuperscript{16} M. Sornarajah, \textit{Resistance and Change in the International Law on Foreign Investment} (CUP 2015) 1.
1.1 MULTILATERAL FAILURES AND BILATERAL SUCCESSES

International investment law constitutes an important part of public international law governing foreign direct investments. Defined as ‘the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets’, foreign direct investment (FDI) is an all-encompassing concept, including almost any kind of business activity. While there is still no comprehensive global treaty governing foreign investments, there are over 3,304 IIAs. IIAs include BITs, regional investment treaties, free trade agreements (FTAs) or sectoral agreements with investment provisions, such as the Energy Charter Treaty.

Efforts to establish global rules to protect foreign investments and a World Investment Court to settle potential disputes between host countries and investors have been pursued by industrialized countries for a long time. A first attempt to create a unified global investment law was made at the Bretton Woods conference in 1944. Agreeing on the importance of promoting economic relations to foster peace and economic growth, the conference participants established the International Monetary Fund (IMF) to secure financial stability and facilitate international trade, and the International Bank for Reconstruction and Development (IBRD) to finance the post-war reconstruction of Europe. The conference participants also considered establishing an International Monetary Fund (IMF) to secure financial stability and facilitate international trade, and the International Bank for Reconstruction and Development (IBRD) to finance the post-war reconstruction of Europe.

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22 Articles of Agreement of the International Monetary Fund (IMF), 22 July 1944, in force 27 December 1945, 2 UNTS 40.

Trade Organization (ITO), governing both trade and investment. However, the Havana Charter never came into force.\textsuperscript{24}

Although the World Trade Organization (WTO),\textsuperscript{25} which came into being in 1995, in some ways has become ‘the missing leg’ of the Bretton Woods ‘stool’,\textsuperscript{26} the moves to adopt multilateral investment rules initiated at the Doha Ministerial Conference in 2001 had to be abandoned at the Ministerial Conference in Cancun in 2003, due to the growing opposition from developing countries and strong criticism from civil society. Following the 2015 Ministerial Conference in Nairobi, the EU suggested that investment could form part of the new issues for negotiation in the WTO,\textsuperscript{27} but it remains to be seen whether the suggestion will be broadly endorsed.

When the Organization for Economic Co-operation and Development (OECD), a group of 30 industrialized countries, attempted to launch a Multilateral Agreement on Investments (MAI),\textsuperscript{28} this effort collapsed. Civil society opposed the MAI, perceiving it to be a one-sided instrument, unilaterally prepared by OECD countries to ensure higher standards of protection and legal security for foreign investors. It did not adequately take into account the developmental needs of the host states, omitting crucial environmental and social issues.\textsuperscript{29}

However, some authors contend that global rules on foreign investment exist already.\textsuperscript{30} On the one hand, some multilateral instruments, such as the Energy Charter Treaty, govern foreign investments albeit in specific sectors. The ICSID Convention constitutes a multilateral procedural instrument establishing the ICSID. Several WTO instruments deal

\begin{footnotesize}
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\item OECD Multilateral Agreement on Investment, Consolidated Text and Commentary, Draft DAFFE/MAI/NM(97)2.
\item S.W. Schill, \textit{The Multilateralization of International Investment Law} (CUP 2009).
\end{enumerate}
\end{footnotesize}
directly with aspects of foreign investments. For instance, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)\(^3\) covers intellectual property, which can be a form of investment.\(^2\) The General Agreement on Trade in Services (GATS)\(^3\) covers the provision of services through a commercial presence in another country. In addition, the Agreement on Trade-Related Investment Measures (TRIMS)\(^4\) deals with performance requirements associated with foreign investment. On the other hand, although never ratified, the Havana Charter inspired many investment provisions.\(^3\) Because of the similarities among these different investment treaties and the fact that they tend to be negotiated from a limited set of model BITs, it has been argued that investment treaties are incrementally building a de facto global investment regime.\(^6\) Some even consider these recurring provisions as evidence of customary law.\(^7\)

In parallel, the current absence of a World Investment Court does not necessarily indicate that this will always be the case. The EU–Canada Comprehensive Economic and Trade Agreement (CETA)\(^3\) and the EU–Vietnam FTA include an Investment Court System (ICS), a standing bilateral court and an appellate tribunal for settling the investment disputes arising from the implementation of the agreements. Both Canada


\(^4\) Agreement on Trade-Related Investment Measures (TRIMS), 15 April 1994, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), 1868 UNTS 186.

\(^5\) Havana Charter, Article 12.

\(^6\) See generally Schill, *The Multilateralization of International Investment Law*.


\(^3\) 2016 EU-Canada Comprehensive Economic and Trade Agreement (CETA). The European Commission proposed the signature of the CETA to the Council of the EU in July 2016. The European Parliament voted in favour of CETA on 15 February 2017. The EU national parliaments must approve CETA before it can take full effect.
and the EU have also informally discussed the establishment of a World Investment Court, analogous to the World Trade Organization Appellate Body or the European Court of Human Rights. They propose the inception of a standing court with judges nominated by the treaty parties, and an appellate body. Finally, discussions are taking place on a global scale at the United Nations Commission on International Trade Law (UNCITRAL).

Notwithstanding the persistent failures at the multilateral level, states have successfully negotiated IIAs at the bilateral and regional levels. Most IIAs are BITs. Comprehensive economic cooperation agreements, FTAs and mega-regionals also include provisions on investments. Whether regional agreements can provide a platform for future multilateral investment rules or undermine multilateralism remains to be seen.

