UNIVERSITA' COMMERCIALE "LUIGI BOCCONI"

PhD SCHOOL

PhD program in Legal Studies

Cycle: XXXV

Disciplinary Field (code): Ius/13

ISDS IS FALLING APART: WILL DIVERSITY SAVE IT?

An economic lesson on the Future of Investor-State Dispute Settlement

Advisor: Giorgio SACERDOTI

Co-Advisor: Giovanni TUZET

PhD Thesis by

Roberto ISIBOR

ID number: 3107434

Year 2023

ABSTRACT

In 2010, more than 70 academics issued a public declaration stating that '[i]nvestment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose' and that '[t]here is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration'. More than a decade has passed since this declaration. While it is true that investment treaty arbitration is still alive, it is also true that the latter (arguably) seems to still be under challenge.

On this assumption, and against the backdrop of the alleged and controversial investment arbitration 'crisis', this research addresses what appears to be a 'noisy' gap in the legal and economic debate: does the lack of diversity and legitimacy make the ISDS an inefficient system?

To provide a 'new' perspective and, at the same time, support the importance of more judicious use of the economic approach in international law, this research aims to fill this gap by analysing the relationship between 'lack of legitimacy' and 'lack of diversity' in terms of economic costs. It will be illustrated why (and under which conditions) addressing the lack of diversity in ISDS entails an improvement in the legitimacy of the system and, consequently, whether (and under which conditions) the above findings lead to increased efficiency in ISDS. To this end, a notion of sustainable diversity will be proposed. The claim is that geographical-, gender- and/or arbitrators-based definitions of diversity should be replaced by a definition of diversity that takes into account the beliefs of ISDS constituencies.

Grazie a Franca, Rocco, Mia, mamma, papà e a tutti coloro che hanno reso felice la mia vita, anche solo per un momento.

TABLE OF CONTENTS

ABSTRACT **2**

TABLE OF CONTENTS **4**

LIST OF ABBREVIATIONS **7**

1. INTRODUCTION **10**

1.1 From common sense to economics *10*

1.2 Economic approaches to law *15*

1.3 The lack of diversity and legitimacy in ISDS *20*

1.4 The concept of diversity *24*

1.5 Global law *29*

1.6 Structure *30*

FIRST PART **31**

2. THE CRISIS AND REFORM OF ISDS **32**

2.1 Introduction *32*

2.2 Context and history of IIL *39*

(a) The IIL 39
(b) Protection of foreign investors: Between conventional and customary international law 41
(c) The quest for protection of foreign investors: From the era of the Western Empires to the contemporary architecture 44
(d) (The attempts for a) Multilateralization of IIL 47
(e) The BITs architecture 49

2.3 Investments disputes *51*

(a) ISDS 51
(b) ITA's peculiarities 54

2.4 The legitimacy issue *57*

(a) ISDS: From infancy to maturity 57
(b) IIL and ISDS: is there any solution to the legitimacy crisis? 65

2.5 Conclusions *69*

3. IIL: SUBSTANTIAL AND PROCEDURAL RULES **71**

3.1 Introduction *71*

SECTION A **71**

3.2 Scope of application in IIAs *71*

(a) The notion of investment 71
(b) The notion of investor 74

3.3 (main) Standards of protection in IIAs *76*

(a) FET 76
(b) Full protection and security 79
(c) Most Favoured Nation 80

(d) National Treatment ... 81
(e) Transfer of funds ... 82
(f) Expropriation ... 83
(g) Umbrella clauses ... 84
(h) Obligations for investors ... 85

SECTION B ... 87

3.4 Preliminary remarks on investment-arbitration ... *87*
(a) Numbers of ISDS ... 87
(b) ICSID and institutional arbitration vs UNCITRAL rules and ad hoc arbitration ... 88
(c) Costs and duration of arbitration ... 90
(d) Selection of arbitrators ... 91

3.5 Preliminary steps ... *93*
(a) Jurisdiction and admissibility ... 93
(b) Cooling off-period and the exhaustion of local remedies ... 95

3.6 The Arbitral Proceedings ... *96*
(a) Conduct of arbitration ... 96
(b) Appointment of arbitrators ... 96
(c) Constitution of the arbitral tribunal: independence and impartiality ... 98
(d) Seat of arbitration ... 99
(e) Amici curiae ... 99
(f) Dissenting and concurring opinion ... 100

3.7 Challenging the awards ... *101*
(a) ICSID recognition, annulment procedure and setting aside ... 101
(b) Domestic setting aside ... 103

3.8 Enforcement ... *105*

3.9 The ICS and the MIC ... *107*

3.10 Conclusions ... *109*

SECOND PART ... 111

4. LEGITIMACY IN ITA ... 112

4.1 Introduction ... *112*

4.2 The concepts of legitimacy and legitimation ... *112*

4.3 Forms of legitimacy ... *116*
(a) Normative legitimacy ... 116
(b) Normative legitimacy: is there or should there be any moral approach to legitimacy? ... 118
(c) Normative legitimacy: A too formalistic approach? ... 120
(d) Sociological legitimacy ... 121

4.4 Legitimacy in ISDS ... *122*

4.5 Conclusions ... *124*

5. DIVERSITY IN ITA ... 125

5.1 Introduction: 'Male, pale and stale' ... *125*

5.2 Diversity and ISDS ... *126*
(a) The (alleged) lack of geographical diversity among arbitrators ... 126

(b) The shades of diversity among arbitrators ... 128

5.3 ***Diversity as a standard of legitimacy*** ... *131*
(a) Introduction: why does diversity matter in ISDS ... 131
(b) Diversity and legitimacy ... 132

5.4 ***Bias and diversity*** ... *133*
(a) Diversity and bias in ISDS: are data supporting it? ... 133
(b) Diversity and bias in ITA: there is still a case to discuss it ... 135

5.5 ***The concept of sustainable diversity*** ... *140*
(a) The lack of a notion of diversity ... 140
(b) Proposal for a concept of sustainable diversity ... 142

5.6 ***Conclusions*** ... *145*

6. AN ECONOMIC APPROACH TO DIVERSITY IN ISDS ... 146

6.1 ***Introduction*** ... *146*

6.2 ***The notion of efficiency*** ... *146*

6.3 ***An economic theory of legal process*** ... *152*

6.4 ***Topics in the economics of the ISDS*** ... *158*

6.5 ***An economic approach to diversity in the legal process*** ... *163*
(a) The notion of efficiency factor ... 163
(b) Legitimacy and diversity as efficiency factors ... 164

6.6 ***Conclusions*** ... *166*

7. CONCLUDING REMARKS ... 167

BIBLIOGRAPHY ... 170

LIST OF ABBREVIATIONS

- AfCFTA: *African Continental Free Trade Area*
- ASEAN: *Association of South-East Asian Nations*
- AU: *African Union*
- BIT: *Bilateral Investment Treaties*
- CEN-SAD: *Community of Sahel Saharan States*
- CETA: *EU-Canada Comprehensive Economic and Trade Agreement*
- CJEU: *Court of Justice of the European Union*
- COMESA: *Common Market for Eastern and Southern Africa*
- CPTPP: *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*
- CRCICA: *Cairo Regional Centre for International Commercial Arbitration*
- EAC: *East African Community*
- ECCAS: *Economic Community of Central African States*
- ECOWAS: *Economic Community of West African States*
- ECT: *Energy Charter Treaty*
- EU: *European Union*
- FCN: *Friendship, Commerce and Navigation Treaties*
- FTA: *Free Trade Agreement*
- GATS: *General Agreement on Trade in Services*
- GATT: *General Agreement on Tariffs and Trade*
- IBA: *International Bar Association*
- IBRD: *International Bank for Reconstruction and Development*
- IIA: *International Investment Agreements*
- ICC: *International Chamber of Commerce*

- ICJ: *International Court of Justice*
- ICSID: *International Centre for the Settlement of Investment Disputes*
- ICSID Convention: *Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Opened for Signature at Washington, on March 1965. No. 8359 UN*
- ICS: *Investment Court System*
- IGAD: *Inter-Governmental Authority on Development*
- IIL: *International Investment Law*
- IMF: *International Monetary Found*
- ISA: *Investor-State Arbitration* (including all three forms of consent to arbitration: treaty, domestic legislation, and contracts)
- ISDS: *Investor-State Dispute Settlement*
- ITA: *Investment Treaty Arbitration* (as a specific type of ISA characterized by a treaty-based consent)
- ITO: *International Trade Organisation*
- LCIA: *London Court of International Arbitration*
- MERCOSUR: *Mercado Comun der Sur*
- MIC: *Multilateral Investment Court*
- MIGA: *Multilateral Investment Guarantee Agency*
- NAFTA: *North American Free Trade Agreement*
- NGO: *Non-governmental organisation*
- OECD: *Organisation for Economic Co-operation and Development*
- OHADA: *Organisation for the Harmonisation of Business Law in Africa*
- PAIC: *Pan-African Investment Code*
- PCIA: *Permanent Court of Arbitration*

- RCEP: *Regional Comprehensive Economic Partnership*
- RECs: *Regional Economic Communities*
- SADC: *Southern African Development Community*
- SCC: *Stockholm Chamber of Commerce*
- TEU: *Treaty on the European Union*
- TFEU: *Treaty on the Functioning of the European Union*
- TFTA: *Tripartite Free Trade Area*
- TRIMS: *Agreement on Trade-Related Investment Measures*
- TPP: *Trans-Pacific Partnership*
- TTIP: *Transatlantic Trade and Investment Partnership*
- UMA: *Union du Maghreb Arabe*
- UN: *United Nations*
- UNCITRAL: *United Nations Commission for International Trade Law*
- USMCA: *United States-Mexico-Canada Agreement*
- WTO: *World Trade Organisation*

1. INTRODUCTION

1.1 From common sense to economics

Ultimately, it could be argued that every individual and every social formation in which his or her personality develops pursue a single and exclusive end, his or her individual and unquestionable utility, and its 'innate' pursuance, to be intended as the fulfilment of individual preferences, provides the key to interpreting and predicting the behaviours and choices of others.[1]

---

[1] There are some necessary clarifications to be made about this statement. Firstly, the notion of utility does not correspond (per se) to a patrimonial advantage, nor can it be said to be pursued most rationally and efficiently.
Secondly, the statement at stake is ethical one, in the sense that it addresses ethical preferences individuals, and their *Weltanschauung*, including both moral ideals and behaviours. It is a descriptive ethical statement in the sense that it questions what the present author believes people think is right (or rather what individuals actually pursue in terms of right), not what 'right' means; although, it winks to naturalist moral realism (in terms of meta-ethics) or how the right is put into practice (in terms of applied ethics). Nevertheless, underestimating this statement's normative/prescriptive consequence would be incorrect or reductive.
In order to clarify the foregoing, it is useful to observe the following.
Affirming that moral agents pursue utility is, per se, a value-free approach. The statement does not guide people in making a decision nor evaluate how reasonable those decisions are. Conversely, the statement assumes that utility is the driver of agents' conduct. That said, it is necessary to clarify that utility is not employed in this work as Bentham and Jevons did as solely a concept of satisfaction or pleasure experienced. As known, for Bentham, the utility was 'the property of any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness'. In contrast, Jevons transformed it into a feature of the persons, as 'the sum of pleasure and pain prevented'. According to Georgescu-Roegen, an approach similar to Bentham's concept of utility was taken on the matter by modern economic theory. In the sense that, in short, pleasure is the positive and pain is the negative (paraphrasing Emerson, '[f]or every minute you are angry you lose sixty seconds of happiness').
An 'evolution' of the concept of utility streams out from psychologists' studies, for instance, by Scitovsky, who drafted a distinction between comfort (satisfaction of a need) and desire (transition from discomfort to comfort and temporary sense of pleasure).
Further insights were given by psychoanalytic approaches suggesting that a complex picture of fulfilled life includes a place for both pleasant and unpleasant experiences. Hence, unhappiness as well as happiness.
As noted by Csikszentmihalyi (promoting ideas which recall Aristotele's eudaimonia), quality of life is enjoyment based on 'flow'. 'Csikszentmihalyi's happiness' as true enjoyment is not just experiencing pleasure or satisfying need but includes the ability to acquire skills, perfect them, and a sense of purpose, of fulfilment. The opening ethical statement of this work is built upon a concept of utility that recalls the idea of fulfilment as something more than pleasure, satisfaction and happiness.
With no particular theoretical intentions, it could be said that utility in this work is partially based on the insight from Csikszentmihalyi's notion of 'flow' (insofar as this theory broadens the concept of utility). Utility is therefore seen as a psychological condition which leads any individual to feel to have a purpose in their life (and daily life) and, hence, try to fulfil this purpose within the constraint of life experiences. Indeed, the other side of the coin is the constraint that derives from other individual behaviours, from human physical limits, and from natural (environmental limits). More in detail, the constraint arises from cases of irreducible contrast between opposing utilities and the necessary imposition of one utility over another. Or by the physical or natural inability to realise (or to elaborate) one's utility. Therefore, the life of the individuals is not only a stream of choices and actions towards fulfilment but also a pendulum that swings

In line with this perspective, it could be further argued that scholars should pay particular attention to economic science and its instruments. Indeed, the latter is the social science that, by definition, enquires into the sharing and allocation of the finite resources of our existences to realise individual (and thus social formations) utility.[2] Hence, among the social sciences, it is among the ones that have the most investigated utility and prediction.[3]

That said, it would be naïve to underestimate the issue of how to solve potential (and frequent) conflicts between individuals pursuing opposing utilities or to consider

---

between the tension towards fulfilment and constraints. From this perspective, the abovementioned statement is not just descriptive but also normative, whereas it implicitly sustains that a preference should be given to the empowerment of fulfilment to the greatest extent of individuals.
For an overview of the concept of utility see: Driver, J. (2022), *The History of Utilitarianism*, Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/archives/win2022/entries/utilitarianism-history/ (last access on 8 January 2023); Xin Yuan L. (2020), *Utilitarianism in Mill and Bentham: a comparative analysis*, Frontiers in Educational Research, Vol. 3, Issue 4: 34-37; Jevons W. S. (2013), *The Theory of Political Economy*, Palgrave Classics in Economics, London; Chappe R. (2012), *Pleasure, Happiness, and Fulfillment: The Trouble with Utility*, Institute for New Economic Thinking, https://www.ineteconomics.org/perspectives/blog/pleasure-happiness-and-fulfillment-the-trouble-with-utility (last access on 8 January 2023); Nandy A. (2012), *The Idea of Happiness*, Economic and Political Weekly, Vol. XLVII, No. 2, pp. 45-48; Sen. A. (1997), *Maximization and the Act of Choice*, Econometrica, Vol. 65, No. 4, pp. 45-780; Burns J. H. and Hart H. L. A. (1996), *The Collected Works of Jeremy Bentham. An Introduction to the Principles of Morals and Legislation*, Claredon Press, New York; Csikszentmihalyi M. (1990), *Flow: the psychology of optimal experience*, Haper & Row, first edition, New York; Kahneman D. and Tversky A. (1979), *Prospect Theory: An Analysis of Decision under Risk*, Econometrica, Vol. 47, No. 2, 263-291; Sen A. (1977), *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, Philosophy and Public Affairs, Vo. 6, No. 4, pp. 317-344; Scitovsky T. (1976), *The Joyless Economy*, Oxford University Press USA, Revised Edition, New York; Georgescu-Roegen N. (1968), *Utility*, International Encyclopedia of the Social Sciences, New York, Macmillan; Jevons W. S. (1871), *The Theory of Political Economy* (1871), Kelley, fifth edition, New York; Mill J.S. (1863), *Utilitarianism*, https://www.loc.gov/item/11015966/ (last access on 8 January 2023).

[2] As defined by Robbins, '[t]he economic study the disposal of scarce means. It is worth highlighting that this definition does not contradict the significance of the utility concept in economic science. Robbins L. (1935), *An Essay on the Nature and Significance of Economic Science*, p. 16 https://milescorak.files.wordpress.com/2020/02/robbins-essay-nature-significance-economic-science.pdf (last access on 8 January 2023). Furthermore, it is worth observing that the reference made to economics in this paragraph primarily recalls the role of economic science in a descriptive sense (i.e., as a means to understand how individuals behave), while implicitly acknowledging a prescriptive role of economics (as better clarified in the following paragraph). The rationale of the referral is to support the idea that economic intuitions and models can be applied in other social science realms. For further details on economics and micro-economics see chapter one, section two, and chapter six.

[3] As will be seen below, according to some approaches, economics is considered a formal science. However, the present author agrees with the majority approach, according to which economics is a social science. See Chetty R., Yes, Economics Is a Science, *The New York Times*, 20 October 2013, https://www.nytimes.com/2013/10/21/opinion/yes-economics-is-a-science.html (last access on 8 January 2023); Eid D., No, Economics is Not a Science, *The Harvard Crimson*, 17 October 2019, https://www.thecrimson.com/article/2019/10/17/eid-economics-not-science/ (last access on 8 January 2023).

economic approaches only as a key to interpreting our existence, depriving it of a normative scope.

From this further perspective, economic-based approaches are also a means preferable to mere common sense for deciding how to allocate finite resources among individuals in the heterogeneity of moral, ethical, religious, and political perspectives and, thus, reconcile opposing utilities.

It follows that economic approaches can play a dual role – descriptive and normative – and these two functions can provide useful and sound insights when (and if) applied to other social sciences, including law.[4]

Indeed, suppose the law is the set of rules that govern the relationships between individuals and the social formations in which their personalities develop. In that case, it could be claimed that law entails and incentivises a given allocation of resources among said individuals and social formations.

If the above can be asserted, there is no doubt that law can and should be subject to economic analysis. More in detail, on the one hand, economic approaches can explain how rules accompanied by sanctions incentivise the behaviours of the economic agents (descriptive). On the other hand, economic approaches can replace common sense and be used to design regulatory policies that respond to the criteria of efficiency (normative).[5]

This work attempts to probe the frontiers of these assumptions. In particular, the one that acknowledges economic approaches a normative weight.[6]

---

[4] As to the instruments applied by economic studies to normative analysis, a glimpse of them will be addressed in the following sections and chapters. At this stage, a normative perspective is aligned to the proposed concept of utility as primarily a descriptive ethical statement and, ultimately, also a prescriptive statement (see note 1**Error! Bookmark not defined.**). In heterogeneity, lacking common goals, and in the presence of contrasting interests, utility is deemed preferable to constrictions or common sense-based decisions. From this perspective, economics provides instruments for applying the aforementioned ethical statement.

[5] For a general overview of the economic approaches to law see (among the others): Cooter R. and Ulen T. (2014), *Law and Economics*, Pearson New International Edition, Sixth Edition, Edinburgh; Miceli T. J. (2017), *The Economic Approach to Law*, Stanford University Press, Third Edition, Stanford; Mackay E. (2000), History of Law and Economics, in Bouckaert B. and G. De Geest (ed), *Encyclopedia of law and economics*, Vol. 1, Edward Elgar Publishers, pp. 65-117; Goldsmith J. L. and Posner E. A. (1999), *A theory of Customary International Law*, University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 63.

[6] This work will not explore in detail how economic approaches pave the way for understanding how to pursue utility and reduce constraints. However, it is here assumed that maximisation, equilibrium and

It is assumed that international law, particularly international investment law, is, not unlike any other legal framework, the set of rules that guide individuals' behaviour and the social formations in which their personality develops (states, companies, international organisations, etc.).[7] As such, international law and international investment law may or may not promote an efficient allocation of resources.[8]

If the above is assumed, it can be further argued that economic approaches provide a valuable tool to address the following questions:

Is there an efficient allocation of resources? How can the efficient allocation of resources be implemented?

The matter is anything but new. The novelty is the object of investigation. Indeed, if some attention has been paid to the connection between economic approaches and international law,[9] there is a negatable paucity of integrated studies of ISDS, legitimacy and diversity from an economic perspective.[10] In this sense, filling this gap would entail manifold

---

efficiency (arguably the main intuitions of economic science) are three elements characterising the concept of utility (on utility, see note 1**Error! Bookmark not defined.**).

[7] See (among the others) the analysis made by Broude on behavioural economics in international law. In particular, Broude's findings on behavioural analysis of states conducts and states as unitary actors. See Broude T. (2015), *Behavioural International Law*, University of Pennsylvania Law Review, Vol. 163, pp. 1099-1157.

[8] With reference to economic analysis of IIL, see (among the others): Sykes A. O. (2019), *The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design*, Cambridge University Press, Vol 113, No. 3, pp. 482-534; Sasse J. P. (2011), *An Economic Analysis of Bilateral Investment Treaties*, Gabler Verlag, 2011th Edition, Wiesbden; Bonnitcha J. and Aisbett E. (2013), An Economic Analysis of Substantive Protections Provided by Investment Treaties, in Sauvant K. P. (ed) *Yearbook on International Investment Law and Policy 2011-2012*, Oxford University Press, New York; Vandevelde K. L. (2000), *The Economics of Bilateral Investment Treaties*, Harvard International Law Journal, Vo. 41, pp. 469-502 (Vandevelde is one of the leading scholars who produced a number of publications evaluating the extent to which investment treaties are liberal).

[9] Other than the works mentioned in note 9, see, for instance: Dunoff K. L. and Trachtman J. P. (1999), *Economic Analysis of International Law*, Yale Journal of International Law, Vol. 24, No. 1; Van Aaken A. (2014), *Behavioral International Law and Economics*, Harvard International Law Journal Vol. 55, pp. 421-481; Sykes A. O. and Guzman A. (2017), Economics of International Law, in Parisi F., *The Oxford Handbook of Law and Economics*, Oxford University Press, Oxford; Sykes A. O. and Posner E. A. (2013), *Economic Foundations of International Law*, Cambridge: Harvard University Press.

[10] On economic approaches to international adjudication and international arbitration, see (among the others): Guandalini B. (2020), *Economic Analysis of Arbitrator's Function*, International Arbitration law Library, Kluwer Law International, Vol. 55; Van Aaken A. and Broude T. (2016), *Arbitration from a Law & Economics Perspective*, Hebew University of Jerusalem Legal Studies Research paper Series No. 16, p. 37; Kirby J. (2015), *Efficiency in International Arbitration: Whose Duty Is It?* Journal of International Arbitration, Vol. 32, No. 6, p. 689-696; Kovacs R. B. (2012), *Efficiency in International Arbitration: An Economic Approach*, (2012), 23(1) American Review of International Arbitration Vol. 155, No. 3; Benson B. L. (2000), *Arbitration*, in Encyclopedia of Law & Economics, Vol. 5, pp. 159-193. To the knowledge of

consequences in advancing research on why and how to improve the system, other than being justified by the paramount importance of this field of law (due to i) the apparent crisis that is affecting this system, which is experiencing a moment of overall or radical reform aimed at preventing its debatable 'collapse', ii) the fact that this area of law deals with the most relevant sovereign prerogatives, iii) the (alleged) economic logic that justifies the interest of states, companies, and individuals in transnational investments, and iv) the need to set new standards in the emerging global law procedure).[11]

Moving aside from a direct analysis of the inherent complexity of assessing how to increase the efficiency of a dispute resolution mechanism,[12] the present study focuses on

---

this author, there are no works addressing in a comprehensive and integrated way ISDS efficiency nor the rich empirical literature on the practice of ISDS has been considered by economic approaches. Faure and Ma have made an attempt to fill the gap. See Faure M. and Ma W. (2020), *Investor-State Arbitration: Economic and Empirical Perspective*, Michigan Journal of International Law, Vol. 41, No. 1. Also, even in this case, no attention has been paid to a major critique to ISDS as the lack of legitimacy.

[11] In global law, more than any national and/or regional framework, cultural, ethical, and value heterogeneity have an impact on normative crafting.

[12] A leitmotiv of this research would be the concepts of mechanism, system and institution. Concerning the concept of mechanism and system, there is no purpose in creating any theoretical distinction between the two notions or using them in any technical sense. Only for clarification purposes, the concepts would be used in a pretty interchangeable way (unless a standard terminology usually applies in literature; for instance, with dispute resolution mechanisms). Generally, a system would be preferred when the end is to highlight the complexity of a specific legal structure and note its textured composition. A mechanism would be preferred when it would be prevalent the interest to notice the unitary nature of the legal structure and/or the fact that the latter is part of a larger process. That said, more 'problematic' is the concept of institution, to which extensive reference will be made throughout the work. In order to disentangle the issue, reference is made to Searle's analysis on the matter. The first point is to consider institutional facts. Institutional facts are those facts – as the present author's nationality, the fact that this author has a twenty euro bill in his pocket and so on – that can exist only given certain human institutions. As noted by Searle, such facts differ from natural facts – as the sea level, the distance of the Earth from the Sun and so on (provided that also for state these facts, the institution of language and convention of measures is needed; however, in this sense, it necessary to distinguish between the statement of the fact (which is institutional) and the fact stated). That clarified, following Searle, '[a]n institution is any collectively accepted system of rules (procedures, practices) that enable us to create institutional facts. These rules typically have the form of X counts as Y in C, where an object, person, or state of affairs X is assigned a special status, the Y status, such that the new status enables the person or object to perform functions that it could not perform solely in virtue of its physical structure, but requires as necessary condition the assignment of a status function'. It follows that in this work, institutions are any procedure and practice able to create institutional facts. For instance, ISDS is an institution, and the awards issued by arbitral tribunals in ISDS are institutional facts. Clearly, institutions can be a system composed of several sub-institutions (as, for instance, happens with ISDS and the various sub-institutions as the arbitral organisms composing it) that in a specific case can have relevance as unitary and distinct institution from their container. Furthermore, both legal mechanisms and systems may be institutions (as far as they can create institutional facts), and in this thesis that ILL, ISDS and ITA are institution (jointly and severally). Finally, it should be added (anticipating a topic better addressed in the next chapter) that – in a broad sense – the level of collective acceptance of an institution is here considered an equivalent of the institution's legitimacy. On the topic of institutions, see Searle J. R. (2015), *What is an Institution*, Cambridge University Press.

a particular preliminary (and unsolved) question: amid ethical, moral, and political heterogeneity, could economic-based approaches enlighten the existence of an efficiency relationship between diversity and ISDS?

1.2 Economic approaches to law

As clarified above, one of the first main assumptions of this work is that economic argument may, or better, should have a say in legal studies. However, it remains unclear what comes at stake when reference is made to economics in law. What does an 'economic approach to diversity' actually mean? In particular, what does 'an economic lesson on the future of Investor-State Dispute Settlement' entail?

The first straightforward answer is that economic approaches to the law provide 'a scientific theory to predict the effects of legal sanctions on behaviour'.[13] Hence, an economic-based approach to diversity and an economic lesson on the future of ISDS means and entails assessing how and under which condition is possible to know (and

---

[13] See Cooter and Ulen (2014), p. 3. To have a glimpse of the relevance of economics approaches to law, it is helpful to make reference to Ackerman's comment on this school. The latter defined economic analysis of law as 'the most important development in legal scholarship of the twentieth century'. As a further confirmation of economic approaches to law relevance, it is worth noting that – for two consecutive years, in 1991 and 1992 - Coase and Becker (two of the 'founders' of this school) were awarded the Nobel Prize in Economics. That clarified, it should be noted that the prodromic of modern economic approaches to the law can be found at least in the XIX century (if not earlier) with the Marxist school and the liberal school (and, even before, in the classical economics, as in the works of Smith, Ricardo and Bastiat (in particular in '*The Law*'). Various works focused on the relationship between economics and law in the XX century (before the 1960', the decade when economic analysis of law is traditionally considered to be borne). In this regard, it is worth referring to Pareto, Vailati, Calderoni, Weber, the American pragmatist and realist schools. Among the many precursors, mention must surely be made to the Italian debate on the relationship between law and economics, oscillating between the identification of the former in the latter, passing through the acknowledgement of an 'equality', and arriving at a thesis in which the former prevailed over the latter – a debate which persists (in a certain sense) also in modern theories. Within the Italian debate of the first half of the XX century, it is worth recalling Croce and his work '*Riduzione della Filosofia del Diritto nella Filosofia dell'Economia*', where he assumed that law is a-moral and that instead, its identity is economical. On the other side, it is worth mentioning both Capogrossi and Carnelutti. The former saw the law as a system capable of directing the economy outside its logic, while the latter argued the need for the law to impose its logic on the economy, acting as a glue between economics and ethics. With reference to the 'modern' United State economic approaches to law, as said, they date back to 1960 and are based on the agreement of various authors on a central point: the law is an economic incentive. See, among the others, Pastore B. and Tuzet G. (2016), *Il Pragmatismo fra Diritto ed Economia*, Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno, pp. 361-489; Landreth H. and Colander D. C. (1994), *History of Economic Thought*, Houghton Mifflin, p. 297 (law as superstructure); Croce B. (2016), *Riduzione della Filosofia del Diritto alla Filosofia dell'Economia*, Giuffè Francis Lefebvre; Capogrossi G. (2004), *Pensieri vari su economia e diritto*, Carabba; Carnelutti F. (1951), *Teoria Generale del diritto*, Foro Italiano; Del Vecchio G. (1954), *Diritto ed Economia*, Studium; Miceli (2017).

assess) if diversity incentivises the conduct of economic agents in ISDS. The underlining assumption behind this ‘supposed’ predictive capacity of the economic approaches to law is that legal norms – i.e. the obligations accompanied by sanctions emanating from and applied by bodies ‘appointed’ to do so – are economic incentives.

To simplify this, let us imagine that every conduct (C) is accompanied by a sanction (S). Given that this sanction can be negative (a disadvantage) or positive (an advantage), economic approaches agree that a consequence (EC) follows from its application (or applicability) to the conduct. The consequence is the change in the behaviour of the economic agent as a result of the threat or the application of the sanction.

$$(C \rightarrow S) \rightarrow EC$$ [14]

More precisely, C → S means a relationship whereby the legal qualification of certain conduct could entail the application of a sanction (here → means a normative relationship).[15] → EC is the consequence of the subsumption on the agents, in terms of agents’ desire to prevent (or to obtain) the sanction (here → means a causal link).[16]

However, it would be simplistic to claim that the relationship between law and economics is limited to the above equation – au contraire. The relationship between conducts, sanctions and consequences is only the starting point of an analysis that for decades (and in a sense for centuries) has sought to transfer the contributions of economic science to the legal one. It follows that an economic lesson to ISDS is firstly and foremost a journey through the various ways in which economics can engage with law, as well as an attempt to support the application of (certain) economic lenses for the sake of contributing to the ‘advancement’ of the ISDS-related set of rules.

More in detail, as to the heterogeneity of the economic analysis of law (or law and economics), it should be noted that economic schools approaching law differ markedly from one another in the way they analyse the relationship between conducts, sanctions and consequences, and the implications of this relationship.

---

[14] On the scheme, see Tuzet G. (2018), *L’analisi economica come argomentazione giuridica*, Teoria Juridica Contemporanea, Vol. 3, No. 2, p. 105.
[15] See Tuzet (2018), p. 105.
[16] See Tuzet (2018), p. 105.

For instance, an ‘economic-based’ prediction may be accompanied by an evaluation based on social values or neutral. Using an example made by Cooter and Ulen, there is an appreciable difference between a study that merely states that ‘higher fines for speeding on the highway will presumably cause less of it’ and another study that states instead that ‘higher fines exceeds the resulting benefit from fewer accidents, so a higher fine is “inefficient”’.[17] The latter study adds a negative assessment to the cold analysis, a negative assessment based on inefficiency. In this sense, in addition to being a science of prediction, it can be said that economic approaches to law often ‘steal’ from economic science also other instruments, such as the concept of efficiency maximisation or that of distribution of incomes,[18] applying them – in different scales – to legal regimes.

More in detail about the various schools, the following could be said.

The first fundamental distinction is between normative and positive approaches.[19] This distinction recalls the idea of an analysis of the world ‘as it ought to be’ versus an analysis of the world ‘as it is’.[20]

In normative approaches, there are two strands: pure and applied. The former approach leads to abstract discourses, ‘elaborating economic or economic-moral systems (when useful and the good are linked) regardless of concrete and determinate contexts’.[21] Conversely, the applied approach considers ‘determined contexts and problems’ and is ‘an applied approach that elaborates normative proposals for those contexts and problems, taking into account their specific features and contextual constraints’.[22]

Within the positive approaches, a distinction is made between those scholars who consider economics a formal science and those who consider it an empirical science. In the former case, there is a focus on formal logic, deductive tools, axioms and *a priori*

[17] See Cooter and Ulen (2014), p. 4.
[18] See Cooter and Ulen (2014), p. 4.
[19] See Tuzet (2018), pp. 107-112. See also Parisi F. (2005), *Scuole e Metodologie nell’Analisi Economica del Diritto*, Rivista Critica del Diritto Privato, pp. 377-489; Mercuro N. and Medema S. G. (2006), *Economics and the Law. From Posner to Post-Modernism and Beyond* (2006), Princeton University Press.
[20] See Tuzet (2018), pp. 107-112.
[21] See Tuzet (2018), p. 108.
[22] See Tuzet, (2018), p. 108.

assumptions. In the second case, economics is equated with social science, i.e. the science that studies human choices in relation to means to achieve certain ends.[23]

Without prejudice to the above, it is worth highlighting that no thesis postulates an uncontaminated positive or normative analysis. Conversely, it is common to hold a certain level of hybridity (a positive analysis often results in the idea of a preference for one system, of one state, over another, whereas a normative analysis often takes its cue from a 'factual' description).

That clarified, the normative approach is typical of the 'Yale School' of which Calabresi is the leading exponent.[24] The basic idea of this approach, and the law and economics school in general, is that law can influence economic dynamics, with the consequence that legal intervention can be used to correct market failures. This approach is therefore based on two elements: i) identifying desirable economic-social ends and ii) identifying the means to achieve these ends in an economically appropriate manner.

Among the others, Calabresi is famous for his distinction between Law and Economics, on the one hand, and Economic Analysis of Law, on the other.[25] The latter introjects a reductionist perspective that is lacking in the former. In other words, from the Economic Analysis of Law perspective, norms become 'mere' economic incentives. On the contrary, in Law and Economics discourse, there is an attempt to assess interactions and mutual influences. More in detail, in the Economic Analysis of Law, it is economics that explains the law. Conversely, although it is recognised that rights and norms arise from economic interests, according to Law and Economics, it is valid to state that economic transactions occur within a framework of norms and rights.[26]

The positive approach is typical of the 'Chicago School', whose leading exponent is Posner.[27] As a school exemplifying the theories falling under the umbrella of Economic

---

[23] See Tuzet, (2018), p. 108.

[24] See, among the others, Calabresi G. (1961), *Some Thoughts on Risk Distribution and the Law of Torts,* Yale Law Journal, Vol. 70, No. 4, pp. 499-552; Calabresi G. (2016), *The Future of Law and Economics. Essay in Reform and Recollection*, Yale University Press, Online Edition, New Haven.

[25] See Calabresi (2016), Chapter one.

[26] See G. Tuzet, (2018), p. 109.

[27] See, among the others, Posner R. (1973), *Economic Analysis of Law*, Little Brown and Company. It should be pointed out that Posner has developed a more explicitly normative thesis with time, moving away from a merely descriptive analysis. See for instance, Landes E. M. and Posner R. (1978), *The Economics*

Analysis of Law and contrasting Yale School, the basic idea of the Chicago approach is to explain the law in economic terms, translating legal dynamics into economic dynamics and causes.[28]

Another relevant distinction is between the neoclassical and behavioural approaches.

In neoclassical theory, the economic agent is assumed to be a rational maximiser of his or her own utility (to be understood as a goal generic enough to encompass any human purpose, such as spiritual, material, monetary and so on).[29] Rationality is understood (in simple terms) as the capacity to have preferences and satisfy them. With the clarification that even altruistic behaviour, like selfish behaviour, actually responds to the satisfaction of said preferences. Although it is doubtful that every human being, even most human beings, acts rationally, according to Posner, neoclassical rationality is a useful assumption for developing arguments.[30]

Due to the limitations of neoclassical theories in terms of predictive capacity and thus with reference to the assumption of the rationality of economic agents, a critical 'innovation' occurred with the development of those theoretical schools called behavioural economic approaches.[31] These analyses stem from the need to consider that biases, cognitive constraints, and emotions influence economic agents (also states),[32] and economic models must take this into account in order to bring economic theory closer to reality. In this sense, the economic approach also focuses on psychological processes, going beyond the axiom of neo-classical rationality. An interesting development is the nudge approach, whereby the fallacies of economic agents are used in an applied normative perspective.[33]

---

of the Baby Shortage, The Journal of Legal Studies, Vol. 7, No. 2, pp. 323-348. Please note that when reference is made to Posner, mention is made of Richard Posner (and to not Eric Posner).

[28] See Landes E. M. and Posner R. (1978), *The Economic of the Baby Shortage*, The University of Chicago Press.

[29] See Cooter and Ulen (2014), pp. 22-54, and Miceli (2017), Introductory Concepts

[30] Posner R. (2011), *Economic Analysis of Law* (2011), Aspen Published.

[31] See Cooter and Ulen (2014), pp. 22-54, and Miceli (2017), Introductory Concepts. Please, note that other distinctions can be drawn in economic approaches to behaviours (for instance, by distinguishing among bounded rationality, biases theories, emotional cognition, etc.).

[32] See Broude (2015), pp. 1122-1126.

[33] For an overview on the topic, see Sunstein (2014), *Why Nudge? The Politics of Libertarian Paternalism*, Yale University Press.

Having clarified the above, why then talk about an economic lesson to ISDS? What does it mean?

In pluralistic societies, ethical questions are highly divisive. It becomes almost impossible to translate ethical goals into commonly agreed regulatory policies.[34] While ethics divide, economics enjoys an objective status that can unite. Indeed, i) economic approaches can remain a-moral and a-ethical, hence, not being permeated by moral and ethical evaluations that make it a highly divisive concept in a pluralistic system (as global/international legal systems); ii) economic approaches can reconcile themselves with ethical and moral goals, without frustrating them; iii) science-based approaches are better than common sense.[35]

From this perspective, this work would like to provide a methodological instrument to develop novel economic and normative statements in the realm of ISDS. In particular, the aim is to find a point of intersection between concepts such as legitimacy, diversity (which originate and thrive primarily outside the legal debate),[36] ISDS (as a peculiar and unique legal system) and the economic approach.

1.3 The lack of diversity and legitimacy in ISDS

Why does ISDS need an economic lesson? Besides clarifying what an economic lesson means, it is necessary to clarify why an economic lesson is needed. In this regard, this work starts with another assumption: a system is under challenge, and (a pretty obscure concept denoted as) diversity has a say in it.

This assumption is not the main focus of the thesis. The present author is not interested in assessing whether the system is effectively under challenge or even in an erratic crisis. Nor is the present author interested in understanding the deep interconnection between diversity and the system. On the contrary, this assumption is relevant insofar as it sets the

[34] Although regulatory policies (and specific norms) do not need to be agreed upon by all the constituencies affected by their application, both for decision-making process reasons and for reasons of effectiveness, there should be a minimum threshold of acceptability and understandability of regulatory policies and norms. In international law, where the consensus is the decision-making method par excellence, the need for common (or alike) grounds is even more evident.

[35] It is assumed that states and complex organisations can be considered economic agents.

[36] This does not mean that legal literature does not address these two topics. However, legitimacy is typically a subject of political science, and diversity has been frequently addressed in ethical discourse and critical studies.

scene for explaining how an obscure and morally/ethically charged concept such as diversity can be translated into economic terms. Thus, to determine how economic analysis can have a role in designing regulatory policy reforms aimed at promoting diversity in ISDS.

In order to achieve the abovementioned goal, it is necessary to explain what ISDS is, the context where the system exists, what diversity is and how it engages with ISDS.[37] However, before, it is necessary to provide more information on this assumption so the reader can follow the rationale behind this work. In this regard, it is helpful to stress since the introduction that the first reason to address diversity in ISDS from an economic perspective is that the public debate asks for it. Indeed, diversity is more topical than ever among ISDS scholars, experts and stakeholders.[38]

The underlying justifications behind this vivid debate and the consequent spread of the 'quest for change' are manifold, and they have become frighteningly compelling,

[37] See below chapters two and three. It should be stressed that investigating these issues is intrinsically different from having the purpose of showing the most hidden feature of the assumption or disentangling each and all the issues connected with it.