States sign IIAs for both economic and political reasons. States generally expect that the conclusion of such treaties will encourage FDI. Therefore, both developed and developing countries strategically push IIAs albeit for different reasons. On the one hand, host countries – generally developing and least developed countries – compete to attract

40 Ibid.
41 G. Kaufmann-Kohler and M. Podestà, ‘Challenges on the Road toward a Multilateral Investment Court’, 201 Columbia FDI Perspectives, 5 June 2017.
43 Ibid.
FDI and assume broad obligations for the protection of foreign investors in order to attract foreign investments. According to Guzman, LDCs ‘face a prisoner’s dilemma’: while, as a group, they would be better off if they did not ratify IIAs, ‘each individual LDC is better off “defecting” from the group by signing a BIT that gives it an advantage over other LDCs in the competition to attract foreign investment’. Most developing countries adopting BITs overestimated the economic benefits of BITs, signed them because of ‘foreign policy considerations’, and ‘entirely ignored’ their costs, including the risk of investment treaty claims, ‘until their own country was hit by a claim’.

On the other hand, industrialized countries sign IIAs to obtain favourable standards. In the aftermath of World War II, the customary international law governing foreign investment was ambiguous and lacked adequate enforcement mechanisms. These flaws in the international investment regime hindered foreign investments; risk-adverse investors did not invest where there was little predictability regarding the protection of foreign investments under international law. Consequently, capital exporting states began to fill this legal gap by negotiating BITs.

Nowadays, the traditional distinction between capital importers and capital exporters has become blurred. Not only do industrialized countries compete to attract FDIs, but emerging economies also pursue their own investment treaty-making agenda. The emerging awareness that both industrialized and developing countries compete for FDIs (and can be respondent in investment arbitration) has entailed a gradual

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48 L.N. Skovgaard Poulsen, ‘Bounded Rationality and the Diffusion of Modern Investment Treaties’ (2014) 58 International Studies Quarterly 1–14, 2 (noting, at 5, that ‘decision-makers tend either to exaggerate or entirely to ignore low-probability, high-impact risks’).


51 Ibid. 68–70.

 recalibration of investment treaties. Nowadays, IIAs tend to reflect a
more balanced approach to the protection of foreign investments than that
taken in past decades.\textsuperscript{53} In fact, recent IIAs include preambles, exceptions
and carve-outs that restate the importance of non-economic concerns in
international investment law and arbitration.

1.2 CONTENTS OF INVESTMENT TREATIES

While investment treaties differ in their details, their scope and content
have become standardized over the years, as negotiations have been
characterized by an ongoing sharing and borrowing of concepts.\textsuperscript{54} The
inclusion of the most favoured nation clause in most BITs also drives
convergence in treaty interpretation. Moreover, arbitral tribunals have
constantly drawn upon earlier cases – which, albeit not binding, consti-
tute persuasive precedents – leading to the coalescence of a \textit{jurisprudence
constante}.\textsuperscript{55} This section briefly examines this \textit{common lexicon}
of investment treaty law.\textsuperscript{56}

Typically, after defining foreign investors and their investments, IIAs
include provisions on non-discrimination (both national treatment and
most favoured nation treatment), minimum standards, and fair and
equitable treatment. Other common provisions in investment treaties
concern the repatriation of profits and other investment-related funds or
the promise to freeze the existing regulatory regime for the duration of
the investment (stabilization clauses). A small number of investment
treaties also include provisions prohibiting certain forms of performance
requirements – i.e. obligations on investors to act in ways considered

\textsuperscript{54} C. McLachlan, ‘The Principle of Systemic Integration and Article
\textsuperscript{55} See F.G. Sourgens, ‘Law’s Laboratory: Developing International Law on
Investment Protection as Common Law’ (2014) 34 Northwestern JIL & Business
181–247 (providing a theory of persuasive precedent in investor–state arbitra-
tion); A.K. Bjorklund, ‘Investment Treaty Arbitral Decisions as Jurisprudence
Constante’, in C. Picker, I. Bunn and D. Arner (eds), \textit{International Economic
see G. Kaufmann-Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’
(2007) 23 \textit{Arbitration International} 357–78; Z. Douglas, ‘Can a Doctrine of
FILJ 104–110.
\textsuperscript{56} C. McLachlan, L. Shore and M. Weiniger, \textit{International Investment
Arbitration} (OUP 2007) 6.
beneficial for the host economy, mostly relating to local content, joint ventures, technology transfer and employment of nationals.

Protection against unlawful expropriation and guarantees of compensation in the event of nationalization, expropriation or indirect expropriation constitute the core of investment treaties. In general terms, states can expropriate private property; such expropriations are lawful provided certain conditions are met.57 For instance, according to Article 1110 of the North American Free Trade Agreement (NAFTA):

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation.58

The concept of expropriation is broadly construed in investment treaties that not only protect foreign assets from the direct and full taking of property, but also from de facto or indirect expropriation. Indirect expropriation refers to measures that do not directly take investment property, but that interfere with its use, depriving the owner of its economic benefit.59 Interference in the use of property or with the enjoyment of its benefits can constitute indirect expropriation even where the property has not been seized and the legal title of the property has not been affected.60 If a host state targets a foreign investor by imposing very high taxes or regulatory requirements that may make the foreign investment economically unviable, this can constitute an indirect expropriation.

In particular, the central question raised by the so-called indirect expropriation is how to draw the line between legitimate regulations that do not give rise to compensation and regulatory takings that do.61 States have an inherent right to regulate domestic affairs, including business activities.62 Moreover, due to the rise of international treaties, ‘states are

58 NAFTA, Article 1110.
62 ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Hungary, ICSID No. ARB/03/16, Award, 2 October 2006, para. 423.
increasingly becoming subject to international obligations that require [them] to regulate’. There is no settled approach to cases where investors allege that certain regulatory measures constitute a compensable form of expropriation. Thus, as Professor Schreuer points out, today, the most difficult question for an arbitrator faced with an allegation of expropriation is not so much whether the requirements for a legal expropriation have been met, but whether there has been an expropriation in the first place.

Because IIAs include vague standards of investment protection, they do not give arbitral tribunals ‘clear guidance as to the scope of obligations assumed under the treaties’. Such vagueness can be an added value as it can ‘accommodate new facts that the lawmaker might not be able to foresee or some valuable aims that might be involved in the situation’. Moreover, ‘too detailed a regulation might be difficult, if not impossible, to apprehend and apply’. Therefore, some vagueness ‘leav[es] some room for adjustment when necessary and avoid[s] unnecessary complexity’. However, such vagueness has raised the question as to whether criteria such as proportionality and reasonableness can help the arbitrators to interpret and apply investment treaty provisions.

1.3 INVESTOR–STATE ARBITRATION

Investor–state arbitration has moved ‘from a matter of peripheral academic interest to a matter of vital international concern’. Since the 1980s, investor–state arbitration has become a standard feature in international investment treaties for the settlement of disputes that arise

67 Ibid.
68 Ibid.
between the foreign investor and the host state. Under this mechanism, foreign investors may bring claims against the host state before international arbitral tribunals. This differs from the traditional paradigm of states as the only subjects of international law and the only ones having the capacity to raise international claims against other states in legal proceedings. Not only is the number of investment treaty arbitrations continuously rising, reaching a total of 696 publicly known cases by the end of 2015, but the high profile of several investment disputes in key areas has caused investor–state arbitration to attract the sustained interest of policy makers, scholars and the public at large. Investor–state arbitration is a truly global phenomenon: 124 states were sued via investor–state arbitration between 1990 and 2014 and ‘investors from over 70 countries have filed investment arbitrations representing increasingly diversified industries’.

Investor–state arbitration depoliticizes disputes between foreign investors and the host states. It constitutes a rule-based dispute-settlement mechanism for resolving investment disputes that shield such disputes from power politics and insulates them from the diplomatic relations between states. The depoliticization of investment disputes benefits: (1) foreign investors; (2) the host state; and (3) the home state. First, foreign investors no longer have to rely on the vagaries of diplomatic protection; they no longer depend on the discretion of their home states as to whether a claim can be raised against another state. Rather, they

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76 Ibid.
77 Ibid. 853.
80 Puig, ‘No Right without a Remedy’, 844.
can bring direct claims and make strategic choices in the conduct of the proceedings.\textsuperscript{82} In this regard, investor–state arbitration can facilitate access to justice for foreign investors\textsuperscript{83} and provides a neutral forum for the settlement of investment disputes.\textsuperscript{84} It is perceived to be necessary to render meaningful the more substantive investment treaty provisions.\textsuperscript{85}

Second, the depoliticization of investment disputes protects the host state,\textsuperscript{86} by reducing the interference of the home country in the domestic affairs of the host state. It prevents or “limit[s] unwelcome diplomatic, economic and perhaps military pressure from strong states whose nationals believe they have been injured”.\textsuperscript{87} Third, the depoliticization of investment disputes also protects the home state in that it no longer has “to become embroiled in investor–state disputes”.\textsuperscript{88}

While investor–state arbitration has become increasingly popular among investors, and the number of investment treaty arbitrations has grown significantly, the regime has attracted criticism by scholars, states and society. The principal concern is that international investment law and arbitration can adversely affect state regulatory autonomy in important public policy-related fields, and even prevent regulation in such fields (the so-called regulatory chill).\textsuperscript{89} Some scholars contend that the investment regime is facing a ‘legitimacy crisis’.

1.4 THE ‘LEGITIMACY CRISIS’ OF INTERNATIONAL INVESTMENT LAW

Is international investment law and arbitration facing a ‘legitimacy crisis’? A multidimensional concept used in different fields of study, legitimacy indicates the acceptance of a legal system.\textsuperscript{90} A system is

\textsuperscript{82} Puig, ‘Recasting ICSID’s Legitimacy Debate’, 485.
\textsuperscript{84} Puig, ‘No Right without a Remedy’, 846.
\textsuperscript{88} Roberts, ‘Triangular Treaties’, 390.
\textsuperscript{90} J.M. Coicaud, \textit{Legitimacy and Politics} (CUP 2002) 10.
considered to be legitimate when it operates in a manner that is consistent with widely held values, norms and beliefs. The legitimacy of the international legal system in general and the investment treaty regime in particular has been discussed intensively.91 Scholars have questioned whether international (investment) law lacks input legitimacy, criticizing how arbitrators are selected, the procedures by which arbitral awards are rendered and the power exercised.92 They have questioned whether international investment law lacks output legitimacy, that is, reasonable performance.93 They have also questioned whether international (investment) law has yielded to power struggles, neglected non-economic interests in favour of economic ones and privileged foreign investors over states.94