[38] See Strezhnev A. (2016), *Detecting Bias in International Investment Arbitration*, 57th Annual Convention of the International Studies Association, Atlanta; Van Harten G. (2016), *Arbitrators Behaviour in Asymmetrical Adjudication (Part two): An Examination of Hypotheses of Bias in Investment Treat Arbitration*, Osgoode Hall Law Journal, Vol. 51, No. 3; Polonskaya K. (2018), *Diversity in the Investor-State Arbitration: Intersection Must Be Part of the Conversation*, Melbourne Journal of International Law Vol. 9; Bjorklund A. K. (2019), *The Diversity Deficit in Investment Arbitration*, EJIL:Talk https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/ (last accessed 8 January 2023); Bjorklund A. K. and others (2020), *The Diversity Deficit in International Investment Arbitration*, The Journal of World Investment & Trade, Vol. 21, No. 2-3, pp. 410-440; Chen R. (2021), *The Substantive Value of Diversity in Investment Treaty Arbitration*, Virginia Journal of International Law Vol. 61 No. 3. See also with reference to arbitration in general: Brekoulakis S. (2013), *Systemic Bias and Institution of International Arbitration: A New Approach To Arbitral Decision-Making*, Journal of International Dispute Settlement, Vol. 4 No. 3 553; Franck S. D. and others (2015), *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, Columbia Journal of Transnational Law, Vol. 53, No. 3, p. 429; Gómez K. F. (2018), *Diversity and the Principle of Independence and Impartiality in the Future Multilateral Investment Court*, The Law & Practice of International Courts and Tribunals, Vol. 17, No 1. On public debate on diversity, see also, Previti G. (2022), *Companies Are Key To Driving Diversity in* Arbitration, Burford, https://www.burfordcapital.com/insights/insights-container/companies-key-to-diversity-in-arbitration/ (last access 8 January 2023); Patl A. (2022), *How Companies Can Improve the Pipeline of Diverse Lawyers in Arbitration*, Burford, https://www.burfordcapital.com/insights/insights-container/blog-nylj-diversity-arbitration/ (last access 8 January 2023); Evans J. and Osborne N. (2022), *The Diversity Problem in Arbitration,* Global Legal Post, https://www.globallegalpost.com/news/the-diversity-problem-in-arbitration-339877594 (last access 8 January 2023).

especially in ITA, i.e. treaty-based investment disputes.[39] In particular, the lack of diversity is perceived as detrimental to the very survival of ISDS,[40] and addressing the theme is considered crucial for improving the system (questioned) legitimacy.[41]

More in detail, arbitral awards within ISDS can determine states' liability for exercising their legislative or, more generally, sovereign prerogatives. Such impact has raised questions of legitimacy within ISDS and ITA stakeholders.[42] States and public opinion are questioning the acceptability of the proceedings as such and becoming unwilling to tolerate it and tolerate the negative outputs of an arbitral award (regardless of whether the decisions are formally correct or not).[43]

---

[39] ITA is a type of ISDS and, in particular, a kind of ISA. ISDS, conceptually, may refer to any investor-state dispute resolution instrument. In the broad sense, the MIC and domestic in-court disputes could also follow within a definition of ISDS. However, traditionally ISDS is used as a category referring to investor-state arbitration. Hence, as synonymous with ISA. For terminological clarification, traditional ISDS and ISA would be used to refer to investor-state arbitration in this work. In contrast, ISDS is employed as a generic term that gathers any form of investor-state dispute resolution instrument (including non-arbitration ones).

[40] A legitimacy debate sharpened by the nature of ISDS as adjudication mechanism dealing with matters of public international law. For an overview on the difference between private and public adjudication (and then also between commercial and investment arbitration), see:

[41] 'An institution is legitimate when it is perceived as having the right or the authority to make decisions and when its decisions are viewed as worthy of respect or obedience', see Gibson J., Karlen D. and Smentkowski B. P. (2019), *Court*, Encyclopedia Britannica, https://www.britannica.com/topic/court-law (last access 8 January 2023). A further definition of legitimacy is provided Easton as 'reservoir of favorable attitudes or good will that helps [citizens] to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging their wants', see Easton D. (1975), *A Re-Assessment of the Concept of Political Support*, British Journal of Political Science, Vol 5, No. 4, p. 435.

[42] Please note that constituency and stakeholder are here referred to as any individual and (unitary) social formations whose beliefs contribute to providing an institution capable of creating institutional facts. As introductory reading on legitimacy in IIL, see: Cotula L. (2017), *Democracy and International Investment Law*, Leiden Journal of International Law, Vol. 30, No. 2, p. 351; Grewal D. and Adkins C. (2016), *Democracy and Legitimacy in Investor- State Arbitration*, The Yale Law Journal, Vol. 126; Dings J. and de Pous P. (2014), *As it stands, the TTIP could threaten democracy*, Financial Times https://www.ft.com/content/d49b7bb6-94de-11e3-af71-00144feab7de (last access 8 January 2023).

[43] From a brief introduction on the difference between performance satisfaction and legitimacy: Nelson M. (2021), *Biden's court commission is worried about Supreme Court 'legitimacy.' So what is 'legitimacy,' exactly'*, https://www.washingtonpost.com/politics/2021/10/22/bidens-court-commission-is-worried-about-supreme-court-legitimacy-so-what-is-legitimacy-exactly/, Washington Post, last access 8 January 2023). Moreover, companies are also starting to implement codes of ethics and codes of conduct where (some of them) legitimacy-related issues are evidently at stake (with reference to the topic of this work, the promotion of diversity also among the communities and with third parties is becoming a prominent element in companies' values design. See, for instance, PWC, *PWC Code of Conducts* (2021), https://www.pwc.com/gx/en/ethics-business-conduct/pdf/pwc-code-of-conduct-april-2021-v2.pdf, last access 4 December 2022, p. 9.

The consequences of the (also lack of diversity-driven) legitimacy crisis are evident: an increasing backlash against traditional ISDS,[44] a number of states terminating BITs[45] containing ITA provisions,[46] and a tentative approach to reforms aimed at establishing alternative models to traditional ISDS.[47]

Within the debate at stake, critics often believe that the lack of diversity in the adjudicators' panel and the relevant lack of diversity amongst institutions and 'advisors'[48] have an essential role in the legitimacy deficit of ISDS since the lack of representativeness leads to a loss of confidence (in terms of sociological legitimacy).[49]

Nevertheless, this palpable activism has attracted little or no attention from economic literature, even though interesting arguments could be built through this instrument of analysis. This gap is neglectable as economic approaches can, in a descriptive sense, help explain whether and why lack of diversity is hindering the functioning of ISDS and, in a normative sense, help create a system which can maximise diversity (as a goal norm) and ISDS efficiency (or at least not negatively affect it).

---

[44] See Beattie A. (2017), *Arbitration on trial: the US and UK's fear of the supranational*, Financial Times, https://www.ft.com/content/e607c6b2-28f5-11e7-bc4b-5528796fe35c, last access 8 January 2023; *The Arbitration Game* (2014), The Economist https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game last access 8 January 2023; Broadman H. (2020), *Time to Modernize Investor Dispute Arbitration*, Financial Times https://www.ft.com/content/fca34d7f-0080-4b80-87ec-c47432887b2e, last access 8 January 2023.

[45] BIT is the principal instrument to regulate international investment laws but not the only one.

[46] E.g., see: Feris J. (2014), *Challenging the status quo – South Africa's termination of its bilateral trade agreements*, DLA Publications, https://www.dlapiper.com/en/germany/insights/publications/2014/12/international-arbitration-newsletter-q4-2014/challenging-the-status-quo/, (last access 9 November 2021). Interesting also the difficult that EU is encountering in let Member States Constitutional Court to accept, more in general, further supranational systems of adjudication (as even MIC). See Pogatchnik S. (2022), *Ireland's Top Court Rejects Canada-EU Trade Deal as Unconstitutional*, https://www.politico.eu/article/irelands-top-court-rejects-canada-eu-trade-deal-as-unconstitutional/ (last access 8 January 2023).

[47] For instance, MIC (see section 3.9) and the activities of the UNCITRAL Working Group III (see, Working Group III: Investor-State Dispute Settlement Reform, https://uncitral.un.org/en/working_groups/3/investor-state, last access 8 January 2023).

[48] In the concept of 'advisors, this author includes both Legal Counsels and Expert Witnesses.

[49] For instance, see, R. Chen (2021). As will be highlighted in the following sections and chapters, it is worth noting that there are grounds to claim that lack of diversity also impacts the quality of ITA decision-making. Although the issue is relevant in terms of legitimacy (perceived lower quality of decision-making chip-away legitimacy in the institution), from an economic perspective, the effective impact of diversity on decision-making can and should be considered an autonomous topic.

1.4 The concept of diversity

But what does diversity mean? When reference is made to diversity in ISDS, what do people refer to?

It goes without saying that the diversity debate in ISDS is a drop in the ocean of the broader diversity debate.[50] The interest in diversity goes far beyond ISDS since the lack of diversity refers to a cross-cutting (perceived) issue and involves every aspect of public life. It follows that analysing diversity in ISDS requires contextualisation of the debate and the scrutiny of the insights coming from concurrent analyses on the matter.

The importance of diversity in contemporary discourses trails 'the success, increasingly and cumulatively since the 1960s, of the key identity-based public/political campaigns among women's, African American, lesbian and gay, age and disability-based movements'.[51] More in detail, during the years, such separate movements 'amalgamated'

---

[50] See Faist T. (2009), *Diversity – A New Mode of Incorporation?*, Ethnic and Racial Studies, Vol. 32, No. 1, pp. 171-190; Salzbrunn M. (2012), *Vielfalt/Diversity/Diversité*, Soziologische Revue, Vol. 35 No. 4, pp. 375-394; Vertovec S. (2012), *'Diversity, and the social Imaginary*, European Journal of Sociology, Vol. 53, No. 3, pp. 287-312.

[51] See Vertovec S. (2014), Introduction, in *Routledge International Handbook of Diversity Studies*, Routledge, p. 1. From an intellectual point of view, an important role on the development of diversity discourse and related studies is held by the critical legal studies, which is an approach to social philosophy arguing that social problems stem more from social structures and cultural assumptions than from individuals. With specific reference to international, among the others, see Loveday H., and Lavers T. (2019), *Feminist Judgments in International Law*, Oxford: Hart Publishing, Bloomsbury Collections (containing an analysis of which tangible differences would follow if gender parity on international benches were achieved); Trimble P. R. (1990), *International Law, World Order, and Critical Legal Studies*, Stanford Law Review, Vol. 42, No. 3. See, more in general, on critical legal studies, Unger R. (1983), *The Critical Legal Studies Movement*, pp. 561-657 (Unger argues that critical legal movements '*redefined and reformulated*' the major themes of leftist and progressive legal theorists (as the critique of formalism and objectivism in legal doctrine, as well as the purely instrumental use of legal practice and doctrine to advance leftist aims) and, in doing so, argues in favour of the use of law as instrument for social transformation); Ewald W. (1988), *Unger's Philosophy: A critical Legal Study*, Faculty Scholarship at Penn Law, Vol. 97, No. 5, pp. 665-756 (which contains relevant critics to the (arguably) most important critical legal scholar); Williams R. A. Jr. (1987), *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, Minnesota Journal of Law and Inequality, Vol 5, No. 103, pp. 103-134. That clarified, also for reasons related to the high political stance of the critical studies approach, the latter would not be taken into consideration in this thesis. However, the present author does not disregard the appreciable thoughts, relevance and innovative ideas streaming out by this approach (as the use of a narrative technique against the dominance of logics). In any case, it is interesting noting the difficult relationship between critical legal studies and (modern) economic approach to law studies, while there have been attempts to reconciliate the two stances. See, on the topic, Carbado D. W. and Gulati M. (2003), *The Law and Economics of Critical Race Theory*, The Yale Law Journal, Vol 112, pp. 1757-1828.

into a comprehensive diversity narrative (which included both anti-discrimination and normative rhetoric) that also influenced ISDS debate and other branches of law.[52]

If diversity is a thing, and it is difficult to challenge this fact, the meaning of diversity is quite blurred and difficult to grasp. Questionably, 'diversity […] can refer to practically anything'.[53] In other terms, diversity appears as a signifier devoid of clear significance. Hence, the need to briefly analyse the state of the art so as to understand the extent to which the foregoing assumption is true and what can be done to substantiate the concept of diversity.

---

[52] See Vertovec (2014), p. 2. In general, the incentive to pursue diversity is often linked to 'negative' motivations (such as fear of lawsuits and reputation risks for firms and governments) or (also cynical) positive perspectives (promoting a range of attributes in light of the benefit they may provide),

[53] See Vertovec (2014), p. 2. According to Vertovec, there is 'the corpus of "diversity" seems marked by its elusive multivalence (speaking or having meanings to many audiences), if not outright vagueness. This is not only because of uncertainty with regard to its subjects, but also with regard to its purpose. Much of this elusiveness stems from the fact that across a range of public institutions the goal of "diversity" policy are mixed. We can identify at least six facets of "diversity" discourses, policies and practices derived from a range of programmes, mission statements, campaign and guidelines within intuitions:
Redistribution. This facet includes policies intended to redress historical discrimination against groups, especially "economic harm". Here, the purpose of "diversity" is largely akin to Affirmative Action, with goals toward helping minorities gain better access to scares economic and societal goods – especially jobs, equitable income, housing and education.
Recognition. "Diversity" policies for recognition are also directed toward a kind of historical redress, but here with respect to "cultural harms". Measures here are to foster dignity and esteem among minorities, promote positive images, and facilitate their fuller participation in social interaction and political process.
Representation. This facet of "diversity" can be characterized as a politics of presence. Here the goal is to create an institution – a company workforce, teaching faculty, student body, health service, civil service, military, police, or chamber of pollical representatives – that looks like the population it serves. This may include the use of monitoring or quotas.
Provision. Public services today often employ this facet of "diversity". It entails identifying, developing skills around, sensitizing staff to, and responding adequately to the specific requirement of customers with reference to their myriad group and differences (variously and broadly defined).
Competition. Often known as the "business case for diversity", this facet takes in strategies to improve a company's marketing and, ultimately, market share. Promotion of "diversity" and a diverse workforce is to gain a better understanding of customers, spot market opportunities and thereby increase competitiveness, improve product quality, appeal to a wider consumer base and increase sales. The promotion of "diversity" in a company's public relations is also meant to influence customer perceptions by improving its image (or at least deflecting image damage by not having a visible "diversity" commitment). It is also, at the same time, a measure to avoid grievances and discrimination lawsuits.
Organization. "Diversity" management policies, training programmes, structures and staff positions within corporations or other institutions serve the purpose of developing and delivering many of the facts listed above. Additionally, they are undertaken with the aim of maximizing the performance of teams or workforce. The premise, drawing from a large body of management and human relations materials, is that more diverse teams outperform less diverse ones'. See Vertovec (2014), pp. 2-3.

From this perspective, an essential starting point is distinguishing diversity as a category of analysis in social science and as a notion used in public discourse to put some order in the debate.[54] In particular, it is worth giving some examples of the attempts at rationalisation diversity and, in any case, the insights offered in the social science literature (opposite and amid the chaotic nature of public discourse on diversity).

Wimmer believes that diversity is a descriptive term.[55] He observes that diversity 'captures different dimensions of social differentiation: ethnic, religious, gender and so on. And, as such, it is useful because it implies multi-perspectivity; it is not focused exclusively on ethnicity or exclusively on gender or exclusively on social class. So, it brings together all of these differentiations, mode of distinctions and categorizations together and forces us to think about the relationship between them. It thus runs against the tendency to see these different modes of differentiation and categorization as separate domains that are unrelated to each other. It forces us to adopt a holistic perspective on social processes looking from different angles. That is the potential, [he] think of using "diversity" as a concept. […] It avoids the overspecialization that comes from looking at gender, or at ethnic differentiations and so on exclusively, and forces you to think about the relationship between the different dimensions of diversity. It has also the advantage of avoiding essentialization, because diversity is a concept that describes a plurality of modes of categorizations and differentiations that are internally complex etc. So, it avoids all of the more problematic and essentialized notions of gender or sexuality or ethnicity'.[56]

[54] According to Brubaker, diversity is 'not only a zeitgeist term, a policy catchphrase, or a corporate tool though it is indeed all of these. It's important to distinguish between categories of analysis – the categories that social scientist use – and categories of practice that are used in everyday social and political life. And "diversity" is clearly both a category of analysis and a category of practice. As a category of practice, it's used in the corporate world, in universities, in advertising, in public discourse, and so on. So if we are going to use the term in social science, we have to give the term a specific analytical meaning, otherwise we risk simply conflating the analytic category with the practical category'. See Brubaker R. (2012), *An interview with Rogers Brubaker*, Max Plank Institute for the Study of Religious and Ethnic Diversity, https://www.mmg.mpg.de/50980/interview-with-rogers-brubaker (last access 8 January 2023).
[55] In Chapter Five, in providing a definition of diversity, a descriptive perspective on the subject will be followed.
[56] See Wimmer A., *Interview with Andreas Wimmer* (2009), Max Plank Institute for the Study of Religious and Ethnic Diversity, https://www.mmg.mpg.de/65148/interview-with-andreas-wimmer (last access 8 January 2023).

Although interesting and rich in insights, Wimmer's reflections on the topics (as those of several of his colleagues) are far from conclusive.[57] More in detail, the methods to observe and describe diversity are debatable. The problem is to such an extent that, according to many authors, the diversity notion is ultimately vague and unclear.[58] For instance, Vertocev argues that diversity 'can immediately refer to several, concomitant modes of social differentiations'.[59] In addition, Eriksen notes that 'when you say diversity, you remind yourself that there is diversity within any designated group and that boundaries are not absolute'.[60]

Nonetheless, it is worth noting that the literature of the social sciences has made and is making an enormous contribution to the analysis of the subject of diversity, both by analysing how the notion has been used in debates (namely – alternatively or jointly – as a form of i) redistribution, ii) recognition, iii) representation, iv) provision, v) competition and/or vi) organisation)[61] and by providing an overview of the issues on which the study of the subject should focus (and is focusing on)[62] (i.e., 'question notion of homogeneity'; 'break from, challenge or at least be cognizant of social scientific categories versus public categories'; 're-examine core questions in social science, particularly around differentiation and the nature of society'; 'provide new insight on the social organization of difference'; 'provide an alternative lens for looking at a variety of longstanding social and cultural issues'; 'examine the discrete workings of different kinds of difference', 'avoid lumping together dissimilar types of difference'; 'explore the relations or parallels

[57] For some it is an old concept, always known (it recalls Durkheim's concept of differentiation and in general of hegemony in social groups). However, according to Brubaker would be reductive to consider diversity only a concept that refers to notion known to sociology (as differentiation and heterogeneity). In addition, the author observe that it is difficult to talk about diversity in general terms, each type of diversity works different in daily life and in the political life. See Brubaker (2009).

[58] According to Landau, this vagueness can have the serious negative consequence of thinking, wrongly, that we are discussing the same thing when in fact completely different concepts are being discussed. See Landau L. (2011), *Diversity Interview*, Max Plank Institute for the Study of Religious and Ethnic Diversity, https://www.mmg.mpg.de/63553/interview-with-loren-landau (last access 8 January 2023).

[59] See S. Vertovec (2012), p. 7.

[60] See Eriksen T. H. (2009), *Interview with Thomas Hylland Eriksen*, Max Plank Institute for the Study of Religious and Ethnic Diversity, https://www.mmg.mpg.de/53772/interview-with-thomas-hylland-eriksen (last access 8 January 2023).

[61] See for details note 53.

[62] For a general review on researches on diversity, see Max Planck Institute for the Stud of Religious and Ethnic Diversity, https://www.mmg.mpg.de/home (last access 10 January 2023) or the University of Birmingham Institute for Research into Superdiversity https://www.birmingham.ac.uk/research/superdiversity-institute/index.aspx (last access 10 January 2023).

between them'; 'interrogate purported fixed differences and overlapping multiplicities'; 'understand, appreciate and explore the intersectionality, multiplicity and boundary-crossing dynamics of social categories'; 'develop a path-breaking social science of complex open systems'; 'adopt a perspective on otherness grounded in recognizing the partiality and emplacement of categories'.[63]

The present author believes that the above rationalisation of the problem is essential and should be the starting point for any diversity analysis.

Despite these insights, ISDS literature regarding ISDS usually lacks preliminary and in-depth analysis of current studies on the subject in the social sciences. Moreover, diversity analysis in ISDS is often carried out in conjunction with analysis of diversity in commercial arbitration, with less attention paid to the peculiarity of the IIL system as such (in terms of relevant diversity, categorisation and agents that come at stake).

The main consequence of this approach is that historically diversity in ISDS has been primarily analysed as a matter of geographical (as well as race and ethnicity) and gender diversity among arbitrators. This perspective stems from activism and criticism from under-represented countries (often overlapping with non-white majority countries) and women's activism in arbitration. In this sense, the debate on diversity in ISDS has also ridden the wave of activism that emerged in the second half of the XX century on the issue (namely, mainly on the issues of race, ethnicity and gender, while less attention has been paid to other topics such as sexual orientation). More specifically, the debate on diversity in the ISDS manifested mainly in terms of lack of representation (the claim that ISDS should better represent its constituencies – as far as gender and geographical representation are concerned, with some focus also on race, ethnicity and age) and lack of recognition (the claim that ISDS should work on readdressing the historical marginalisation of the non-Western world). On the second issue, the focus has always been mainly on the role of arbitrators in the ISDS system (also because of the tendency to consider the issue of diversity in commercial and investment arbitration as a single discourse).[64] From this perspective, a further trend has been to merge the issue of

[63] See Vertovec S., *Introduction,* in Routledge international handbook of diversity studies (2014), Routledge, p. 9.

[64] See note 38. However, within law firm circles, it should not be underestimated the activity carried out to enhance underrepresented groups representation among lawyers.

recognition with that of competition (understood as the idea that diversity can improve arbitrators' decision-making and, thus, the quality of ISDS's awards).

This work will build upon the literature on diversity in ISDS, and thus on the focus on arbitrators, to construe a more extended notion of diversity, which goes beyond arbitrators' gender, geographical, racial and ethnical heterogeneity.

1.5 Global law

Exploring the connections between economics, diversity, and ISDS has a broader purpose. In fact, the present work also aims to underline the connection among areas which do not often talk to each other: i) international/global procedural law;[65] ii) legitimacy of global institutions;[66] iii) global ethics;[67] and iv) economic approaches to law.

The aim is not to provide a detailed analysis of the four topics but to highlight the common thread that justifies potential further interdisciplinary research. The suggestion is that a general theory of global law and legal process is needed and that – in a heterogeneous global system, where global institutions often lack sufficient legitimacy – economic instruments can play a leading role in creating a general theory of global law and legal process.

---

[65] See King A. S. (2021), *Global Civil Procedure*, Harvard Law Journal, Vol. 62, No.1; Shabtai R., Elements of International Procedural Law (2006), in Shabtai R. *The Law and Practice of the International Court*, *1920-2005* (2006), Brill Nijhoff, pp. 1021-1052. As illustrated by King, '[g]lobal civil procedure includes the procedural rules, practices, and social understandings that govern transnational litigation and arbitration. A global civil procedure norm is a norm adopted across courts or arbitration providers with the purpose of making that jurisdiction or provider more competitive in attracting transnational litigation or arbitration. Global civil procedure norms are at stake in multiple present trends and debates, including model laws in commercial arbitration, the procedure of international tribunals, the debate over investment dispute resolution, the rise of courts oriented towards international litigation, and sprawling litigation spanning multiple jurisdictions and fora'. In this sense, a challenge for the future is to develop a general principles of law applying to international/global dispute resolution (a general theory of international legal procedure).

[66] See chapter four on the topic of legitimacy. With reference to the concept of global institution, it is claimed that is a global institution an institution (as defined in note 12) that creates institutional facts which have a universal, quasi-universal or allegedly universal collective acceptance.

[67] This author refers to global ethics as the amount of literature concerning development of common ethical standards in a world of global actors. See, for instance, Widdows H. (2011), *Global Ethics: An Introduction*, Routledge.

To support the abovementioned claim, it will be argued that even particularly thorny ethical issues, such as diversity, and topics like legitimacy can be addressed in economic terms.[68]

1.6 Structure

To achieve its various purposes, the work is divided into two parts.

In the first part, the focus will be on the IIL and ISDS. The end is to provide an extensive representation of the system. In particular, the aim is to understand the rationale behind legitimacy debates in ISDS, showing the historical and structural issues with ISDS. To this end, it would be in particular highlighted how, since its origins, the legitimacy of the system has been questioned and how this problem arose with i) the increasing utilisation of the dispute mechanism at stake and ii) the increasing doubts on the rightfulness of subjecting sovereign prerogatives to third private adjudicators. Furthermore (chapter three), the aim is i) to highlight the steps a claimant and/or defendant must go through to adjudicate their right and ii) to show what ISDS is about and how complex and debated the applied substantial IIL provisions are.

The second part addresses the nature and interrelation between legitimacy and diversity. In chapter four, legitimacy will be disentangled, whereas in chapter five, the focus will be on diversity in connection to legitimacy (and quality of decision-making). In chapter six, the focus will be on the economic approach, particularly on efficiency. In fact, it will be claimed and argued that diversity is an efficiency factor.

---

[68] The claim would be addressed through the analysis of ISDS. The pioneering nature of the system is due to the fact that ISDS is a unique global decentralised system where state and individual play at the same level. From this perspective, ISDS (and, in particular, ITA) deserves particular attention, and it is considered the perfect field to show off the potentiality of economic approaches in global systems and in global procedural law.

FIRST PART

2. THE CRISIS AND REFORM OF ISDS

2.1 Introduction

Can BITs prevent a developing country from using specific legislation to correct past economic and social injustices?[69]

The question can be investigated starting from the (in)famous case Piero Foresti, Laura de Carli & Others v Republic of South Africa ('Foresti').[70] With its various side effects, the latter is a landmark dispute for assessing the pernicious implications of the relentless expansion of IIL.[71] It is not a surprise that the case has been extensively scrutinised and used as an exemplification case in the negative portrayal of the system.[72]

The Foresti case began on 8 November 2006 on the grounds of two BITs: *Agreement between the Government of the Republic of South Africa and the Government of the Italian Republic for the Promotion and Protection of Investment* ('ITA-S.A. BIT');[73]

---

[69] See Friedman A. (2010), *Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties, the Global South*, Brigham Young University International Law & Management Review, Vol. 7, No. 1, pp. 37-51.

[70] See Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/262/foresti-v-south-africa (last access on 8 January 2023).

[71] Interestingly, the case raised further important issues, which will not be discussed in this context for reasons of thematic coherence. Nonetheless, the bribery case that occurred in the Foresti case deserves a brief mention in light of the interesting debate among experts on the interaction between international and domestic institutions in the fight against corruption. The case, in a nutshell, concerned the conduct of Mr. Nthai, a lawyer appointed by the respondent state, and, in particular, the alleged attempt to obtain a bribe from the applicants. The subject of the agreement was his promise to persuade his client, the sate of South Africa, to drop the case and, at the same time, waive its claim for restitution of legal fees (amounting to 5 million euros). In return, the claimants would pay him a bribe, also promising to drop the case. The matter was made 'public' when the claimants decided not to join the bribe attempt but to report the matter to the South African State and the arbitral tribunal. On the topic, see Kabre R. J. (2021), *The Interplay Between International and National Institutions in Fighting Corruption. Lesson From the Pietro Foresti, Laura de Carli & Others v. The Republic of South Africa*, Verfassungsblog on Matters Constitutional, https://verfassungsblog.de/the-interplay-between-international-and-national-institutions-in-fighting-corruption/ (last access 8 January 2023).

[72] See, among the others, Leibold A. M. (2016), *The Friction between Investor Protection and Human Rights: Lessons from Foresti v. South Africa* (2016) 38 Houston Journal of International Law, Vol. 38, No. 1, pp. 215-269; Brickhill J. and Du Plessis M. (2011), *Two's Company, Three's a Crowd: Public InterestIntervention in Investor-State Arbitration (Piero Foresti v. South Africa)*, South African Journal on Human Rights, Vol 27, No. 1, pp. 152-166.

[73] Accordo tra il Governo della Repubblica Italiana e il Governo della Repubblica del Sud Africa in Materia di Promozione e Protezione degli Investimenti, signed on 9 June 1997, entered into force on 16 March 1999 and terminated on 16 March 2019, IC-BT 1238 (1997), see https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2122/italy---south-africa-bit-1997- (last access on 8 January 2023).

Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments (hereinafter, 'BELGOLUX-S.A. BIT').[74]

Several Italian citizens and Luxembourg companies operating in the South African mining sector initiated arbitration under the ICSID Additional Facility against the Republic of South Africa.[75] The case they brought concerned the action pursued by the African country to tackle the apartheid regime's social injustice.[76] In light of the authority

---

[74] Accord entre l'Union économique belgo-luxembourgeoise et la République d'Afrique du Sud concernant l'encouragement et la protection réciproques des investissements, 14 AOUT 1998, Signed on 14 August 1998, entered into force on 14 March 2003 and terminated on 13 Marco 2013. See https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/537/bleu-belgium-luxembourg-economic-union---south-africa-bit-1998- (last access on 8 January 2023).

[75] See note 70. See also Sciso E. (2021), *Appunti di diritto internazionale dell'Economia*, Giappichelli, p. 91. As far as ICSID is concerned, a more detailed analysis will be provided in Chapter three. To give a quick overview of the institution, ICSID was established in 1966 (with the ICSID Convention) and had as its purpose the legal settlement of disputes and conciliation between international investors and states (also performing an advisory function). At the organisational level, it is part of and funded by the World Bank Group and is based in Washington D.C., USA (with other local offices around the world). To date, ICSID has 165 members (164 UN member states plus Kosovo). Note that Bolivia and Venezuela withdrew in 2012, while Ecuador withdrew in 2009 but rejoined ICSID in 2021. Of 165 members, seven countries, including Russia, have signed but not ratified the ICSID Convention. Among the non-members, the most prominent are Brazil, India and South Africa. ICSID is based on two regulations: ICSID Convention, Regulations and Rules and ICSID Additional Facility Rules. The second applies when one of the parties is not a contracting state or a national of a contracting state. ICSID also acts as an advisory body. As of 2022, with reference to the caseload, the majority of cases are conventional arbitration cases (90.6%), then arbitration cases under the ICSID Additional Facility (8.0%) and a very small number of conciliation cases (1.2% under the Convention and 0.2% under the Additional Facility Conciliation). The usual basis of consent for ICSID jurisdiction is BIT (60%) and, secondarily, investment contracts. In terms of sector, most cases concern oil, gas and mining disputes (25%), then energy (17%). See *ICSID*, https://icsid.worldbank.org/ and, for statics on the caseload, *The ICSID Caseload Statistics*, https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics (last access 8 January 2023). For an overview on ICSID, also see Broches A. (1972), *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Recueil des Cours de l'Académie de La Haye, Vol. 136, II, pp. 331-410; Sacerdoti G. (2004), *Investment Arbitratoin under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, ICSID Review, Vol. 19, No. 1, pp. 1-48; Sinclair A. C. (2004), *Nationality of Individual Investors in ICSID Arbitration*, International Arbitration Law Review, Vol. 7, No. 6, pp. 191-195; Spierman O. (2004), *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties*, Arbitration International, Vol. 20, n. 2, pp. 179-211; Schill S. W. (2022), *Schreuer's Commentary on the ICSID Convention, The ICSID Convention: A commentary on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States*, Cambridge University Press; Parra A. R. (2020), *ICSID: An Introduction to the Convention and Centre*, Oxford University Press.

[76] South Africa has been characterised for several decades (formally, since 1948, with the bulk of legislation enacted after the election of the National Party government until 17 June 1994) by a rigid apartheid system: a system of racial segregation based on the culture of *baasskap* (sometimes translated with the concept of 'white supremacy'). On the topic, see, Mathabane M. (2002), *The Threat That Apartheid Left Behind*,

granted by the Black Economic Empowerment ('BEE') provisions of the Minerals and Petroleum Resources Development Act of 2002 ('MPRDA'), the South African government seized ownership of all natural resources in the country.[77] Companies that

---

Washington Post, https://www.washingtonpost.com/archive/opinions/2002/11/10/the-threat-that-apartheid-left-behind/0a14edb4-74ee-4b7a-a154-b5ca0285f78f/ (last access 8 January 2022). *Baasskap* ensured that South Africa was controlled in any of its life aspects by the white population minority. The system also led to South Africa's international marginalisation (es. the US sanction denominated '*Comprehensive Anti-Apartheid Act*' of 1986 (H.R.4868 - Comprehensive Anti-Apartheid Act of 1986m 99th Congress 1985-1986, https://www.congress.gov/bill/99th-congress/house-bill/4868, last access 8 January 2022) and the sporting boycott of South Africa, see Gershon (2022), *Fighting Apartheid with Sports*, JSTOR Daily, https://daily.jstor.org/fighting-apartheid-with-sports/, (last access 8 January 2023)). On the history of apartheid, see, for instance, The Editors of Encyclopaedia Britannica, *Apartheid* Britannica, https://www.britannica.com/topic/apartheid/Opposition-to-apartheid (last seen, 8 January 2023). Despite the end of the discrimination system at stake during the first years of the XXI century, and even today, apartheid continues to influence, also in terms of lack of opportunity for black South African. In order to address the disparity created by apartheid (the first action came directly after the African National Congress election in 1994), one of the instruments implemented by the South African government has been the Black Economic Empowerment strategy aimed at i) increasing black South African ownership interest in enterprises in both standard and priority sectors of the economy, ii) increasing the number of new black South African enterprises, and iii) increasing the number of black South Africans in executive management positions. For an overview of the strategy the South Africa's Economic Transformation, see, *A Strategy For Broad-Based Black Economic Empowerment*, https://www.gov.za/sites/default/files/gcis_document/201409/dtistrat1.pdf, last access on 10 October 2022; and in general BEE, see South Africa Department of Trade, Industry and Competition, *B-BBEE*, http://www.thedtic.gov.za/financial-and-non-financial-support/b-bbee/, last access on 10 October 2022). The empowerment provisions are contained in several laws, including controversial bills prescribing the transfer of certain percentages of enterprise ownership to black South Africans, i.e. the *Mining and Petroleum Resources Development Act No. 28*, issued on the Government Gazette Vol. 448 No. 23922, on 10 October 2002, https://www.gov.za/documents/mineral-and-petroleum-resources-development-act last access on 8 January 2023 ('MPRDA') and the following revisions. MPRDA initially required Black South African enterprises to own 51% of the nation's mining industry (reduced to 26%). The post-apartheid South African government then established mineral rights through a licensing system. Private companies that previously held mineral rights were allowed to apply for licences to continue their activities. However, many private companies complained that the rights granted through the licensing procedure were not the same as those they previously enjoyed under the South Africa's *Mineral Act No. 50*, issued on the Government Gazette Vol. 311, No. 13253 on 22 May 1991, https://www.gov.za/sites/default/files/gcis_document/201409/a501991.pdf last access 8 January 2023 ('SAMA'). Mining companies found many provisions of the MPRDA puzzling, including the five-year limit for licences, after which companies must submit a new application. Moreover, such licences can be denied for a wide range of reasons. The shift from a system of private ownership of mineral rights established under SAMA to a new system of state ownership under the MPRDA led to the Foresti arbitration. See, among others, Friedman (2010); Morolong M. and Malesa G. (2021), *The Requirement For Empowerment in the South African mining Sector: Looking for Legal Certainty from the Courts*, International Bar Association, https://www.ibanet.org/empowerment-south-africa-mining, last access 10 October 2022.

[77] Vis-Dunbar D. (2009), *South African court judgment bolsters expropriation charge over Black Economic Empowerment legislation in the mining sector*, Investment Treaty News, https://www.iisd.org/itn/en/2009/03/23/south-african-court-judgment-bolsters-expropriation-charge-over-black-economic-empowerment-legislation/, last access 10 October 2022.

previously held mining licences were obliged to apply for new licences under a specific licensing system (and to meet particular social and development objectives).[78]

Although the provisions intended to address the historical racial inequality, the South African government's conduct triggered a dispute on the grounds of an alleged breach of its international obligations under the ITA-S.A. and BELGOLUZ-S.A. BITs, in terms of alleged illegal expropriation, as well as the violation of the Fair and Equitable and the National Treatment standards.[79]

The case has been discontinued, and there has been no decision on the merits.[80] Nonetheless, it sparked tremendous interest and intervention in the case of multiple (local and international) NGOs.[81] Indeed, the case exemplified the open debate in the

---

[78] Vis-Dunbar (2009).

[79] See, Foresti's award, p. 11 ff., note 70.

[80] See Foresti's award, note 70. It is worth noting that the Tribunal did not issue any decision on jurisdiction or substantive issues, since the Claimants requested the discontinuance of the proceeding. It is worth noting that a further dispute arose on the discontinuance. Indeed, both parties affirmed to have won the case. In particular, South Africa rejected the idea that it settled the ICSID matter (the Government affirmed that Claimants benefitted from a longstanding beneficial framework provided under South African law). Consequentially, after the Claimants' Request for Discontinuance, the Respondent asked the Tribunal to issue a default award, not on the merits, but only with respect to fees and costs. The Tribunal ultimately held that the question of costs was within its power (whereas there were no clear winners or losers) and ordered the Claimants to pay a relatively modest sum of 400,000 EUR to South Africa (out of the 5 Million and more EUR suffered in costs by the Respondent). In any case, the arbitration attracted the interest of stakeholders on issues such as the interaction among South Africa's constitution, human rights law and IIL. Among the arguments made by the parties and interveners, it is interesting the position of the Human Rights NGOs on the expropriation standard to be applied (see note 81 for further information on the interveners). The NGOs filed an amicus brief in the case arguing that the ICSID tribunal should take into account the '*on-the-ground reality*' in South Africa that vast inequalities exist within the borders of South Africa and '*they can only be corrected through proactive measures' instead of 'abstract economic principles*' (see Foresti's Petition for Limited Participation as Non-Disputing Parties, 17 July 2009, available at http://www.investmenttreatynews.org/documents/p/214/download.aspx (last access on 17 October 2022)). See also, Perterson L. E. (2010), *Discontinuance of Bilateral Investment Treaty Claim Leave Some Questions Unresolved for South Africa; Future Shape of BIT Programs Still Up in the Air*, IAREPORTER, https://www.iareporter.com/articles/discontinuance-of-bilateral-investment-treaty-claim-leave-some-questions-unresolved-for-south-africa-future-shape-of-bit-program-still-up-in-the-airlast/ (last access on 8 January 2023).

[81] After the filing, four non-governmental organizations (NGOs) requested permission from ICSID to jointly file amicus curiae with the Tribunal pursuant to ICSID Additional Facility rules 41(3) 27, 39 and 35.35 Of the four NGOs, two were South African and two were international. The two South African NGOs were the Centre for Applied Legal Studies and the Legal Resources Centre. The other two were the International Centre for the Protection of Human Rights (INTERIGHTS) and the Centre for International Environmental Law (CIEL). More in detail, the two South African NGOs claimed that their presence in the Foresti arbitration would provide local knowledge and context of the public interest issues at stake, and could thereby assist ICSID in understanding such issues. The two international petitioners, the Center for International Environmental Law and the International Centre for the Legal Protection of Human Rights focused on bringing an international or systemic perspective on the human rights issues addressed in the

international community. In particular, developing countries' ability to meet their international obligations and, at the same time, pursue essential domestic policies of socio-economic development.

It is therefore not so surprising that (after Foresti) South Africa radically decided to recalibrate its investment policy with i) the adoption of the 'Protection of Investment Act 22 of 2015',[82] ii) the termination of (most of) its BIT,[83] and iii) the abandonment of the traditional ISDS/ISA arbitration as a method of resolution of international investment disputes.[84]

An interesting comment on the relationship between Foresti and the South African government's decision is provided by Poulsen,[85] with a reasoning that applies (or could apply) to other 'African' BITs (and capital-importing states BITs in general). Poulsen's thesis is that while a combination of bureaucratic conditions and a lack of expertise and coordination led South African officials to ignore the risks of BITs and overestimate their benefits for a long time – neglecting the contradiction between BITs and the South African Constitution –, Foresti made the South African authorities examine their IIL policies. On that occasion, it was realised that South Africa's BEE programme (the

---

arbitration. Additionally, the International Commission of Jurists filed a petition to take part in the proceedings as a non-disputing party. As a matter of fact, on 5 October 2009, the Tribunal permitted the NGOs to intervene in the proceeding and ordered that they could have access to certain confidential materials in the arbitration. The intervention concerned the filing of written pleadings, but not the participation in the oral face of the proceeding (neither the attendance nor the submission). See note 70: 17 July 2009, Petition for Limited Participation as non-Disputing Parties in term of Articles 43(3), 27, 39 and 35 of the Additional Facility; 5 October 2009 Letter regarding Non-Disputing Parties. See also L. E. Peterson, *NGOs Permitted to Intervene in South Africa Mining Case and for Second Time at ICSID, Petitioners to See Documents* (2009), IAREPORTER https://www.iareporter.com/articles/ngos-permitted-to-intervene-in-south-africa-mining-case-and-for-second-time-at-icsid-petitioners-to-see-documents/.

[82] See South Africa, *Protection of Investment Act no. 22*, issued on the Government Gazette Vol 606 no. 39514, on the 15 December 2015, https://www.gov.za/documents/protection-investment-act-22-2015-15-dec-2015-0000 (last access on 17 October 2022).