Legitimacy concerns relate to both substantive and procedural aspects of the investment regime.95 From a substantive perspective, international investment law in general, and investor–state arbitration in particular, are seen as having an increasing impact on sovereign policy objectives.96 States sign and ratify IIAs to attract FDIs and promote (sustainable) development.97 However, they do not surrender their ability to govern.98 Yet, investment arbitrations can (and have) touch(ed) upon key public

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93 Ibid.
interests, ranging from access to water to tobacco control, and from environmental protection to cultural heritage management. As a result, both scholars and practitioners contend that international investment law and arbitration is constraining the regulatory autonomy of the state. Concerns have arisen that IIAs ‘become a charter of rights for foreign investors, with no concomitant responsibilities or liabilities, no direct legal links to promoting development objectives, and no protection for public welfare in the face of environmentally or socially destabilizing foreign investment’.

Alongside these substantive concerns, several procedural factors feed into the perception of a legitimacy crisis. Investor–state tribunals are constituted ad hoc, under different arbitral rules. The fact that arbitrators are untenured can fuel the perception of conflicts of interest within or between arbitral tribunals. While the selection of arbitrators can lead to requests for disqualification, such requests are rarely successful, fuelling a presumption of bias. There is no appellate court to ensure consistency in their rulings. Inconsistent awards have caused concern, leaving many observers with the impression that international investment arbitration lacks coherence. Lack of transparency may preclude public awareness of the very existence of investor–state arbitrations. Forum-shopping – either by using the most-favoured-nation (MFN) clause, or by

corporate restructuring in order to be protected by a given IIA – risks altering ‘the delicate equilibrium between the complainant’s freedom of choice … and protection to the defendant’, in addition to increasing the risk of conflicting awards.\textsuperscript{107}

In response to growing unrest about the international investment law regime, states have increasingly felt the need to protect their regulatory space and to limit arbitral discretion. While a few developing countries withdrew from the ICSID system,\textsuperscript{108} other countries moved away from the Energy Charter Treaty. While several countries terminated existing IIAs,\textsuperscript{109} others omitted investor–state arbitration from the provisions of their treaties.\textsuperscript{110} Finally, several states are revising their model BITs, reducing the level of protection provided by such templates, and expanding the scope of exception clauses.\textsuperscript{111} States have also shown growing reluctance to comply with orders and awards of investment tribunals.\textsuperscript{112}

The ongoing debate as to the perceived legitimacy of the international investment regime highlights the need for some rethinking of the system. Such debate has both evolutionary and revolutionary potential.\textsuperscript{113} On the one hand, evolutionary approaches assume that the international investment regime is experiencing growth pains, but many legitimacy concerns ‘can be resolved over time’.\textsuperscript{114} Evolutionary approaches rely on the traditional tools of treaty interpretation to fine tune international investment law to emerging circumstances. On the other hand, revolutionary approaches assume that the overall structure of the international investment regime is deeply flawed and requires some major reforms.\textsuperscript{115} Revolutionary approaches suggest, \textit{inter alia}, returning to state-to-state

\footnotesize{\begin{itemize}
\item \textsuperscript{107} L.E. Salles, \textit{Forum Shopping in International Adjudication} (CUP 2014) 46.
\item \textsuperscript{108} See S. Ripinsky, ‘Venezuela’s Withdrawal from ICSID: What it Does and Does Not Achieve’, ITN, 13 April 2012 (noting that Bolivia, Ecuador and Venezuela have withdrawn from the ICSID Convention).
\item \textsuperscript{111} Ryan, ‘Meeting Expectations’, 761.
\item \textsuperscript{112} Schill, ‘Enhancing International Investment Law’s Legitimacy’, 64.
\item \textsuperscript{114} Ibid.
\item \textsuperscript{115} Ibid.
\end{itemize}}
dispute resolution, the introduction of an appeals body to review arbitral
awards, and the institution of a permanent World Investment Court.\textsuperscript{116}

The use of concepts such as proportionality, reasonableness and
standards of review in international investment law and arbitration can
simultaneously belong to both evolutionary and revolutionary scenarios.
On the one hand, \textit{de lege lata}, proportionality, reasonableness and
standards of review can be seen as jurisprudential techniques to interpret
vague investment treaty provisions and balance private and public
interests in investor–state arbitration. Some even argue that proportion-
ality and reasonableness are general principles of international law, and
therefore can be applied as sources of law within investment arbitration.\textsuperscript{117} On the other hand, \textit{de lege ferenda}, proportionality, reasonableness and standards of review can be inserted in the text of IIAs.\textsuperscript{118}

In both evolutionary and revolutionary scenarios, legitimacy concerns
do not play only a negative role indicating dissatisfaction with how the
system works. They can also have a positive function in that they can be
perceived as tools to strengthen the system’s perceived legitimacy by
raising important issues, stimulating debate and spurring novel
approaches.\textsuperscript{119} They should be taken into account to allow the investment
treaty system to develop properly. Whether states will opt for evolution-
ary or revolutionary approaches to the system remains to be seen.

1.5 THE DIFFERENT CONCEPTUALIZATIONS OF
INVESTMENT TREATY ARBITRATION

International investment law and arbitration oscillates between national
and international law, and private and public law, historically ‘borrowing
elements from different legal structures’.\textsuperscript{120} Given its hybrid features,
international investment law and arbitration has been considered to be a
system of its own kind and has been analogized to different legal
systems, including international commercial arbitration, public law and
international law (and within the latter, principally, albeit not exclusively,

\begin{thebibliography}{99}
\bibitem{116} Schill, ‘Enhancing International Investment Law’s Legitimacy’, 168 (list-
ing the various institutional reform proposals but endorsing evolutionary
approaches).
\bibitem{117} See Chapter 3 and 4 below.
\bibitem{118} For instance, different parts of the CETA refer to proportionality. See e.g.
Article 8.39.5 of CETA (on the adjustment of costs).
\bibitem{119} Ryan, ‘Meeting Expectations’, 761.
\bibitem{120} Puig, ‘Recasting ICSID’s Legitimacy Debate’, 479.
\end{thebibliography}
WTO law and human rights law). These analogies are heuristic models used to better understand international investment law and arbitration, and to make sense of the related available knowledge. These analogies are descriptive in nature, and reflect and emphasize some aspects of the system rather than others.

However, far from having a purely theoretical character, the selection of the appropriate analogy is a struggle for the soul of international investment law. In this respect, the appropriate analogy does not merely concern the form, methods and procedure, but also the substance, aims and objectives of international investment law. The debate on the appropriate analogy is a struggle for interpretive power, with the resulting ability to impose a predominant discourse and tame divergent narratives. As Schill aptly points out, ‘a culture clash of different epistemic communities’ is taking place, ‘because private commercial and public international lawyers often have different perspectives on, and different philosophies about, the role of law, the state, and the function of dispute resolution’.

The outcome of this debate is important because it will likely influence the evolution of the field. Not only can analogies explain the past and present of international investment law and arbitration, but they can also shape its future. While different analogies compete for describing and explaining international investment law and arbitration, they can (and have) facilitate(d) the transplantation of concepts from given legal fields to the investment regime.

This section illuminates the way international investment law and arbitration has been compared to other systems such as international commercial arbitration, public law adjudication and international law. Within international law, it also examines how international investment law has been analogized to human rights law and WTO law. After highlighting the promises and pitfalls of such comparisons, the section briefly concludes that comparisons are not neutral, and that the selection of the comparator often depends on the perspective of who draws the analogies.

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analogy. At the same time, analogies are useful epistemic tools to study
the international investment regime and identify trajectories of the field.
They also enable scholars and practitioners to better contextualize the
debate on the use of criteria such as proportionality, reasonableness and
standards of review in international investment law and arbitration.

1.5.1 The Commercial Law Paradigm

Because of the procedural rules that govern it, investor–state arbitration
has been analogized to commercial arbitration.124 Arbitrators are
appointed by the parties and/or an appointing institution; most hearings
are held behind closed doors. The parties select the applicable law, and
there is no appeal mechanism. Awards rendered against host states are, in
theory, readily enforceable against host state property worldwide, due to
the widespread adoption of the New York125 and Washington Conven-
tions,126 which provide for the prompt enforceability of foreign arbitral
awards and ICSID awards respectively. The awards have only limited
avenues for revision and cannot be amended by the domestic courts.127
Furthermore, ICSID arbitrations are wholly exempted from the super-
vision of local courts, with awards being subject only to an internal
annulment process.128 The grounds for annulment are narrow and con-
cern due process issues: i.e. the tribunal was not properly constituted; it
manifestly exceeded its powers; there was corruption on the part of a
member; there was a fundamental serious departure from a procedural
rule; or the award did not state the reasons on which it was based.

The procedural features of investor–arbitration can be explained in
light of the origins of the system.129 For a long time, most investment
disputes had a commercial nature; and both home and host states

124 N. Blackaby, ‘Investment Arbitration and Commercial Arbitration (or the
Tale of the Dolphin and the Shark)’, in J.D.M. Lew and L. Mistelis (eds),
Pervasive Problems in International Arbitration (Kluwer Law International
2006) 217–33.
125 Convention on the Recognition and Enforcement of Foreign Arbitral
126 Convention on the Settlement of Investment Disputes between States and
Nationals of Other States, Washington DC, 18 March 1965, in force 14 October
1966, 575 UNTS 159.
127 New York Convention, Article V.
128 ICSID Convention, Article 53.
129 Pauwelyn, ‘At the Edge of Chaos?’, 408.
preferred to keep the dispute behind closed doors. Nowadays, investment disputes include not only contract but treaty claims and relate to a wide variety of state conduct, ranging from its commercial behaviour to regulation. Yet, ‘as much as the types of claims and disputes changed, the method of settling these disputes remained the same’. The commercial arbitration perspective emphasizes the private law aspects of investor–state arbitration, such as party autonomy and party equality.

However, ‘investment treaty arbitration differs from international commercial arbitration in several regards, namely the subject matter of the disputes [and] the relationship of the parties’. While commercial arbitration generally involves private parties and concerns disputes of a commercial nature, investor–state arbitration involves states and private actors and may concern disputes of a public law nature. As investment treaty arbitrations are often regulatory disputes, the resulting awards ‘may directly affect the social fabric of the host state’. Moreover, ‘investment treaty arbitration affects third parties and their behavior intensely, as the outcome of arbitrations … not only affect future interpretations of similar standards and shape the expectations of investors and states about the decision-making of tribunals, but also affect investment treaty making’.