[83] For a review of the BITs terminated by South Africa, see https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa (last access on 8 January 2023).

[84] See, among the others: Forere M. A. (2017), The New South African Protection of Investment Act, in Morosini F. and M. R. Sanchez Badin M. R., *Reconceptualizing International Investment Law from the Global South*, Cambridge University Press; *South Africa begins withdrawing from EU-member BITs* (2012), Investment Treaty News, https://www.iisd.org/itn/en/2012/10/30/news-in-brief-9/ (last access on 8 January 2023).

[85] Poulsen L. (2011), *Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded rationality*, PhD Thesis, The London School of Economics and Political Science, http://etheses.lse.ac.uk/141/ (last access on 8 January 2023).

country's most comprehensive and far-reaching socio-economic project) conflicted with international investment obligations. Foresti, according to Poulsen, alerted the South African authorities that the BITs, particularly the relevant ISDS clauses, were undermining the state's regulatory powers and critical public policy objectives.

Further examples of a difficult balance between states (and their citizen rights) and foreign investor protection come from the Argentinian saga dated the early XXI century.[86] As a consequence of Argentina's economic collapse of December 2001 and the government's attempts to tackle that unprecedented crisis,[87] several foreign investors – such as Enron and Azurix from the United States, Total, Vivendi and Suez from France, Siemens from Germany, Gas Natural from Spain and National Grid from the United Kingdom – initiated dozens of legal claims against the country under the investment arbitration system, relying on the clauses included in an array of investment treaties stipulated in the 1990s by Argentina.[88] To give an idea of the massive number of arbitrations scattered by the Argentine economic crisis, it should be noted that more than 30 claims have been filed against Argentina with an estimated value of around 17 USD billion, equal to the national government's national budget.[89]

---

[86] See Van Harten G. (2007), *Investment Treaty Arbitration and Public Law*, Oxford University Press.

[87] Argentina's economic collapse in 2000 was largely due to the currency regime crisis. Since the Asian financial crisis of 1998, the peg of the peso to the US dollar has paralysed Argentine exporters who could not compete with foreign players. As the difficulties increased, in mid-2001, some $20 billion was transferred out of the country to avoid the risk of a speculative devaluation. Argentina's central bank reserves fell sharply in November of that year, and the government, in response, froze bank accounts and imposed wage and capital controls. As a reaction, the International Monetary Fund blocked the disbursement of one billion dollars to Argentina on 7 December, accusing the country of failing to impose austerity measures and other reforms. This sent the economy into a tailspin and led to popular uprisings (in a fortnight, at the end of December, five presidents were forced out of office). The Economist described the following months as 'an unparalleled decline' and 'an economic collapse on a par with the Great Depression of the 1930s'. By November 2022, more than half the population was living in poverty. Only in 2004 did the burden stabilise and the economy begin to recover..

[88] See, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3; Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12; Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01; Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3; Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19; Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8; Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10; National Grid plc v. The Argentine Republic, UNCITRAL.

[89] On the topic, see: Peterson L.E. (2005), *Argentine bondholders girding for multi-billion dollar investment treaty claim*, Investment Law and Policy News Bulletin; Lowe V., *Some Comments on Procedural Weaknesses in International Law* (2004), American Society of International Law, Vol 98, pp. 37, 39.

Only to give a glimpse of the critiques of the situation created by the Argentine economic crisis, it is worth mentioning the lecture on the role of arbitration given by the Nobel Prize-winner Stiglitz, where he questioned whether the current system was too blunt as an instrument to resolve disputes arising out of the Argentine financial crisis:[90]

'It is not clear whether the arbitrators have the ability to judge the full societal consequences of what would have happened had, say, all utility contracts been honoured [in Argentina]' […] '[i]n the case of Argentina, it is clear that maintaining prices in dollars — when the rest of the economy was undergoing pesofication – would have [...] represented a vast redistribution of wealth from the rest of the economy to the utilities, clearly an unfair and inequitable outcome.'[91]

The debate around Foresti, the investment arbitration controversy linked to the Argentine crisis, and other cases acted as a litmus test of the growing dissatisfaction with the IIL system.[92] In particular, an increasing number of stakeholders have begun to review and weigh the benefits of implementing an investor-friendly ecosystem against the adverse effects of limiting states' regulatory powers. In particular, the main object of criticism has been (and still is) the set of provisions allowing the enforcement of investment rights outside the national procedural circuit, i.e. the ISDS mechanism.[93]

The response to the criticism was the start of a season of reforms, the outcome of which is still complex to predict, given the lack of consensus in the international community on the approach to be adopted on the issue.[94] Generally speaking, it can be observed that in the heterogeneity of the debate, with reference to ISDS, the following main strands have

---

[90] Speech mentioned by Peterson in L. E. Peterson, *Argentine Crisis Arbitration Award Pile Up, but Investors Still Wait for a Payout*, https://www.bilaterals.org/?argentine-crisis-arbitration&lang=fr. (last access on 8 January 2023); Stiglitz addressed the topic also in the article Stiglitz J. (2002) *Argentina, Shortchanged Why the Nation That Followed the Rules Fell to Pieces*, Washington Post, https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Argentina.pdf, (last access on 8 January 2023).

[91] However, differently from Foresti, the bulk of cases and critics do not lead to the termination of BITs by Argentina.

[92] See, as examples of disputes where racial, cultural heritage and environmental concerns were raised, Southern Pacific Properties (Middle East) Ltd. v. Egypt, ICSID Case No. ARB/84/3; Parkerings-Compagniet AS v. Lituania, ICSID Case No. ARB/05/8; Compania del Desarrollo de Santa Elena S.A. v. Costa Rica, ICSID Case No. ARB/05/8; Methanex Corporation v United States, NAFTA/UNCITRAL 3 August 2005; Glamis Gold Ltd v. United States, UNCITRAL 8 June 2009.

[93] See sections 2.3, 2.4 and 2.5 for further details.

[94] See sections 2.3, 2.4 and 2.5 for further details.

emerged:[95] i) countries that have ended their BITs or introduced investment policies expressly contrary to ISDS; ii) countries that have maintained a 'business as usual' approach; iii) countries that have promoted more or less radical changes.

In order to understand the reasons for the criticism of ISDS in more detail, an overview of the functioning of international investment law, with a particular focus on ISDS and the ITA, will be provided in the following paragraphs.

More in detail, the history of international investment law, and the historical reasons for the current architecture, will be outlined, and then details on the functioning of ISDS and the ITA will be provided. Following this, attention will be focused on the problem of legitimacy in ISDS, where the issue originated and how it is currently addressed.

At the end of the analysis, the reader will be provided with the tools to understand the origins of the ISDS legitimacy crisis and the main impacts on the system.

2.2 Context and history of IIL

(a) <u>The IIL</u>

IIL is an essential part of the international economic law system.[96] In particular, through investment treaties, states give up part of their sovereignty in exchange for an 'economic' opportunity,[97] i.e. the (allegedly) increased propensity of economic actors to conduct transactions in that state.[98] As illustrated by Bernardini, IIL is aimed at providing 'for the private investor, the remuneration of invested capital within a framework of guaranteed

---

[95] See section 2.3, 2.4 and 2.5 for further details.

[96] The present author is aware that the concept of IIL is disputed. That said, this work will follow a broad interpretation of investment law, which comprises all rules concerning investment protection, excluding national investment law. For an overview on investments between exporting and importing countries, Sacerdoti G. (1997), *Bilateral Treaties and Multilateral Instruments on Investment Protection*, in Recueil de scours de l'Académie de La Haye (1997), Vol. 269, I, pp. 251-460; Mauro M. R. , *Gli Accordi Bilaterali sulla Promozione e la Protezione degli Investimenti* (2003), Giappichelli; Dolzer R. and Schreuer C. (2008), *Principles of International Investment Law*, Oxford University Press; Baetens F., *Investment Law within International Law: Integrationist Perspectives* (2013), Cambridge University Press; Sornarajah M. (2010), *The International Law on Foreign Investment* (2010), Cambridge University Press; Treves T., Seatzu F. and Trevisanut S. (2014), *Foreign Investment, International Law and Common Concerns*, Routledge; Salacuse J. W. (2015), *The Law of Investment* Treaties, Oxford University Press; Focarelli C. (2016), *Economia Globale e Diritto Internazionale*, Il Mulino, pp. 260-290.

[97] As to the definition provided in note 96, IIAs are just one of IIL sources (arguably, the most relevant).

[98] In this sense, one of the risks related to IIL concerns the potential dependence of the host state on foreign investment as a vital factor to the development of the local economy. A risk that consists in the state's dependence on external factors (concerning the investor) that it can hardly control (particularly when that state has little or no say in the international relations sphere).

contractual stability; for the host state, the assurance of a flow of capital, technologies and managerial skills capable of guaranteeing the country an orderly economic and social development, without giving up its sovereign prerogatives'.[99]

The IIL is increasingly central today as it regulates (promotes and protects) the activities of multinational companies (and individuals) as foreign investors. In particular, it regulates the activities of foreign investors in developing countries.[100] In this sense, the IIL's rules appear as limitations of sovereignty for importing states, albeit with their consent. From this perspective, they are causing quite a few tensions within the importing states and among international stakeholders (e.g. NGOs and resistance movements).[101] In particular, the ability of multinational companies to force host states to accept their conditions, threatening relocations, and provoking downward competition, especially with regard to human, social and environmental standards, is often criticised.[102]

These criticisms are well known, and it can be said that one of the main features of the system is the attempt to balance, on the one hand, respect for the economic sovereignty of the host state (including its social function) and, on the other, the protection of the private investor's investment and profits. Indeed, through investment treaties, states give up part of their sovereignty in exchange for an 'economic' opportunity, i.e. the (allegedly) increased propensity of economic actors to conduct transactions in that state. It follows that in the IIL there are, in the first place, two concomitant and essential perspectives, i.e. that of the investor and that of the states.[103]

---

[99] See, Bernardini P. (2008), *L'Arbitrato nel Commercio e negli Investimenti Internazionali*, Giuffrè Editore, p. 245.

[100] For categorisation of countries according to economic development, see https://www.imf.org/external/pubs/ft/weo/2022/01/weodata/groups.htm (last access 8 January 2023).

[101] See, for instance, Vadi V. S. (2011), *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law* (2011), Columbia Human Rights Law Review, Vol. 42, No. 3, pp. 797-889.

[102] See Dupuy P. M., Francioni F. and Petersmann E. U. (2009), *Human Rights in International Investment Law and Arbitration*, Oxford University Press; Summa B. (2011), *Foreign Investment Arbitration: A Place for Human Rights?*, The International and Comparative Law Quarterly, Vol. 60, No. 3, pp. 573-596; Guntrip E. (2014), *International Human Rights Law, Investment Arbitration and Proportionality Analysis: Panacea or Pandora's Box*?, EJIL: Talk, https://www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/ last access on 8 January 2023.

[103] '[I]nternational law is "multi-layered". It conceptually and structurally differs from traditional public international law in that it not only provides for norms protecting legal interests between States but also – and in fact mainly – governs the relationship between the host state and the investor. In this secneone ay speak of the 'hybrid nature' of investment law'. See *The Law Relating to Aliens, the International Minimum*

To better understand the two mentioned perspectives, it is necessary to add that long-term relationships between the investor and host state characterise investments.[104] Indeed, they often involve complex business planning, the immobilisation of substantial resources, and a long-term return rate. Hence, the need for investors to manage and minimise the risks associated with a long-term relationship (political, legal, and strictly commercial). In this sense, investment treaties and, more generally, international investment protection standards minimise investment-related risks: mainly legal ones, but also (albeit indirectly) political and commercial ones.

The mentioned need of investors to minimise the aforementioned risks is the main reason states decide to provide international protection to them.[105] In particular, states are inclined to remove obstacles to channel more foreign investment by addressing long-term risks and providing stability and predictability (hence, creating the so-called investment-friendly environment). Of course, these are only some of the benefits, as it is possible to mention others; for instance: the protection of citizens abroad (ensuring a mutual benefit to foreigners); the depoliticisation of disputes and the denial of any revival of the old-fashioned gunboat diplomacy; the creation of a uniform, specialised and international legal framework for investment; the creation of international ties (also in terms of pacifying political relations); and the promotion of the development of certain countries.

(b) *Protection of foreign investors: Between conventional and customary international law*

To analyse the subject of IIL, it is helpful first to clarify the general context in which foreign-host state relations are regulated.

Standard and State Responsibility, Bungerberg and others, (2015), p. 23; see also Zachary D. (2003) , *The Hybrid Foundation of Investment Treaty Arbitration*, British Yearbook of International Law, Vol. 74 BYIL, pp. 152-284; Sacerdoti G., Acconci P., Valenti M. and De Luca A. (2014), *General Interest of Host States in International Investment Law*, Cambridge University Press.

[104] For this reason, they are (theoretically) pretty distinguishable from trade transactions.

[105] As will be discussed in more detail below, the background of the protection of foreign investors can be traced not only to a state's necessity to attract capital but also to the Western world's 'aggressive' foreign economic policy. Historically, the perspective has been not to attract foreign investment but to protect citizens abroad as much as possible. It should be noted that the interest in protecting one's own citizens still remains one of the main economic incentives for states to enter into agreements, and the historical imbalance between exporting and importing capital still characterises the global economy.

The protection of foreign investors exists in international law, even apart from conventional agreements between states to protect and promote investment.[106] In fact, before World War II, issues relating to foreign investment were examined – almost exclusively – within the more general framework of the treatment of foreigners and their property (i.e. law of aliens) and thus within the framework of customary international law.[107] More specifically, according to international law, the state was still (and it is still) obliged to accord a particular treatment to the foreigner and his property, the so-called 'international minimum standard'.[108] In particular, the state has a positive obligation to protect the foreigner, which translates into adopting appropriate measures to prevent and

[106] The principal source of norms for the protection of international investment stocks in the Colonial Era was customary international law, which obligated host states to treat investment in accordance with an international minimum standard. See Vandevelde K. J. (2005), *A Brief History of International Investment Agreements* (2005), U.C. Davis Journal of International Law & Policy 12 U. C., Vol. 12 Fall 2, pp. 157-194; Brownlie I. (2019), *Principle of Public International law*, Oxford Edition, pp. 527-528; Donald R, and Shea R., *The Calvo Clause: A Problem of Interamerican and International Law and Diplomacy* (1955) University of Minnesota Press; (about espousal) Whiteman M. M. (1967), *Digest of International Law* 63 Michigan Law Review, p. 1317.

[107] See G. Sacerdoti (1997); Sciso E. (2012), *Appunti di diritto internazionale dell'Economia*, Giappichelli, p. 181 ff. The status of foreigners (i.e. law of aliens) was already addressed by Emer de Vattel in 1758 (de Vattel E. (1844), *The Law of Nation*, J Chitty Translation, chapter VIII) and before him, by authors like Francisco de Vittoria and Hugo Grotius, who pleaded for a right to travel, live and trade in foreign countries as well as a level of non-discrimination in the treatment of foreigners (see *The Law Relating to Aliens, the International Minimum Standard and State Responsibility*, Bungerberg and others, (2015), pp. 55-71). With reference to arbitration in IIL, the 1794 Jay Treaty already provided for mixed arbitration between States and individuals, serving as successful model for future arbitration. However, the importance of this model should not be overestimated. Indeed, until the Communist Russian Revolution, the main view among international commentators was upon state's national law to '*protect private proper*ty' and that '*domestic scheme protection would lead to sufficient* guarantees'. In this regards, in 1818 US Secretary of State John Adams sustained that: '[t]here is no principle of the law of nations more firmly established than which entitle the property of strangers with the jurisdiction of another country in friendship with their own to the protection of its sovereign by all efforts in his power' (Moore J. B. (1906), *A digest of International Law*, Govt. Print. Off., Washington). For an overview on the topic, see Dolzer R. and Stevens M., *Bilateral Investment Treaties,* (1995) Kluwer Law International. The pre-Russian revolution perspective, as it will be highlighted afterwards, it is mainly linked to the hegemonic approach of Western countries on treatment of foreign investors (and alien more in general), which basically recall a protection of (Western) investor on an unilateral basis, making the protection of investor through international minimum standards or international agreements marginal. The mentioned 'national-based' perspective was confirmed also for completely different reasons by the famous study of the Argentinian jurist Carlos Calvo, which sustained that 'the international rule should be understood as allowing the host state to reduce the protection of alien property together with reducing the guarantees for property held by nationals', in Calvo C. (1868), *Derecho International Teorico y Pratico de Europa y America*, D'Amyot, Paris. If contextualised in his historical times, the Calvo doctrine was aimed at contesting the gunboat diplomacy by capital-exporting countries and their supremacy (aligned to Calvo, it is worth mentioning the Communist Russia and the Mexican approach to protection of foreign investors, which lead (in the latter case) to nationalization of US interests in 1938. See, Dolzer (1995).

[108] See Hobe (2015), Bloomsbury Collection, p. 14.

suppress crimes against his/her person or property. Failure to comply with these obligations results in the state committing a tort under international law against the individual's home state.

As regards the procedural protection of the foreigner's substantive rights in case of infringement of minimum standard, once all domestic remedies of the host state have been exhausted, the national state of the foreign investor may act in diplomatic protection, in defence of its national, at the international level.

From this perspective, treaty-based investment protection and the investor's right to directly sue the host state before an international arbitral tribunal is an 'exception' to the historical and ordinary features of international (and past IIL) law. This development originated in the XIX century and spread in its current form (as a BIT-based system), especially since the 1970s.

Although the role of customary international law is now marginal in current IIL,[109] being aware of it is crucial to understand which are the alternative to BITs, regional agreements, and/or multilateral treaties. Moreover, the importance of customary international law in IIL also derives from the fact that the latter evolution is basically the history of the attempts of the international community to craft a system that would increase investment flows around the globe by providing more effective protection to foreign investors in comparison to what would be granted to them by the standard international customary protections. In other words, the current IIL framework is the outcome of the attempts to depart from customary standards. Indeed, customary international law was (and is) perceived not to offer an adequate mechanism to protect foreign investment. On this point, as noted by Vandevelde:[110]

'First, some countries disputed that customary international law imposed an international minimum standard on the treatment of foreign investment. Most notably, the Latin American countries adhered to the Calvo doctrine, under which foreign investors were entitled only to the treatment that the host country afforded to its own investors' […]

---

[109] On the interaction between customary and conventional international law in IIL, please see Acconci P. (2005), *Is There Room for Customary Law in International Investment Law? (The Requirement of Continuous Corporate Nationality in the Loewen Case)* (2005), Transnational Dispute Management, www.transnational-dispute-management.com/article.asp?key=479 (last access 8 January 2023).

[110] See Vandevelde (2005), p. 163.

'[s]econd, even where it was agreed that an international minimum standard existed, the content of the standard was vague and arguably not particularly demanding' […] '[t]hird, in the absence of an agreement by the host state to submit the dispute to arbitration, the only mechanism offered by customary law for the enforcement of customary norms was espousal (a mechanism whereby an injured national's state assumes the national's claim as its own and presents the claim against the state that has injured the national).'[111]

To the end of better illustrate the reasons behind the development of a treaty-based IIL and the modern ISDS model, the following sections will address the process that led to the creation of the current framework, which is primarily based on bilateral (or regional) treaties for the protection and promotion of investment and investment arbitration.

(c) *The quest for protection of foreign investors: From the era of the Western Empires to the contemporary architecture*

The modern origins of the IIL and ISDS can be traced back to the late XIX and early XX centuries. Indeed, although the number of agreements related to investment protection and promotion has increased significantly in recent decades, international investment agreements have a long history.[112]

As mentioned in the previous section, before World War II, the protection of foreign investments was not often the subject of international agreements.[113] Nonetheless, as it

[111] Espousal is often considered unsatisfactory: the national's state has no obligation to espouse a claim; there is a need to exhaust all national remedies under the law of the host state; if the claim is espoused, and the investor loses control over it. For an overview of the protection of the individual under public international law, see *The Law Relating to Aliens, the International Minimum Standard and State Responsibility*, in Bungerberg and others, (2015), p. 46.

[112] See Hobsbawm E. , *Industry and Empire, the making of modern English society, 1750 to the Present Day*¸1968, Pantheon Books, p. 129-31; Brownlie (2019), p. 500; Vandevelde (2005), p. 158; *State Contracts and the Relevance of Investment Contract Arbitration*, in Bungerberg and others (2015), p. 153-186.

[113] The US 'Friendship, Commerce and Navigation' is an example of an international treaty model. The first such agreement was the Treaty of Amity and Commerce, U.S.-Fr., 16 July 1782, 8 Stat. 12, negotiated with France in 1778 by Benjamin Franklin, Arthur Lee and Silas Dean. Other XVIII Century agreements include Treaty of Amity and Commerce, U.S.-Netherland, 8 October 1782, 8 Stat. 32; Treaty of Amity and Commerce, U.S.-Sweden, 3 April 1783, 8 Stat. 60; Treaty of Amity and Commerce, U.S.-F.R.G. (Prussia), 9 July- 10 September 1785, 8 Stat. 84; Treaty of Peace and Friendship, U.S.-Morocco, June 23-July 6, 1786, 8 Stat. 100; Treaty of Amity, Commerce and Navigation, U.S.-G.B., 19 November 1794, 8 Stat. 116; and Treaty of Friendship, Limits and Navigation, U.S.-Spain, 27 October 1795, 8 Stat. 138. With reference to BIT, the US model was introduced in 1982, with the Treaty Between The United States Of America And the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments signed on 11 March 1986 and entered into force on 27 June 1992,

happens nowadays, large flows of funds were directed from Western countries to the rest of the world.[114] However, since a substantial part of the 'investments' was directed from the 'Motherland' to the respective colonies, the usual legal framework for investment protection – including dispute resolution – was, in most cases, the applicable 'national/imperial' legislation. In particular, when brought to judicial review, disputes typically fell under the jurisdiction of the courts and colonial administrators of the relevant Western empires. The relationship between Western countries and their colonies could be described as follows. On the one hand, a regulatory framework facilitated economic freedom and the penetration of actors authorised by the Western empires. On the other hand, there were the native authorities and populations, which were subject to the rules of the Western empires and confrontation with the Empire if they interfered with the activities of the 'foreign' investors.[115]

Where there has been no direct colonisation, Western powers have nevertheless been able to impose extraterritorial rules on foreign countries in terms of economic investments and relations.[116] Indeed, to defend the interests of their investors, Western countries

---

https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1419/egypt---united-states-of-america-bit-1986-, last access on 8 January 2023.

[114] In this research it will be often distinguished between Western states and non-Western atates. This distinction will be based according to the main UN groupings. The Western group is comprised of the following states: Andorra, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom and the United States. All other states are classified as non-Western. Another classification, refers to developing and developed countries. In third regard, it is here taken into account the income of the state, as calculated and grouped by the World Bank. Developing countries are all countries but those with high-income (for the list, see https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups, last access 8 January 2023).

[115] See Van Harten (2007), pp. 13-18. See also Hill S. M. (1990), *Growth of International Law in Africa* 16 LQ Rev 249, pp. 256–9; Asante S. K. B. (1981), *Transnational Investment Law and National Development* Vol. 24; Ghai Y., Luckham R., and Snyder F. (1987), Introduction in Ghai Y., Luckham R., and Snyder F., *The Political Economy of Law*, Oxford: OUP; Muchlinski P. T. (2000), *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, International Lawyer Vol. 34, pp. 1034–5. It should be noted that in many cases, Western Empires granted governing powers directly to a chartered colonial company. See Hill (1990), pp. 258–9 and 264; Latané J. H. (1907), *Address*, American Society of International Law, p. 136.

[116] See Van Harten (2007), 15; Muchlinski (2000), p. 1034–5; Krisch N. (2005), *International Law in Times of Hegemony*, EJIL, pp. 369, 401–2; Fatouros A. A. (1976), *On Domesticating Giants: Further Reflections on the Legal Approach to Transnational Enterprise*, U Western Ontario Law Review, Vol. 15, pp. 151, 166.

commonly used military force, imposing treaties and rules of domination on foreign states, as happened to the Ottoman Empire, Egypt, Persia, and China (to name a few).[117]

Apart from cases of imposition of extraterritorial laws by Western countries and formal colonisation, some countries remained independent during the XIX and XX centuries (as Japan and some countries in Latin America).[118] In these cases, laws on the treatment of foreign investments were not the product of Western countries' imposition, and international investment disputes were conducted as inter-state disputes.[119]

The third type of inter-state or inter-territorial relations (i.e. the establishment of reciprocal agreements) expanded during the XX century. A significant milestone in this process was the Porter Convention of 1907, whereby a number of states agreed to a general prohibition of using force to collect their citizens' debts. However, this required the 'debtor state' to accept international arbitration to settle disputes with foreigners.[120] Within this context, international arbitration has emerged as a method to deal with

---

[117] See Grigsby W. E. (1986), *The Mixed Court of Egypt*, LQ Review Vol. 12, p. 252; Latter A. M. (1903), *The Government of Foreigners in China*, LQ Review, Vol. 12, p. 316; Fairbank J. K. (1959), *The United States and China*, Cambridge, Mass: Harvard University Press, pp. 120–3; Johnston W. R. (1973), *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century*, Durham, NC: Duke University Press, p. 29; Lipson C. (1985) , *Standing Guard-Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* Berkeley: University of California Press, pp. 13–14; Roberts J. A. G. (1999), *A History of China*, London: Macmillan, pp. 162–8; Anghie A. (1999) , *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*. Harvard International Law Journal Vol. 40, p. 41.

[118] See Van Harten (2007), p. 16; Farrelly M. J. (1894), *Recent Questions of International Law: Japan and European Consular Jurisdiction*, LQ Review, Vol. 10, pp. 254, 266–7; Alvarez A. (1909), *Latin America and International Law*, AJIL, Vol. 3, 269; Muchlinski (2000) pp. 1034–5. Japan was the only Asian country to escape colonisation from the West. With reference to Latin America, Haiti became independent in 1804, followed by Colombia, Chile and Mexico in 1810. Haiti gained independence from France, while the other three Latin American countries from Spain.

[119] See Van Harten (2007), p. 16; Muchlinski (2000), pp. 1033 ff.; Peter W. (1995), *Arbitration and Renegotiation of International Investment Agreements*, The Hague: Kluwer Law International, pp. 6–7. The new agreements were based on the European model of bilateral trade treaties dating back to (at least) the XIX century, which was built on a commitment to mutual recognition of non-discrimination in trade in goods and the unhindered pursuit of commercial activities in the territory of each state. See Wilson R. R. (1949), *Post-War Commercial Treaties of the United States*, AJIL, Vol. 43, pp. 262, 263 and 277; Walker H. (1956), *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, American Journal of Comparative Law, Vol. 5, pp. 229, 230–1; Dolzer (1995), pp. 10–11.

[120] The root of the convention could be traced to the blockade of Caracas and its bombarding by Germany, Italy and Great Britain as a reaction to the Venezuelan Cipriano Castro's government decision to not repay its debts to European creditors. See Hood M. (1975), *Gunboat Diplomacy 1895–1905*¸ London: George Allen & Unwin, pp. 187–8; Morón G. (1964), *A History of Venezuela*, London: George Allen & Unwin, pp. 185–7; Drago L. (1907), *State Loans in Their Relations to International Policy*, AJIL Vol. 1, p. 692; Paulsson J. (2005), *Denial of Justice in International Law*, Cambridge: CUP, pp. 22–3.

disputes between the state and investors/creditors, overcoming the use of force in international economic affairs. From this viewpoint, and although arbitration became an increasingly attractive tool for investment protection, Van Harten observed that 'many developing countries remained hostile toward, given its historical association by the great powers and the fact that it was commonly imposed simply as another vehicle of discipline and control'.[121] Indeed, although not based on colonialism and exterritoriality, current IIL and ISDS standards are rooted in this context of imbalance.[122]

(d) *(The attempts for a) Multilateralization of IIL*

A hallmark of the IIL's history has also been the continuous attempt to establish and enforce international investor protection standards by Western states by accepting extensive (almost universal) multilateral agreements. In the post-colonial era, and in general, where colonialism and extraterritorial rules could not have been imposed, the alternative of applying the minimum standard of protection from customary international law was less favourable to foreign investors than any other colonial or quasi-colonial regime. A multilateral investment code has always been the first answer to the need to define the universal or quasi-universal protection standard. However, these efforts have been usually seen by the so-called capital-importing countries as 'discriminatory toward domestic investors and as an unacceptable challenge to their regulatory autonomy'.[123] Indeed, the history of multilateral investment law agreements is littered with failures.

A first attempt could be traced back to the 1920s with the 'Convention on the Treatment of Foreign' drafted by officials from the League of Nations and the International Chamber of Commerce in 1929. While the draft included only inter-state arbitration, it was rejected after some states' various grounded objections.[124]

After World War II, negotiations for a multilateral investment code were pursued as part of the negotiations for the creation of the ITO. However, the investment provisions

[121] See Van Harten (2007), p. 16.

[122] The point will be addressed in more detail in the next sections. There are grounds to support Van Harten claim if it is taken into consideration how North-South relationship are usually covered by ISDS, while this does not (usually) happen in North-North relationship (with the major – for the moment exception of the ECT). On ISDS coverage see, Bonnitcha J., Poulsen L. and Yackee J. (2021), *A Future Without (Treaty-Based) ISDS: Costs and Benefits*, in Elsig M., Polanco R. and van den Bossche P., *International Economic Dispute Settlement: Demise or Transformation*, Cambridge University Press, chapter 8.2.

[123] See Van Harten (2007), p. 19.

[124] See Van Harten (2007), p. 19.

included in the 1948 Havana Charter were far from the business lobbies' initial proposal.[125] Therefore, the predominantly American business groups rejected the draft.[126]

A further attempt was pushed by Western European countries, with Germany in the first place in 1959. The Abs-Shawcross Draft Convention on Investment Abroad ('Abs-Shawcross') was the result of the German and British investor organisations' work, and thus more in line with their agenda than the Havana Convention and the 1929 draft convention.[127] More specifically, it included 'liberal standards to protect investment' (economic freedom for investors and 'broadly worded' protection from expropriation). Moreover, as a significant innovation, it contained the right for the investor (directly) to file a treaty arbitration claim with the ICJ or the UN Secretary-General.[128] Whereas the Abs-Shawcross proposal did not become a multilateral treaty, it became the model for the 1967 Draft Convention of the Protection of Foreign Property drafted by the OECD, which again failed to become formal, but, more importantly, became the model for the European BITs.[129]

Other proposals of (enforceable) multilateral investment treaties were rejected during the second half of the XX century.[130] In the 1980s, the investment-related negotiations within the Uruguay round of GATT were opposed by developing states.[131] The lobbying activity

---

[125] See van Den Bossche P. (2005), *The Origins of the WTO. The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press; Lester S., Mercurio B., Davies A. (2018), *World Trade Law*, Bloomsbury.

[126] The attempt to introduce investment in ITO was finally dropped when the US administration refused to submit the ITO treaty to Congress for ratification. See Van Harten (2007), pp. 19-20; Lester (2018), p. 55-59; Sciso E. (2021), pp. 259-263.

[127] See G. Van Harten (2007), pp. 19-20. See also Sacerdoti G. (2014), *Havana Charter (1948)*, Max Planck Encyclopedia of Public International Law.

[128] See Van Harten (2007), pp. 20-21. See also Seidl-Hohenveldern I. (1961), *The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table*, Journal of Public Law, Vol 10, pp. 100-112.

[129] See Van Harten (2007), pp. 21 ff.; Dolzer (1995), p. 2.

[130] An example of non-enforcement instruments is the OECD Declaration on International Investment and Multinational Enterprises, first adopted on 21 June 1976 and lastly revised in 2011, https://www.oecd.org/newsroom/theoecddeclarationoninternationalinvestmentandmultinationalenterprisespromotingresponsiblegovernmentandresponsiblebusiness.htm#:~:text=TheOECD%20Declaration%20on%20International%20Investment%20and%20Multinational%20Enterprises%20provides,non%2Ddiscrimination%20and%20investment%20protection (last access on 8 January 2023).

[131] It would be important to observe that, in any case, WTO agreements do apply to investment in important wars under GATS and TRIMS. However, those provisions are much more modest than BITs and regional investment treaty models. In particular, WTO does not allow direct claims from investors. See Van Harten (2007), pp. 21-22.

of the US Council for International Business at the OECD lead to the 1998 proposal of a Multilateral Agreement on Investment.[132] Apart from its far-reaching content, which represented the synthesis of the IIL's evolution over the previous decades, the adoption of the draft agreement was thwarted inside and outside the OECD[133] and ultimately rejected by Western governments as its stipulation would 'hamper proactive regulation and democratic decision making'.[134] In 2003 at the WTO's Cancun ministerial conference,[135] investment was included in the agenda of future work and became one of what was called the 'Singapore Issues'.[136] Also in this case, a clash between developed and developing countries arose, and it proved impossible to agree on the point.[137]

(e) *The BITs architecture*

In light of the impasse at the multilateral (quasi-universal) level, grounded on the macroscopic divergence between capital exporting and some capital-importing countries (for instance, in recent years, Brazil, Malaysia and South Africa), the development of IIL and the creation of a high standard and liberal investment regime has been pursued through alternative means: bilateral and regional agreements.

In particular, BITs are an essential source of current international investment law. There are estimates of around 3000 BITs in the world, with countries such as Belgium, China, Egypt, Germany, Italy, Netherlands, Romania, United Kingdom and Switzerland with 100 or more signed BITs each.[138] They provide guarantees for the investment of investors from one of the contracting states in the other contracting states. They are usually short

---

[132] See OECD, *Draft MAI Negotiating Text*, issued on May 1995, https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm (last access on 8 January 2023).
[133] In particular, by NGOs (foremost in the environmental sector) and capital-importing countries.
[134] See Van Harten (2007), p. 22. The MAI was abandoned after France, with the support of others, withdrew from negotiations.
[135] The Fifth WTO Ministerial Conference, Cancun Mexico, 10-14 September 2003. See https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm (last access on 27 October 2022).
[136] Other than trade and investment (in connection), the other issues were: transparency in government procurement, trade facilitation (customs issues), and trade and competition.
[137] See Van Harten (2007), pp. 22-23.
[138] See Dolzer R., Kriebaum U. and Schreuer C., *Principles of International Investment Law* (2022) Oxford Public International Law, p. 1. With reference to datas regarding the number of BITs for each state, see: https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties (last access on 8 January 2023).

and structured in three parts: *i)* definition, *ii)* substantive standards for protection, and *iii)* dispute settlement.

The main definitions contained in BITs are those about the concepts of 'investors' and 'investments'.

Concerning substantive standards of protection, the typical clauses are the following:

1. Guarantee of fair and equitable treatment ('**FET**');
2. Guarantee of full protection and security;
3. Guarantee of national treatment ('**NT**');
4. Guarantee of most-favoured-nation treatment ('**MFN**');
5. Guarantees in case of expropriation;
6. Guarantees concerning the transfer of funds.

The last part concerns dispute resolution. Traditionally, there are two different kinds of provisions: i) arbitration in the event of a dispute between the host state and foreign investors (investor-state arbitration);[139] ii) arbitration between two states' parties to the treaty (state-to-state arbitration).

Usually, BITs do not include an obligation on investors. However, what is currently subject to debate (and new model treaties are going in this direction) is the necessity to introduce within investment treaties the obligation for the foreign investor to observe certain human rights, environmental, and labour standards and the possibility for the host state to pursue counterclaims.[140]

---

[139] See below, chapter three.

[140] See Mann H. and others (2005), *IIS Model International Agreement on Investment for sustainable development*, IISD, https://www.italaw.com/sites/default/files/archive/ita1027.pdf (last access on 8 January 2023); Kriebaum U. (2006), *Privitazing human rights. The interface between international investment protection and human rights*, Transitional Dispute Management, https://www.transnational-dispute-management.com/article.asp?key=947 (last access on 8 January 2023). An example in this regard is the Nigerian-Morocco (signed but not in force), which allows the States to bring actions against investors for violating their obligations to protect the environment and promote human rights. For a brief overview of the instruments that can be used against the abuses of corporations, see Focarelli (2016), pp. 251-259. See also Acconci (2013). With reference to international standards applicable to multinational companies (as investors), see Focarelli (2016), pp. 243-259.

A more established trend is to conclude not just BIT but FTAs,[141] a more comprehensive arrangement which includes not only investment issues.[142] More in detail, FTA is a treaty aimed at creating a free-trade area between two or more states (bilateral or multilateral FTA). The aim is (generally) to expand business opportunities, and they often include not only preferential tariff treatment and clauses on trade facilitation but also provisions on investment, intellectual property, government procurement, technical standards and sanitary and phytosanitary issues.[143]

It should be noted that within the traditional general structure, several states have created their model of treaties, which are modified from time to time to reflect the policies' background choices.[144] This trend started with capital-exporting countries and is now followed by capital-importing states.[145]

2.3 Investments disputes

(a) ISDS

The same existence of obligations and standards of protection raises the question of how to deal with breaches. In other words, through which instrument address and settle investor-state disputes?

---

[141] In this thesis, BIT and FTAs, as well as any international convention and/or agreement having as subject, also partially, investment rules (within the present definition of IIL) are jointly described and defined as IIA. Please note that while the attempts to create universal treaties have failed (as mentioned above), the conclusion of sectoral (e.g. ECT) or regional (e.g. NAFTA) agreements containing investment provisions is far from unusual. However, as mentioned above, these agreements have a limited thematic or geographical scope.

[142] The trend started with 1989 US-Canada Free Trade Agreement signed on 2 January 1988, entered into force on 1 January 1989 and superseded by NAFTA on 1 January 1994. Further examples are the AfCFTA project to include an investment protocol (see https://au-afcfta.org/trade-areas/investment/ (last access on 8 January 2023), the USMCA (Chapter 14) and CETA (chapter eight).

[143] It should be also distinguished between customs unions and free-trade areas. While customs union requires identical external tariffs, this requirement does not apply to customs union. Often FTAs are the first steps for economic integration.

[144] See for example, the Dutch model BIT https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download (last access 8 January 2023) and Italian model BIT https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6438/download (last access 8 January 2023).

[145] See for instance, the SADC BIT Model, https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (last access 30 December 2022). It is interesting in this sense the new Africa Arbitration Academy's Model BIT. See https://www.africaarbitrationacademy.org/model-bit-for-africa/, last access on 27 October 2022.

Where an investor considers that the host state has violated its rights as an investor, many alternatives (potentially) are available. In particular, it may i) ask for protection from the home state, which can act (through disputes or diplomatic means) against the host state, ii) apply before the judicial authorities of the host state, iii) apply before the judicial authorities of its home state, or iv) directly initiate an international conciliation or arbitration procedure if provided for by the applicable contract, treaty or domestic law.

It follows that investment protection disputes may concern (alternatively) either the investor and the host state directly or the investor's home state (in lieu of the latter) and the host state. Disputes of the second type correspond to different dispute resolution methods and are governed by classic international rules, including customary ones. On the other hand, disputes of the first type are specific to the IIL. Investor-state disputes are usually submitted to arbitration, in addition to prior negotiation and attempts at conciliation or mediation, and based on specific clauses in bilateral or regional treaties.

In particular, since the 1970s, IIL has been characterized by the emergence of a general agreement to consider arbitration between investors and states as the preferable means to settle investment disputes.[146] Indeed, compared to other options and state-to-state arbitration, investor-state arbitration appeared from the outset as the most appealing alternative,[147] becoming synonymous with ISDS (indeed, also named ISA).[148] In this sense, 'from a historical perspective, investment arbitration […] has been designed to accomplish two fundamental objectives. The first objective was reconciling two opposite interests: on the one hand, the interest of foreign investors and their home States to access

[146] See De Luca A. and Sacerdoti G. (2019), Investment Dispute Settlement, in Krajewski M. and Hoffmann T. R., *Research Handbook of Foreign Direct Investment*, Edward Elgar Publishing; Kaufmann-Kohel G. and Potestà M. (2021), Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future Outlook, in Baumler J. and others, *European Yearbook of International Economic Law*, Springer. Unlike the WTO system, there is no single dispute settlement mechanism for foreign investment disputes. However, awards rendered in foreign investment arbitrations are often invoked as precedents for the purpose of reconstructing international law. It is important to highlight that in the ISDS system, ICSID holds a central role.

[147] More in detail, the first two hypotheses (diplomacy and host state's court) can be considered less convenient because, in the first case, they make the investor depend on the national state's interest, while the second exposes the investor to risks of partiality and lack of competence. Furthermore, the third option (home state's courts) can be considered inconvenient, given the so-called jurisdictional immunity of the foreign state before alien courts for the acts considered *jure imperii*.