1.5.2 The Public Law Paradigm

International investment law has been conceptualized as being akin to domestic public law, because of functional analogy. Like domestic public law, international investment law governs ‘the relation of private

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130 Ibid.
131 Ibid.
132 Ibid.
134 Ibid. 75.
136 Schill, ‘Enhancing International Investment Law’s Legitimacy’, 76.
137 Ibid. 85.
economic actors and governmental power’. In the same way that domestic public law protects private property, prohibits discrimination and endorses rule of law standards for the treatment of private interests, international investment law provides for the protection of foreign direct investments, prohibits discrimination and ‘endorse[s] rule of law standards for the treatment of foreign investors by states’.

While investment treaty arbitration structurally resembles a private model of adjudication, substantively, it gives arbitrators a comprehensive jurisdiction over what are essentially regulatory disputes. Adjudication over a state’s acta jure imperii implies a significant departure from the conventional use of international commercial arbitration. Arbitral awards ultimately shape the relationship between a state, on the one hand, and private individuals, on the other, determining matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state. Many of the recent arbitral awards have concerned the determination of the appropriate boundary between two conflicting values: the legitimate sphere for state regulation in the pursuit of public goods; and the protection of foreign investment from state interference.

The public law perspective views international investment law and arbitration as constraining the exercise of state power vis-à-vis private interests. It considers the international investment regime as governing the transnational relationship between foreign investors and the host state, rather than international relations among states. It encourages arbitral tribunals to interpret and apply vague investment treaty provisions ‘expanding public law thinking within the existing structure of investment treaty arbitration itself’. Proponents of the public law perspective recommend using public law concepts such as proportionality

139 Schill, ‘Enhancing International Investment Law’s Legitimacy’, 60.
140 Ibid. 59.
143 Van Harten, Investment Treaty Arbitration and Public Law, 70.
146 Ibid.
147 Schill, ‘Enhancing International Investment Law’s Legitimacy’, 57.
in investor–state arbitration\textsuperscript{148} ‘to guide the interpretation of investment treaties, to understand the role and powers of investment treaty tribunals, and to develop suggestions for legal reform’.\textsuperscript{149} Moreover, comparative public analysis can be used to identify general principles of law, which are a source of international (investment) law according to Article 38(1)(c) of the Statute of the International Court of Justice.\textsuperscript{150}

The literature advancing a public law approach to international investment law and arbitration ‘has been invaluable in generating an awareness … that investment disputes are public in character’.\textsuperscript{151} It has also highlighted the important linkage between comparative law and international law in the genesis of general principles of international law. It has contributed to bringing international investment law to the forefront of international legal debate.

However, ‘international investment law remains an international discipline that is detached from the domestic public law of any one state’.\textsuperscript{152} Public law approaches risk ‘confusing resemblance with equivalence’.\textsuperscript{153} The fact that investor–state arbitration is analogous to judicial review does not mean that it is judicial review.\textsuperscript{154} Arbitral tribunals have narrower remedies than constitutional courts.\textsuperscript{155} Arbitral tribunals rarely award restitution; rather, they award compensation and damages.\textsuperscript{156} While public law approaches emphasize the role of states as trustees of their population’s well-being, they risk neglecting the fact that states ‘have certain basic obligations toward the rest of humanity’ under public international law,\textsuperscript{157} thus overlooking ‘the power of international law to advance international public policy in economic and non-economic
spheres in an integrated and coordinated way’. The public law approach risks increasing the fragmentation of international law and diluting its universality. Finally, by mandating the adoption of public law analogies and the migration of constitutional ideas from the domestic sphere to the international realm, there is a risk of neglecting the cultural background of such concepts and their suitability to public international law in general and international investment law in particular. Therefore, international law scholars have argued that while investor–state arbitration has public law features, it remains ‘a creature of public international law’.

1.5.3 The International Law Paradigm

International investment law and arbitration is a subfield of public international law. International investment agreements are international law treaties. Not only do investment treaty obligations ‘apply irrespective of internal law’, but, as Crawford suggests, ‘[i]nvestment law … is about the way in which we bring the state under some measure of control, which is the main aspiration of general international law’. The limited powers available to states to review arbitral awards confirms the primacy of international law obligations over national law.

International investment law ‘borrows important legal infrastructure from international law’. International law governs the interpretation and application of investment treaties, including the jurisdiction, competence and powers of arbitral tribunals. Like other international courts and tribunals, arbitral tribunals have to settle disputes in conformity with

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159 Ibid.
162 Schill, ‘Enhancing International Investment Law’s Legitimacy’, 73.
165 Puig, ‘Recasting ICSID’s Legitimacy Debate’, 480.
166 Ibid.
international law. Customary rules of treaty interpretation, as restated by the Vienna Convention on the Law of Treaties, and in particular Article 31(3)(c), enable ICSID arbitrators to take into account other international law regimes when interpreting an IIA.

Considering international investment law and arbitration as a subfield of international law means that IIAs are viewed as contributing to the governance of international relations between states. In parallel, such an approach 'brings with it the expectation that legal relations between states will serve as vehicles for carrying forward … international public policies for economic, social, cultural, health, environmental and vital related purposes'. Within public international law, economic aims and objectives 'are pursued as only one dimension of an integrated set of public policies'.