[148] In general terms, ISDS is the unique system through which countries can be sued by foreign investors (private individuals) for certain state actions affecting their investments.

a neutral international forum,[149] granting the application of the international law of foreign investment, together with the relevant domestic rules; and, on the other hand, the interest of host States to regulate economic operations of foreigners within their jurisdiction, thus preserving their sovereignty. The second objective was de-politicizing investor-to-State disputes, thus preventing them from escalating to an interstate level with the view to avoiding diplomatic, and possibly more radical, interventions by investors' home State. Impartiality and de-politicization of investment disputes have indeed been the main reasons for the success of investment arbitration'.[150]

Having clarified the above, as far as the definition of ISDS is concerned, it can be stated that it amounts to '[a] procedural mechanism that allows an investor from one country to bring arbitral proceedings directly against the country in which it has invested'.[151] Under ISDS, a dispute between the state and the foreign investor is adjudicated (alternatively) by i) one or more private individuals (arbitrators) appointed by the 'parties'[152] themselves; ii) according to rules agreed upon by the 'parties' or the institution appointed by the 'parties' (in line with the procedural rules agreed upon by the 'parties' or the institution appointed by the 'parties').

Avoiding going into procedural details, which will be analysed in chapter three, and before outlining the historical development of ISDS-related debate, it is worth pointing out that sources of ISDS are manifold, not only BITs and IIAs in general but also national investment laws and contracts between states and investors. The nature of the source is critically important. Indeed, although ISDS is a catch-all term, its actual scope and

[149] 'The access to neutral forum is generally considered an essential element: In both human rights law, and to a lesser degree, investment treaty arbitration, access to impartial fora is seen as essential to the realisation of the substantive legal obligations that States have undertaken – so much so that the traditional distinction between a State's obligations and their adjudication has started to become blurred. Investment arbitration sits at an intermediate position compared to international dispute settlement on the basis of ex post consent for a specific case and compulsory dispute settlement in trade matters under the WTO agreements', see *Dispute Resolution*, in Bungerberg (2015), p. 1216.

[150] See De Luca A. (2019). It worth highlighting the historical development of IIL and how the dispute resolution system (since Porter Convention) have been also used as alternative instrument to gunboat diplomacy. In this terms, it is possible to agree with Van Harten in considering the mechanism an expression of the capital-exporting and capital-importing states conflict, and, to a certain extent, the expression of the 'superiority' of the former above the latter, see Van Harten (2007), pp. 12 ff.

[151] See *Investor-State Dispute Settlement (ISDS)*, Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default&contextData=(sc.Default)&firstPage=true (last access 8 January 2023).

[152] As a remark, please consider that in ITA, the concepts of parties to the judgement and parties consenting to arbitration are not overlapping.

functioning are determined *de facto* by its source and can vary significantly in terms of content. For instance, ITA versus other forms of arbitration, or whether ISDS provides for institutional arbitration (see chapter three for details), or requires or not the exhaustion of local remedies, and so on. The common point to all ISDS is that it traditionally represents a private adjudication and, therefore, is distinct from international and domestic courts.

(b) *ITA's peculiarities*

Within ISDS and ISA, a peculiar mechanism is ITA.

Preliminary, ITA is a mechanism or, better, a system.[153] It is the set of rules, individuals, social groups and organisations that regulate and apply the conditions and modalities by which a foreign entity (physical or legal) may seek and obtain, including through enforcement, protection of its investment rights against a state and (rarely, for the time being) *viceversa*. More in detail, ITA is characterised by a complex, flexible and intricate plethora of rules, norms, institutions, social groups, and other actors that, in different ways, may influence its nature, purpose and functioning. In this regard, it could be mentioned: i) arbitral institutions (such as ICSID, ICC, etc.), ii) arbitral tribunals (when appointed),[154] iii) rules on consent and process (which may be found (for example) in international treaties, including the BITs, in domestic law or created *ad hoc* by the institutions participating in ITA, including arbitral tribunals).[155] In addition, the ITA may also be influenced by other 'factors', for example, the actors that may intervene or play a role in the arbitral proceedings (such as *amicus curiae* and domestic courts in the event of appeals or the need to enforce awards), as well as the actors affected by the decision

[153] And in both these senses, it can be categorised as an institution.
[154] It is here believed that arbitral institutions and the arbitral tribunal should be conceptually distinct. Differently from the domestic court system, arbitral tribunals are not an emanation of an arbitral institution (in administered arbitration) but a separate entity whose activities need to be made within the framework of the arbitral institution, which, however, does not have a hierarchical power over it or extended mechanism of controls (outside some formality checks, a supporting activity and, only potentially, an appointing power). Moreover, in *ad hoc* arbitration, arbitral institutions are absent from scratch.
[155] It is here referred to all the rules that, in different ways, define how arbitral proceedings works: from the consent to arbitrate to the final enforcement of arbitral decisions.

and those that otherwise play an autonomous and relevant role in shaping ITA, as an institution.[156]

More analytically, it is a form of traditional ISDS and, hence, of ISA, ITA deals with disputes arising in the context of the IIL and thus concerns public international economic law. In other words, it deals with breaches of obligations relating to foreign investments. It follows that any dispute that does not concern investments by foreigners and their obligations is, by its very nature, outside the institution's scope and, therefore, irrelevant. In addition, it is structured upon 'a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case'.[157] Arbitration in ITA is also 'international'. The feature of internationality arises from the fact that ITA, for its same nature, requires a 'foreign' or 'international' element, i.e., the dispute concerns an alien's investment. Moreover, the dispute as such will take place in the ITA between a foreign investor (who may initiate the proceedings but whose consent is not strictly necessary to have an ITA proceeding) and the state that provided consent to arbitration by treaty and was the beneficiary (at least, allegedly) of an investment by the other party (i.e., the foreign investor). It follows that any dispute which does not concern investment by foreigners and their obligation are, by their very nature, outside the scope of the instrument and, therefore, irrelevant.

If the above features are shared with other traditional ISDS/ISA mechanisms, ITA is peculiar for one reason: the source of consent to arbitration.

---

[156] The role of third-party decision-makers is complex and debatable. Here, their relevance is argued since the very nature of the ITA entails an effect on sovereign powers and, thus, on citizens' rights and prerogatives. From this perspective, it is also argued that a distinction should be made between the role of the state in the ITA and that of its citizen and national institutions. Indeed, the latter can influence the state's ability to comply with the decision, even in a disruptive way. From this point of view, a strictly formal approach (focusing only on the state as the only relevant actor in the IIL) may fail to understand whether and under what conditions the ITA could function in a given time and space. The above also applies with reference to non-state international bodies (such as international NGOs), which play an important role in influencing the effectiveness and legitimacy of the system, and also with reference to experts (such as arbitrators, professors, lawyers, etc.), who flesh out legal concepts and provisions and, more generally, transform the ITA into a living, functional system.

[157] See Born G. (2012), *International Arbitration: Law and Practice*, Kluwer Law International.

To clarify what the above entails, it should be highlighted that consent to arbitration may be provided through three different forms:[158] i) by treaty, ii) through domestic law, and iii) on a contractual basis.[159] With reference to arbitration clauses entered into by states and foreign investors employing contracts, they are the product of states' private capacity. In other words, in this case, state consent has the commercial (investment) relationship with other private parties as the object.[160] Differently, through domestic consent, arbitration is provided directly by national law to any investment that qualifies as such according to that law.[161] The last typology only concerns arbitration provided by international treaties among states (i.e. ITA).

The main difference among these three sources of arbitration is that international and domestic law provides general consent to arbitration, whereas contractual consent concern *ad hoc* and limited consent (against a specified party and with reference to the specific cases that may arise from the breach of the specific contract at stake). The difference is relevant because '[u]nlike contract-based arbitration, which relies on the specific consent of private parties,[162] both legislation and treaty-based arbitration engage disputes within the regulatory sphere. They expose the state to claims by a broad class of potential claimants in relation to any governmental activity affecting foreign investors, in the absence of a contract between an individual investor and the state'.[163] In other words, ITA is not a reciprocal consent adjudication but an instrument aimed at reviewing

---

[158] See Van Harten (2007), p. 24.

[159] As noted by Van Harten '[t]he form of a state's consent is significant because it correlates strongly with the positioning of investment arbitration in the private or public sphere, and in the domestic or international sphere. Thus it points to the character of the adjudicative authority that is exercised by arbitrators'. See Van Harten (2007), p. 24..

[160] Early ICSID arbitration was only contractually based, see Holiday Inns S.A. and others v. Morocco, ICSID case no. ARB/72/1; Kaiser Bauxite Company v. Jamaica, ICSID Case no. ARB/74/3; Adriano Gardella S.p.A. v. Cote d'Ivoire, ICSID Case no. ARB/74/1 and AGIP S.p.A. v. People's Republic of the Congo, ICSID Case no. ARB/77/1.

[161] For instance, see Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case no. ARB/84/3.

[162] For the concept of arbitration without privity as defined by Paulsson. See Paulsson J. (1995), *Arbitration without Privity*, ICSID Review – Foreign Investment Law Journal, Vol. 10, No. 2, pp. 232-257. The main point is that treaty based and domestic based arbitration are cases where there is no agreement between two parties, but the arbitration is conferred unilaterally by the state. In a case a legislative concession, in another case as effect of an agreement between the host state and third state.

[163] See Van Harten (2007), p. 25.

(through adjudication) public law. Indeed, it mainly applies to a dispute concerning the exercise of sovereign authority and thus impacts the state's regulatory sphere.[164]

In addition, ITA also differs from domestic law-based arbitration since it stems from the agreement of two or more parties governed by international law. In contrast, the second option is a unilateral choice of the state, with what follows in terms of flexibility and consistency with domestic laws and legal principles. This feature is not unproblematic. In particular, according to Van Harten, using private arbitration at the international level raises 'special concerns about the delegation of adjudicative authority to arbitrators who are insulated from domestic judicial review. These concerns are not present, or at least not prevalent, in contract-based arbitration because such arbitration does not usually determine core questions of public law. Further, the concerns are not as significant in the case of legislation-based arbitration because the delegation of authority to arbitrators is subject to direct control by the legislature or courts of the delegating state. Treaty-based arbitration goes much further in its removal of investment arbitration from the legal domain of a state's own governing institutions and in the delegation of core elements of the judicial function in public law to private arbitration, in both the public and the international sphere'.[165]

2.4 The legitimacy issue

(a) *ISDS: From infancy to maturity*

Following the structure proposed by Behn, Fauchald and Langford,[166] the evolution of ISDS can be divided into five phases.[167]

More in detail, the system moved 'from infancy through adolescence to maturity',[168] and (foreseeably) during this process, it suffered several 'complications' and 'issues'. In

---

[164] Conversely, in consensual arbitration both the parties own legal rights and obligations. In ITA instead is not a relationship between juridical equals, but it engages in regulatory relationship between parties. See Van Harten (2007), p. 45.

[165] See Van Harten (2007), p. 25. It should also be noted that, even if Host states are not obliged to keep IIAs in place definitively, survival clauses may prolong treaties' applicability for 20 years or more, including ISDS.

[166] See Behn D., Fauchald O. K. and Langford M. (2022), *The International Investment Regime and Its Discontent*, in Behn D., Fauchald O. K. and Langford M., *The Legitimacy of Investment Arbitration*, Cambridge University Press, p. 39.

[167] See Behn, Fauchald and Langford (2022), pp. 61 ff.

[168] See Behn, Fauchald and Langford (2022), pp. 61 ff.

particular, ISDS suffered in the years of a legitimacy crisis, parallelly to IIL, which acted as an overarching issue capable of drawing together all the various problematics appeared in the system (such as lack of diversity, the correctness of decisions, consistency, private nature of ISA, accessibility, transparency and so on) and triggered efforts towards reform.[169] '[I]n some ways, the emergence of ISDS regime is a classic story of the growth of an inter-state system that brings with it a number of unintended consequences and is followed by a backlash that is likely to lead to a significant reform or even collapse'.[170]

The first phase of the ISDS story is characterised by the *de facto* absence of ISDS awards. Only ten years after the German-Pakistan BIT, in 1969, Italy and Chad signed the first BIT, including an ISDS clause.[171] Nonetheless, it took more than 20 years to get to the first ISDS-based award.[172] Between 1987 and 1994, ICSID registered eight cases and three final awards rendered,[173] to which should be added two non-ICSID registered cases.[174] If disputes were absent, the 1980s and (especially) 1990s were instead vibrant in terms of newly signed BITs, creating the bedrock for the exponential growth of cases in the years after.

In fact, in the second phase of ISDS, starting in 1995 and ending in 2003,[175] the cases increased steadily, amounting at the end to 101 ICSID-registered cases (with 24 awards

[169] See Behn, Fauchald and Langford (2022), pp. 61-62; Frank S. D. (2005), *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, Fordham Law Review, Vol. 73, 1521; and see Van Harten (2007), pp. 12 ff.

[170] See Behn, Fauchald and Langford (2022), p. 62. On the other hand, as we seen 2.2(b) disputes between investors and States are not new, what it is new is the recent 'institutionalization' of the issue and the increased reliance of stakeholder on it. In addition, equally new is the capacity and extended role of civil society in international law and its capacity to became a preeminent actor in the international law decision making.

[171] Accordo tra il Governo della Repubblica Italiana ed il Governo della Repubblica del CIAD per Proteggere e Favorire gli Investimenti di Capitali signed and entered in force in 11 June 1969.

[172] See Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, see https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1/aapl-v-sri-lanka (last access on 8 January 2023). The first case brought under ISDS (but settled) was Holiday Inns S.A. and others v. Morocco, ICSID Case No. ARB/72/1, see https://www.italaw.com/cases/3391 (last access on 8 January 2023).

[173] ICSID is of central importance in investment arbitration procedure. ICSID tribunals only handle arbitrations between states and non-state entities, and in this are different from ICC and SCC tribunals, which handle both commercial and investment arbitration. See, among the others, Collier J. and Lowe V. (2000), *The Settlement of Disputes in International Law, Institutions and Procedures*, Oxford University Press, p. 59. Bernardini P. (2010), ICSID Versus Non-ICSID Investment Treaty Arbitration, in Miguel Fernández-Ballesteros A. and David Arias D., *Liber Amicorum Bernardo Cremades*, La Ley, pp. 159–188.

[174] See Behn, Fauchald and Langford (2022), pp. 64-65.

[175] See Behn, Fauchald and Langford (2022), pp. 65-67

issued) and 35 (known) non-ICSID cases registered (with 14 awards issued).[176] These were the years of the first cases from NAFTA, where the first claims against developed states were brought. In this period, beginning with NAFTA, environmental concerns started to be on the table of the debate. In addition, many cases were initiated after the Argentinian 2001 crisis in this period.[177] At a negation level, as seen above, this was also the period where the latest attempts at achieving multilateralism (through a 'universal' agreement) in IIL were made (with MAI and the WTO's Singapore issues). The answer to these failings was the increased growth of BITs.[178] Moreover, the first major problems with the IIL and ISDS systems emerged during this period. In particular, inconsistency. Two controversies, in particular, sparked the debate: i) the interpretation of the umbrella clause scope of action and the two opposite positions in the SGS cases (SGS v Pakistan and SGS v Philippines);[179] ii) the Lauder v Czech Republic and CME v Czech Republic awards,[180] were on the grounds of the same subject-matter the Tribunals issued two different conclusions.[181] In general, in this period, there was the feeling that 'ISDS had some shortcomings that, if not properly managed, could produce unjust ad illegitimate results'. Regrettably, they were not adequately managed.[182]

The critics of ISDS matured between 2004 and 2010. The third phase of ISDS is where the legitimacy crisis emerged in the academic literature.[183] Scholars were trying to figure

---

[176] See Behn, Fauchald and Langford (2022), p. 65.
[177] See Behn, Fauchald and Langford (2022), pp. 65-66
[178] See Behn, Fauchald and Langford (2022), pp. 66-67.
[179] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6.
[180] Ronald S. Lauder v. The Czech Republic, UNCITRAL; CME Czech Republic B.V. v. The Czech Republic, UNCITRAL.
[181] See Behn, Fauchald and Langford (2022), p. 66.
[182] See Behn, Fauchald and Langford (2022), p. 67.
[183] See Behn, Fauchald and Langford (2022), p. 67, but also Brower C. N., Brower C. H. and Sharpe J. (2003), *The Coming Crisis in the Global Adjudication System*, Arbitration International. Vol 19, No. 4, p. 415; Franck S. D. (2005), *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent* Decisions, Fordham Law Review, Vol. 73, p. 1521. See Van Harten (2007); Sornarajah M. (2008), A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration, in Sauvant K., *Appeals Mechanism in International Investment Disputes*, Oxford University Press; Caron D. (2009), *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, Suffolk Transnational Law Review, Vol. 32, p. 513; Waibel M. and others (2010), *The Backlash Against Investment Arbitration: Perceptions and Reality*, Kluwer.

out if there were a crisis and how to define it.[184] They mainly considered the correctness and consistency of decisions, environmental concerns and compatibility between investors' rights and states' freedom to implement anti-economic crisis measures.[185]

Scholars criticised the system by alleging that: it was based on privatisation through arbitration of state and public economic issues; it led to and against developing states and in favour of influential investors; it was opaque, close and costly; incoherent and inconsistent; lacking due care to non-economic interests as human rights, environmental concerns etc.; unbalanced in favour of the investor, without considering their responsibilities; biased in favour of investors' interest to the detriment of public interests.[186] In this regard, the 2010 Public Statement (signed by 76 academics) expresses

---

[184] The doubts concerned also the same nature of ISDS, and ITA. See, for instance, Van Harten G. (2006), *Investment Treaty Arbitration as a Species of Global Administrative Law*, The European Journal of International Law, Vol. 17, No. 1, 121-150; and Kingsbury B. and Schill S. (2011), *Investor-Sate Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, Transnational Dispute Management, https://www.transnational-dispute-management.com/article.asp?key=1700 (last accesso 8 January 2023).

[185] See Behn, Fauchald and Langford (2022), p. 67. Of course, the debate was strimming from the second period issues, NAFTA and environmental concerns, inconsistency and Argentina economic crisis. These were also the years of the Foresti case and the infamous water war of the case Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/74/aguas-del-tunari-v-bolivian (last access 8 January 2023).

[186] See Behn, Fauchald and Langford (2022), p. 68. See also, for instance, Stiglitz J., *Beware of TPP's Investor–State Dispute Settlement Provision*, Rosevelt Institute, https://rooseveltinstitute.org/publications/beware-of-tpps-investor-state-dispute-settlement-provision/ (last access 8 January 2023); on the matter, see generally Sacerdoti, Acconci and others (2014). See also *The Arbitration game*, Economist, https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game (last access 8 January 2023) that well illustrates the terms of the public discussion on investment arbitration, which is defined as '*a way to let multinational companies get rich at the expense of ordinary people*'. This article (which is just an example of the kind of articles on the matter which have appeared in European newspapers over the last years) echoes the tone and the arguments against investment arbitration of an article against the NAFTA which appeared in Depalma A. (2001), *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, New York Times, https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html (last access 8 January 2022). For a general overview of the concerns raised by the current system, see UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, 18 September 2017 (A/CN.9/WG.III/WP.142), paras 19–45; and Kaufmann-Kohler G. and Potestà M. (2016), *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*, CISD First Report, https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf (last access on 8 January 2023), pp. 6–15.

an important expression of dissatisfaction with the doctrine of the International Investment Regime:[187]

'We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially it is hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability […] Investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose. There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including refusal to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose'.[188]

Regarding the ISDS numbers, from the 2000s, it stabilized at around 40 new claims per year. The effect of the increasing caseload and the issues arising from there also triggered a reaction at the negotiation level. Some states started to consider the *status quo* not sustainable. Since the Foresti case in 2007, South Africa reviewed all its IIA policies, abstaining from entering new ones, terminating the existing ones, objecting to the use of traditional ISDS, and deciding to regulate its IIL through domestic law (i.e. the Foreign Investment Act).[189] Latin American countries reacted similarly to the debate;[190] Venezuela, Ecuador, and Bolivia also decided to move away from the ICSID convention.[191]

Between 2011 and 2016, the legitimacy debate of ISDS erupted. As noted by Behn, Fauchald and Langford, in this period, ISDS was characterized '(1) a significantly

---

[187] A copy of the public statement can be found at https://www.bilaterals.org/?public-statement-on-the&lang=en (last access 8 January 2023).

[188] Analysis of ISDS as autonomous focus, in terms of legitimacy, is a 2000s development. Before, it was more focused on strictly legal analysis or on econometrics research aimed at proving the qualities of IIL as such.

[189] See Behn, Fauchald and Langford (2022), pp. 69-70; Republic of South Africa (2009), *Bilateral Investment Treaty Policy Frameowork Review. Government Position Paper*, https://static.pmg.org.za/docs/090626trade-bi-lateralpolicy.pdf (last access 8 January 2023).

[190] See Titi C. (2014), *Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas*, SSRN, https://ssrn.com/abstract=2690775 (last access 8 January 2022).

[191] Venezuela denounced ICSID in 2012, while Bolivia left ICSID in 2007. Ecuador left ICSID in 2009 but rejoined in 2021.

increasing number of ISDS cases initiated and decided; (2) a proliferation of annulment proceedings; (3) an intensification of the legitimacy discourse among scholars, including the emergence of literature that questioned or strengthened the empirical basis for claims regarding legitimacy and increasing focus on means to remedy legitimacy deficits and (4) shifts in state policy towards IIAs, including a significant reduction of the signing of IIAs and the emergence of the EU as an IIA negotiator following the entry into force of the Lisbon Treaty'.[192] As a (partial) consequence of these challenges, IIL faced a decrease in new IIAs signing.[193] Diminution has been counterbalanced by the growth and stabilisation of the ISDS caseload to more than 70 per year.[194] More in detail, 441 new ISDS cases have been registered in this period and around 25 awards per year.[195]

The fifth and latest period of ISDS life started in 2017, with the United States phasing out from TPP and TTIP involvement and the renegotiation of NAFTA, which later became USMCA (with ISDS only between the United States and Mexico, not between the United States and Canada). However, surprisingly, the rest of the world has been very active, particularly in entering into the mega-regional agreement: CETA, between the EU and Canada, and AfCFTA, among most African countries, are two examples. This period is also characterised by different (often opposing) strands, such as the new Italian and Dutch

---

[192] See Behn, Fauchald and Langford (2022), pp. 71-72. Despite the above, Behn, Fauchald and Langford view the legitimacy debate sympathetically as a standard and 'healthy' part of the new regime, i.e. a kind of '*adolescence crisis*', see Behn, Fauchald and Langford (2022), p. 73 and also, Brown C. and Miles K. (2011), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press; Bjorklund A. (2013), *The Role of Counterclaims in Rebalancing Investment Law*, Lewis and Clark Law Review, Vol. 17, No. 2, p. 461; Stone Sweet A. and Grisel F. (2014), The Evolution of International Arbitration: Delegation, Judicialization, Governance, in Mattli W. and Dietz T., *International Arbitration and Global Governance: Contending Theories and Evidence* (2014), Cambridge University Press, chapter two.

[193] In 2011, Australia announced that its future BITs would no longer include ISDS after the Philip Morris case but reversed it in 2016 by negotiating the TPP and signing the CTPP. The States responding to ISDS claims with IIA unilateral reform are the minority (as partially Czech Republic, Romania, Indonesia and India). See K. Gordon and J. Pohl, Investment treaties over time: treaty practice and interpretation in a changing word (2015), OECD Working Papers on International Investment, 2015/02, OECD Publishing; but difficult in new IIA (with ISDS) is evident (for instance, see the TTIP saga). This is not a general sentiment, though, as various states are neither abandoning nor reforming ISDS and instead concluding new agreements: see RCEP, for example. On the other hand, see EU activism. The Union is indeed proposing MIC as an alternative to traditional ISDS in its new agreement with third parties. Furthermore, incredible activism could also be seen on the African continent.

[194] See Behn, Fauchald and Langford (2022), p. 73.

[195] See Behn, Fauchald and Langford (2022).

BIT models[196] and Ecuador's full (and first in history) phase-out from IIL.[197] In addition, the Achmea case has been particularly debated within the EU, through which the CJEU declared the incompatibility with EU law of intra-EU BITs and required EU Member States to terminate them. In addition, the EU started to insert substitute ICSs into traditional arbitration ISDS.[198] This attempt further led to work on the international fora to support the development of a MIC.[199] In the international fora, several works have been aimed at modifying the system's rules, and some works have also been done at the ICSID level and within the arbitration centres.[200] Among all of them, the more comprehensive is the current work at the UNCITRAL working group III, that since 2017 has been developing a comprehensive reform of ISDS.[201] In this sense, the last emergence of strong critics of ISDS triggered a season of reform that is ongoing and will continue in the coming years.[202]

---

[196] The models can be respectively found at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6438/download and at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.

[197] However, as mentioned in 2021 Ecuador has re-joined ICSID.

[198] See, for instance, the agreements between EU and Canada (CETA, chapter eight), EU and Vietnam (EU-Vietnam Investment Protection Agreement, chapter three), EU and Singapore (EU-Singapore Investment Protection Agreement, chapter 3) and, under negotiations, EU and Mexico (EU-Mexico Agreement in Principle, chapter on investment, section C). With the exception of CETA (and Mexico), these treaties have yet to enter into force.

[199] See, for further information on EU strategy on MIC and ICS, *https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en* (last access on 8 January 2023).

[200] An example is the '*United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*', see https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/transparency-convention-e.pdf (last access on 8 January 2023).

[201] See https://uncitral.un.org/en/working_groups/3/investor-state (last access on 8 January 2023).

[202] To provide an idea of the relevance and the reasons of the controversy and public backlash against ISDS, it is sufficient to make reference to the recent 2019 *Tethyan Copper Company Pty Limited v Pakistan*, ICSID Case No. ARB/12/1 case, where the Asian country was ordered to pay six billion Dollars as compensation. Besides to the merit of the question, it is sufficient to note that the amount ordered by the tribunal was equal to the amount that Pakistan received from the IBMF as bailout in the same here. In general terms, observers disagree about the fairness and value of the system, and ISDS has became politically toxic also in capital exporting states (it is not a case that reform of ISDS is now a prominent item in the political agenda, as for example for the EU). A further issue is that the focus of policymakers on new treaties is not so well founded. Indeed, most of the ISDS cases are based on 15-20 years old treaties, which continue to exists. In this sense, also the strategy to remove ISDS all-together from new BIT may be not sufficient. In this regards, while considered time-consuming, the main strategies to cope with old BITs and IIAs in general is termination (with the limits of sunset clauses), renegotiation and state interpretation. See on the topic, Poulsen L. and Gertz G. (2021), *Reforming the Investment Treaty Regime, A 'Backward-looking' Approach*, Chatham House https://www.brookings.edu/research/reforming-the-investment-treaty-regime/?fbclid=IwAR0Q7US5zzXc3e6mmr9JoPVFcEtgoHFPXRh_kr6UQnFmxcMlJ23bSvEycXY (last access 8 January 2023). On the importance of new IIAs without ISDS, see, for example: recent Brazilian

Concerning the present debate regarding ISDS, the core of controversy are the expansive interpretations of the ISDS tribunals[203] and interpretations that trigger awards of billions of euros with considerable fiscal, public finance and foreign-exchange reserves implications.[204] Furthermore, political outrage has been scattered by the rise of disputes against climate change measures, whereas after COVID-19, there have been requests for an ISDS moratorium during the pandemic.[205] Further critiques have been raised on potential clashes between investment treaties and IMF's Articles of Agreement, which

---

BITs; the EU's recent investment agreements with China and Japan (which may include the EU's version of ISDS in the future, but which for now include post-establishment national-treatment clauses without the mechanism); the USMCA; the U.S.-Australia FTA; and New Zealand's relationship with several signatories to the CPTPP. On the risk connected to 'old' BIT, see Gaukrodger, D. (2016), *The legal framework applicable to joint interpretative agreements of investment treaties*, OECD working paper No. 2016/01, https://www.oecd-ilibrary.org/docserver/5jm3xgt6f 29w-en.pdf (last access 8 January 2023); and United Nations Conference on Trade and Development (UNCTAD) (2020), *Possible reform of Investor-State dispute settlement (ISDS): Multilateral instrument on ISDS reform (Note by the Secretariat),* UNCITRAL Working Group III Paper, (last access 8 January 2023). For further information, see the following. On U.S. government concerns with ISDS, see, for example, Yong L. (2018), *Lighthizer justifies opposition to ISDS in NAFTA*, Global Arbitration Review, https://globalarbitrationreview.com/article/lighthizer-justifies-opposition-isds-in-nafta (last access 8 January 2023); Simson, C. (2020), *Biden comes out against 'special tribunals' for corporations*, Law360, https://www.law360.com/articles/1295978/biden-comes-out-against-special-tribunals-for-corporations (last access 8 January 2023). When removing ISDS from the U.S.-Canada investment relationship, Canada's then foreign minister, Chrystia Freeland, noted that it '*strengthened our government's right to regulate in the public interest*'. See Government of Canada (2018), *Prime Minister Trudeau and Minister Freeland deliver remarks on the USMCA*,, youtube.com/watch?v=UROrmufEVD4 last access 8 January 2023.

[203] See Gaukrodger D. (2014), OECD working paper No. 2014/02, Paris: OECD, https://www.oecd.org/daf/inv/investment-policy/WP-2014_02.pdf (last access 8 January 2023); and Clifford Chance (2019), *United Kingdom nationalisation: the law and the cost – 2019 update*, https://www.cliffordchance.com/briefings/2019/07/uk_nationalisationthelawandthecost-201.html (last access 8 January 2023). On distortion of competition between foreign and domestic firms, see Gurria, A. (2016), The growing pains of investment treaties in Love, P. (2016), *Debate the Issues: Investment*, Paris: OECD, https://www.oecd-ilibrary.org/docserver/9789264242661-12-en.pdf. (last access 8 January 2023), it is more and more evident that from a historical perspective (through analysis of records), states often did not want to grant investors extensive rights as interpreted by the ISDS tribunal and were not foreseeing the implication of IIAs in other public policy areas. See Poulsen L. (2015), *Bounded Rationality and Economic Diplomacy: The Political Economy of Investment Treaties in Developing Countries*, Cambridge University Press; Hepburn, J., Paparinskis, M., Poulsen, L. and Waibel, M. (2020), *Investment law before arbitration*, Journal of International Economic Law, Vol. 23, No. 4.

[204] See Paparinskis M. (2020), *A Case Against Crippling Compensation in International Law of State Responsibility*, Modern Law Review, Vol. 83, No. 6.

[205] See Bacchus K., and Sachs J. (2020), *Why we need a moratorium on investment disputes during COVID-19*, The Hill, https://thehill.com/opinion/international/501872-why-we-need-a-moratorium- on-trade-disputes-during-covid-19 (last access 8 January 2023); Columbia Center for Sustainable Investment (2020), *Call for ISDS moratorium during Covid-19 crisis and response*, ccsi.columbia.edu/2020/05/05/isds-moratorium- during-covid-19 (last access 8 January 2023).

usually prevent states from using capital controls to address balance-of-payments' difficulties.[206]

(b) <u>IIL and ISDS: is there any solution to the legitimacy crisis?</u>

If such a debate has sparkled in the literature and among policy makers, why the legitimacy crisis has not yet been resolved?[207]

As seen, international investment tribunals (and IIL as a whole) are in the unique situation of having to regularly defend themselves from attacks on their legitimacy as mechanisms for resolving disputes about the scope and the limits of state sovereignty.

As noted by Brower and Schill, 'defenses of the legitimacy of international investment law and investment dispute resolution have not [...] kept pace with the enormous development of this field of international law and the accompanying critical attention it has received', which is a consequence of the 'unprecedented increases in transborder investment flow'.[208] Indeed – unavoidably – the increase of BITs and IIAs and the increase in ISDS cases attracted critical attention from investors, host states, civil society, public interest, and stakeholders in general, contributing to the narrative of an IIL and ISDS 'legitimacy crisis'.[209]

---

[206] See Siegel D. (2004), *Using free trade agreements to control capital account restrictions: Summary of remarks on the relationship to the mandate of the IMF*, ILSA Journal of International and Comparative Law 10 (2): 297-304; Waibel M. (2009), BIT by BIT – The silent liberalization of the capital account, in Binder C., Kriebaum U., Reinisch A., and Wittich S., *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, Oxford: Oxford University Press.

[207] For an overview of the current challenges and debate in ISDS see, Elsig M., Polanco R. and van den Bossche P. (2021), *Part II – Current Challenges in Invernational Investment Dispute Settlement*, in Elsig M., Polanco R. and van den Bossche P., International Economic Dispute Settlement: Demise or Transformation, Cambridge University Press, pp. 189-294.

[208] See Brower C. N. and Schill S. W. (2009), *Is Arbitration a Threat or a Boon to The Legitimacy of International Investment Law?*, Chicago Journal of International Law, Vol. 9, n. 2, Article 5. Although the debate on legitimacy has become more complex and has gained centrality in doctrine and among stakeholders, it is believed that the work of Brower and Schill still provides a comprehensive and interesting overview of the issues being debated in the IIL (subject to the logical evolution of the debate).

[209] See, among the others, Sornarajah (2008); Afilalo A. (2005), *Meaning, Ambiguity and Legitimacy: Judicial (Re-)construction of NAFTA Chapter 11*, Nw J Intl L & Bus, pp. 279, 282; Franck (2005); Afilo A. (2004), *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, Georgetown Intl Envir Law Review Vol. 17, p. 51; Brower (2003); Brower C. N. (2002), *A Crisis of Legitimacy*, Natl L J B9.

In this regard, while some of the main problems concern the unpredictability and incoherence of investor-state dispute settlement,[210] the debated on ISDS can be primarily categorised into two structural critics that are difficult to address with specific and limited reforms:

i) '[H]egemonic critique of international investment law that originates from a Marxist analysis of international law and views international investment law as an attempt by developed countries to impose their power on weaker, developing countries';[211]

ii) '[P]erceived unevenness created by a regime that protects property, investment, and foreign investors without sufficient regard to other non-investment-related interests of host states'.[212]

In both cases, critics are aligned in focusing on the assumption that IIL 'favor the interest of investors over the host state's competing interest, thus establishing an asymmetric legal regime that is detrimental to state sovereignty'.[213]

More in detail, as a consequence of these critics, the following IIL features have been under attack:

i) Substantive obligations in IIL, since they are considered as biased towards investor rights without providing sufficient obligations on investors, thus threatening state capabilities to advance public interests (in particular for those states that are strongly dependent on foreign capitals, such as African states);[214]

---

[210] See, for instance, Zarra G. (2018), *The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?*, Chinese Journal of International Law, Vol. 17, No. 1, pp. 137–185.

[211] See Brower and Schill (2009), p. 474. See also, B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making* (2004), Eur J Intl L 1, 7, 15 (where it is argued that subjecting national law to international standards is an attempt to remove local barriers to the accumulation of capital); Chmini B. S. (1999), *Marxism and International Law*, Econ & Pol Wkly, p. 337.

[212] See Brower and Schill (2009), p. 474. See also Chung O. (2007), *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, Va J Intl L 953, 47; Van Harten (2007).

[213] See Brower and Schill (2009), p. 474.

[214] See Brower and Schill (2009), pp. 474-476. The authors also challenge the idea that IIL creates a regulatory chill against the host state (see pp. 483-489).

ii) The right of the investor to initiate arbitration, which does not exist under customary international law, and allows the investor to settle before a private adjudicator a dispute regarding the state's regulatory power (a downside exacerbated by the fact that – usually – only the investors can initiate arbitration and not the host state);[215]

iii) The selection of who decides disputes involving politically sensitive matters. It is argued that arbitration is not suitable for addressing public law disputes (concerning human rights, protection of the environment, social policies etc.) because arbitrators are privately contracted and do not hold public office. In other words, arbitration 'institutionalize(s) a pro-investor bias because arbitrators are influenced by their self-interest in being reappointed in the future case' and, for their very nature, they cannot be impartial and independent.[216]

At closer inspection, these criticisms of the IIL and ISDS do not simply concern its functioning but rather its theoretical existence (as an instrument for Western countries' primacy over others and as an instrument inherently biased in favour of economic interests to the detriment of interests of a different nature). From this point of view, any reform or proposal for reform under consideration would hardly be able to resolve these criticisms conclusively. More specifically, while the asymmetry of the system (in favour of economic interests) can be addressed through a reform aimed at introducing new obligations on investors, it is less practical to challenge through reform the Marxist critique to IIL and ISDS. Moreover, even when asymmetries (bias in favour of investors and economic interests) are taken into account, the concrete scope of the challenges to the system is such that it would be difficult to see how arbitration can maintain its role in ISDS (it is no coincidence that the EU has proposed to substitute with MIC and ICS the

---

[215] On the other hand, it should be noted that '[d]ispute settlement has a central function in stabilizing the expectations of foreign investors and enables them to counter opportunistic behavior by the host state, such as unreasonable interferences with the investor's economic rights or even expropriations without compensation', see Brower and Schill (2009), p. 477 (in general see pp. 447-483); See also Schwartz A. and Scott R. E. (2003), *Contract Theory and the Limits of Contract Law* (2003), Yale Law Journal, p. 541; Guzman T. (2008), *How International Law Works: A rational Choice Theory*, Oxford, pp. 71-117; van Aaken A. (2008), *Perils of Success? The Case of International Investment Protection*, Eur Bus Org L Rev 1, 14.

[216] See Brower and Schill (2009), p. 489 (in general, see pp. 489-495);

traditional ISDS). Indeed, private adjudication seems difficult to reconcile with the public interest, and, in general, it is difficult to legitimise any check on states' regulatory power in the terms proposed by the conventional IIL. Moreover, it is rather questionable whether limiting investor protection or imposing obligations on investors would have a beneficial effect on IIL, given the primary interest of the host state in attracting investment to the territory (in particular, it is questionable whether a new BIT model introducing such changes would serve the interests of those countries particularly dependent on foreign investment). In other words, it is difficult to imagine what reforms of the IIL and ISDS, while keeping investment arbitration as the most distinctive feature, would appease stakeholders' criticism (while maintaining IIL (alleged) benefits).

The present author claims to approach the issue starting from the concept of legitimacy itself.

It is believed that the most thorny contestations to the system concern facts related to the acceptance of IIL and ISDS as global institutions and systems with a direct bearing on individuals. In this sense, rather than starting from the criticisms that have emerged in the system, it is necessary to assess the legitimacy factors of the IIL and ISDS (to maximise them).

That clarified, this thesis assumes that diversity is among the main maximisers of legitimacy. This assumption originates from the same Marxist and pro-investor bias critiques mentioned earlier.

More in detail, four factors make it clear that the lack of diversity is a key element in the legitimacy crisis of IIL and ISDS:

i) Pro-western state and pro-investor bias are overlapping elements. Namely, investors are often from Western countries, creating an asymmetrical system in the sense of favouring (or rather seen as favouring) the West at the expense of the rest of the world;

ii) Such bias allegation finds further support in the origin of ISDS and IIL since they have their ancestor in the colonial and imperialist structures of the nineteenth century;[217]

iii) It is believed (rightly or wrongly) that in the origin and formation of the IIL and ISDS, there was a complete marginalisation of certain areas of the world, e.g. the African region, so that one can speak of a system in the image and likeness of Western interests;[218]

iv) The system lives on through ISDS and the decisions made by its arbitrators. In this sense, there is also a total marginalisation of importing countries, particularly African ones. In fact, neither are they usually called upon to decide disputes, nor are disputes settled before arbitration bodies set up in the territories of these states.[219]

2.5 Conclusions

It is not difficult to understand the rationale behind the attention given to diversity in the last years. Conversely, there are grounds to support this attention.[220]

The (alleged) Western prominence in IIL and ISDS, starting from the arbitrators to the doctrine and policy makers (coupled with the post-realist critique of the indeterminacy of

---

[217] See section 2.2.
[218] See, on Africa, El Kady H. and De Gama M. (2019), *The Reform of the International Investment Regime: An African Perspective*, ICSID Review, pp. 1-14; Parra A. R. (2019), *The Participation of African States in the Making of the ICSID Convention*, ICSID Review, pp. 1-8; Botchway F. N. (2019), *Consent to Arbitration: African States' Practice*, ICSID Review, pp. 278-295; Mbengue M. M. (2019), *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, ICSID Review, pp. 455-481; Akinkugbe O. D. (2019), *Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law*, ICSID Review, pp. 434-454.
[219] See Ofodile U. E. (2019), *African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges*, ICSID Review, pp. 296-364 (for a review of the decisions concerning African states); Onyema E. (2019), *African Participation in the ICSID System: Appointment and Disqualification of Arbitrator*, ICSID Review, pp. 365-387; Kidane W., *The Culture of Investment Arbitration: An African Perspective* (2019), ICSID Review, pp. 411-433.
[220] See note 38.

law and outcome biases),[221] justifies the view according to which the system is *de facto* a mechanism of Western dominance or at least an unfair mechanism.[222]

Addressing the lack of diversity in IIL (among policymakers, scholars, arbitrators, arbitral tribunals and so on) will (probably) positively impact the unbalance of the structure by i) (apparently) making it less a Western world instrument and ii) including alternative (less pro-investor and pro-exporting countries) perspective in the IIL and ISDS.

The issue, however, is to understand if any of the reforms would be able to address the legitimacy crisis of ISDS without detriment to the system's main goals and traits. Probably the main challenge for the future.

In this sense, this author suggests that the preliminary focus should have a methodological nature. In this regard, the proposal is not only to employ an economic approach to address the reform of IIL and ISDS but to consider diversity as an element to address the lack of legitimacy of ISDS.

As to the pursuit of the above-mentioned proposal, in the following sections and chapters, it will be addressed: i) how IIL and ISDS work; ii) what legitimacy means; iii) if diversity only concerns arbitrators' geographical, gender, ethnicity or race heterogeneity, or something more; iv) which are the connection between diversity and ISDS (in particular if there is room to claim that diversity is not just a matter of perceived legitimacy).

In light of the above, it would be possible to claim that diversity is an efficiency factor in ISDS, and its maximisation may (under certain conditions) improve the general efficiency of ISDS, not only its legitimacy.

---

[221] See Garcia Bielsa J. J. (2022), *Indeterminacy, Ideology and Legitimacy in Investment Arbitration: Controlling International Private Networks of Legal Governance?*, International Journal for the Semiotics of Law, 35, 1967-1994. As a concept, indeterminacy reflects the idea that the rules of international law cannot be identified nor their content determined with certainty. An approach grounded on the principle of indeterminacy of law entails a critical role on the identity of decision-makers.

[222] See notes 211 - 212. As mentioned in the introduction, the present author does not suggest that the view is correct, but limits the comment to acknowledge the reasonability of it. On the Africanization of international law and IIL (including ISDS), see: Mbengue M. M. and Schacherer S. (2017), *The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime*, The Journal of World Investment & Trade; El Kady and De Gama (2019), pp. 1-14.

3. IIL: SUBSTANTIAL AND PROCEDURAL RULES

3.1 Introduction

Before addressing the topics of legitimacy and diversity, an overview of the main substantive and procedural provisions of IIL and ISDS is deemed useful.

The purpose of this brief overview is not to analyse in detail the evolution and the main reform processes but to provide a reconstruction of the actual functioning of the system. This exercise will serve two purposes. On the one hand, it will help to understand the connection between the structure of IIL and the alleged legitimacy crisis. On the other hand, it would help grasping the impact on ISDS of the economic considerations referred to in chapter six.

To achieve the above, the chapter is divided into two sections. In the first section, some typical BIT substantive provisions will be analysed. The second section will reconstruct the various steps leading from the emergence of an international investment controversy to its resolution through arbitration.

SECTION A

3.2 Scope of application in IIAs

(a) The notion of investment

The notion of investment refers to assets (and related rights) that are qualified as protected investments under IIAs,[223] as well as to the criteria *ratione materie* to determine the competence of ICSID.[224] It follows that investment is a basilar concept in IIL. A preliminary condition for the existence of the same system.

---

[223] In terms of macro-category, it is possible to categorize investment in: foreign direct investments (which entails the controlling ownership of a business based in another country), portfolio investment (which entails a type of passive investment that does not – usually – involve the active management or control of a company), and other investment that cannot be qualified in none of those category. That clarified, definition of investment in treaties can be categorised in two opposite models: open and closed. In the modern versions of the first model, investments are defined as ‘every kind of asset’, then exemplified with several non-exhaustive cases (see, for instance, the Italian BIT Model 2020, Article 1.1.). On the contrary in closed model, relevant investment are specifically and restrictively enumerated (see, for instance, NAFTA, Article 1139). If the second model may be considered restrictive, the first arise problems in terms of clarity.

[224] ICSID Convention, Article 25(1). For an introductory overview on ICSID, see note 75.

Nevertheless, investment as a notion fails to have a clear meaning. Neither conventionally nor in customary law is it possible to find a uniform description of assets and activities that fall under the category of investments.

Of course, attempts to give coherence to the concept, at least within ICSID, have not been lacking.[225] On the contrary, there is quite a lively debate on the concept of investment, and different positions have emerged over time. In this regard, it is worth mentioning the works of Delaume, that in the 1980s proposed the concept of investment as a contribution to the host state's development,[226] and Carreau, which proposed the criteria of contribution, duration, and risk.[227] These authors' and others' works were reflected in the IIL caselaw on the interpretation of Article 25(1) ICSID Convention.[228] Firstly in Fedax v Venezuela case of 1996, where the Tribunal considered five requirements for qualifying activity as an investment:

[225] According to which a dispute would be justiciable if 'arising directly out of an investment'. As to article 25(1) of the ICSID Convention, a question arise about the relationship between ICSID and BIT definition of investment. As it will be better clarified below, ICSID is indeed a type of institutional arbitration to which usually IIA makes reference to. In other terms, in case of a violation of substantive rights conferred by an IIA (or other investment instruments), the damaged party can use the ICSID instrument to seek compensation. As a prerequisite to the application of the ICSID tool it is necessary that the violation concern an investment following under the scope of both the relevant IIA and ICSID. The question is thus, which is the relation between the definition of investment eventually provided by the IIA at issue (or the other investment instrument) and 'the one contained' in the ICSID. There are different approaches. However, the normal perspective is to consider Article 25(1) ICSID a standard of reasonableness to BIT scope of applications ('double barrelled approach'). Further stances are present, for instance in Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/229/romak-v-uzbekistan, (last access 8 January 2023), paras 192-207, where it is held that: '*BIT investment to be interpreted under ICSID definition*'; Acconci P. (2013), *The Unexpected Development -friendly Definition of Investment in the 2013 IDI Resolution*, The Italian Yearbook of International Law, Brill Academic Publishers, Vol. XXIII, 2013, pp. 69-90.

[226] See Delaume G. R. (1982), *Le Centre International pour le Règlement des Différends relatifs aux Investissements*, CIRDI, 109 JDI, 775-843, p. 801.

[227] See Carreau D., Juillard P. and Flory T. (1990), *Droit International èconomique*, Librairie géneérale de droit et de jurisprudence, pp. 560-563.

[228] The relevance of the interpretation of the concept of investment according to ICSID provisions is due to the double keyhole nature of the convention. More in detail, in order to establish its jurisdiction *ratione materiae* and/or *ratione personae*, an arbitral tribunal must therefore respectively assess that an alleged investment and/or investor qualifies as an investment and/or investor under the relevant applicable treaty and under the ICSID convention.

'The basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development'.[229]

Those criteria (further developed) became known as the 'Salini test',[230] after that the Tribunal in Salini v Morocco held:

'The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction […]. In reading the Convention's Preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contribution and duration of performance of the contract. As a result, these various criteria should assess globally even if, for the sake of reasoning, the Tribunal considers them individually here'.[231]

Salini and Fedax followed an objective approach,[232] which has not been the only one in the doctrine and caselaw. Indeed, some tribunals have leaned towards a more subjective perspective, attributing a more significant role to the consent of the parties (through the BIT),[233] while others have taken a more hybrid position, not recognising the relevance of

---

[229] See Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, para. 43, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/11/fedax-v-venezuela (last access 8 January 2023).

[230] The criteria were confirmed also in a concomitant case: Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6 https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/49/rfcc-v-morocco (last access 8 January 2023).

[231] See Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Award, para. 52 https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/50/salini-v-morocco (last access 8 January 2023).

[232] See also Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award, para. 53, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/135/joy-mining-v-egypt (last access 8 January 2023) (which added a fifth criteria: regularity of profit and return). See also Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award, para. 77 https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/191/helnan-v-egypt (last access 8 January 2023) and Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award, para. 100, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/223/phoenix-action-v-czech-republic (last access 8 January 2023).

[233] For instance, Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8, Award, paras. 130-131, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/293/inmaris-perestroika-v-ukraine (last access 8 January 2023); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, paras. 312-318, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/202/biwater-v-tanzania (last access 8 January 2023); Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID

consent but contesting that this may be sufficient in itself, also given the content of ICSID Article 25(1).[234]

The current doctrine and caselaw seem blurred and far from consistent in interpreting the concept of investment under Article 25(1) ICSID. In particular, as noted by various authors,[235] while tribunals seem to seek certainty and consistency in theory, they 'emphasize the importance of different criteria differently as they see fit. Thus, they replace the parties' subjective consideration with their own'.[236]

(b) *The notion of investor*

Besides the concept of investment, addressing the scope of application of IIL also means answering a further question, i.e. who is the investor?[237]

According to ICSID Convention, the *ratione personae* conditions that need to be satisfied are both those outlined in the Convention and those of the instrument containing the consent to arbitration, in accordance with the 'double keyhole' nature of ICSID.[238]

Investors may be either natural or legal, and the states are free to define the individual protection class under the IIA.[239]

Case No. ARB/05/10, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/205/mhs-v-malaysia, paras. 75-79 (last access 8 January 202); RMS Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Award, paras. 236-238, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/394/rsm-v-grenada (last access 8 January 2023). With the consequence that the concept of 'investment' is basically the one contained in the investment instrument coming into relevance in the single case.

[234] For instance, Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Award, para. 97, https://www.italaw.com/cases/3458 (last access 8 January 2023): 'In reliance on the consensual nature of the Convention, they [the Drafters] preferred giving the parties the greatest latitude to define these terms themselves, provided that the criteria agreed upon by the parties are reasonable and not totally inconsistent with the purposes of the Convention'.

[235] See *The Scope of Application of International Investment Agreements*, in Bungerberg and others (2015), p. 514.

[236] See *The Scope of Application of International Investment Agreements*, in Bungerberg and others (2015), p. 514.

[237] The question extend also to the topics regarding whether state and NGOs could be considered investors. See, among the others, Dolzer and others (2022).

[238] According to Article 25(2) of the Convention 'any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered [with the Centre], but does not include any person who on either date also had the nationality of the Contracting State party to the dispute […]'.

[239] See for example, Agreement Between the Government of the Republic of Finland and the Government of the Federal Republic of Nigeria on the Promotion and Protection of Investments, Article 1(3),

Commonly, reference to the natural person is made to nationals of contracting states other than the host state. More in detail, nationality is determined on the grounds of the 'applicable law' of that contracting state of which nationality is claimed.[240] There is also a tendency to extend protection to natural persons who reside or are permanently domiciled in the country's territory.[241]

BITs and other investment agreements usually have no comprehensive definition of legal entities.[242] However, like the definition of a natural person, the notion of a legal person is not the subject of particular controversy. Where it was, it was usually with reference to the necessary legal capacity to assert claims[243] or nationality planning and abuse of rights.[244]

---

https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1526/finland---nigeria-bit-2005- (last access 8 January 2022).

[240] See, for example, Nigeria-Finland BIT, Artivcle 1(3). In addition, in Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, para https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/83/soufraki-v-uae (last access 8 January 2023), the Tribunal said (para. 55): 'It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality… But is no less accepted when, in international arbitration or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge… Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue'.

[241] See for example, Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Art. 1, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/3711/morocco---nigeria-bit-2016- (last access 8 January 2023). Interestingly, in the Italian BIT Model 2022, the concept of national comprise any EU citizens which is established in Italy according to the EU laws (in detail, Articles 49 and 54 of the TFEU).

[242] See *The Scope of Application of International Investment Agreements*, in Bungerberg and others (2015), pp. 638 ff.

[243] For instance Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, para. 131, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/113/impregilo-v-pakistan-ii- (last access 8 January 2023) and the power to bring claim for and on behalf of swiss joint venture. Conversely, in Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), para. 418, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/284/abaclat-and-others-v-argentina, (last access 8 January 2023) was interpreted as extending its application also to legal entities with limited legal capacity(this also because the condition of full capacity was not clearly stated in ICSID convention and then Italian law should have been applied).

[244] *The Scope of Application of International Investment Agreements*, in Bungerberg and others (2015), p. 641 ff. In Saluka Investments B.V. v. The Czech Republic (para. 240), UNCITRAL https://www.italaw.com/cases/961 (last access 8 January 2023) it has been said on this regards that: 'The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty'.

That clarified several criteria applied in IIA autonomously or in combination. In particular, the following are usually employed in IIA:

i) Place of incorporation;[245]

ii) Seat criterion;[246]

iii) Control criterion;[247]

iv) The criterion of actual economic activity.[248]

3.3 (main) Standards of protection in IIAs

(a) *FET*

Fair and equitable treatment, or FET, is a core substantive standard in IIL, determining the absolute minimum treatment granted to foreign investors.[249]

---

[245] For instance, Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the People's Republic of Bangladesh Article 1, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/271/download (last access 8 January 2023). These criteria have raised concerns regarding the abuse of the right. Most of the tribunals, however, opposed to dismiss claim on this basis and stuck to the plain wording of BIT (and other agreements), for instance in the case Tokios Tokeles where 99% of the shareholder were Ukrainian while the company was incorporate in Lithuania. This, however, was opposed by the dissenting opinion of Prof. Prosper Weil (para. 20), who however issued the opinion on the grounds of the object and purpose of ICSID convention, and not of the BIT at issue.

[246] See Vertrag zwischen der Bundesrepublik Deutschland under Islamischen Republik Afghanistan -Ober die Forderung und den gegenseitigen Schutz von Kapitalanlagen, Article 1, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1/afghanistan---germany-bit-2005- (last access 8 January 2023). In some cases criteria i) and ii) are combined, as Agreement Between The Belgo-Luxemburg Economic Union And The Republic Of Armenia On The Reciprocal Promotion And Protection Of Investments, Article 1, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/167/armenia---bleu-belgium-luxembourg-economic-union-bit-2001- (last access 8 January 2023). In other cases, same concept but other wording, see in Accordo tra il Governo della Repubblica Italiana e il Governo Del Regno Hascemita Di Giordania Sulla Promozione e la Protezione Degli Investimenti, Article 1, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2082/italy---jordan-bit-1996- (last access 8 January 2023).

[247] It is usually used to extend the scope of investor definition. See, for instance, Agreement On Promotion, Encouragement And Reciprocal Protection Of Investments Between The Kingdom Of The Netherlands And The United Mexican States, Article 1(1)(3) https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2535/mexico---netherlands-bit-1998- (last access 8 January 2023).

[248] See for example in Agreement between the Swiss Confederation and the Republic of Belarus on the Promotion and Reciprocal Protection of Investments, Article 1 https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/450/belarus---switzerland-bit-1993- (last access 8 January 2023).

[249] See, among the others, Picherack J. R. (2008), *The expanding scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone too Far*, 9 JWIT 225-291; Mayeda G. (2007), *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment. Treaties* 41 JWT 273–291; Zeyl T. J.

Almost any IIA includes this provision, the only exception being the oldest models.[250]

With reference to the wording of FET provisions in the conventional instrument, they are manifold.[251] The difference also pertains to the structural side.[252] FET can be described in the preambles,[253] as a standalone provision[254] or in combination with other standards.[255] With regard to the normative content of FET, there are multiple positions in legal doctrine and caselaw. According to some views, FET is more or less synonymous with 'rule of law', considering how this principle is widely and globally spread.[256] According to this analysis, taking into duly consideration the specific formulation of FET case to case, the

---

(2011), *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law* 49 Alberta L. Rev. 203–235; Haynes J. (2013), *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns – The Case for Regulatory Rebalancing* 14 JWIT 114–146; Campbell C. (2013), *House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law* 30 J.

[250] For instance the Gesetz zu dem Vertrag vom 25. November 1959 zwischen der Bundesrepublik Deutschland und Pakistan zur Forderung und zum Schutz von Kapitalanlagen https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1732/germany---pakistan-bit-1959- (last access 8 January 2022), but even when left out it may be relevant in light of the most favourite nation clause.

[251] On the different ways of phrasing FET clauses, see Tudor I. (2008), *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press 15–52; Newcombe A. and Paradell L., *Law and Practice of Investment Treaties: Standards of Treatment* (2009) Kluwer Law International, 257–261; Kläger R., *Fair and Equitable Treatment*, in International Investment Law (2011) Cambridge University Press 9–21.

[252] See *Standards of Protection*, in Bungerberg and others (2015), p. 704.

[253] See e.g. Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment of 14 November 1991, Preamble, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download (last access 8 January 2023).

[254] See e.g. Agreement between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments of 27 January 2009 Art. 4(1), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4811/download. (last access 8 January 2023)

[255] See e.g. Agreement between the Federal Republic of Germany and the Hashemite Kingdom of Jordan concerning the Encouragement and Reciprocal Protection of Investments of 13 November 2007, Art. 2 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4960/download (last access 8 January 2023).(nestled in the 'Promotion and Admission' provision); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments of 19 June 1980 Art. 2(2) (in the same sentence as full protection and security) https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/390/bangladesh---united-kingdom-bit-1980- (last access 8 January 2023).

[256] On a contrary position, according to Trimble and Bozeman the word is not homogeneous in terms of value. In particular, Trimble believes that some of the core values of Asian and African societies are fundamentally inconsistent with the premises on which modern international law has been built (including rule of law and human rights more in general). See Trimble (1990).

latter involves (as non-exclusive elements): i) the principle of legality; ii) administrative due process and the denial of justice; iii) protection of legitimate expectations; iv) the requirement of stability, predictability and consistency regarding the legal framework; v) non-discrimination; vi) transparency; vii) principles of reasonableness and proportionality.[257]

FET has been the victim of harsh critics.[258] According to Salacuse, the standards are 'maddeningly vague, frustratingly general, and treacherously elastic'.[259] In the opinion issued in the Suez v Argentina case, Nikken further held that 'the development of the doctrine of legitimate expectations is the result of the interaction of the claims of investors and their acceptance by arbitral tribunals, buttressed by the presumed moral authority of the decided cases. I believe that the standard of fair and equitable treatment has been interpreted so broadly that it results in arbitral tribunals imposing upon the Parties obligations that do not arise in any way from the terms that the Parties themselves used to define their commitments. Indeed, more attention has been paid to what the claimants have considered the scope of their rights than what the Parties defined as the extent of their obligations. Unfortunately, I have not have the intelligence or the ability to convince my colleagues in this Tribunal […] about the irrationality and the weakness of this jurisprudence, of which I am convinced'.[260] As noted by Jacob and Schill, 'FET has become a lightning rod for much of the substantive protection of foreign investments […] FET is considered a legal standard, rather than an empowerment of tribunals to render decisions *ex aequo et bono* […]. Nevertheless, a uniform and doctrinally clear vision of what limitations the standard precisely entails for State measures affecting foreign investors remains elusive'.[261]

---

[257] See *Standards of Protection*, in Bungerberg and others (2015), pp. 717 ff. Clearer and more restrictive definition of FET have been introduced in new agreements as, for example, in CETA (see Article 8.10 and European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (last access 8 January 2023) and USMCA (see Article 14.6).
[258] *Standards of Protection*, in Bungerberg and others (2015), p. 703.
[259] See Salacuse (2010), p. 221.
[260] Suez v Argentina's separate opinion Nikken, para. 27.
[261] See *Standards of Protection*, in Bungerberg and others (2015), pp. 703-704. See also Schreuer C. (2005), *Fair and Equitable Treatment in Arbitral Practice*, 6 JWIT 357, 365; Perera S. M. (2012), *Equity-Based Decision-Making and the Fair and Equitable Treatment Standard: Lessons From the Argentine Investment Disputes – Part I,* 13 JWIT 210–255; Perera S. M. (2012), *Equity-Based Decision-Making and the Fair*

(b) *Full protection and security*

Very few IIAs do not include a full protection and security provision.[262]

The standard at issue originates from customary law as the state's duty to physically protect the personal integrity and the property of aliens in their territory.[263] The historical connection between these two concepts led to several discussions and positions in the legal doctrine and jurisprudence on the interrelation between the two.[264] It started with the AAPL v Sri Lanka case, which seemed to be suggesting that the two concepts are independent. It passed through Noble Ventures v Romania, where the minimum protection standard under customary law was considered equivalent to security and protection.[265] Then, it 'landed' with the most supported interpretation, according to which full protection and security are something more than customary law standards.[266] Of course, the standard finds the 'floor' in the relevant customary obligations, but in concrete, it requires something more (unless the BIT itself limits the provisions' relevance).

The above clarifies that it can be distinguished between an uncontested core of the provisions[267] and controversial additional features of it. In particular, anything beyond physical harm is debatable, not only on the grounds of distinction between this standard and minimum protection under customary law but also to the potential overlaps with FET

---

and Equitable Treatment Standard: Lessons From the Argentine Investment Disputes – Part II, 13 JWIT 442–485.

[262] For instance, Agreement Between the Government of the Arab Republic of Egypt and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments, as well as the Indian 2003 BIT model, https://edit.wti.org/document/show/8a4ecc95-6831-4a9a-a71f-11b5afb11251?textBlockId=8b150510-b9d6-4565-b566-87978fdab264&page=1 (last access 8 January 2023).

[263] See Dickerson H. (2013), Minimum Standards in R. Wolfrum, *The Max Planck Encyclopedia of Public International law*, Oxford University Press, Vol. 9.

[264] See *Standards of Protection*, in Bungerberg and others (2015), p. 771 ff.

[265] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11 https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/58/noble-ventures-v-romania (last access 8 January 2023).

[266] See, for instance, Azurix v Argentina.

[267] See Saluka v Czech Republic, where one of the ground protections within the standard at issue has been applied: 'the duty to prevent physical harm to investors and investment'. See also Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan ICSID Case No. ARB/05/16, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/185/rumeli-v-kazakhstan (last access 8 January 2023). Some doubts have been casted on how would be possible physical security of intangible assets (see Siemens v Argentina). In addition, if the content is undisputed, the level of protection to be provided is instead variable.

provisions. In particular, the interaction is seen in the context of the potential guarantee of a stable legal environment and with reference to the suppression of physical harm, since when physical harm occurs, the state's reaction is not merely preventive but of actual suppression of an event that has already taken place and/or is taking place.

Of course, the potential overlap between the FET and the protection and security provisions in the IIA is not an unsolvable problem, as long as it is possible to grant both clauses a minimum of autonomy and avoid considering them a mere (and unnecessary) repetition.

(c) *Most Favoured Nation*

MFN is a non-discrimination provision contained in IIAs that requires a contracting state to accord foreign investors and investments from another contracting state a treatment no less favourable[268] than the one accorded[269] to the investors and investments from third (non-contracting) States.[270]

Although MFN clauses are similarly drafted and are a common standard in IIAs,[271] investment caselaw has failed to develop a uniform interpretation of the clause.[272] The main controversy concerning MFN is whether it is limited to substantive favourable treatment or extends its scope to dispute settlement issues.

---

[268] A concept that should be considered as different from providing the same equal treatment, see Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, para. 243, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/183/daimler-v-argentina (last access 8 January 2023). Conversely, see Suez v Argentina and AWG Group Ltd. v. The Argentine Republic, UNCITRAL, para. 55, https://www.italaw.com/cases/106 (last access 8 January 2023).

[269] With reference to the temporal scope, it usually considered aimed at protecting from future discriminatory concession, there are doubts on whether this provisions apply to existing (at the time of the treaty) more favourable concession.

[270] The history of this clause can be retrace in the XII and XII century, already at that time European city states agreements contained MFN clauses. From XX century unconditional MFN clause have become the cornerstone of international commercial relation (for instance, see GATT, Article 1). See Hilf M. and Geiß R. (2012), Most-Favoured-Nation Clause, in Wolfrum R., *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Vol. VII, pp. 384-387. On the historic development of MFN clauses see also Schill S. (2009), *Multilateralizing Investment Treaties through Most-Favoured-Nation Clause*, Berkeley Journal of International Law, Vol. 27, p. 496, 509 ff.

[271] An example is the following: 'treatment accorded by the granting State to the beneficiary State, or to the person or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to a persons or things in the same relationship with that third State' in the International Law commission Draft Articles 1978 on MFC clause with commentaries, Article 5.

[272] See *Standards of Protection*, in Bungerberg and others (2015), p. 808 ff.

A landmark case in this regard is Maffezini v Spain. In that case, the Tribunal considered the jurisdictional issues covered by MFN.[273]

The decision triggered several reactions regarding treaty drafting (and amendment with annexes or interpretative declarations of existing treaties).[274] However, some states appreciated and supported the approach, such as Austria, that in 2008 added wording referring to dispute settlement in its model BIT.

As a general note, after Maffezini, there is not a prevailing view on the scope of application of MFN and the relevance of procedural treatments in the caselaw.[275]

(d) *National Treatment*

NT as MFN is a non-discrimination clause usually contained in IIAs.[276]

As MFN, NT is not an absolute standard (different from FET and full protection and security) but a relative or comparative standard. The protection provided by NT (and

[273] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/19/maffezini-v-spain (last access 9 January 2023).

[274] On the topic see, Olarte-Bacares C., Prieto-Rios E. and Ponton-Serra J. (2020), *Are interpretative declarations appropriate instruments to avoid uncertainty? The cases of the Colombia–France BIT and the Colombia–Israel FTA*, IISD Investment Treaty News, https://www.iisd.org/itn/en/2020/12/19/are-interpretative-declarations-appropriate-instruments-to-avoid-uncertainty-the-cases-of-the-colombia-france-bit-and-the-colombia-israel-fta-carolina-olarte-bacares-enrique-prieto-rios-juan-ponton-se/ (last access 9 January 2023).

[275] Example of endorsement, *ex multis*, Siemens v. Argentina, paras. 32-121; Gas Natural v. Argentina, para. 29; RosInvestCo UK Ltd. v. The Russian Federation SCC Case No. 079/2005, paras. 114 ff., https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/184/rosinvest-v-russia (last access 9 January 2023). Example of rejection, *ex multis*, Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan ICSID Case No. ARB/02/13, paras 101 ff., https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/96/salini-v-jordan (last access 9 January 2023); Plama Consortium Limited v. Republic of Bulgaria ICSID Case No. ARB/03/24, para. 199 ff., https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/133/plama-v-bulgaria (last access 9 January 2023); Telenor Mobile Communications AS v. Republic of Hungary ICSID Case No. ARB/04/15, paras. 92 ff., https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/158/telenor-v-hungary (last access 9 January 2023); Vladimir Berschader and Michael Berschader v. Russian Federation SCC Case No. 080/2004, paras. 184 ff., https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/155/berschader-v-russia (last access 9 January 2023).

[276] As MFN it trace its story to the European middle ages. See VerLoren van Themaat P. (1981), *The Changing Structure of International Economic Law*, Springer, pp.19–21; Bjorklund A. K. (2018), The National Treatment Obligation, in Yannaca-Small K., *Arbitration Under International Agreement*, pp. 532 ff; Schwarzenberger G. (1967), *The Principles and Standards of International Economic Law*, Brill, Leiden. Interestingly, in Calvo doctrine NT has a relevant importance not as a favourable treatment but as a limiting standard aimed at not providing to foreign investor a better treatment than to nationals. See Donald and Shea (1955).

MFN) is linked to the treatment provided to third parties. In the case of MFN, the treatment of third foreign investors, with NT, to other national investors.

The formulation of NT is quite standardised and usually appears as a standalone clause.[277] For instance according to Article 10(7) of the ECT:

'Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable'.[278]

The most relevant differences among IIAs about NT concern the existence of a protected right of entry and the exceptions to its application.

Lastly, it should be noted that besides NT, some IIAs provide for anti-arbitrary and discriminatory treatment.[279] However, often Tribunal considers the two overlappings and does not clearly distinguish them.[280]

(e) *Transfer of funds*

Transfer of funds is the provision aimed at conferring foreign investors' 'right to make transfers, to the types of payment covered by this right, to question of convertibility and applicable exchange rates, and in many cases also to limitation on free transfer of funds'.[281] As held in Continental v Argentina:

'This type of provision is a standard feature of BITs: the guarantee that a foreign investor shall be able to remit the investment country income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus

[277] It should be noted that this is not always the case. For instance, in Italy model BIT 2022, MFN and NT are regulated together under Article 5 of the model.
[278] The caselaw, while more recent than those concerning GATT and WTO, have focused on various issue regarding: the domestic comparator, the discriminatory intent, what is a discrimination (see *Standards of Protection*, in Bungerberg and others (2015), p.856 ff.)
[279] See Heiskanen V. (2008), Arbitrary/Unreasonable or Discriminatory Measures in Reinisch A., *Standards of Investment Protection*, Oxford University Press, pp. 87–110.
[280] For instance, Consortium RFCC v Morocco, para, 74.
[281] See *Standards of Protection*, in Bungerberg and others (2015), p. 871 ff.

any accrued capital gain, in case of sale or liquidation, is fundamental to the freedom to make a foreign investment and an essential element of the promotional role of BITs'.[282]

Conversely, the restriction of transfers can negative impact the value of the investment. In this regard, as argued by Sacerdoti: '[t]he provisions on monetary transfers are of the utmost importance for the foreign investor. The possibility of remitting from the investment country both the income produced and the value of the very investment made, plus any capital gain, in case of sale or liquidation is obviously of fundamental importance for any prospective or actual investor abroad'.[283]

The above should not undermine the several good reasons why a state may want to exercise its right to restrict the free flow of funds. There could be background reasons aimed at addressing the balance of payment problems, implementing anti-corruption measures, ensuring payment of taxes, avoiding capital flight and sheltering their currency (which may be of utmost importance during an economic crisis, as the Argentinian in the 2000s), or providing incentives to a foreign investor to reinvest capital gains the host state.[284]

(f) *Expropriation*

It should be firstly made clear that neither in the past nor currently the expropriation of foreign property is prohibited. On the contrary, international customary and conventional laws require that the expropriation is conducted under certain conditions. In particular, it usually requires that the power is exercised: i) for public purposes, ii) in a non-discriminatory way, iii) under compensation.[285]

We can distinguish different forms of expropriation. Direct expropriation (to date relatively rare) as 'forcible deprivation of property by means of administrative or legal measures'.[286] Indirect expropriation (*de facto* expropriation, creeping expropriations, tantamount measures and measures having an equivalent effect): the investors retain the

[282] See Continental Casualty Company v. Argentine Republic ICSID Case No. ARB/03/9, para. 239, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/117/continental-casualty-v-argentina (last access 9 January 2023).
[283] Sacerdoti G. (1997), 358-359.
[284] See *Standards of Protection*, in Bungerberg and others (2015), p. 872. Please note that, notwithstanding the prominence of the provision in an investment perspective, the relevant caselaw is scarce in number.
[285] For an overview on the topic, see *Standards of Protection*, in Bungerberg and others (2015), p. 962 ff.
[286] See *Standards of Protection*, in Bungerberg and others (2015), pp. 970-971.

formal property of the asset but substantially cannot exercise and/or benefit economically from it.

Arguably, the provision at issue is the most interesting from a historical perspective regarding its connection to the great historical moments of the XX century. In particular, compensation is seen as a mechanism to prevent states from obtaining an unjustified transfer of wealth from the investor's home state through expropriation. Indeed, significant nationalisations/expropriations followed specific historical events such as the Mexican and Soviet Union revolutions, the decolonisation process and the post-apartheid regime. From this point of view, the question about agreeing with Hull's formula (adequate, prompt and effective compensation) or supporting the interest of developing states and (current and former) communist states in limiting compensation from the concept of fullness to that of adequacy appears anything but purely theoretical. In the background, expropriation has also been a historical means of wealth distribution, particularly in cases where the previous distribution of national wealth (from which the investor benefited or was one of the main actors) was the product of historical imbalances and (perceived) injustices, which were often the trigger for decolonisation and revolutionary processes.

That clarified, from being the dominant claims in IIL until the 1950s, they now have a less critical role in this field, as FET and other standards have become a central protection standard for investors. Currently, disputes usually concern whether an interference could be considered an expropriation; less focus is given to the compensation side. The question is everything but uncontroversial, and multiple approaches can be found in jurisprudence. In addition, with reference to the interference, the caselaw usually refers to a quantitative requirement (in terms of the impact of the interference) and, more recently, to the context and purpose of the measures. Also, in this regard, the approaches have been manifold, with a trend to balance investors' rights and their legitimate expectations with the public interest of host states.[287]

(g) <u>*Umbrella clauses*</u>

The Umbrella clause 'creates a reciprocal international law obligation owed by and between contracting States requiring them to observe such obligations that they may enter

---

[287] See *Standards of Protection*, in Bungerberg and others (2015), pp. 902 ff. and 1030.

into with investors of the other contracting State or with regard to the investment of such investors, and sometimes both. Coupled with an investor-State dispute settlement mechanism, umbrella clauses apparently afford a direct remedy in international law to foreign investors regarding their investment-backed State contracts and other obligations that a State may enter into or regarding their investment'.[288]

They are arguably one of the most troubled and divisive provisions in IIAs for their far-reaching scope.[289] They elevate to a treaty status the obligation contracted by the state in private negotiation with investors and/or any other domestic law assumed obligation.[290]

(h) *Obligations for investors*

Investor obligations are those legal requirements in an investment instrument that does not impose conditions on the host state but on investors. They can be:[291]

i) direct obligations of conduct;[292]

---

[288] See *Standards of Protection*, in Bungerberg and others (2015), pp. 888-889.

[289] See *Standards of Protection*, in Bungerberg and others (2015), pp. 895 ff.

[290] Models of umbrella clauses are the following: United Kingdom Model BIT, Article 2: '[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party'. Article II(2) of the 1984 and the 1987 United States Model BITs: '[e]ach Party shall observe any obligation it may have entered into with regard to investments'. Germany Model BIT 1999, Article 8: '[e]ach Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party'. Article 10 of the Switzerland Model BIT: '[e]ach Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party'. Article 3(4) of the Netherlands Model BIT: '[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party'.

[291] See *Obligations of Investors*, in Bungerberg and others (2015), pp. 1160 ff.

[292] It is not widely widespread, whereas in gaining momentum, some examples are regional treaties, in particular in Africa (see Morocco-Nigeria BIT, for instance under Articles 14 and 18, 19 and 20), and in some of the so called new generation BIT (for instance, the Dutch Model BIT 2010, which impose the respect of Corporate Social Responsibility to investors under Article 7). And again, for instance, the Community Investment code of the Economic Community of the Great Lakes countries date 1982, article 19 where it is provided the establishment of programme of local manpower training and advancement of local managerial staff. Again, the COMESA Investment agreement articles 11- and 13 (obligation to comply with domestic law), and article 16 obligation to hire qualified persons from any country needs to give a priority to workers with same qualification available in the MS or other MS and Article 10 Annex 1 SADC protocol on finance and investment 2006 (obligation to comply with domestic law). Ghana and Botswana included investors' obligation in their model BIT. See *Obligations of Investors*, in Bungerberg and others (2015), pp. 1160-1165, where it is observed also that direct obligation arise important substantial and procedural issue. In particular, with reference to jurisdiction as ISDS is currently structured in order to provide enforcement rights to investors and not viceversa.

ii) indirect obligation of conduct;[293] and/or

iii) obligation to tolerate regulatory measures.[294]

The issue of investors' responsibility is far from new, although most IIAs focus on investor protection and do not impose direct obligations on them.[295] However, it is undoubted that in recent years there has been an increasing emphasis on the theme for several reasons. Among those, it is relevant to mention the growing importance of non-state actors and civil society in international law.

The issue of investors' public obligation is pre-eminent in the quest for IIL reform. It is no coincidence that the most developed obligations come from models developed by African states and capital-importing states.[296] The foregoing is because imposing obligations on investors is perceived as the most direct and effective way to force them to contribute (or at least not negatively impact) the territory in which they invest.

---

[293] See *Obligations of Investors*, in Bungerberg and others (2015), pp. 1165. This category includes provisions in investment agreements that signal a commitment towards corporate social responsibility, while not being legally binding on investors. An example is Article 72 of the EPA CARIFOURM foresees that the parties 'shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that' investors comprehensively abstain from engaging in corruptive business practices (lit. a), act in accordance with core labour standards as stipulated in the ILO (International Labour Organisation) Declaration on Fundamental Principles and Rights at Work (lit b), do not 'manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements' signed and ratified by the parties (lit. c) as well as 'establish and maintain, where appropriate, local community liaison processes' (lit. d); or COMESA investment agreement art. 7 para 2.Article 7 para. 2 lit. d that the CCIA Committee shall be responsible for 'making recommendations to the Council on any policy issues that need to be made to enhance the objectives of this Agreement'. Thereby, it explicitly refers to 'the development of common minimum standards relating to investment in areas such as' environmental and social impact assessments, labour standards, respect for human rights and corruption'. See also Section 3 of the Italian BIT Model 2022, where interestingly it has been acknowledged also the right of counterclaim of State against the investor. On the topic, see M. C. Malaguti, *The New Italian Model Bit Between Current and Future Trends* (2021) Brill.

[294] Traditionally the most widely use instrument, as well the most indirect. Example FTA between USA and OMAN para. 4 lit. b Annex 10-B '[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations'.

[295] See, *inter alia*, *Obligations of Investors*, in Bungerberg and others (2015), pp. 1154 ff.; Acconci P. (2005); Choudhury B. (2020), *Investor Obligations for Human Rights*, ICSID Review – Foreign Investment Law Journal, Vol 35, Issues 1-2, pp. 82-104; Kryvoi Y. (2012), *Counterclaims in Investor-State Arbitration*, Minnesota Journal of International Law, Vol. 21, issue 1, pp. 216-252; Krajewski M. (2020), *A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty Application*, Business and Human Rights Journal, Vol. 5, No. 1, pp. 105-129; Kessedjian C. (2021), *Rebalancing Investors' Rights and Obligations*, The Journal of World Investment, Vol 22, Nos. 5-6, pp. 645-649.

[296] See, for instance, Morocco and Nigeria BIT 2016.

Furthermore, it allows states to place their development and social needs on the table, preventing the discourse of economic profit from becoming the only point of view when considering investments. It is arguable that, given the public and sovereign law impact of IIL, a stronger focus on bilateral (or trilateral) obligations between private and public actors would probably make the system more sustainable and equilibrated.

The growing quest to include this obligation, and the developing states' views on it, coupled with the increased sensitivity of Western countries to environmental, labour, human rights and general social concerns, would probably be a trigger for an increased number of investors' obligations in the coming years. It is no coincidence that also, given the role of civil society and the impact of multinationals on global and national economies, even Western BIT models (such as the Dutch 2019 one) included direct obligations for investors or, in any case, (as the Italian 2022 one) extended the scope of application of corporate investor responsibility. Moreover, this is increasingly a further incentive to move away from the asymmetric nature of the current ISDS, whereby the state can also enforce investor obligations through these instruments. In conclusion, the obligation of investors is a topic that gained new momentum and probably would be one of the main cornerstones of a 'new' IIL, less unbalanced towards capital exporting countries' interests (and short-term investor's return).[297]

SECTION B

3.4 Preliminary remarks on investment-arbitration

(a) Numbers of ISDS

As of 2022, the cumulative of known ITA cases reached 1,229.[298] At least 130 states (including more than 80 developing countries) and one economic grouping were involved. In particular, in terms of respondent states, Argentina ranks first with 62 claims, followed by Venezuela with 57 cases and Spain with 56. On the opposite, in terms of

---

[297] On the debate see Mann H. and others (2005); Kriebaum U. (2006). In this regard, among the various initiative, it is worth mentioning the '*Working Group Hague Business and Human Rights Arbitration Rules Project*" and *The Hague Rules on Business and Human Rights Arbitration* (2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (last access 9 January 2023).

[298] The data referred to in this section are collected from: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1000 (last access 8 January 2023) and UNCTAD (2022), ILA Monitor, Issue 1, July 2022, https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf (last access 8 January 2023).

claimants, developed-countries-based investors brought most of the claims (about 75% in 2021). The highest number of claims are coming from investors based in the United States (207 cases), the Netherlands (128 cases) and the United Kingdom (100 cases).[299] With reference to the applicable IIAs, BITs have been called into question 940 times (including in the counting when more than one BIT has been invoked in the same proceeding, as in the Foresti case), followed by ECT 150 times and NAFTA 76 (in addition to other five cases on the grounds of the 'brand new' USMCA). Of the known cases, the ICSID Convention was applied in 660 cases, followed by UNCITRAL Rules (381 cases),[300] ICSID Additional Facility (69 cases), SCC (56 cases) and ICC (22 cases). With reference to the administering institution, ICSID has been called into question in 761 cases (applying ICSID Convention, ICSID Additional Facility and UNCITRAL Rules),[301] followed by the PCA (217 cases) and SCC (56 cases).[302]

In addition, as of 2022, there have been 151 ICSID annulment proceedings (39 pending), 7 ICSID resubmission proceedings (two pending) and 135 (known) judicial reviews by national courts (24 pending). More in detail, in the annulment proceedings, five times the awards/decisions were actually annulled entirely and ten times partially. In the judicial review by national courts, there have been 20 entire settings aside and five partial settings aside.