In order to clarify and operationalize vague investment treaty provisions, public international lawyers propose comparative reasoning, drawing parallels between international investment law and other fields of public international law that fulfill analogous functions in restraining the exercise of state power vis-à-vis non-state actors. They propose 'cross-regime analysis, drawing, for example, on WTO or human rights law'. For instance, private enforcement of international investment law has been analogized to the private enforcement of human rights law; the limited influence of states on the arbitral process has been analogized to the limited influence that WTO member states have on the WTO dispute-settlement proceedings. Not only can such an approach 'ensure cross regime consistency' and defragment the fragmentation of international law 'by stressing commonalities and openness of international investment law towards other international regimes', but it can also reinforce the perceived legitimacy of the international investment regime.

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170 Ibid.
171 Ibid. 473.
173 Ibid. 88.
Even accepting the theoretical merit of comparative reasoning in a developing field such as international investment law and arbitration, in practice, international lawyers must be mindful that analogies are not neutral, and the selection of the given comparator can have significant implications on the field.\(^{174}\) Within the matrix of international law, some specific analogies are drawn between international investment law and human rights law, on the one hand, and between international investment law and international trade law, on the other.

### 1.5.3.1 Human rights law

Human rights law and international investment law are often juxtaposed for both substantive and procedural reasons.\(^{175}\) At the substantive level, human rights law and international investment law provide for analogous standards of protection.\(^{176}\) Suffice it to mention that the following binary standards are available under international investment law and human rights law respectively: denial of justice and the right to a fair trial; full protection and certain aspects of the rights to privacy, liberty and life; expropriation and the right to property; fair and equitable treatment and due process; national treatment and non-discrimination.\(^{177}\)

At the procedural level, access to investor–state arbitration shares many characteristics of the direct right of action before human rights courts.\(^{178}\) While states are the traditional subjects of international law, both human rights law and international investment law empower individuals to bring claims against states before international courts and tribunals. Both branches of international law are characterized by a

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\(^{174}\) Vadi, ‘Critical Comparisons’, 100 (‘comparisons are not a neutral or objective phenomenon’).


\(^{177}\) Ibid.

bottom-up approach to dispute settlement, which make them very
dynamic fields of study.

However, international investment law and human rights law have
different aims and objectives, as well as different substantive and
procedural features.\textsuperscript{179} Such differences discourage making any broad
analogies. While international investment law aims at promoting (sustain-
able) development, international human rights law aims at protecting,
promoting and fulfilling human rights. While international investment
law primarily pursues economic objectives, international human rights
law pursues other values. Obligations under international investment law
are bilateral and reciprocal; obligations under human rights law are \textit{erga omnes}
and do not rely on reciprocity.\textsuperscript{180} This does not mean that there
may not be some forms of meaningful overlap, as economic development
can be a factor in human well-being.

The procedural requirements for having access to investment treaty
arbitration differ considerably from those for having access to human
rights courts. For instance, in human rights law, the exhaustion of local
remedies is a procedural requirement for the admissibility of a claim. By
contrast, in international investment law, the exhaustion of local remedies
is required only with regard to denial of justice claims – i.e. the claimant
cannot invoke denial of justice without prior exhaustion of local rem-
edies. However, the exhaustion of local remedies may not be necessary
for other investment treaty claims; rather, it may be precluded by the
fork-in-the-road provision. This provision allows the investor to select the
desired venue for filing his/her claim, but precludes subsequent recourse
to other dispute-settlement mechanisms. Therefore, arbitral tribunals do
not merely constitute an additional forum with respect to state courts (as
is the case for all international human rights courts), but they are also an
alternative to the latter.

While human rights instruments have advocated a human-rights-
sensitive interpretation of international investment agreements,\textsuperscript{181} it is
worth mentioning that such an approach can have a dual effect. On the

\textsuperscript{179} M. Hirsch, ‘Investment Tribunals and Human Rights: Divergent Paths’, in
P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds), \textit{Human Rights in

\textsuperscript{180} E. de Wet and J. Vidmar (eds), \textit{Hierarchy in International Law: The Place
of Human Rights} (OUP 2012).

\textsuperscript{181} See e.g. Economic and Social Council, Commission on Human Rights,
Sub-commission on the Promotion and Protection of Human Rights, Report of
the High Commissioner for Human Rights, Trade and Investment, E/CN.4

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one hand, it can enhance the state’s right to regulate in the public interest, thus restricting investors’ property rights. On the other hand, it can also reinforce the protection of investors’ rights. For instance, a number of regional human rights instruments protect property rights, and there is a growing body of human rights jurisprudence involving the protection of property rights. However, some scholars wonder whether arbitrators would be able to apply human rights law in a way that is consistent with the interpretation provided by human rights courts.182

1.5.3.2 WTO law

International investment law and international trade law are often viewed as similar due to perceived substantive, sociological and procedural commonalities.183 From a substantive perspective, the case for drawing such an analogy is evident. Both regimes govern global economic integration, promote transnational business, and aim to foster (sustainable) development.184 Both seek to overcome protectionism and limit discrimination.185 Both are ‘branches of international economic law’.186 Moreover, certain international trade treaties present an articulated regime that the investment treaties presuppose. For instance, the TRIMS, the TRIPS and the GATS bring FDI into the trade fold.187 If international investment law and international trade law are not yet merging,188 they

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183 Vadi, Analogies in International Investment Law and Arbitration, 209.
184 Ibid.
185 But see N. DiMascio and J. Pauwelyn, ‘Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 AJIL 48–89 (suggesting that while international investment law is about protecting foreign investors and individual rights, international trade law is about liberalization and state-to-state exchange of market opportunities).
Proportionality, reasonableness and standards of review

certainly converge to a certain extent.\textsuperscript{189} From a sociological perspective, Members of the WTO Appellate Body often sit on investor–state arbitration.\textsuperscript{190}