(b) *ICSID and institutional arbitration vs UNCITRAL rules and ad hoc arbitration*

[299] It is worth noting that the Netherlands, as a respondent in investment arbitrations, only received its first claim in 2021.
[300] Reference is made to all the different version of the rules: i) the 1976 version; ii) the 2010 revised version; and iii) the 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration and iv) the 2021 version which incorporates the UNCITRAL Expedited Arbitration Rules.
[301] As well as *ad hoc* rules, as in the (pending case) Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland ICSID Case No. ADHOC/15/1, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1111/strabag-and-others-v-poland (last access 9 January 2023).
[302] Please note that in some cases data are not available, as well in other in other case no administering institution has been involved. An African arbitral institution has been involved only two times, the CRCICA (and time applying CRICA arbitral rules and another time applying *ad hoc* rules).

As a standard, IIAs offer investors more alternative methods of arbitration.[303] Commonly, IIAs refer to the ICSID Convention,[304] ICSID Additional Facility rules,[305] UNCITRAL Arbitration Rules,[306] Rules of Arbitration of the ICC,[307] LCIA Arbitration Rules[308] and Arbitration Rules of the Arbitration Institute of the SCC.[309] However, in the predominance of cases (as seen in the preceding section), arbitral proceedings are ultimately administered by the ICSID (applying the ICSID Convention) or governed by the UNCITRAL Rules.

But what does it mean that a dispute is administered by an arbitral institution or is based on *ad hoc* arbitration?

Institutional or administered arbitration is a form of arbitration conducted with the support of, and according to the rules of, an arbitral institution. The arbitral institutions provide a set of rules and a list of services to the parties through its structures.[310] From this perspective, an administrated or institutional arbitration gives birth to a contractual relationship between the parties and the institution. On the contrary, in *ad hoc arbitration,*

---

[303] For instance, according to Article 26(4) ECT:
'(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph 2(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
(a) (i) the International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and National of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facilities Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;
(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or
(c) an arbitral proceedings under the Arbitration Institute of the Stockholm Chamber of Commerce."'

[304] ICSID Convention arbitration is governed by ICSID Convention, ICSID Institution Rules, ICSID Arbitration Rules and ICSID Administrative and Financial Regulations. See https://icsid.worldbank.org/procedures/arbitration/convention/overview/2022 (last access 9 January 2023).

[305] See https://icsid.worldbank.org/rules-regulations/additional-facility (last access 9 January 2023).

[306] See https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration (last access 9 January 2023).

[307] See https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ (last access 9 January 2023).

[308] See https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (last access 9 January 2023).

[309] See https://sccarbitrationinstitute.se/en/resource-library/rules-and-policies/scc-rules (last access 9 January 2023).

[310] As for instance, providing spaces, appointing arbitrators, providing comprehensive set of rules, providing review of awards formal legitimacy and more else.

the proceedings are governed by the rules established by the same IIA or directly by the parties after the dispute arises, with or without referral to a set of predeterminate *ad hoc* rules. In this regard, as seen by the relevance of UNICTRAL Rules, *ad hoc* arbitration does not mean that contracting states and/or dispute parties must draw up arbitration rules from scratch.[311]

From a comparison in terms of costs and benefits, it could be argued that, on the one hand, *ad hoc arbitration* grants considerable freedom to parties. On the other hand, the clear advantage of administered arbitration is that the parties do not have to formulate their own rules for conducting disputes, which may be complex and challenging.

Having clarified the above, the ICSID and the UNCITRAL Rules will be analysed in more detail in the next sections. Indeed, it is reasonable to address the steps and rules that the relevant agents need to follow and comply with in the arbitral processing by providing an overview of the functioning of ICSID as an institutional arbitration method and the UNICTRAL Rules as a set of rules usually referred to in *ad hoc* arbitration.[312]

(c) *Costs and duration of arbitration*

Investment arbitration is extremely expensive.[313]

Since most of the IIAs do not provide any guidance on costs, arbitration rules play a critical role in shaping the costs of the mechanism for the parties. More in detail, most of the arbitration rules have clear provisions on costs (their determination, administrative and tribunal fees).[314] However, the rules at stake usually leave the tribunal and parties to question the cost allocation.

[311] It is *ad hoc* arbitration because the UNCITRAL Rules are not linked to any institution. Indeed, for instance, under UNCITRAL the arbitrator appointing authority (if the parties do not indicate or are not able to indicate their arbitrations) is the Secretary General of the Hague Permanent Court of Arbitration.
[312] For a general overview, see *Dispute Resolution*, in Bungerberg and others (2015), p. 113 ff.
[313] For a review about statistics of ISDS in terms of costs, see Hodgson M. Kryvoi Y. and Hrcka D. (2021), *2021 Empirical Study. Costs, Damages and Duration in Investor-State Arbitration*, British Institute of International and Comparative Law and Allen & Overy, https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf (last access 9 January 2023).
[314] For instance, with reference to arbitrators fees, ICSID acknowledge arbitrators up to US $3,000 per day of meeting or other work (see, Schedule of Fees and Articles 5 of the Additional Facility Rules), whereas UNCITRAL Rules (both 1976 (Article 39) and 2010 versions (Article 41), refers to the concept of ‘reasonable arbitrator fees’),

In general terms, parties incur two different categories of costs: i) party costs (fees and expenses of legal counsel, as well as for witnesses and experts, travel, translations and other related cots); ii) arbitration or tribunal costs, mentioned above (which comprise fees and expenses of the tribunal, as well as any administrative costs to be paid).

Up to 2020, the median costs incurred by parties for investment arbitration have been 3.8 million dollars for investors (mean of 6.4 million) and 2.6 million dollars for respondent states (median of 4.7 million).[315] From a comparative point of view, ICSID has been more expensive than UNCITRAL-based disputes in total costs.[316] However, there is no 'winner' in terms of arbitration or tribunal costs.[317]

With reference to the duration of proceedings, the median length of known proceedings has been 4.4 years.[318] In this regard, it should be noted that from 2017 to 2020, there has been a sensible increase in the duration of proceedings compared to the past.[319]

(d) *Selection of arbitrators*

A fundamental feature and right in arbitration is one of the parties to nominate or appoint the arbitrator of their choice. Moreover, the arbitrator is an essential actor in the proceeding, as 'the quality of arbitration proceeding depends to a large extent on the quality and skill of the arbitrators chosen'.[320] Hence, the parties' choice is not just a right but an essential step in their judicial strategy.

It is indeed held that '[o]nce a decision to refer a dispute to arbitration has been made, nothing is more important than choosing the right arbitral tribunal. It is a choice which is important not only for the parties to the particular dispute, but also for the reputation and standing of the arbitral process itself'.[321] Thus, as noted by Onyema, 'to make an informed choice, the party has certain clear attributes it must look for in the prospective arbitrator. This would of necessity, depend on what the party hopes to achieve from the arbitration.

---

[315] See Hodgson M. Kryvoi Y. and Hrcka D. (2021), p. 11.
[316] See Hodgson M. Kryvoi Y. and Hrcka D. (2021), p. 11.
[317] See Hodgson M. Kryvoi Y. and Hrcka D. (2021), p. 13.
[318] See Hodgson M. Kryvoi Y. and Hrcka D. (2021), p. 32.
[319] See Hodgson M. Kryvoi Y. and Hrcka D. (2021), p. 32.
[320] Lew J. D. M., Mistelis L. A. and Kroll S. M. (2003), *Comparative International Commercial Arbitration*, p. 232, Kluwer.
[321] Redfern A. and Hunter M. (1999), *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, p. 190.

This of course, would differ depending on whether the party is a claimant or respondent, solvent or insolvent, amongst others'.[322]

The question is: how do parties select arbitrators?

As mentioned above, parties select arbitrators in line with their goals for their same participation in the arbitration. As also noted by Onyema, '[w]here the party does not have any interests or incentives in pursuing the arbitration (typically assumed to be the position of most respondents) it might decide not to cooperate with the other party and frustrate the proceedings as much as is possible. It might refuse or fail to meet appointment deadlines as provided in the laws/rules or even refuse to make any appointments. It might delay the proceedings by repeatedly asking for extension of time very close to agreed deadlines. The arbitral tribunal would have to indulge such dilatory tactics (for some time) so as not to jeopardize its award for failing to give the party an opportunity to present its case and answer to that of its opponent. The tribunal would carefully document all such dilatory actions in its award to show that the party was actually given the opportunity to participate fully in the proceedings. In this case, the parties would need to appoint arbitrators who are flexible but firm enough to appreciate and provide for these dilatory tactics.'[323]

Apart from these more extreme cases, other criteria may be relevant for parties. For example, experience in the management of cases, team-working (as the arbitrators in the panel need to be capable of working together; especially if they are of different nationalities and legal backgrounds); professional qualification and type of expertise, availability (it would be frustrating to have an arbitrator that cannot devote its time to the proceedings), and familiarity with the language(s) of arbitration. Moreover, nationality can be another relevant criterion (also in terms of 'affinity' with the party).

In order to select their arbitrators, the parties (or the institutions) then need to proceed along a (costly) selection process made by research and interviews. Selection is a pretty complex part of the arbitration process (in the broad sense), as the parties and arbitrators need to get in touch without negatively impacting the adjudicator's impartiality. Indeed,

---

[322] See Onyema E. (2005), *Selection of Arbitrators in International Commercial Arbitration*, SOAS, https://eprints.soas.ac.uk/4424/1/Selection_of_arbitrators.pdf (last access 9 January 2023), p. 2.
[323] Onyema (2005), p. 9.

even when nominated or appointed by the party, the arbitrators remain a third independent and impartial party.

In this regard, diversity debates have been usually linked to this process, as diversity-bias claims argue in favour of the unconscious bias of arbitrators, which cannot be eliminated except with an increased (or even imposed) heterogeneity of the arbitral tribunal.

3.5 Preliminary steps

(a) Jurisdiction and admissibility

Address foreign investment protection under international law entails also exploring how investors can enforce their rights and force host states to comply with standards of protection. To this end, the following paragraphs and sections will provide an overview of the steps a party has to go through when seeking judicial protection of a right. The focus will be on ITA. Nonetheless, most of the considerations highlighted below can broadly apply to ISDS.[324]

Firstly, following an alleged violation of the host state, the investor has to preliminary assess whether its asserted right is (in the broad sense) justiciable. The assessment requires to evaluate both 'the power of a court or judge [as well as tribunal and arbitrators] to entertain an action, petition or other proceeding' (i.e., the jurisdiction)[325] and 'the power of a tribunal to decide a case at [that] particular point in time in view of possible temporary or permanent defects of the claim' (i.e., the admissibility).[326]

The first prerequisite for jurisdiction is the existence of a dispute.[327] For instance, Article 25 of the ICSID Convention expressly refers to 'legal disputes' (for instance, according

[324] As mentioned, the choice to focus exclusively on arbitration is due to the fact that most of the literature on diversity and legitimacy of ISDS has been on the procedural matters and the role of arbitrators. Less focus has been given to policy making (and potential biases), consent from states and roles of the other actors in ISDS (with notable exceptions, as for example the studies concerning African marginalisation in IIL more in general; see notes 218 and 219). To simplify the analysis in this work the focus will be only on arbitration as such and on arbitrators. However, as it will be pointed out time-to-time, the work have a broader look to each feature of ISDS.
[325] See *Dispute Resolution*, in Bungerberg and others (2015), p. 1299 note 30. See also, Bernardini (2008), p. 1213. See also Douglas Z. (2009), *The International Law of Investment Claims*, Cambridge University Press, p. 293, distinguishing the existence of an adjudicative power (*l'attribution de la juridiction*) and the scope of adjudicative power (*l'étendue de la juridiction*).
[326] See *Dispute Resolution*, in Bungerberg and others (2015), p. 1213.
[327] It is generally not permissible to have merely theoretical rulings on issue which do not have any grounds on a concrete claim from a party towards another. This makes particular sense in ISDS where there is not a

to the Report of the Executive Directors, the existence of a legal dispute means that 'while conflict of rights are within the jurisdiction of the Centre, mere conflict of interests are not').[328] Furthermore, the scope of jurisdiction limits the investor's right to apply for protection, i.e.:[329] i) *ratione personae*, it is usually limited to disputes between contracting host State (or any subdivision or agency) and national (individual or companies) of another contracting state; ii) *ratione loci*, the investment at issue needs to be made within the territory of the contracting host state; iii) *ratione temporis*, the jurisdiction should exist at the moment the processing is registered, and jurisdiction exists for conducts (in the broad sense) that took place or continue to exist after the entry in force of the IIL obligation and until the expiration of the same (also considered the so-called sunset clause, according to which an IIAs protection validity could continue various years after the formal denunciation of the same);[330] iv) *ratione materiae*, there should be an activity which can be framed as an investment.[331]

With reference to jurisdiction, it is important to mention the *Kompetenz-Kompetenz* doctrine, according to with 'power to be the ultimate arbiter of disputes concerning the extent of those limited competences'[332] is conferred to the same arbitral tribunal. The importance of the principles is linked to the fact that its absence 'would imply that tribunals need to declare themselves incompetent whenever one of the parties disputed

---

'rule of precedents' system or an appeal mechanism protecting the consistent and current interpretation of the law (such as the Court of Cassation in the Italian legal system).

[328] ICSID (1993), *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965*, ICSID Reports, Vol. 1, p. 28. The issue with IIL is that counterclaims are not usually at the host states' disposal. Indeed, IIAs are mainly composed of asymmetrical obligations, exclusively upon states. Therefore, counterclaims in IIL are usually at disposal when the ISDS arises from contractual obligations. Please note that counterclaims are different that objections on the merits, because they ask a condemnation against the same claimant, or in any case a remedy against the latter, and not just to dismiss the main claim on the basis of certain assertations.

[329] See *Dispute Resolution*, in Bungerberg and others (2015), p. 1241 ff.

[330] In particular, sunset clauses (sometimes also referred to as survival or grandfathering clauses) guarantee that all investments made prior to the termination of a treaty continue to be protected during a certain period of time, typically ranging from five, ten, 15 and up to 20 years. The function of the sunset clause is to protect the legal expectations of the investors who made their investments based on the protection offered by the existing investment treaty. Indeed, many investment treaties also cover investments made prior to the entering into force of the treaty.

[331] Not every admissibility conditions requires a preliminary activity (positive or negative). For instance, the fork-in-the-road clause 'merely' provide that arbitral protection is alternative and not cumulative with domestic court litigation. If the claimant opt for litigation, arbitration is no longer available.

[332] See *Dispute Resolution*, in Bungerberg and others (2015), pp. 1231-1232.

the tribunal's jurisdiction, even on spurious grounds'.[333] The principle indeed can be found in several treaties, including Article 41(1) of the ICSID Convention and 23(1) of the UNCITRAL Arbitration Rules.

On the admissibility conditions (whether 'the claims before the tribunals are temporally defective'),[334] the main ones are the following:[335] i) the fork-in-the-road clauses, according to the investor needs to choose from the outset between the domestic court and international arbitration, '[i]f the investor chooses to settle the dispute in domestic courts, the option of international arbitration is no longer available, and viceversa';[336] ii) the cooling-off period; iii) the exhaustion of local remedies.

If there is jurisdiction and the admissibility conditions are met, the investor may initiate proceedings against the host state.

(b) *Cooling off-period and the exhaustion of local remedies*

To invoke a right recognised by an IIA before an ISDS tribunal, the investor's claim must fall within the jurisdiction of the tribunal and must be admissible. The admissibility prerequisite often requires the investor to take a number of preliminary steps before filing the claim (as outlined in the previous section).

Among them, it is widespread that the BITs provide for a 'cooling-off period' clause. During this period, the investor is obliged to seek an amicable settlement of the dispute.[337] Of course, the parties are not prevented from negotiating in the absence of such a provision. However, its existence imposes them to consider discussing among each other and avoid impetuous claims.[338]

Besides the 'cooling-off period', preliminary to arbitration, investors may be forced to exhaust local remedies. According to this clause, the party is required to file the claim before the domestic court of the host state. Arbitration is available to it only when no local authority is entitled to hear its petition(s). The rationale of the clause is evident, as it

[333] See *Dispute Resolution*, in Bungerberg and others (2015), p. 1232.
[334] See *Dispute Resolution*, in Bungerberg and others (2015), p. 1273.
[335] With reference to prerequisites, as the waiting clauses, they can be framed as jurisdiction requisites or admissibility one, it depends whether they can be considered as condition of the consent or not.
[336] See *Dispute Resolution*, in Bungerberg and others (2015), p. 1381.
[337] For instance, see US-Argentina BIT, Article 7.
[338] With reference to the nature of this preliminary step, it is it debated if it is jurisdictional or could be considered an admissibility condition. See *Dispute Resolution*, in Bungerberg and others (2015), p. 1293.

expresses the willingness to safeguard state sovereignty by requiring to seek to redress the harm suffered before domestic bodies before moving to international fora. However, even more than cooling-off clauses, this rule could sensibly harm the expectations of the investor, which may be forced to unnecessarily wait years before seeking relief before an arbitral tribunal.

3.6 The Arbitral Proceedings

(a) *Conduct of arbitration*

The conduct of arbitration is strictly connected to the arbitral rules and, in any case, leaves some room for the parties' and arbitrators' management autonomy.

As to the end of the present thesis, it is not relevant to address the topic in detail. On the contrary, it is sufficient to make some limited remarks.

In particular, as a general outline, the conduct of arbitration can be outlined as follow: a) those activity aimed at constituting the tribunal; b) once the tribunal has been constituted, the activities aimed at obtaining the relevant information on the case (also through evidence gathering); c) the final deliberation process that conducts to the awards; d) the post-award activities and remedies.

As to phase b) it is sufficient to say that it is often divided into a written and an oral part. In addition, it is worth mentioning the trend of bifurcation. Hence, the separation of the proceedings into distinct phases addresses different discrete issues (usually, the separation is between jurisdictional issues and merits or liability and damages).

(b) *Appointment of arbitrators*

The first *strictu sensu* procedural step in arbitration is the appointment of arbitrators. In *ad hoc* arbitration, the arbitrators are appointed according to the arbitration agreement contained in the IIA or agreed between the parties. If the parties fail to meet the requirement or no rules are set, the only alternative is to refer to the mandatory law of the seat of arbitration. UNCITRAL has some fall-back mechanisms, which grant an appointing authority (the Secretariat General of the Hague Permanent Court of Arbitration) the power to intervene under the conditions set forth by Articles 8-10 of the UNCITRAL Rules and set the number of arbitrators to three. In UNCITRAL, the appointment is made through the notice of arbitration, which is a notice of intention which

shall contain: a demand that the dispute should be referred to arbitration; the names of the parties; identification of the arbitration agreement and other agreements from which the dispute stems; a 'brief' description of the claim and an indication of the amount involved; the relief or remedy sought; a proposal about the number of arbitrators; the language; and, the place of arbitration if not previously agreed. The notice may also include a proposal for the designation of the appointing authority and a notification of the appointment of an arbitrator.[339]

On the other hand, if institutional arbitration applies, the appointment of arbitrators (and the registration of the case, which means the 'notification' of the existence of a dispute to the selected institution and the request to administer it) is made in accordance to the rules of the relevant arbitration institution.[340] In ICSID arbitration, the first act is the request for arbitration pursuant to Article 36 of the ICSID Convention,[341] which is sent to the Secretary-General. The subsequent steps are registering the request[342] and constituting the tribunal.[343] In these later steps, a significant role is played by the nationality of arbitrators. ICSID imposes that the majority of the arbitrations have to be not of the same nationality as the contracting states. These rules can be waived if the parties' agreement appoints the arbitrators (or the sole arbitrator).[344] When the selection is made by the ICSID and not by the parties, the arbitrators are usually selected from a pre-defined panel, and the rule is that it should be an arbitrator not of the nationality of the contracting States.

---

[339] See Article 3 UNCITRAL rules.

[340] The registration (in the broad) sense it is usually indicated as the date of commencement of the arbitration. In *ad hoc* arbitration is relevant instead the date where the applicant serve a notice of arbitration (which usually includes the appointment of the party's arbitrator, if agreed) to the respondent (in UNCITRAL rules this is set by Article 3.2).

[341] The content of the request are specified in in Rule 2 of the ICSID Institution Rules. The request must designate: '(i) the names of the parties and indicate if one of them is a subdivision or an agency of the contracting States; (ii)the date of consent and the instrument where such consent was recorded; (iii) the nationality of the party who is a national of a contracting State; (iv) the matter in dispute and in particular the legal issue arising out of the investment; (v) when the national is a juridical entity, a statement confirming that the actions has been authorised by the relevant internal organs'. Rule 3 of the ICSID Institution Rules states that there may be some optional elements, such as the number and/or method of appointment of the arbitrators and any other provision for the settlement of the dispute.

[342] The Secretary-General must register the request unless the dispute seems manifestly outside the jurisdiction of the Centre.

[343] The number (mandatorily uneven) and method of appointment of arbitrators is determined by the parties. In the absence, the default rules is that there are three arbitrators, each side appoints one and the president is agreed by the parties. If an agreement misses, the appointment would be made by the centre of arbitration (in the behalf of its chairman, i.e. the president of the IBRD).

[344] See ICSID Convention, Article 39.

(c) Constitution of the arbitral tribunal: independence and impartiality

Other essential principles (rules) that regulate a tribunal's constitution and its activity during the proceedings are those concerning the independence and impartiality of the arbitrators. The absence of these qualities may lead to their challenge and disqualification.

Increasing attention has been posed to this issue, and in this regard, an important role is held by the IBA Guidelines on Conflict of Interest in International Arbitration (adopted by resolution of the IBA Council in 2014).[345] A usual duty linked to the impartiality and independence requirement is the duty of disclosure upon the arbitrators. An arbitrator should disclose, also during the proceedings, 'any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality'.[346]

With reference to this requirement, ICSID is set forth that '[p]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators' and '[a] party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14 [...]'"[347]

Conversely, a more relaxed requirement is provided by UNCITRAL, which calls for proof that a particular fact is 'likely to give rise to justifiable doubts'.[348] In any case, the idea behind those principles is to avoid a (conscious or unconscious) bias favouring one of the parties.[349] However, all these rules take into consideration exclusively individual

---

[345] See https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918 (last access 9 January 2023),

[346] ICC arbitration rules, Article 11(2).

[347] ICSID Convention, Articles 14(1) and 57 ICSID.

[348] UNCITRAL Arbitral Rules, Article 11.

[349] See cases: Universal Compression International Holdings v. Venezuela (arbitrator and claimant counsel were co-counsel in a prior just concluded proceedings) (in the same there was also failed attempt to recuse prof. Brigitte Stern on the grounds of being repeatedly appointed by Venezuela in various cases); Amco v Indonesia and Vivendi v Argentina for professional contacts between counsel and arbitrators; Tidewater v Venezuelan were the Tribunal enlighten about the difference between ICSID and UNCITRAL requirements; Telekom Malaysia Berhad v Ghana addressed the issue of arbitrators working also as counsel

potential biases, asking them to disclose connections and providing an instrument for parties to recuse an arbitrator if they can show that a particular fact demonstrates a lack of independence and impartiality, thus, risk of bias. Consequentially, no relevance is given to this norm to structural biases, which are not streaming from the single appointment but from the configuration of the arbitral tribunal.

(d) *Seat of arbitration*

The seat of arbitration is the location selected by the parties as the legal place of arbitration, which determines the arbitration's procedural framework.

It is important to distinguish the seat of arbitration from the place of the hearing. The first is a purely legal notion. The latter is a geographical and operation choice.

The significance of the seat of arbitration is due to the fact that the *lex arbitri* (the procedural law of the arbitration, in terms of the framework) is determined by the seat. It entails that issues such as the 'gap-filling' mechanism, absent parties' agreement, interim measure, and *kompetenz-kompetenz* are determined by the applicable domestic law. In addition, domestic law may impose the application of certain rules, also despite the agreement of the parties, and ultimately determine whether the award is enforceable

The only case where the seat of arbitration is irrelevant is ICISD. Indeed, the latter is the only arbitration centre and arbitral procedure governed by a treaty, the Washington Convention on the Settlement of Investment, and it can be described as genuinely international and delocalised.[350]

As to the choice, the seat of arbitration is generally a party decision. If no decision is made, arbitration centre rules or the arbitral tribunal decision will determine it.

(e) *Amici curiae*

As a general consideration, it should be noted that ICSID (and other arbitration procedural rules) allows and considers third-party participation (i.e. participation of parties not

(the point is that a lot of ITA cases concerns the same legal issues); Urbaser v Argentina raised questions about the relevance of previous scholarly opinions.

[350] See ICSID Convention, Article 44: '[a]ny arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.'

involved in the dispute). Article 32(2) of the ICSID rules that Tribunal can allow third parties to attend the hearing (after consulting the Secretary-General), and according to Article 37(2), a party may also file a written submission.[351] The importance of *amici curiae* in ISDS is linked to the 'administrative' or, in any case, 'public' nature of the dispute at stake, which highlights the importance of the involvement of other actors further than states and investors.

It is worth noting that, differently from ICSID, the UNCITRAL Arbitration Rules (2010) do not have a specific provision on *amici curiae*.

(f) <u>*Dissenting and concurring opinion*</u>

The issuance of dissenting and concurring (or separate) opinions is a practice arising from the common law system. These are individual opinions of the arbitrator attached to the award, expressing disagreement with the majority disposition (dissenting) or agreement with it without adherence to the reasoning contained therein (concurring).[352]

More in detail, the difference between the two is that concurring, unlike dissenting, addresses the *ratio decidendi* in order to reveal different angles for complex issues without (necessarily)[353] contesting the outcome of a decision.

Both dissenting and separate opinions are becoming increasingly important in the system, not only in terms of number. Indeed, even if they do not affect the reason or result of the award, some authors believe they have some effects on an award expressing customary international law. Moreover, they are often invoked as a basis for annulment.

---

[351] As examples, in Biwater v. Tanzania (para. 283) and Suez v. Argentina (para. 284) the arbitral tribunal admitted written submissions from *amici curiae*, but denied them attendance at the hearings.

[352] See, on the topic, Breeze, R. (2012), *Dissenting and Concurring Opinions in International Investment Arbitration: How the Arbitrators Frame Their Need to Differ*, International Journal for the Semiotics of Law – Revue Internationale de Sémiotique Juridique, Vol. 25, No. 3; Breeze, R. (2016), *Balancing neutrality and partiality in arbitration: discursive tensions in separate opinions*, Text & Talk, Vol. 36, Issue 4; Charlotin, D. (2019), *A Data Analysis of the Iran–US Claims Tribunal's Jurisprudence—Lessons for International Dispute-Settlement Today, Journal of International Dispute Settlement*, Vol. 10, Issue 3; Titi, C. (2018), *Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion, The Law & Practice of International Courts and Tribunals*, Vol. 17, Issue 1.

[353] A trend is to issue opinions that contain both concurring and dissenting parts (so-called, concurring dissenting opinions). See, for example, Biwater v Tanzania, Concurring and Dissenting of Born, https://www.italaw.com/sites/default/files/case-documents/ita0093_0.pdf (last access 9 January 2023).

Some doubts have been cast on the legitimacy of the practice, also due the fact that dissenting is usually issued by the arbitrator appointed by the party that lost the case.[354]

3.7 Challenging the awards

(a) *ICSID recognition, annulment procedure and setting aside*

ICSID could be considered the only genuinely delocalized and *strictu sensu* international mechanism of arbitral adjudication. The reason is that the recognition and the annulment of awards are not subject to any domestic review.

More in detail, pursuant to Article 53 of the ICSID Convention, '[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award'.[355] Arguably, this is one of the most important provisions of the ICSID Convention as it 'provides a system for enforcement that is independent of the New York Convention and other international and domestic rules dealing with the enforcement of foreign arbitral awards'.[356]

ICSID Convention excludes any domestic setting aside procedure. In particular, pursuant to Article 53(1) of the ICSID Convention, the ICSID award cannot be appealed, meaning it is final and binding. The only exception to this rule is the ICSID annulment procedure, pursuant to Section 5 of the ICISD Convention, which can take place only on five exclusive grounds (Article 52(1) ICSID Convention): i) the tribunal was not properly constituted;[357] ii) the tribunal has manifestly exceeded its powers;[358] iii) there was

---

[354] Breeze, R. (2012), p. 398

[355] Please note, however, that under Article 55 ICSID is also provided with that award cannot override sovereign immunity.

[356] See C. H. Schreuer, L. Malintoppi, A. Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary*. Please note that, apart from enforcement remedies, a refusal to enforce the award by itself constitutes a breach of an international treaty (ICSID convention) and is a source of international responsibility for the state.

[357] Used a few times (up to 2014, *to update* only five times and never uphold). The concept of a properly constituted tribunal is not defined in ICSID conventions and rules, thus is the product of the *ad hoc* committee interpretation (see Azurix *ad hoc committee* and see *Dispute Resolution*, in Bungerberg and others (2015), pp. 1441-1443).

[358] According to the Tribunal in Soufraki v UAE: '[t]he boundaries are defined by objective criteria set out in the ICSID Convention, more precisely (a) in Article 25 relating to jurisdiction and (b) in Article 42 dealing with the applicable law, as well as (c) by subjective limits set by the Parties' consent. The basic architecture of ICSID arbitration consists of: – the core elements of ICSID jurisdiction as set out in Article 25 that cannot be dispensed with either by the Parties' mutual consent, or by the unilateral decision of one of the parties; – the rule on the applicable law embodied in Article 42, which is binding on the tribunal and relies in part (Article 42, first sentence) on the Parties' choice or consent; and last but not least, – the issues

corruption on the part of a member of the tribunal;[359] iv) there has been a serious departure from a fundamental rule of procedure;[360] v) the award has failed to state the reasons on which it is based.[361]

ICSID annulment mechanism is generally considered not to be an appealing instrument: '[the annulment procedure is] not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon [the annulment grounds]'.[362] According to this distinction, annulment is the 'retroactive obliteration of a decision' and not an 'a decision reconsidered by a higher authority'.[363]

Having clarified that, the annulment review under ICSID is done by an *ad hoc* committee, which cannot modify an award but reject or uphold the application (also partially). It is a legitimacy analysis, which does not involve (or should not involve) any correctness evaluation. However, in practice, the committee's powers have varied over time.[364] To this regard, it worth recalling the Schreuer classification between three generations of committee decisions: i) Klockner I and Amaco prototype,[365] where there are have been re-examination of the merits; ii) Maritime International Nominees Establishment v

put to the tribunal for its decision that are in the Parties' discretion. Thus, the structure within which an ICSID tribunal has to remain is defined by three elements: the imperative jurisdictional requirements, the rules on applicable law, and the issues submitted to the arbitral tribunal. In respect of these three elements, the tribunal is bound not to manifestly exceed its powers.' Consequentially, the tribunal exceeds its powers when it wrongfully fails to exercise jurisdiction, excess of power by going beyond its jurisdiction, and fails to apply the proper law. In addition, those error should be manifest. See also See *Dispute Resolution*, in Bungerberg and others (2015), pp. 1443-1447.

[359] The grounds have never been decided.

[360] It is common ground of annulment. Both the concept of serious and fundamental are not defined in ICSID convention and rules and are the product of the *ad hoc* committee caselaw. Fundamental recall to a minimal standard of procedure and seriousness so as to deprive a party of the benefit or protection that the rules were intended to provide.

[361] This is the most claimed ground (there should be a lack in the award in identifying the factual and legal premises leading the decision).

[362] Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Working Paper for Consultative Meetings of Legal Experts Designated by Governments, History of the ICSID Convention, vol. II-1, 184 et seq., 219. See *Dispute Resolution*, in Bungerberg and others (2015), p. 1434.

[363] See B. A. Garner, Black's Law Dictionary (2004) Thomson West, 100 and 105, definitions of '*annulment of judgment*' and '*appeal*', respectively.

[364] This further confirm the substantial difficulty to categorise ICISD annulment in terms of contract with appeal procedures.

[365] Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, https://www.italaw.com/cases/3373 (last access 11 January 2023).

Guinea prototype, in which limits to review where emphasized;[366] iii) Wena Hotels limited v Egypt prototype, confirm the previous approach and highlighting that the committee would intervene only in more serious and important cases.[367] It is worth mentioning that Honlet, Legum and Crevon opened a discussion about a fourth generation of decisions that instead 'demonstrate that no general agreement has been reached' on the theme of the scope of review.[368]

Procedurally speaking, only awards are subject to annulment[369] within 120 days after the latter has been rendered (Article 52(2) ICSID convention).[370] After the registration of the application for annulment, which should be in writing a state in detail the grounds of challenge, the Secretary-General requests the Chairman of the Administrative Council to appoint an *ad hoc* committee (under the recommendations of the ICSID secretariat).

The Committee will decide on the claim. The award will no longer exist if annulled and lose any power as *res judicata* (even partially). Hence, the party may resubmit the dispute before an arbitral tribunal from scratch.

(b) *Domestic setting aside*

As to non-ICSID awards, final and binding awards may be subject (and are usually subject) to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and its review system when presented for recognition in a country other than that under which it was rendered ('foreign award').

That said, it is challenging to address the topic of domestic setting aside proceedings as the various national procedural law differs significantly from the other: e.g., in terms of the number of '*appeal*' stages and scope of review. Nonetheless, providing an overview of the topic is helpful to understand what can be done to challenge a non-ICSID award.

---

[366] Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, https://www.italaw.com/cases/3361 (last access 11 January 2023).
[367] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, https://www.italaw.com/cases/1162 (last access 11 January 2023).
[368] See *Dispute Resolution*, in Bungerberg and others (2015), p. 1438.
[369] Note that in ICSID there cannot be partial awards. Besides annulment, awards can be subject to supplemental and rectifications.
[370] If the ground is corruption, 120 days from it discovery (that should be occur within three years from the issuance).

Firstly, the jurisdiction of the national court in setting aside proceedings is determined by the parties' choice of the seat of arbitration. Usually, national control is not a second instance full review on the merit, but instead, a limited review aimed at 'ensuring that a valid arbitration agreement existed, important procedural principles were observed and that the outcome of the arbitral proceedings does not violate the public policy of the State which the parties chose as a seat of arbitration'.[371]

Although different, it should be noted that national laws typically share several similarities. The foregoing is a consequence of the fact that they are traditionally inspired (directly or indirectly) by article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958[372] and the Articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration of 1985 (which is also inspired by the New York Convention).

More in detail, under the UNCITRAL Model Law, the setting aside procedure could be based on: i) lack or invalidity of the agreement to arbitrate;[373] ii) lack of notice to a party

---

[371] See *Dispute Resolution*, in Bungerberg and others (2015), p. 1451.

[372] According to Article V: '*1.* [r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country'.

[373] Article 34(2)(a)(i). More in detail, '[A]n arbitral award may be set aside if a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the State in which the setting aside is sought. The complete lack of an agreement is not explicitly included but a fortiori, if there is no valid consent of one or both of the parties, it must be possible to bring a challenge. This ground for setting aside generally requires a narrow interpretation, focusing on the existence and the validity of the arbitration agreement, in order to effectively distinguish it from other grounds, particularly from the 'excess of

or other inability to present the case;[374] iii) inclusion in the award of matters outside the scope of submission and excess of authority;[375] iv) irregularity in the composition of the tribunal or in the arbitral procedure;[376] v) non-arbitrability of the subject matter;[377] vi) violation of public policy.[378]

It should be noted that the importance of national setting-aside procedure is also connected to states' interest in reviewing arbitral awards insofar as they conflict with some fundamental domestic principles. It is by chance that a waiver to it is usually allowed only in a few jurisdictions (such as Switzerland)[379] and is usually restricted. On the other hand, the broad language of Article V(1) and V(2) of the New York Convention has allowed some national courts to enforce arbitral awards even if they were set aside in the jurisdiction of the seat of arbitration.[380]

3.8 Enforcement

---

authority' pursuant to Article 34(2)(a)(iii) of the Model Law'. For an overview see *Dispute Resolution*, in Bungerberg and others (2015), pp. 1464 ff.

[374] Article 34(2)(a)(ii). The lack of notice ground is not likely to be successful as States have difficulty to use a '*run and hide*' technique. Usually, the notice of arbitration or the request is served to the embassy in the home State of the investor and/or to a representative authority in the Respondent State. The inability to present the case instead is traditionally framed instead as a violation of the right to be heard and occur when the '*parties did not have the opportunity to comment or where the tribunal declines to take into account certain evidence adduced by the parties*'. See *Dispute Resolution*, in Bungerberg and others (2015), p. 1468.

[375] Article 34(2)(a)(iii). This is a case of *ultra vires* vice of the award.

[376] Article 34(2)(a)(iv). Under this ground are usually possible to claim irregularities in terms of independence and impartiality.

[377] Article 34(2)(b)(i). Non-arbitrability is usually used by State to protect their monopoly with reference to matters which entails important public policy issues.

[378] Article 34(2)(b)(ii). It is worth noting that public policy is concept which have a strong connection with the local caselaw and laws. In general is considered to be a fundamental principle of law of the nation at stake. According to the Report of the Report of the United Nations Commission on International Trade Law with regard to the UNCITRAL Model Law, public policy covers 'fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside'. See report of the United Nations Commission on International Trade Law on the work of its eighteenth session, June 3-21, 1985, p. 63, https://uncitral.un.org/en/comm/sessions/18 (last access 9 January 2023).

[379] Article 192 of the Swiss Private International Law Act, waiving is permitted if the parties do not have domicile, habitual residence or place of business in Switzerland.

[380] See, e.g., Hilmarton Ltd. v. Omnium de Traitement et de Valorisation, French Cour de Cassation, 23 March 1994, (1995) XX YCA 663; PT Putrabali Adyamulia v Sté Rena Holding, French Cour de Cassation, 29 June 2007, (2007) Rev. Arb. 507; See, e.g., Chromalloy Aeroservices Inc. v. Egypt, US District Court for the District of Columbia, 31 July 1996, 939 F.Supp. 907; contra TermoRio S.A. E.S.P. v. Electranta S.P., US Court of Appeal, DC Circuit, 25 May 2007, 487 F.3d 928.

In legal proceedings, it can be distinguished between the immediate goal, which is basically obtaining the relief requested through the claim, and the indirect goal, obtaining the 'utility' that could not be obtained through the spontaneous performance of the other party. Ultimately, the success of a dispute is achieving the indirect goal, thus obtaining the coveted utility.

From this perspective, obtaining arbitral relief may not be sufficient since it represents a mere precept, order, and declaration that modifies the legal reality of things but not the 'physical' reality. As was the case before the commencement of proceedings, also after an arbitral award, it is necessary that the losing party voluntarily decides to comply with the law – in this case, with the content of the award. Hence, relevant treaty provisions tend to ensure that in case of lack of voluntary compliance, any award ordering the defendant to pay damages or otherwise comply with its breached obligations may be enforceable against it. From this perspective, an essential step in ITA and ISDS, in general, is the enforcing phase.

It is necessary to highlight that in ISDS, compliance with awards is the normality (which does not mean that the parties would not try to challenge an arbitral decision, as noted above). In particular, states are usually influenced in complying due to consideration regarding 'the special political embarrassment factor, the threat of economic retaliation, and the reluctance to send a wrong message to potential future investors'.[381] In addition, the ISA-related enforcement system provides a vital role in spontaneous compliance, which has an impactful dissuasive role. More importantly, the enforcement regime allows countries to seek relief in the same State and on State's assets in third countries.

The procedure should be distinguished between the ICSID special enforcement regime, governed by (and not only) Articles 53 and 54 of the ICSID Convention,[382] and non-

[381] Reinisch A. (2010), Enforcement of Investment Awards, in Yannaca-Small K., *Arbitration under International Investment Agreements*, Oxford University Press, p. 671.

[382] The most important provisions is Article 54: '(1) Each contracting state shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A contracting state with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state. (2) A party seeking recognition or enforcement in the territories of a contracting state shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each contracting state shall notify the Secretary General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation. (3)

ICSID awards[383] usually enforced through ordinary commercial arbitration rules and, thus, firstly, New York Convention 1958.[384]

As national setting aside procedure, trying to discuss a uniform enforcement procedure outside ICSID is rather complex, also for the structural and theoretical difference between national procedural laws (indeed, the practical execution of the awards remains in the realm of national laws, which determine the modalities and deadlines for attack losing party's assets). In general terms, enforcement procedure, a generic term which includes any activity aimed at achieving compliance with the arbitral award, can be structured in two phases. The first step is aimed at obtaining an enforceable legal title when arbitral awards (even if final binding) are not able to have this quality on their own, and the second step is aimed at executing the title and forcing the losing party to confer the winning one the 'utility' contained in the award.[385]

3.9 The ICS and the MIC

Without prejudice to the fact that this thesis would like to focus exclusively on traditional ISDS, it is necessary to refer (briefly) to an important alternative to ISA that emerged in the last decade and is strongly supported by the EU.

As recalled in chapter two, over the last few years, ISDS has become the object of growing criticism, even from traditional supporters of the existing ISDS system.[386] From this

---

Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought'.

[383] Including those under the ICSID Additional Facility Rules.

[384] For being enforceable, the award should be: i) within the scope of application of the convention; ii) based on an agreement in writing to arbitrate; iii) comply with the formal and procedural requirements prescribed by the convention (example the filing of the original copies of the award). Conversely, the enforcement can be rejected if: i) tribunal lack of jurisdiction or power to deal the dispute; the procedure followed in the arbitration is incorrect; the award is not binding or set aside in the country of origin (the language by the way leave some floor of freedom according to some national courts); violation of public policy. It should be noted that IIAs may provide for special enforcement rules, and that enforcement can be made also under domestic arbitration law.

[385] Enforcement it is here employed in order to describe all the process, whereas it should be noted that Article 54 ICSID Convection and New York Convention differentiate between enforcement (obtaining an executing title) and execution (forcing the losing party to provide the agreed utility). At the same time, a distinction between this two phases could be drawn by talking about: recognition (first phase) and enforcement (second phase).

[386] As for instance the Unites States, since the Trump administration. See De Luca and Sacerdoti (2019), p. 232.

perspective, particularly interesting is the approach of the EU, which in the last years has supported a radical innovation: the introduction of the ICS.

The ICS is a two-tier (semi) permanent system, which establishes a Tribunal of the first instance and an appellate Tribunal. The rationale behind its introduction is to move away from privatisation (through arbitration) of treaty investment disputes.[387]

The ICS has been implemented in the CETA, in the EU-Vietnam FTA, and the EU-Singapore FTA and the two-tier structure applied shares some similarities with the WTO adjudication system.

More in detail, taking as an example the CETA, the relevant ICS comprises 15 members: five nationals from the EU, five nationals from Canada, and five from third countries. The members are appointed by the CETA Joint Committee pursuant to Article 8.27(2) CETA for five – once time renewable – years.[388] The investment decisions are decided by a division of three members (a member from the EU, one from Canada and one acting as president from the third state). With reference to the Appellate Tribunal, Article 8.28(2) CETA sets forth that '[t]he Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on: (a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)'.[389] Finally, according to Article 8.41 CETA, the ICS award would be qualified as an ICSID award and receive the appropriate treatment.

The European approach has not limited itself to a bilateral level but has also been supported on the multilateral fora, as the UNCITRAL Working Group III (with the proposal for the adoption of the MIC).

---

[387] For an overview, see De Luca and Sacerdoti (2019), pp. 232 ff.

[388] The member obtains a monthly retainer fee and are subject to strict conflict interest rules (with reference to IIL disputes).

[389] It should be noted that, if the parties agree, CETA allows also traditional ISDS before ICSID or according to UNCITRAL rules.

It should be seen if MIC would have enough traction and obtain the relevant support to become 'real',[390] provided that, at the moment, there is no universal consent on it.[391]

3.10 Conclusions

This chapter outlined some of the main features of IIL, both in substantive and procedural terms.

In light of what has been analysed, it appears that IIAs clauses have long been characterised (with a trend that has only recently partly disappeared)[392] by terminological vagueness, exacerbated by the fragmentation of the system and the lack of uniformity across IIAs wording and relevant jurisprudence. The interpretation of IIL standards has then been particularly contentious, with extensive interpretations – often far removed from the original intents of the contracting parties – that have emerged over time.

At the procedural level, it can be said that ISDS represents a box containing various potential instruments, which may vary considerably in nature and characteristics.

In any case, in its current configuration, ISDS presents the following common characteristics: parcelisation and limited review of judgments; privatisation of the means of resolution (and confidentiality);[393] high costs; favour towards the recognition of awards and their enforcement, which, however, mainly passes through national systems, with consequent re-nationalisation and potential politicisation of this phase; autonomy and strategic selection of arbitrators by the parties.

The conclusions and analysis in this chapter are particularly relevant to economic analysis. Indeed, understanding the design of IIL and ISDS is the starting point for assessing the system's actual costs and the incentives for relevant agents to participate in it. In particular, for the purposes of the present thesis, the above analysis has the merit of providing the reader with the tools to understand: i) the relevance of the arbitrators'

---

[390] In the sense to have such a broader consent to address also the issues of consistency and coherency of IIL, which for example is the main rationale of the appeal system.

[391] To review: See De Luca and Sacerdoti (2019). With reference to Japan, EU is still currently engaging with Japan for introducing ICS in their newly agreed FTA. See on the topic, European Parliament, *The Eu-Japan Economic Partnership Agreement*, pp. 18-19, 45 https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603880/EXPO_STU(2018)603880_EN.pdf (last access 9 January 2023).

[392] See, for example, the new FET clauses in USMCA and CETA.

[393] As proven by the fact that the real total number of ISDS case is unknown.

interpretative activity in implementing the protection standards contained in the IIAs (and beyond); ii) what the costs (in a broad sense) are for the parties to the proceedings in question.

Having clarified the above, it should be stressed that ISDS is not just a matter of arbitrators' decision-making process and parties' behaviour. Indeed, as appears from the systems' complexity, an important role is held by arbitral institutions – and even before by the agents creating the arbitral rules framework – as well as by the further actors involved in ISDS. An example is the role of legal counsel, which usually conducts the interviews and suggests parties on the selection of arbitrators. It follows that – as mentioned in the introduction – focusing on ISDS by just analysing the conduct of arbitrators is insufficient if the end is to study how to incentivise the system's efficiency.

Nonetheless, an analysis that starts on arbitrators' conduct would still be beneficial on two grounds. Firstly, many methodological findings can be translated to other actors. Secondly, the amount of data on arbitrators makes it easy to assess and reason for systemic proposals for ISDS (as, in the present thesis, on assessing diversity reforms regarding economic efficiency and what this entails).

SECOND PART

4. LEGITIMACY IN ITA

4.1 Introduction

In the previous chapters, great attention has been paid to the legitimacy deficit, but few words have been spent on the notion of legitimacy from a theoretical point of view. Therefore, it is then deemed essential to gap this lacune before addressing diversity and economic analysis of diversity in ISDS. The benefits will be twofold: i) understanding the actual connection between diversity and legitimacy (moving away from the 'politicisation' of the issue);[394] ii) being able to argue and explain in which terms legitimacy is an efficiency factor and, consequentially, address the claim that diversity is an efficiency factor too.

Provided that, in the broad sense, legitimacy is a term that encompasses different concepts, the chapter will address the main distinctions developed in the literature, i.e., the one between legitimacy *strictu sensu* and legitimation, as well as the one between normative and sociological legitimacy.[395] More in detail, the present chapter will disentangle the two topics and try to contribute to the debate on the nature of legitimacy in ISDS and ITA. In particular, the following sections will detail the above-mentioned categories and argue about why moral considerations should be excluded from normative legitimacy analysis.[396]

4.2 The concepts of legitimacy and legitimation

[394] As mentioned in the first chapter, diversity debate in ISDS arose also as consequence of the racial, gender and so on movements developed from 1960's onwards. From this perspective, diversity in ISDS has been often seen as the product of the public debate on diversity, with fewer in-depth analysis on the connection on the sociological notion of diversity and the connection between diversity and legitimacy. That clarified, however, it should be noted that more attention has been paid on connection between diversity and individual and structural biases (whereas also this analysis have been often harmed by the poor attention on the construction of the concept of diversity).

[395] With reference to the difference between normative and sociological legitimacy, as outlined in the literature, and better clarified below, it seems to the present author that it recalls the difference between internal point of view (of the participant) and external point of view (of the observer). See on the topic, the classic Hart H. L. A. (1961), *The Concept of Law*, Oxford.

[396] In this work, it will be assumed that ISDS and ITA can be considered institution in the sense explained in note 12.

As Behn, Fauchald, and Langford noted, legitimacy 'by [its] very nature – defy precise meaning'.[397] It follows that – as highlighted by the same authors[398] and by Offe[399] and Føllesdal – [400] the main risk with legitimacy is to be a signifier devoid of genuine significance.[401]

It is, therefore, essential to try to make sense of legitimacy. To this end, the present chapter will follow the structure that Behn, Fauchald and Langford proposed. In particular, it will first distinguish between 'legitimacy and legitimation' and then between 'normative and sociological legitimacy'.[402] Afterwards, it will be clarified in more detail what is meant by 'normative and sociological legitimacy' and, in particular, what these entail (section 4.3).[403]

Starting from the concepts of legitimacy and legitimacy, the following is observed.

Normative legitimacy 'concerns the rightness of an institution's exertion of power'[404] and, more in detail, 'the right to rule,[405] understood to mean both that institutional agents

---

[397] See Behn D., Fauchald O. K. and Langford M. (2022), Introduction: The Legitimacy Crisis and the Empirical Turn, in Behn D., Fauchald O. K. and Langford M., *The Legitimacy of Investment Arbitration*, Cambridge University Press, p. 13. See for an overview of the concept of legitimacy in international law and international relations, Bodansky D. (2013), Legitimacy in International Law and International relations, in Dunoff J. L. and Pollack M. A., *Interdisciplinary Perspectives on International Law and International Relations*, Cambridge University Press, pp. 321 ff.
[398] See Behn, Fauchald and Langford (2022), p. 13.
[399] See Offe C. (2009), *Governance: An 'Empty Signifier?'*, Constellations, Vol. 16, No. 4, p. 550.
[400] See Føllesdal A. (2020), *Survey Article: The Legitimacy of International Courts*, Wiley Online Library onlinelibrary.wiley.com/doi/pdf/10.1111/jopp.12213 (last access 20 October 2022).
[401] According to Grossman 'at the highest level of abstraction […] a 'legitimate' international adjudicative body is one whose authority is perceived as justified'. See, Grossman N. (2009), *Legitimacy and International Adjudicative Bodies*, George Washington International Law Review, Vol. 107, p. 5.
[402] See Grossman and also Fallon Jr. ten instead to distinguish between the kinds of legitimacy: i) legal, 'reasonable or 'correct' interpretation a matter of law; ii) moral, 'is a functional of a moral justifiability or respect-worthiness'; iii) social, 'believes that 'particular claims to authority deserve respect or obedience for reason not restricted to self-interests'. See Grossman (2009), p. 5 and Fallon R. H. Jr. (2005), *Legitimacy and the Constitution*, Harvard Law Review, Vol. 118, pp. 1787, 1790, 1794-1801. Of course, alongside normative and sociological legitimacy, it is possible to highlight a political legitimacy standard too (namely, how the actors strategically pursue the enhancement normative and/or sociological legitimacy). However, to the end of this research political legitimacy will not under scrutiny. For other, as Bodansky, political legitimacy is within the normative analysis see Bodansky (2013), p. 327.
[403] See Behn, Fauchald and Langford (2022), p. 13. With reference to this point, '[l]egitimacy is a moral perspective or sociological belief but legitimation refers explicitly to the process by which actors "come to believe in the normative legitimacy of an object"'. See Behn, Fauchald and Langford (2022), p. 13.
[404] See Behn, Fauchald and Langford (2022), p. 13.
[405] See Buchanan A. and Keohane R. (2008), The Legitimacy of Global Governance Institutions, in Wolfrum R. and Röben V., *Legitimacy in International Law*, Springer, p. 405.

are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral,[406] content-independent reasons to follow them and/or to not interfere with others' compliances with them'.[407] In the legal context, normative legitimacy may include 'claims about legal authority'[408] besides a moral justification.[409] Legal legitimacy is thus a 'property of an action, rule, actor or system which signifies a legal obligation to submit to or support that action, rule, actor or system'.[410] From this perspective, it could be argued that normative legitimacy in the realm of law – particularly in the context of ISDS – may concern moral and legal justifications.

Sociological (or descriptive) legitimacy is different from normative legitimacy.[411] 'It asks whether "the governed" believe and accept that an institution has, or maintains, the power to rule over them'.[412] In simpler terms, it concerns being 'widely believed to have the right to rule'.[413] As Behn, Fauchald, and Langford noted, sociological legitimacy

---

[406] It should be distinguished between moral legitimacy and self-interest (and obedience under coercion). See Buchanan and Keohane (2008), pp. 409 ff.

[407] See Buchanan and Keohane (2008), p. 25. This is one common definition in global governance institutions context.

[408] See Behn, Fauchald and Langford (2022), p. 14. For an overview on the distinction between legitimacy, rational persuasion and compulsion, see D. Bodansky *Legitimacy in International Law and International relations*, in Dunoff J. L. and Pollack M. A. (2013), *Interdisciplinary Perspectives on International Law and International Relations*, Cambridge University Press, pp. 325-326.

[409] According to Abi-Saab in legal realm, legal legitimacy shall be the only relevant approach, excluding other and broader definition of normative legitimacy (including the moral one). See Abi-Saab G. (2008), The Security Council as Legislator and as Executive in Its Fight against Terrorism and against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy, in Wolfrum R. and Röben V., *Legitimacy in International Law*, Springer, p. 116.

[410] Thomas C. (2014), *Uses and Abuses of Legitimacy in International Law*, Oxford J. Legal Studies, Vol.34 No. 4, pp. 729, 735.

[411] The relationship between these two perspective on legitimacy is complex. As noted by Bodanskyy, '[o]n the one hand, to some degree, descriptive legitimacy seems conceptually parasitic on normative legitimacy since beliefs about legitimacy are usually beliefs about whether an institution, as a normative matter, has a right to rule. People justify, criticize, and persuade on the basis that an institution is actually legitimate (or illegitimate). On the other hand, some argue the other way around, that normative legitimacy depends on descriptive legitimacy. It has an intrinsically social quality and depends on people's beliefs. An institution could not be normatively legitimate if no one through it so.' See D. Bodansky *Legitimacy in International Law and International relations*, in Dunoff and Pollack (2013), p. 327.

[412] See Behn, Fauchald and Langford (2022), p. 15.

[413] See Buchanan and Keohane (2008), p. 405. In the following sections, it will be employed the concept of beliefs to refer to the individual and social groups acceptance of a certain institution. It should be noted that the notion of belief is here used in a broad sense. In this regard, the author is aware of the technical distinction between beliefs (as understanding of the world as it is) and desires, aspirations, normative commitments and so on, as mental status regarding the world as ought-to-be. However, it is not in the

‘empirically catalogue belief systems of those subject to a particular legal system, set of rules or institution. It does not claim to evaluate whether those beliefs are normatively justified’, with the consequence that ‘[f]or sociological legitimacy, it may be important to identify which actors or audiences are the targets of a particular institution’s legitimacy – which can include “both state and societal actors, from government elites to ordinary citizens”, representing different “constituencies”’.[414] From this perspective, sociological legitimacy is considered necessary because ‘in a democratic era, multilateral institutions will only thrive if they are viewed as legitimate by democratic publics’.[415] In particular, with reference to ISDS, ‘an enhanced sociological legitimacy for an international court or tribunal can improve compliance, which “may affect its actual normative legitimacy, enabling states to prevent free-riding on agreed rules”’.[416]

That clarified, it should be then noted that legitimation differs from legitimacy (normative and sociological) since the first is ‘inherently a dynamic concept’ and a ‘strategic response to identified legitimacy deficits’.[417] In other terms, if the lack of legitimacy (and its analysis) is the starting point, legitimation strategies aim to find a way to mitigate legitimacy gaps and, thus, have a positive impact on the institution in question in terms of improving normative and sociological legitimacy and thus strengthening the authority (in a broad sense) of the institution.

---

interest of this work to investigate further on this theme. On this difference, see Searle J. (1969), *Speech Acts – An essay in the Philosophy of Language*, Cambridge University Press.

[414] See Behn, Fauchald and Langford (2022), p. 15. To review. See also, Tallberg J. and Zürn M. (2019), *The Legitimacy and Legitimation of International Organizations: Introduction and Framework*, Review of International Organization, Vol. 14, No. 4, p. 581. For the theme of sociological legitimacy see, Weber M. (1964), *The Theory of Social and Economic Organization*, Free Press; Franck T. (1990), *The Power of Legitimacy Among Nations*, Oxford University Press.

[415] Buchanan A. and Keohane R. (2006), *The Legitimacy of Global Governance Institutions*, Ethics and International Affairs, Vol. 20, No. 4, pp. 405, 406. It should be noted there is not a vast literature on sociological legitimacy in international dispute resolution, as well as empirical researches on measuring it (on this regards, see Voeten E. (2013), *Public Opinion and the Legitimacy of International Courts*, Theoretical Inquiries in Law, Vol. 14 No. 2, p. 411; Marceddu M. L. and Ortolani P. (2020), *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments*, The European Journal of International Law, Vol. 31 No. 2.

[416] See Føllesdal (2020), p. 6.

[417] See Behn, Fauchald and Langford (2022), p. 17. From a philosophical point of view, legitimation is an act or rather a process that leads to the result, legitimacy. Result to be analysed in a twofold perspective: i) as a tripartition of events (moral normative (with the caveats referred to below), legal normative, sociological), ii) as a relative event (the result is not absolute or nominal (legitimacy or non-legitimacy of the institution), but 'relative', according to an ordinal scale).

From this perspective, in accordance with Behn, Fauchald and Langford, it can be observed that 'the main purpose that legitimacy may serve for ISDS is to influence disputing parties to voluntarily comply with decisions'.[418] The notion can be extended to include 'the willingness of third parties affected by the outcomes of ISDS (e.g. local populations, employees and the investor's home states) to accept and respect the conclusion of an ISDS tribunal' and also 'acceptance by relevant actors (e.g. national or international courts, tribunals and enforcement institutions, NGOs)'.[419] Furthermore, it can be concluded that legitimation within ISDS aims to understand what could be done to improve the general acceptance of the institution among its constituencies.[420]

4.3 Forms of legitimacy

(a) Normative legitimacy

As Behn, Fauchald, and Langford noted, legitimacy discussion 'can be framed and disaggregated in multiple ways within and across different disciplines and traditions'.[421] Indeed, different ways of approaching the subject can be found in the literature. However, it is considered that following Behn, Fauchald and Langford's approach to normative

---

[418] See Behn, Fauchald and Langford (2022), p. 18.

[419] See Behn, Fauchald and Langford (2022), p. 18. We agree with this extended definition insofar as it takes into account the role of ISDS as a procedural means and instrument for applying substantive law (and thus efficiently allocating resources) when the parties are unwilling or unable to do so themselves. ISDS is thus instrumental and an alternative to spontaneous compliance with substantive law, on the premise that substantive law efficiently incentivises the allocation of resources (which could be questioned, but will not be challenged in this research).

[420] It is not the aim and purpose of this research to measure the legitimacy of the system. The thesis aims to assess the abstract connections between diversity and legitimacy in ISDS in general, and in the ITA in particular, and then determine under which conditions the economic analysis of law can act as a tool to determine a legitimacy strategy. In any case, for a brief overview of the empirical measurement of legitimacy, please see Behn, Fauchald and Langford (2022), pp. 19 ff. The authors identify four challenges to empirical analysis: i) construct validity, 'which concerns concretizing and operationalising the abstract moral notion or hidden social phenomenon of legitimacy. For normative forms of legitimacy, this requires reducing complex and contestable concepts in legitimacy debates such as "independence", "transparency", "diversity" or "interpretative activism" into something measurable'; ii) data collection (given the confidentiality and decentralization of ISDS); iii) choice of theory and method (for instance, quantitative, qualitative and/or computational methods); iv) and interpretation of results. As mentioned, none of these topics will be addressed directly. However, it should be understood that all or at least most of them will come into play indirectly. In particular, the definition of diversity and the choice of economic theories for the evaluation of ISDS in general, and legitimacy in particular, have a great connection to issues related to empirical analysis, which, however, will not be explored in detail in this thesis.

[421] See Behn, Fauchald and Langford (2022), p. 26.

legitimacy may be advantageous in terms of clarity, although there is no clear barrier between the different forms of legitimacy, and overlap is inevitable.

Without prejudice to the above, it is then possible to disaggregate normative legitimacy into three elements: i) consent, ii) process and iii) output.

Consent legitimacy (or input legitimacy) answers a 'preliminary' question: how institutions (in their broadest meaning) are established and maintained?[422]

In international law, agreements between states and customary international laws establish and maintain the system.[423] For instance, ITA (as a specific institution within the macro-category of ISDS) founds its sources – in terms of 'original basis and authority' –[424] in the agreements (i.e., the treaties, in any of their forms) concluded by states.[425]

Several issues may arise with regard to the legitimacy of consent in ISDS (and ITA), for instance: i) the actual existence of consent (cases where consent has been directly and/or indirectly coerced (including by threats) or obtained 'deceptively'); ii) the risk that 'treaty authorises actions that its parties [or only one of the parties] never intended'[426] (this is particularly important in the ITA given the *a priori* and indeterminate deprivation/limitation of regulatory powers operated by the state with it); iii) the principal-agent relationship between states and arbitrators and in general the delegation of authority made by states in favour of private adjudicators.[427]

---

[422] See Behn, Fauchald and Langford (2022), p. 27. Please note that with the concept of 'institutions' it is here referred to any human structure composed by rules and norms who is able to shape and constrain individual behaviour.

[423] The importance of how the system has been established easily explain how the historical roots of the system are still such influential in the ISDS related legitimacy talk.

[424] See Behn, Fauchald and Langford (2022), p. 27.

[425] And to relevant principle of customary international law, which have a marginal role.

[426] See Behn, Fauchald and Langford (2022), p. 27.

[427] Of course, many other issues can be identified and assessed when referring to the scope of the legitimacy of consent and, as has already been mentioned, many factors can be relevant in different terms to the legitimacy of input and, to a certain extent, impact on the other categories of legitimacy as well. In this regard, it is important to reiterate that the above are simple categorisations designed to simplify a complex analysis, and therefore descriptive in nature (not rigid). Therefore, it is therefore obvious that this categorisation has alternatives and is not absolute. However, the work of Behn, Fauchald and Langford in this regard is considered to have had the merit of critically developing a categorisation with incredible descriptive value for ISDS and ITA. Indeed, the three forms of regulatory legitimacy are able to cover (almost) all aspects of investment arbitration issues, while maintaining dogmatic accuracy with reference to the most common approaches to legitimacy.

Process legitimacy (or throughout legitimacy) 'generally refers to assessment of the process[es] by which rules, decisions and actions are made, applied, or interpreted'.[428] More in detail, within 'the context of ISDS, arbitral tribunals may be, or be viewed as, legitimate if they fulfil certain criteria such as independence, impartiality, transparency, accountability, judicial restraint and due process or to contribute to more active participation (commonly referred to as standards of procedural justice or fairness) or to standards of decision-making and legal reasoning'.[429]

Output legitimacy 'generally refers to the instrumental or substantive justifications (purposes) for an institution or regime; and how outcomes from decision-making processes are to be evaluated'.[430] According to Behn, Fauchald, and Langford, '[d]ifferent aspects of output may be relevant, ranging from the negative (e.g. the avoidance of 'extreme injustice') to the positive (e.g. the fulfilment of a moderate range of public goods), through to optimal and just outcomes'.[431]

More in detail, within ISDS, outcome legitimacy 'generally require[s] evaluation of whether the resolution of cases produces just effects for both the system of adjudication and the parties to particular disputes. Are the results in terms of allocation of costs and benefits normatively legitimate? Are particular outcomes or effects legitimate? Output legitimacy can also refer to the general effects of ISDS on the justifications for entering into IIAs in the first place: for example, the extent to which it provides protections for investments in exchange for increased flows of FDI.'[432]

(b) *Normative legitimacy: is there or should there be any moral approach to legitimacy?*

If normative legitimacy means 'right to rule' (in a broad sense) and moral normative legitimacy means 'the rightness of an institution's exertion of power',[433] it is necessary

[428] See Behn, Fauchald and Langford (2022), p. 27. It is thus evidence why not only the person of arbitrators are relevant in ISDS. Indeed, the first source of legitimation of ISDS and ITA are those policy-makers (and also scholars) that works 'day-by-day' in crafting the system.

[429] See Behn, Fauchald and Langford (2022), p. 27. It here challenged instead the proposal of Behn, Fauchald and Langford to extend the process legitimacy to efficiency and/or the lack of it.

[430] See Behn, Fauchald and Langford (2022), p. 27.

[431] See Behn, Fauchald and Langford (2022), p. 27. Often, most of the focus on legitimacy is upon the assessment of awards and their connection with other public (domestic or international) goods. See, for instance, chapter 2.1 and the debate around the Foresti case and the Argentinian saga.

[432] See Behn, Fauchald and Langford (2022), pp. 27-28.

[433] See above p. 112.

to address the question: should morality have room in legitimacy talks? Furthermore, should normative moral legitimacy be relevant in ITA and to an economic analysis of it?

To answer this question, it is necessary to recall the functions of morality without entering into thorny discussions on its notion and meaning (including the distinction between law, religion and etiquette).

Firstly, there are two potential uses of the concept of morality: i) 'descriptively to refer to certain codes of conduct put forward by a society or a group (such as a religion), or accepted by an individual for her own behaviour';[434] ii) 'normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational people'.

In a descriptive sense, it is pretty easy to agree that no universal concept of morality applies to all human beings (individuals and institutions). Consequently, with reference to ITA and the rightness of the institution, one can agree that, from a descriptive point of view, there is no universal concept applied by all human beings as to when and under what conditions ITA is 'right'. The foregoing is not true even if one considers a narrower group of human beings (e.g. a single state or only the category of investors or that of states). Indeed, it is reasonable to believe that the justness or rightness of ITA in each social or territorial group is viewed differently, as is evident from the lively and global debate on its future.

Moreover, from the point of view of legitimacy, descriptive morality is not a normative issue but a sociological one. Normative legitimacy asks whether an institution has the 'right to rule' not in terms of the beliefs of individuals. Therefore, from this perspective, whether and to what degree individuals acknowledge authority to an institution is irrelevant.

Conversely, descriptive morality may have a role in sociological legitimacy. More in detail, it would make sense to ask whether the relevant actors in ITA perceive as morally grounded the institution at issue (and this, under certain conditions, may be relevant even if not all human beings accept the same universal notion of morality).

---

[434] See, Gert B. and Gert J. (2020), *The Definition of Morality*, Stanford Encyclopedia of Philosophy at https://plato.stanford.edu/entries/morality-definition/ (last access on 5 November 2022).

That said, about descriptive uses of morality, in the normative sense, 'morality refers to a code of conduct that would be accepted by anyone who meets certain intellectual and volitional conditions, almost always including the conditions of being rational'.[435] Given this definition, the question is then: it makes any sense to use morality in its normative legitimacy approaches?

There are arguments according to which the answer is no.

To the end of this thesis, the scheme of normative morality hardly fits into consequentialist views, such as the economic approach to law – where something is good or bad depending on the outcome –, unless one applies Bentham or Mill's concept of morality.[436] More in detail, it is sensibly different: i) considering at a particular time and space the ethical and moral goals of an individual or a social group and translating them into benefits or costs (a function that recalls a descriptive use of the notion of morality) and ii) sustaining (as Bentham and Mill do) that maximisation of utility is a normative ethical statement and regulatory policies should pursue it.[437] Only in the latter case may normative morality fit in consequentialist approaches. Nevertheless, it cannot be denied that Bentham's and Mill's views are far from straightforward and lend themselves to multiple objections.

In addition, also outside economic analysis of law, it is questionable that there are universal moral truths that it is possible to agree on (or which are known from an epistemological point of view).

From this perspective, normative morality seems mostly an arbitrary concept that would not add value to normative legitimacy analysis.

(c) *Normative legitimacy: A too formalistic approach?*

'Law is distinguished from morality by having explicit written rules, penalties, and officials who interpret the laws and apply the penalties.'[438]

---

[435] See Gert B. and Gert J. (2020).
[436] See note 1**Error! Bookmark not defined.**. As a comment, it should be noted that according to the present author utility is not seen in terms of normative ethics, but as descriptive ethical statement.
[437] This concept is different from the notion of utility sustained by the present author, see note 1.
[438] See Gert B. and Gert J. (2020).

To argue that normative morality should not have any room in legitimacy talk entails that ISDS's normative legitimacy is a question of legal validity. Therefore, if there is compliance with the rules (consent and process), ISDS is also automatically endowed with output legitimacy.

It cannot be denied that such a view may open to criticism of excessive formalism, particularly in cases of aberrant or, more narrowly, politically, morally, ethically and/or socially inappropriate decisions.

This thesis would like to reject such critiques.

The concepts of aberration, morality, ethics, and politics do not add much to a normative evaluation in the context of a global institution such as the ISDS because they are not universal (for the reasons stated above) and thus would result in mere (more or less explicit) arbitrary choices by individuals, social groups and institutions not entrusted of a relevant power in that sense.[439] Moreover, given the actual configuration of ISDS (and ITA), the arbitrary choice would be (arguably) made by individuals and social groups (policy-makers, scholars, arbitrators and arbitral institutions) who do not represent (geographically, in terms of race, ethnicity and gender) the most of the constituencies (including public opinion, citizens of the host state and so on).[440]

Ultimately, it is contested that an approach excluding moral perspectives would be too formalistic. Indeed, individual beliefs on the world of the ought-to-be can still be considered but a sociological feature of legitimacy.

(d) *Sociological legitimacy*

Descriptive legitimacy is influenced (but not always) by normative factors (in particular from a parasitic perspective) and by non-normative factors as, for instance, 'symbolic validation through ritual or pedigree' in international law and, with reference to legal

---

[439] A different matter is that of fairness decisions and the resolution of antinomies, concepts that fall within the legal sphere and are therefore subject to a normative analysis of legitimacy.

[440] This consideration is also true if we consider the environment of experts (who discuss how the ITA and IIL should be framed: indeed, a lack of diversity is also found in this area. Furthermore, with reference to political considerations, it should be noted that international law, including the IIL, is affected by the imbalance of power between states. In other words, the risk of a non-formalistic approach is that it is not more equitable, but only more tilted in favour of certain perspectives, coming from the same area of the world that has 'forced' the remainder into the IIL and ISDS system.

legitimacy, 'the degree to which legal rules are congruent with shared social understandings and are upheld by official practice' or, again, 'the length of time the institution has existed […], the size of the group over which the institution exercises authority, and the degree to which the group has a shared identity and common values'.[441] Moreover, it 'raises primarily empirical questions'.[442] Indeed, as further noted by Behn, Fauchald and Langford, when addressing sociological legitimacy is essential to identify: '*i)* [w]hich actors or audiences are the subject of the legitimacy elements; ii) [w]hether the assessment relates to general or specific aspects about the tribunal (e.g. a particular decision or aspects of its rules of procedure); iii) [t]he advantages and disadvantages of different methods in ascertaining the actors' beliefs; iv) [w]hether beliefs are stable or not; and v) [w]hether there are particular background conditions for the formation of beliefs'.[443]

However, empirical research is not sufficient.

Indeed, as a preliminary condition, it is necessary to understand under which lenses the data gathered would be analysed. In this regard, the present thesis addresses the issue under the economic models' hat. In particular, this work would like to highlight how legitimacy and constituencies' beliefs could be economically relevant.

4.4 Legitimacy in ISDS

If consensus and processes are assumed to be in accordance with the law, the question of the legitimacy of ISDS is one of sociological legitimacy.

The beliefs that may come to the fore are multiple, as the institution has multiple constituencies. In this sense, a significant difference is the point of observation. One can analyse the topic of legitimacy from the perspective of ISDS as a whole, of the ITA alone, or even of a specific BIT. It follows from the change of perspective that different

---

[441] See Bodansky (2013),p. 334.
[442] See Bodansky (2013), pp. 332 ff. Those empirical questions are of the foremost importance. However, they will not be addressed in detail in the next sections. As mentioned, the objective is to provide a theorical model to then apply the empirical instruments to diversity and legitimacy, from an economic approach.
[443] Behn D., Fauchald O. and Langford M. (2015), *How to Approach 'Legitimacy'*, PluriCourts Investment, Internal Working Paper 1/2015, https://www.jus.uio.no/pluricourts/english/topics/investment/documents/1-2015-legitimacy-book-project.pdf (last access 10 January 2023), p. 6.

constituencies, i.e. the subjects that are influenced and with their beliefs, influence the sociological legitimacy of the system.

At the same time, the idea of legitimacy as an absolute discourse is rejected. An individual or social group does not simply recognise or deny the legitimacy of the system.

Every individual (and therefore the social groups in which he or she develops his or her personality) can accept a certain institution to a greater or lesser extent, according to an ordinal scale of values that sees as extremes, on the one hand, the denial (even violent and aimed at the 'destruction') of the institution, and on the other, the total acritical acceptance of the system.

It follows in concrete terms that each individual (and thus social group) may act differently and realise their beliefs differently in the institution.

On one side of the spectrum, there may be the arbitrator who acts by giving an extensive interpretation of the role and task of the institution, deeming it particularly worthy of acceptance among the consociate. On the other, there may be the role of the NGO, which adamantly challenges the very 'right to live' of ISDS. In between, there can be various conducts. The conduct of the arbitrator who criticises (by way of dissenting opinion) the recognised role of the institution, criticising its legitimacy for deciding on particular issues or by way of specific modalities (or just providing parties grounds to challenge the award). Alternatively, there might be the role of domestic courts, which could reject the enforcement of the arbitral decision on the basis of domestic law (even in contrast with international law). Finally, the choice of a state to denounce a specific treaty and phase out from IIL and ISDS.

In other words, the actors of the system, on the basis of their beliefs, may differently contribute to its functioning in one direction or another. In this sense, it can be said that between the two extremes (the institution that is entirely devoid of effectiveness and the institution that acts in absolute continuity with its own ideal model), there is an infinity of alternatives that are embodied in the various ways in which the ISDS, the ITA or an individual BIT materialise in reality.

The various ways ISDS exists through its constituency beliefs create different costs to the system efficiency, in the terms better explained in chapter six.

4.5 Conclusions

In conclusion, to the end of this specific research, legitimacy is considered a question of normative (as legal) and social legitimacy. It follows that moral or at least value-based concerns, such as the issue of diversity, must be considered in their social and not normative dimension.

However, the idea of legitimacy as a black-or-white system is rejected. It follows that, in concrete terms, the beliefs of the constituencies in ISDS take the form of a myriad of other conducts that impact differently on the functioning of ISDS itself and thus also on its efficiency (in the terms that will be better addressed below).

5. DIVERSITY IN ITA

5.1 Introduction: 'Male, pale and stale'

Three out of four arbitrators in ISDS are from the Western states.[444] Is this a problem?

According to many, yes. In particular, it has been highlighted how the lack of geographic diversity contributes to the ISDS legitimacy crisis. Indeed, the unbalance enhances the general belief that ISDS is '[a] system designed by the West, dominated by the West, and producing pro-Western outcomes,'[445] and for this very reason 'unmistakably neo-colonial'.[446]

The lack of geographical diversity is particularly alarming in ISDS and ITA, especially for the four following reasons:

i) Developing countries – non-Western states – are usually the respondents in ISDS cases. Conversely, arbitrators are not usually from those countries;[447]

ii) Although developed countries, and especially the Western states, are a minority in the world, there is still a considerable lack of proportionality between the total number of developed and developing states versus the geographical representativeness of the arbitrators who decide IIL matters;

iii) Developing states are between two and three times more likely than developed states to lose a dispute, and this does not depend on their index of democratisation.[448]

iv) ITA, as a particular ISDS system, more than any other, raises criticalities in terms of deep limitation to state sovereignty.

[444] See Langford M., Behn D. and Usynin (2022), *The West and the Rest: Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration*, in Behn D., Fauchald O. K. and Langford M., *The Legitimacy of Investment Arbitration* (2022) Cambridge University Press, p. 283.
[445] See Langford, Behn, and Usynin (2022), p. 284.
[446] See, Langford, Behn, and Usynin (2022), p. 284.
[447] In numbers, developing States are part of 74.6% of the cases. Non-Western states (whose grouping is larger than those of developing states) are respondents in 90.6% of cases. The numbers are based on ISDS known ISDS cases (not just ITA). See Langford, Behn, and Usynin (2022), p. 289.
[448] See Langford, Behn, and Usynin (2022), p. 290.

There are then relevant justifications for the increasing attention given to the theme, which has been on the spot also in the current UNCITRAL debate on the reform of ISDS.[449]

That clarified, several questions arise when discussing diversity in ISDS, in general, and ITA, in particular. Firstly, if the numbers support the claim about a lack of diversity among arbitrators. Secondly, if only geographical diversity among arbitrators, or other types of diversity, should be considered. Thirdly, under which conditions is diversity relevant to legitimacy and, fourth, if the (alleged) lack of diversity impacts the quality of the decision or affects the decision-making in any way? Fifth, if it is possible to provide a 'universal' definition of diversity in ISDS, and whether it should be limited or not to arbitrators only.

All the above-mentioned issues will be addressed, along with the possibility of providing a general definition of diversity in ISDS.

5.2 *Diversity and ISDS*

(a) The (alleged) lack of geographical diversity among arbitrators

To delve into the details of the issue, there is a need to provide preliminary numbers on diversity.

Notably, in the literature, much of the emphasis has been on the lack of diversity among arbitrators in terms of geographical provenience. This interest is justified by the striking unbalance between state participation as a party to ISDS and ITA arbitral disputes against their weight in arbitral tribunals.

As of August 2018, according to research by Behn, Langford and Usynin, there have been 695 arbitrators in ISDS cases (those known). Of these, only 241 are not from (in terms of citizenship) Western states, i.e. 35%.[450] Moreover, if the distribution of non-Western arbitrators is analysed, it can be observed that almost half of them come from Latin America. More in detail, only 4% of arbitrators appointed in ISDS arbitrations come from

[449] See https://uncitral.un.org/en/working_groups/3/investor-state.
[450] See Langford, Behn, and Usynin (2022), p. 295.

sub-Saharan Africa versus the 15% from the Caribbean, South and Central America.[451] As a matter of fact, it should be noted that the relevance of South American arbitrators among non-Western states is based on two interrelated factors: i) appointment of non-Western arbitrators is usually made in cases involving arbitrations with respondent states from the same region of provenience, and ii) Latin America states have been respondents in 302 cases (much more than any other non-Western country).[452]

Of course, these 'cold' figures do not provide the full picture. The lack of (geographical) diversity is to be considered in absolute terms and with regard to the weight of the single arbitrator in the caseload. In fact, one of the characteristics of ISDS is the tendency to re-appoint the same arbitrators in multiple cases. As a result, the striking feature of the system is that in a total of over 1,000 cases, with usually three arbitrators per panel, only 695 different individuals were appointed in the vest of arbitrators. Moreover, of those 3,327 appointments (as of August 2018), only 875 were non-Western arbitrators: one out of four.[453]

In addition, except in three cases (Stanimir Alexandrov, Rodrigo Oreamuno and Francisco Orrego Vicuña),[454] no non-Western individuals are on the list of the top 25 'power brokers' (determined on the grounds of the number of repeated appointments).[455]

The unbalance is even more pronounced if one considers who appoints the arbitrators and the role of non-Western arbitrators in the arbitral panels.

Again, the data as of 2018 tells us that most non-Western arbitrators' appointments are made by respondents, i.e. states (31% of cases). Claimants, i.e. investors, make far fewer appointments. They appointed non-Western arbitrators in 22% of the cases, almost 10% less. Finally, in only 19% of the cases, the most prestigious and influential role of presiding arbitrator is obtained by non-Western arbitrators, thus in 185 cases.[456] In this

---

[451] More in detail, among non-Western regions: South America 9%, Central America and Caribbean 6%, Eastern Europe and Central Asia 6%, Middles East 5%, Sub-Saharan Africa 4%, South-East Asia 2%, South Asia 2%, East Asia 1% (see Langford, Behn, and Usynin (2022), p. 296.
[452] See Langford, Behn, and Usynin (2022), p. 296.
[453] The figure consider repeated appointments. See Langford, Behn, and Usynin (2022), p. 297.
[454] More in detail, Stanimir Alexandrov is Bulgarian, Rodrigo Oreamuno is Costa Rican, and Francisco Orrego Vicuña is Chilean.
[455] See Langford, Behn, and Usynin (2022), p. 296.
[456] See Langford, Behn, and Usynin (2022), pp. 299-300.

regard, it is worth noting that out of the 19% of selections, 81 appointments (almost half of the cases) have been made by the institution and not by the parties.[457]

Even a dynamic view of the issue keeps the disproportionality in geographical representation clear. Although there is an increased interest in the topic, and the debate has been going on for years, the figures concerning non-Western arbitrator appointments (at least as of 2018) have remained constant at 26%.[458] In fact, as noted by Behn, Langford and Usynin, any pro-diversity logic is counterbalanced by the weight of the 'prior experience norm' in investment arbitration,[459] which leads to an advantage for those who have been in the system the longest.[460] In fact, if only new entrants' appointments are considered, it would be noticed that since 2008 the number of non-Western arbitrators has become 50% of the total number.[461]

(b) *<u>The shades of diversity among arbitrators</u>*

The topic of geographical provenience appears to be much more complex than what may transpire from the previous section.