From a procedural perspective, arbitral tribunals and the WTO dispute-settlement organs essentially share the same functions by settling international disputes in accordance with international economic law. WTO panels, the Appellate Body, and arbitral tribunals are often asked to strike a balance between economic and non-economic concerns. Disputes that cross the boundary between the two regimes are increasing.\textsuperscript{191} Moreover, analogizing international investment law to international trade law can facilitate the cross-pollination of concepts and provide predictability.\textsuperscript{192}

Given ‘the almost universal participation in the WTO’ of states that are parties to IIAs, WTO law would be relevant in investor–state arbitration under Article 31(3)(c) of the VCLT, which requires adjudicators to ‘take[e] into account, together with context … any relevant rules of international law applicable in the relations between the parties’.\textsuperscript{193}

However, there are significant institutional differences between the two systems. While the WTO is an international organization administering a ‘cohesive multilateral system’, IIAs have a bilateral or regional scope and almost never set up an organization.\textsuperscript{194} The very concept of ‘international investment law is an academic systematization’ based on ‘a comparative analysis’.\textsuperscript{195}

The respective dispute-settlement mechanisms also differ. While only states can file claims before the WTO panels and the Appellate Body, foreign investors can pursue investor–state arbitration without any intervention from the home state. After bringing trade disputes before ad hoc panels, states can file appeals on matters of law before a permanent Appellate Body. The WTO Appellate Body only reviews legal errors and ensures consistency in interpretation. Instead, only rarely have appeals mechanisms been included in IIAs. Annulment proceedings are limited to

\textsuperscript{191} Vadi, \textit{Analogies in International Investment Law and Arbitration}.
\textsuperscript{192} L. Hsu, ‘Applicability of WTO Law in Regional Trade Agreements: Identifying the Links’, in L. Bartels and F. Ortino (eds), \textit{Regional Trade Agreements and the WTO Legal System} (OUP 2006) 525–52, 551.
\textsuperscript{194} Ibid. 6–7.
\textsuperscript{195} Ibid. 7.
ascertaining grave breaches of due process. In case of breach, while the WTO dispute-settlement mechanism usually provides for re-establishing the status quo ante, arbitral tribunals usually award the payment of compensation. Furthermore, while remedies at the WTO only have prospective character, arbitral tribunals can authorize damages to the foreign investors.

Finally, while economic analysis has always played an important role in international trade law and the settlement of international trade disputes, legal analysis has predominated in investment disputes. In international trade law, ‘economists and trade policy experts wrote and administered the General Agreement on Tariffs and Trade (GATT). The lawyers came along later’. Instead, international investment law ‘has always been the concern of lawyers’. Lawyers draft IIAs; lawyers have adjudicated investment disputes.

1.5.4 Preliminary Conclusions

These paradigms for categorizing investment treaty arbitrations all have merits and weaknesses and may diverge and converge on specific aspects. Most notably, none of them – except perhaps the international law and public law paradigms due to their comprehensive nature – fully captures the complex phenomenon of investor–state arbitration.

These paradigms are not normative; rather they are descriptive in nature and emphasize some aspects of investment treaty arbitration over others. They are useful theoretical tools to better configure and understand investment treaty arbitration. While investor–state arbitration is a relatively recent phenomenon and remains under-theorized, awareness of the existence of different paradigms promotes a better understanding and functioning of the same.

FINAL REMARKS

In an effort to make their regulatory framework for FDI more attractive to foreign investors, states ratify IIAs. Such adhesion necessarily involves

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196 Ibid. 9.
197 Ibid. 8–9.
199 Ibid.
200 Ibid.
the surrender of a part of, or limitation of, their sovereignty in exchange for certain benefits. In this regard, however, IIAs are more intrusive than trade agreements as foreign investment takes place within the borders of a state. As one author puts it, ‘they may condition … measures taken by governments … in the realm of regulation’. In addition, investment treaties provide foreign investors with direct access to investor–state arbitration.

However, the right to regulate is a basic attribute of sovereignty under international law. In certain cases, not only do states have a right to regulate, but they also have a duty to do so because of international obligations. In these cases, regulation has the function of safeguarding internationally recognized values, and state compliance with its international obligations ‘actually serve[s] as a means to reassert sovereignty’.

Therefore, according to some scholars, investment treaty law and arbitration is facing a ‘legitimacy crisis’, as arbitral awards can affect public policy, but there is uncertainty over the relevance or irrelevance of norms protecting non-economic values within investment treaty arbitration. Furthermore, while developing countries have deemed investment treaty arbitration politically biased against them, even industrialized countries have expressed some concerns about this mechanism. The criticisms on the functioning of investment treaty arbitration in relation to public goods should be taken into account to allow the investment treaty system to develop in accordance with public international law.

Against this background, this study now explores the migration of constitutional ideas from constitutional law to international investment law and arbitration. It then addresses the fundamental question as to whether proportionality, reasonableness and standards of review can facilitate the achievement of a better balance between the public and private interests within international investment law and arbitration or whether they risk fostering expansive interpretations of investment treaty provisions that can further jeopardize the legitimate pursuit of public interests by the host states.

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201 See generally W. Shan, P. Simons and D. Singh (eds), Redefining Sovereignty in International Economic Law (Hart Publishing 2008).