In particular, as noted in a recent study, the concept of geographical origin,[462] which is often placed alongside that of geographical representativeness, 'needs to be disaggregated as i) it is often a proxy for multiple considerations, such as presumed political, ideological alignment, educational and other formative experience, and experience with and expectations of governmental authority; and ii) is overly broad, as it assumes that people within a region share the same experience whereas the regions into which people are often placed can be quite different' (e.g. there is a remarkable cultural difference between an

---

[457] See Langford, Behn, and Usynin (2022), pp. 299-300.
[458] See Langford, Behn, and Usynin (2022), p. 298.
[459] See also on the point Puig S. (2014), *Social Capital in the Arbitration Market*, The European Journal of International Law, Vol 25 no. 2.
[460] See Langford, Behn, and Usynin (2022), p. 298.
[461] See Langford, Behn, and Usynin (2022), p. 299.
[462] This connection is found in the notion that the absence of geographical diversity implies an absence of representativeness of certain areas of the world (in the terms identified in the previous section).

arbitrator from Egypt compared to a Nigerian one, and this is also true between different countries in Europe).[463]

At the same time, the issue of the lack of diversity in ITA is not just a matter of arbitrators' geographical provenience. For instance, among the top 25 'power brokers' arbitrators, only two are females.[464]

Hence, it is no coincidence that the UNCITRAL Working Group III has extended its attention outside geographical provenience to focus also on gender, limited age group and limited ethnicity, on the grounds that there is a general view according to which 'the current lack of diversity in decision-makers in the field of ISDS contribute to undermine the legitimacy of the ISDS regime'.[465]

Arguably, not even the UNCITRAL Working III focus is broad enough. From this perspective, it has been suggested that in order to consider the various facets of an arbitrator, there is a need to consider other characteristics of arbitrators: 'nationality, ethnicity, race, educational attainment and experience, legal training (common and/or civil law expertise, Islamic law expertise, etc.), age, work experience (government, private sector, or both of these), social and economic class, development status of the arbitrator's home state, repeat appointments by either investors or host states, religion, disability, and language proficiency'.[466]

---

[463] See Bjorklund and others (2020), p. 5. In addition, as noted by Behn, Langford and Usynin, geographical origin is not only a matter of nationality and there are other factors that may influence this issue, e.g. place of actual residence (see Langford, Behn, and Usynin (2022)).

[464] Namely, B. Stern and G. Kauffmann-Kohler (which are also the most appointed arbitrators in general). See also, on this topic, Behn, Fauchald and Langford (2022), p. 5.

[465] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), AQ/CN.9/935, para. 70, https://fica-disputeresolution.com/wp-content/uploads/2021/03/FICA-UNCITRALWorkingGroupIIIReport-35thSession.pdf (last access 10 January 2023). In general terms, the Working Group III agreed that the there is a lack of diversity in decision makers in the field of ISDS, and that this contribute to undermine legitimacy. The focus has been (unfortunately) only on arbitrators and diversification of arbitrators pools, but as noted above (interestingly) of different features (not only race, ethnicity and gender). The idea behind increasing diversity, whereas not perfectly framed is moreover not only linked to legitimacy discourse but also to quality of decisions making, as far is believed that more diversity would help arbitrators to understand policy consideration of states and local laws.

[466] See Bjorklund and others (2020), p. 6.

These elements have been variously analysed.[467]

With reference to the lack of gender diversity, it was observed that (as of 2017) in the ISDS, only 11% of arbitrators were women,[468] with Kaufmann-Kohler and Stern accounting for 57% of all appointments received by female arbitrators and with the top 25 female arbitrators accounting for 86% of all appointments.[469]

On the other categories of diversity, extensive research was done in 2015 on international commercial and investment arbitration based on six factors: gender, nationality, age, linguistic capacity, legal training, and professional experiences.[470] The research found that 'median international arbitrator was a fifty-three year-old man who was a national of a developed state and had served as arbitrator in ten arbitration cases'.[471]

Another feature that raises concerns is the tendency to re-nominate the same individuals. For example, on this point, it should be noted that only 50 arbitrators received about 50% of the appointments in 2020 (further confirming the 'prior experience norm').[472]

Moreover, although these types of diversities are usually analysed in isolation, it is fair to note that their intersections are also relevant. Indeed, considering only one element at a time makes many conclusions simplistic.[473]

In light of the above, it could be argued that there are multiple facets of diversity in ISDS and that the debate lacks rationalisation around the same concept of diversity. In most cases, studies on diversity in ISDS are not comparable or take a particularly limited view, as they concern only geographical or gender (arbitrators) diversity. Nonetheless, it is not

---

[467] See Waibel M. & Wu Y. (2012), *Are Arbitrators Political? Evidence from International Investment Arbitration*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101186 (last access 8 January 2023), which focus on themes as the education and career background of arbitrators. Still on arbitrators' background, see Fontoura Costa J. A. (2011), *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, Oñati Socio-Legal Series, Vol. 1, No. 4; Schill S. W. (2011), *W(h)ither Fragmentation? On the Literature and Sociology of international Investment Law*, European Journal of International Law. Vol 22, No. 3, p. 875, 889 on the presence of commercial arbitrators in ITA.
[468] See John T. St., Behn D., Langford M. and Lie R. (2018), *Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration*, PluriCourts Working Paper.
[469] Behn D., Langford M. and Létourneau-Tremblay L. (2020), *Empirical Perspectives on Investment Arbitration: What do We Know? Does it Matter?*, Journal of World Investment and Trade, Vol 22.
[470] Franck and others (2015).
[471] Franck and others (2015), p. 466.
[472] On data on appointments see www.pitad.org (last access 8 January 2023).
[473] On the topic of intersectionality, Polonskaya (2018).

a misrepresentation of ISDS to claim that it is dominated by the older white man and, thus, classified as a 'male, pale and stale' institution.[474] It follows that there is ground to address the impact of this lack of diversity.

5.3 Diversity as a standard of legitimacy

(a) Introduction: why does diversity matter in ISDS

The first object of analysis is the connection between (geographical) diversity and legitimacy, focusing on sociological legitimacy for the reasons highlighted in the fourth chapter.

To better understand this relationship is necessary to preliminary clarify why diversity matters.

According to certain authors, the lack of diversity among adjudicators is notable and is considered particularly relevant for multiple reasons.[475] More in detail, i) '[s]ocial science literature shows that diverse decisionmakers are more likely to avoid cognitive biases and group-think in decision making', 'one or more decision-makers might have the cultural knowledge to understand the dispute in context', '[d]iversity among decision-makers may improve the quality and rigor of the decision they render, and in doing so affect or enhance the normative legitimacy of a particular system', 'diverse decision-makers are likely to be perceived as capable of producing fairer decisions, which is likely to enhance the sociological legitimacy of a particular system', '[a]djudicative systems with decisions-makers that are diverse, inclusive, and representative are more likely to be perceived as legitimate, their decisions are more likely to be complied with, and they are more democratically accountable'.

[474] It should be considered that the concept of diversity as limited to arbitrators is in theory reductive, as the issue of bias in decision making and legitimacy of ISDS is related to all actors, social groups and organisations that may play a role in the process by which an arbitral decision is obtained (starting with the choice to initiate a claim). For the sake of simplicity, we have chosen to focus on arbitrators. However, it should be noted that the reasoning made here (and especially in Chapter VI) is also applicable mutatis mutandis to other actors, social groups and organisations relevant to ISDS (e.g. counsels and arbitral institutions).

[475] See Bjorklund and others (2022), p. 4.

In addition, it is further believed that ‘symbolic diversity alone is insufficient to make a system legitimate or even to be perceived as legitimate – genuine inclusiveness requires that all decision-makers have equal opportunities to shape the outcome of a case’.[476]

Therefore, there are two main grounds for arguing in favour of the relevance of diversity in ISDS: i) the impacts of diversity on the legitimacy of the system and ii) the impacts of diversity on the quality of decisions (in the broad sense).[477]

(b) *Diversity and legitimacy*

In light of the above, the next step is to investigate, in more detail, which are the connection between diversity and legitimacy. Therefore, why can diversity-driven evaluations influence the beliefs of constituencies on ISDS and ITA legitimacy?

The following is suggested in this regard, drawing upon the research of Bjorklund (and others) on the subject.[478]

First, there is an ethical-moral aspect of diversity that has relevance for legitimacy. In fact, while it is true that there is no universal ethical and/or moral code, it is not true that diversity has no ethical-moral connotation. Individuals form a certain assessment of diversity in terms of definition and relevant characteristics. In other words, the belief in the importance of diversity within an institution is primarily connected to the idea that it is right to pursue this goal and that it is correct/necessary to pursue it in a certain way. The ‘certain way’ is characterised both by which characteristics should be the object of interest (geographical, ethnic, gender, intersectional or other) and also by what diversity is (i.e. heterogeneity, representativeness or, as one tends to do, also inclusiveness, equity, whatever the actual nature of these notions might be).

---

[476] See Bjorklund and others (2022).

[477] That clarified, in contrast to the authors mentioned above, it is believed that the claim according to which for having a diverse ISDS is necessary that adjudicators (and decision-makers) ‘should represent the diverse constituencies of the stakeholder subject to their decision*s*’[477] appears based on the sole the criteria of formal implementability. However, as noted above, the concept of diversity in the constituencies is not sustainable. Something should be added to it in order to make diversity matter, i.e. the concepts of dynamic conceptualization of diversity, which considers both sociological legitimacy and decisional-quality impacts.

[478] See Bjorklund and others (2022).

Therefore, it appears that the first perspective on diversity and legitimacy is the one that sees diversity as an application of ethical and moral values of the individuals and/or social groups establishing a constituency. In this sense, an institution that does not represent the constituency's ethical and/or moral values could be considered devoid of the authority to rule. In other words, the duty to comply with the rule of an authority that cannot introject the constituency's moral and ethical 'preferences' could be questioned.[479]

Besides ethical and moral considerations, there is also a question of the connection between diversity and trust in decision-making. Without the need to analyse the subject in detail and ask whether diversity effectively impacts the quality of decision-making, it is fair to deem that constituencies' perception of the functioning of an institution and its decision-making processes is influenced by diversity in the system. In other words, a constituency may perceive that an individual or a group are subject to cognitive bias or lacking the cultural knowledge necessary to evaluate and decide carefully.[480]

In this regard, it can be said that a constituency may not consider legitimate a system whose output (as a decision) is made on the grounds of a poor decision-making process. It follows that, from a sociological legitimacy perspective, the perceived quality of a process and the acceptability of its outcome may be influenced by the system's diversity level.

In conclusion, there are then two main arguments to confirm that diversity is a legitimacy factor: i) constituencies' moral and ethical beliefs, ii) beliefs on the quality of decision-making.

5.4 Bias and diversity

(a) Diversity and bias in ISDS: are data supporting it?

[479] It could be questioned if symbolic validation can be categorised within ethical and moral statements. The present author believes that symbolic validation should be considered apart. However, to the economy of this thesis, symbolic validation of an institution through diversity is considered within the ethical/moral legitimacy discourse.

[480] It should be remember the difference between legitimacy of a decision or a decision-process (as acceptance of the right to rule), rationality of a decision (to which an individual may agree even if does not acknowledge any aprioristic authority to the decision-maker and the decision as such), coercion (the effectiveness of a decision due to a physical or psychological imposition).

Arbitrators, as private adjudicators, are arguably the most representative feature of arbitration and, without doubt, the ones on which most of the research has been focused (including the one on diversity). Therefore, analysing them is a reasonable benchmark for understanding whether it makes sense to argue in favour of a hypothetical connection between diversity and biases in ISDS (thus, supporting the claim that this aspect should be considered in any economic approach to diversity).[481]

In particular, it would be interesting to understand if there is any connection between diversity and decision-making by assessing if statistically relevant data shows a bias of adjudicators.

To this end, reference is made to the latest findings of Behn, Langford and Usynin on the topic of geographical diversity, which has been undoubtedly one of the most discussed and thorny topics about diversity in ISDS and ITA.[482] More in detail, Behn, Langford and Usynin compared the composition of arbitration panels with cases in which the investors lost (by jurisdiction or merit) and cases in which the investor won (even with a partial award). On these grounds, they sought to ascertain whether the composition of the arbitration panel, in terms of the nationality of the arbitrators,[483] had an impact on the

[481] As mentioned above, diversity in ISDS is considered as something more than diversity in terms of geographical traits of arbitrators. ISDS – as in institution – is a complex of rules that goes far beyond the process of issuing the awards and the role of arbitrators. From this perspective, also the policy-makers decision-making process is relevant and can be influenced by the identity of the decision-makers. Accordingly, not only the geographical features may influence the individual's decision-making process. That clarified, to simplify the analysis (and considered the extensive work on the theme), it would be tried to address the connection between diversity and quality of decision-making starting from arbitrators. It is argued that *mutatis mutandis* most of the below finding can apply to different categorisation of diversity.

[482] In 2018, the following data emerged: In the 206 cases where the ITA panel was composed exclusively of Western arbitrators, the investor won 54.9% of the cases (113 against 93). In the 34 cases where the ITA panel was composed of two Western arbitrators and a non-Western chair, the win for investors decreased to 32.4% (11 against 23). In the 47 cases where the ITA panel was composed of two Western arbitrators and one non-Western arbitrator appointed by the claimant, the investor won in 51.1% of the cases (24 against 23). In the 91 cases where the ITA panel was composed of two Western arbitrators and one non-Western arbitrator appointed by the respondent, the investor won in 56% of the cases (51 against 40). In the 8 cases where the ITA panel was composed of two non-Western arbitrators and one Western arbitrator appointed by the claimant, the investor won 25% of the cases (2 against 6). In the 17 cases where the ITA panel was composed of two non-Western arbitrators and a Western chair, the investor won 52.9% of the cases (9 against 8). In the 7 cases where the ITA panel was composed of two non-Western arbitrators and one Western arbitrator appointed by the respondent, the investor won in 42.9% of the cases (3 against 4). In the 13 cases where the ITA panel was composed exclusively of non-Western arbitrators, the investor won 46.6% of the cases (6 against 7). See Langford, Behn, and Usynin (2022), p. 304 ff.

[483] As a simplification nationality and geographical diversity as considered synonymous.

outcome of the decision (favouring the plaintiff or the defendant, who are the investor and the state, respectively).

Interestingly, the conclusion is that 'nationality may not matter that much for actual outcomes – providing a wrinkle in legitimacy critiques. However, there is one sign of home region bias. Panels with non-Western presiding arbitrators tend to favour non-Western respondent states more than their counterparts. The result, nonetheless, lies just outside the zone of statistical significance. Moreover, the mere presence of non-Western arbitrators on a tribunal tends to increase the chance of a claimant-investor succeeding'.[484]

In other words, according to the authors, there is no statistically relevant data that can be deducted and used to support the case for diversity.[485]

The question one might ask is, is this conclusion sufficient to rule out the relevance of geographical and, more generally, diversity from a decision-making quality perspective?

(b) *Diversity and bias in ITA: there is still a case to discuss it*

The present author claims that there is still room to discuss about potential connections between diversity and the quality of decision-making.[486] In particular, it is argued that analysis of diversity and bias should avoid addressing outcomes as such (who wins against who loses) in favour of more nuanced features.

In this regard, it is helpful to first recall the work of Van Harten.[487]

Starting from a different perspective than the one analysed in the previous section, Van Harten questioned the following about the *modus operandi* of arbitrators:[488] i) whether,

[484] See Langford, Behn, and Usynin (2022), pp. 312-313. This conclusion is aligned with other researches on similar topics. For instance, see, Lazo R. P. and Desilvestro V. (2018), *Does an Arbitrator's Background Influence the Outcome of an Investor-State Arbitration?*, The Law and Practice of International Courts and Tribunals p. 17, pp. 18–48.

[485] For the sake of completeness, it should be noted that the authors clearly point out that this conclusion: i) is based on data as of 2018; ii) although one might imagine that an increase in diversity does not have a bearing on the outcome of decisions, it is true that this prediction is based on 'the current system of international investment with its myriad of constraints, incentives and cultures'.

[486] In posing this question, post-realist criticism in terms of the radical indeterminacy of the law has not been investigated. See, for an overview on the topic, Garcia Bielsa (2022).

[487] See Van Harten (2016).

[488] Van Harten (2016), p. 11.

in exercising their discretion, arbitrators apply a comprehensive or restrictive approach; ii) whether the provenience of the claimant/defendants influences these approaches.[489]

Interestingly, Van Harten did not focus simply on the outcome (which is a rather complex concept to address in dispute resolution)[490] but on the expansive or restrictive interpretation of treaty clauses. In this regard, the author considered as an exemplification the following clauses, explaining in each case what means an extensive and/or restrictive interpretation:[491]

‘1. Corporate person investor: Should a claim be permissible where ownership of the investment extends through a chain of companies running from the host to the home state via a third state? Expansive approach: yes. Restrictive approach: no.

---

[489] The countries take into consideration by Van Harten for the second and third hypothesis are: France, Germany, United Kingdom and United States. There was also a third question on whether these approaches are influenced by the origin of the defendant, which remained unanswered given the few available data.

[490] A brief clarification on this point. It is erroneous to think of disputes as a game between two parties in which there are two opposing views in which only one can win over the other. In other words, in dispute, there is no thesis A, opposed by thesis B, whereby a third party must ‘merely’ decide whether to agree with the first or the second. First, the dispute is an instrument. In other words, the relief granted by the adjudicator is a means for the party to achieve a certain good in life. It follows that there is a dyscrasia between means and good that makes it already erroneous to think that a ‘judicial victory’ corresponds in itself to a benefit. Imagine the case of an instrumental defence made for the sole purpose of delaying the other party’s claims and thus frustrating any effective satisfaction. In such a case, even a final ‘defeat’ on the merits, but one that came years after the commencement of the dispute, would in reality turn into a victory for the losing party. Hence, it should, first of all, be made clear that the judicial remedy in itself does not correspond to the good of life, making the focus on the mere outcome of the adjudication process a somewhat short-sighted perspective. Another issue is to understand what is meant by ‘victory’, also eliminating the extra-trial aspect. In fact, even the analysis based on the comparison between what the parties requested and what was obtained suffers from limitations: i) what was requested is often more than what can be expected, based on a strategy widespread in some legal cultures of requesting (and contesting) elements whose justification is doubtful but not completely meaningless; ii) the remedies requested are often various, alternative, subordinate, so that victory can be achieved in various ways and various dimensions. In particular, it may easily be the case that against a claim for EUR 100, the adjudicator awards EUR 50. In such a case, both the plaintiff and the successful party would be interested in reforming the decision to obtain either 100 or 0. In a case such as this, it is difficult, in a strictly procedural sense, to say which party has won. Such issues are typical in all proceedings, especially complex procedures such as the ITA. Indeed, in this sense, the research analysed in the previous section is flawed to the point where it is possible to state whether one party or another won based on the award rendered alone, which in fact, (usually) upholds only part of a party’s claim. With reference to the state, as will be seen below, it should be pointed out that even a judgment rejecting all the plaintiff’s claims may, in fact, be unfavourable if a particularly expansive interpretation of a treaty clause is pronounced, which then goes on to influence subsequent decisions taken based on that treaty (and others).

[491] See Van Harten (2016), pp. 227-228.

2. Natural person investor: Should a claim be permissible where brought by a natural person (a) against the only state of which the person is a citizen or (b) against a state of which the person is a citizen without confirmation of dominant and effective nationality? Expansive answer: yes to either of the two questions. Restrictive approach: no to either of the two questions.

3. Investment: Should the Fedax criteria be applied to limit the concept of investment under the […[(ICSID Convention); or, regardless of whether under the ICSID Convention, should there be a requirement for an actual transfer of capital into the host state as a feature of an investment; or should the concept of investment be limited to traditional categories of ownership? Expansive approach: no to any of the three questions. Restrictive approach: yes to any of the three questions.

4. Minority shareholder interests: Should a claim by a minority shareholder be allowed where the treaty does not permit claims by minority shareholders, such as where the treaty does not include the term "shares" in the definition of investment, or should it be permitted without limiting the claim to the shareholder's interest in the value and disposition of the shares (as opposed to interests of the domestic from itself)? Expansive approach: yes to either of the two questions. Restrictive approach: no to either of the two questions.

5. Permissibility of investment: Should there be an evident onus placed on the claimant (or the respondent state) to show that an investment was (or was not) affirmatively approved or was (or was not) based on corrupt practices? Expansive approach: onus on the respondent state. Restrictive approach: onus on the claimant.

6. Parallel claims: Should a claim be allowed in the face of a treaty-based duty to resort to local remedies that clearly was not satisfied by the claimant; in the face of a contractually agreed dispute settlement clause relating to the same factual dispute; in the face of an actual claim, arising from the same factual dispute, via the relevant path of a treaty-based fork-in-the-road clause; or in the face of an actual claim, arising from the same factual dispute, via another treaty that could lead to a damages award in favour of the investor. Expansive approach: yes to any of the four questions. Restrictive approach: no to any of the four questions.

7. Scope of most-favoured-nation treatment: Should the concept of most-favoured-nation treatment be extended to non-substantive provisions of other treaties (such as dispute settlement provisions)? Expansive approach: yes. Restrictive approach: no.'

Based on these premises, Van Harten pointed out that – in all cases where the data were statistically significant – there was a strong tendency towards an expansive approach.[492] The expansive approach 'enhanced the compensatory promise of the system for claimants and the corresponding risk of liability for states' with the consequence of supporting 'the hypothesis that tested expectations that arbitrators would interpret the law in ways that encourage claims and support the economic position of the arbitration industry'.[493]

First, Van Harten's second conclusion considered whether the fact that a claimant was French, German, from the United Kingdom or the United States was a diriment element. In this regard, the author concluded that when the claimant came from these countries, the tendency to an expansive approach was even higher (especially for the US, except for Germany – where data were not considered statistically significant).[494]

Another approach, which moves away from strictly outcome-based analysis, is the one followed by Alschener.

[492] See the following Van Harten's table of recap, Van Harten (2016), p. 238:

TABLE 2: CLASSIFICATION OF ISSUE RESOLUTIONS BY ISSUE

Issues	No. of issue resolutions	Resolution of issue Expansive (%)	Restrictive (%)
(1) corporate person investor	69	81.94	18.06
(2) natural person investor	6	0.00	100.00
(3) concept of investment	116	72.27	27.73
(4) minority shareholder interest	72	92.00	8.00
(5) permissibility of investment	27	66.67	33.33
(6) parallel claims	165	82.74	17.26
(7) scope of MFN treatment	60	50.00	50.00
Cumulative	**515**	**76.09**	**23.91**

[493] Van Harten (2016), p. 238.
[494] Van Harten's analysis also compares different groupings and classification elements in order to assess whether there are changes in the trends of arbitrators, see Van Harten (2016), pp. 240 – 250.

Alschener addressed the tension in ISDS between consistency – understood as ‘coherence of interpretations and outcomes across ISDS decisions’[495] – and correctness ‘substantive quality of arbitrators’ reasoning and accuracy of outcomes’.[496]

More specifically, according to the above-mentioned author, arbitrators appear to be more interested in pursuing consistency than correctness. To support the claim, Alschener considers a measurable fact: the tendency to cite precedents. According to the author, an arbitral tribunal interested in correctness ‘will build its interpretation closely around the specific language of the applicable IIA and will primarily cite cases relying on awards rendered under the same treaty or highly similar IIAs’[497] because ‘it wants to get its interpretation “right” in the specific case rather than contribute to any wider systemic jurisprudential debate’.[498] The alleged consequence is that an arbitral tribunal more concerned with coherence than correctness will tend to cite ‘cases more liberally including those rendered under more dissimilar IIAs’.[499]

The conclusion of Alschener is that (with exceptions, as in NAFTA) arbitrators cite cases even from treaties with a design quite different from the one in which the case arises.

Alschener’s research adds some interesting insights to Van Harten’s assessments.

On the hand, Van Harten observes that there is a tendency towards an extensive evaluation of BIT clauses, a tendency that is biased towards certain actors. On the other hand, Alschener observes at the same time that there is a tendency for arbitrators to favour consistency of decisions rather than correctness. Read together, it can be speculated that the system tends to develop consistently towards increasingly expansive approaches, given the tendency of arbitrators to cite each other and – per se – to prefer extensive interpretations of arbitral awards.

[495] See Alschner (2022), p. 230.
[496] See Alschner (2022), p. 231.
[497] See Alschner (2022), p. 232.
[498] See Alschner (2022), p. 232.
[499] See Alschner (2022), p. 232.

In light of the above, one could speculate that this tendency is also connected to the characteristics of the arbitrators.[500]

In other words, Van Harten's and Alschener's research leave room for measurements of the quality of decisions through mediated instruments, allowing diversity to be considered among the relevant metrics.[501] The possibility of such an analysis, accompanied by an index of bias and a preference for consistency and expansiveness of interpretation over correctness, indicates that there is probably a case for discussing diversity and bias. Alternately, more humbly, the above-mentioned works leave room to consider the impact of diversity on the quality of decision-making as part of the exercise aimed at constructing an economic equation on diversity as an efficiency factor.[502]

5.5 The concept of sustainable diversity

(a) *The lack of a notion of diversity*

As noted above, the heterogeneity of ISDS literature implicitly confirms that '[d]iversity can be conceptualized around multiple factors and categorized according to different types'.[503]

The issue in this sense is that there are infinite definitions of diversity, most of which are linked to the purpose of the relevant author or interest that the institution is pursuing. It follows that there is an intrinsic difficulty in establishing a universal notion of diversity.

However, it is here believed that there are some common grounds on which to construe a definition of diversity.

---

[500] That said, it is made clear that there is a substantial difference between a system's normative (legal) legitimacy and the correctness of its decision-making process. In particular, a system may arrive at formally correct decisions - at a so-called procedural truth - which does not correspond to the historical truth and does not entail a correct application of the relevant legal norms. In a system such as ISDS, where there is not a body with consistency and correctness control functions, while the tendency to cite precedents might guarantee uniformity, it is equally true that uniformity does not necessarily correspond to the application of the correct legal norm.

[501] To the knowledge of the present author, there are no researches addressing diversity by applying the models suggested by Van Harten and Alschener.

[502] Strezhnev (2016). The above, without prejudice to the fact diversity in ISDS is not just a matter of diversity among arbitrators.

[503] Bjorklund (2020).

The exercise is deemed essential for addressing diversity as an efficiency factor. Indeed, without a clear preliminary definition of diversity, it would be impossible to claim that its absence would negatively impact the system's functioning.[504] Moreover, the lack of definition would favour opportunistic uses of diversity as a notion and hinder comparison among researchers and suggestions on the topic. Therefore, clarifying what is meant by diversity or what diversity should be is relevant.

The first conceptual issue with diversity concerns the scope. Is it correct to debate only on arbitrators, as done, for instance, by the UNCITRAL working group III?

The point deals with the system's intrinsic complexity, which is construed upon different layers of stakeholders/constituencies that influence its current functioning in different ways. At a better look, focusing on arbitrators and adjudicators is pretty limiting when talking about diversity in ITA and ISDS. Indeed, the arbitrators are a piece of a wider spectrum, where a substantial role is also held, for instance, by the arbitral institution. Institutions, such as ICSID, have a fundamental role in the existence of ISDS and ITA. In this regard, it is enough to recall that arbitral institutions determine the 'rule of the game' (hence, most of the procedural rule for the parties in dispute), and, in particular, they usually control the selection of arbitrators when the parties d[505]o not appoint them.

Moreover, as noted in the introductory chapter, there are further reasons to consider the insufficient focus on arbitrators (and arbitral institutions). The rationale for having an arbitrator-focused analysis stream from the public debate on diversity in ISDS, which has often driven the literature, and to the fact that diversity debate in ISDS has usually been included in a wider arbitration-based debate on diversity more than in an autonomous discourse on IIL and lack of diversity in IIL as such.

A different perspective, which starts from legitimacy issues in IIL, requires as an immediate consequence to move away from an arbitration based on an analysis. The

[504] In this sense, if the question is how to address the lack of diversity, a case-by-case definition which take into account specific type of diversity in light of the relevant debate taken into account is acceptable. Conversely, where the claim is that generally speaking lack of diversity is undermining the functioning of a certain system, it is necessary to clarify what diversity is about or, at least, provide (as it will be proposed here) a methodology to determine which type of diversity to take into account.
[505] For instance, no known ISDS has been never brought before a Sub-Saharan arbitration tribunal, and only in two cases (with CRCICA) an African institution has administered an ISDS case.

reason is easy to explain. IIL and ISDS are institutions based on multiple stakeholders impacting their functioning at different levels. More in detail, IIL and ISDS is the product of policy-makers, scholars and doctrinal interpretation, arbitrators' decision-making, arbitral tribunal management of disputes, law firms, expert witnesses and so on. The legitimacy of an institution is based on evaluating all these constituencies. It follows that addressing diversity exclusively from an arbitrator's point of view fails to consider the bigger picture and the wider connection between diversity and legitimacy in ISDS. Instead, a legitimacy-based analysis of diversity in ISDS should start from an analysis of what the constituency believes is relevant in determining their acceptance of the institution. From this perspective, it should be taken into account where and to which extent diversity influences their perspective.

At the same time, diversity is not just a matter of legitimacy. Diversity may impact decision-making quality. However, again, decision-making is not just a matter concerning arbitrators. It concerns rule formation and institutional crafting. It concerns arbitral tribunal management decisions, counsel activities, and scholar and doctrinal interpretation (which cannot be considered objective and neutral).

From a diversity analysis of ISDS, it derives that the focus on arbitrators is wrongly founded.

Besides which constituencies take into account, it remains to be clarified which could be a universal definition of diversity in ISDS and ITA.

(b) *Proposal for a concept of sustainable diversity*

To develop a useful definition of diversity, it is first necessary to disentangle the topic. In this regard, it should be made clear – once again – which is the context of this research.

Diversity is considered an international mechanism for resolving international disputes, having international investment and exercise of sovereign powers as an object.

Moreover, diversity is here addressed as an economic efficiency factor, which means that: i) its implementation raises costs but can also create benefits (for instance, in terms of the quality of the decision); ii) its same existence as a conceptual construction among the ISDS and ITA constituencies has a consequence in terms of sociological legitimacy.

Therefore, any proposed notion should be able to provide content to understand whether and in which terms diversity could improve the efficiency of ISDS and ITA.

It follows that a definition of diversity needs to reflect the dynamic conceptualisation of the topic among the constituencies, the (potential) impact on decision-making, and be an abstract notion that can be concretely implemented through explicit norms and actions and, thus, transformed into costs and benefits.

In light of the above, it is argued that the definition of diversity should be based on i) a measurable heterogeneity and ii) a sociological-based categorisation.

The idea of a definition that can be actually measured and then implemented in real life refers to a proposal of a definition of diversity that is clear enough to determine which real-life feature an individual, a social group and/or an organisation should have to meet the criteria posed by the said definition.

That clarified, construing a notion of diversity needs to further take into consideration the preliminary fact that, in theory, any appreciable difference among individuals, social groups and/or organisations – visible or not – can be categorised as diversity (from the hair colour of adjudicators[506] to academic background, language, passing through the seat of the institutions, appointing and recruiting processes, and any other imaginable and appreciable feature).[507] However, it is equally true that not all differences can have the same relevance.[508] It is easy to understand that not creating a minimum relevance threshold could turn diversity into an empty and irrelevant concept, thus frustrating the concrete implementation criterion. More in detail, if it is true that a feature needs to be measurable (in the sense that it needs to can be translated into real-life characters of

---

[506] Discrimination and prejudice against redheads individuals is defined 'Gingerism' (on this topic see, *Gingerphobia: Carrot-tops see red* (2000), BBC News, http://news.bbc.co.uk/1/hi/special_report/1999/02/99/e-cyclopedia/686977.stm (last access 10 January 2023) and <http://news.bbc.co.uk/2/hi/special_report/1999/02/99/e-cyclopedia/686977.stm> 9 November 2021; Rohrer F. (2007), *Is Gingerism as Bad as Racism?*, BBC News, http://news.bbc.co.uk/1/hi/magazine/6725653.stm (last access 10 January 2023).

[507] Diversity can be considered from two perspectives: a) Diversity of the whole system, in terms of choices within all proceedings referring to the ISA or at least those referred to in a specific framework agreement; b) Diversity within a specific arbitration proceeding. In this paper both forms of diversity come to the fore: the former is in particular necessary to make sense of the concept of institutional diversity.

[508] As an extreme example, it is quite easy to understand that consider at the same level diversity in terms of feet dimension and gender representation is not the same thing.

individuals, social groups and organisations), it is also true that any individual, social group and/or organisation differs from each other. Hence, if any characteristic is relevant to diversity, it would be easy to say that any human and human construction is diverse for its same nature. Therefore, simply defining diversity as any visible and/or invisible difference or combination of differences that distinguish an individual, a group of people or an institution from another individual, group of people or institution would be unsustainable.

To help unscramble the issue and develop a 'sustainable' definition of diversity, reference to a descriptive/sociological categorisation of diversity is needed. More in detail, it is claimed that the relevant categories of diversity should be determined by analysing ISDS constituencies' beliefs.[509]

In light of the measurability (or capability to be implemented) and dynamicity criteria, a sustainable definition of diversity should be the following one:

Any visible and/or invisible difference or combination of differences that distinguish an individual, a group of people or an institution from another individual, group of people or institution, which (effectively) impact the sociological legitimacy of the institution.[510]

---

[509] It is necessary that the quality of decision-making is a different matter from legitimacy. Indeed, a system that is poorly construed because it produces erroneous decisions could still be (theoretically speaking) legitimate if it respects its own internal rules. Of course, a flawed decision-making process has an indirect relevance in terms of legitimacy, i.e. sociological legitimacy, as a way to delegitimise the capacity of an institution to achieve what is willing or should be aimed to achieve. However, this does not directly impact legitimacy but also indirectly. On the other hand, lousy decision-making as a consequence of diversity may be relevant in terms of costs, as better described in section 5.6 and Chapter VI. That clarified, it is worth highlighting that the consequence of the impact of diversity in bad decision-making does not have relevance in terms of the substantive value of the notion. Indeed, diversity as a goal to be pursued as it is right to do so is a different theme. Although such a sense of 'justice' may be justified by an assessment of the effects of its pursuit (therefore, on the quality of decision-making), its moral and ethical nature disregards a close correlation with the effects of its implementation (with the exception of a Mill's based approach). In other words, in sociological legitimacy, the quality of decision may be relevant to determine diversity's moral and ethical value but is not synonymous with it. It follows that saying that diversity matters in terms of sociological legitimacy or quality of decision-making do not entail, in both cases, a relevance of diversity's intrinsic moral and ethical value. As a further consequence, a sustainable definition of diversity based on sociological legitimacy and quality of decision-making is devoid of moral and ethical value.

[510] It is should be noted that this definitions does not take into consideration issues such as: categorisation (how to determine who follow into a certain category), readdress social inequality, self-ascription and ascription by other (which in a certain extent linked to categorisation), distinction between groups and category, and identity. Without providing further detail, instead issues such as intersectionality, multiplicity

The abovementioned definition matches the concept of heterogeneity with a sociological-based categorisation.

Besides empirically applying this definition (thus translating it into particular features), the other main issue is to understand how such a definition of diversity may impact ISDS. In other words, is there a model to determine if the lack of sustainable diversity leads to inefficiency?

5.6 Conclusions

The present chapter has addressed three main issues.

First, to understand why diversity is relevant in terms of legitimacy. Secondly, to analyse whether it makes sense to talk about diversity in terms of its impact on the quality of decision-making or whether, even in this thesis, such a question should be excluded. Third, to define diversity through the concept of sustainable diversity.

It has been argued that the legitimacy of ISDS is impacted by diversity, as the latter influences the beliefs of ISDS constituencies. Moreover, it has been claimed that although no research explicitly demonstrates that the absence of diversity negatively impacts decision-making and creates a systemic bias, it is nevertheless true that there are distortions in the ITA and ISDS systems that would be useful to investigate from a diversity perspective as well.

Furthermore, it has been claimed that a definition of sustainable diversity should be based on two criteria: i) the possibility to measure the heterogeneity of the system / implement it through action and prescription, and ii) categorising and creating a diversity threshold by considering the beliefs of the relevant constituencies.

---

and symbolic and social boundaries does not escape from this definition. For a general introduction on the point, see Vertovec (2014).

6. AN ECONOMIC APPROACH TO DIVERSITY IN ISDS

6.1 Introduction

The main hypothesis of the present thesis is that diversity is an efficiency factor and, thus, that pursuing diversity may impact the efficiency of ISDS and that the lack of diversity is (possibly) a cost in the system.

The analysis of the above hypothesis requires breaking down the question into three sub-questions. It is necessary to establish what diversity is,[511] what is meant by the notion of efficiency (in ISDS) and what is meant with the notion of efficiency factor.

In light of the above, it is necessary to address the connection between diversity and efficiency of ISDS and analyse in which terms diversity is an efficiency factor.

In this chapter, after having already analysed the impact of diversity in ISDS and provided a (potential) definition of diversity, the focus will be on disentangling the claim according to which diversity is an efficiency factor of ISDS.

6.2 The notion of efficiency

As clarified in the fifth chapter, to the extent relevant here, diversity is considered to mean:[512]

Any visible and/or invisible[513] difference or combination of differences that distinguish an individual, a group of individuals or an institution from another individual, group of individuals or institution, which impact the sociological legitimacy of the institution.[514]

The definition requires the assistance of empirical analysis in order to be substantiated. Focusing on sociological legitimacy, this empirical analysis should be aimed at understanding the beliefs of the constituencies that come to the fore in each case.

[511] As already seen in chapter 5.

[512] For the concept of institution, please see note 12.

[513] The referral to visible and invisible diversity is aimed at taken into consideration both characteristics that can and cannot be readily seen, such as race, on the one side, and gender preferences, on the other.

[514] In a normative sense, diversity means to include in something different types of individuals, group of individuals and/or institutions.

Therefore, in the context of ISDS and IIL, it is necessary to assess the beliefs of the relevant constituencies. Hence, the stakeholders of this public international law system.[515]

As defined by the constituency, diversity could be considered a goal to maximise in economic terms. It follows that legal norms can be designed in order to incentivise economic agents to pursue this goal.

However, pursuing a goal norm is not without consequences, as it necessarily entails (or often entails) at least the compression of another goal. For example, imagine the following case in the context of ISDS. Assuming that the constituencies consider it essential to have an arbitral panel composed of individuals from different races, a regulatory policy could require parties to choose arbitrators based on racial criteria.[516] Such a choice would, however, limit the parties' options in choosing arbitrators and would, therefore, not be without prejudice to other goals (such as maximising the parties' autonomy).[517] Imagine also the further case where the rules are race and age-based and require the appointment of particularly young arbitrators (under 30) other than imposing racial diversity (the arbitral panel should be composed of arbitrators of different races). Again, such a measure might not guarantee a sufficient pool of competent arbitrators, especially in a highly specialised system such as the ISDS, where specialisation is acquired over time. The expected consequences are an increase in the costs of these arbitrators' fees (given their scarcity) and a negative impact on the quality of decision-making (given the lack of sufficient experience/expertise).

[515] From practical purposes, it would not be considered the relationship between this definition and decision-making. Nonetheless, it is believed that with some adjustment most of the considerations made here are applicable to decisions making analysis.

[516] For instance, the claimant could be imposed to appoint an arbitrator from the same racial group to which belong the majority of the population of the respondent state.

[517] Parties' right to appoint the arbitrator is probably the most characteristic exemplification of the parties autonomy in arbitration, which bestows the parties freedom and is consider a core tenet of arbitral process. From another perspective (i.e., the social cost of parties' freedom), and hence anticipating a topic which will be better addressed in the following paragraphs, it can be said that parties' autonomy – in theory – should also positively impact legitimacy of the system. However, it is doubted that the above finding would apply in a system with social costs that go pretty beyond the private parties interest as ISDS, and ITA in particular. Without prejudice to the fact that also the social costs of international commercial arbitration may cast some criticalities on the importance and prevalence of parties' freedom.

The fact that a measure can both incentivise and de-incentivise the pursuit of two or more different goals opens the space for a further claim. What is the criterion for determining to which extent to pursue a goal rather than another in ISDS?

The present author argues that efficiency is the yardstick for determining whether maximise a certain goal within the ISDS.[518]

To substantiate the abovementioned argument and clarify what efficiency in ISDS means, it is useful to remark that economic approaches to law 'draws upon the principles of microeconomic theory'.[519]

Microeconomics concerns decision-making by individuals and small groups, and it basically studies 'how scarce resources are allocated among competing ends'.[520] From this perspective, this science can deal with: i) the theory of consumer choice and demand (how a consumer, with limited income, chooses among an array of goods and services); ii) the theory of business organisation or firms (how and what produce); iii) interaction between consumers and firms (coordination of the agents in the market); iv) supply and demands for inputs into the productive process; v) welfare economics.[521]

Economic studies employ three essential concepts: maximisation, equilibrium and efficiency.

Regarding maximisation, it means 'choosing the best alternative that the constraints allow'.[522] In a 'world' of interaction among maximising actors and/or goals to be maximised, an equilibrium is a 'pattern of interaction that persist unless disturbed by outside forces'.[523] Efficiency, instead, is the criterion for choosing between alternatives.

---

[518] Coleman J. L. (1980), *Efficiency, Utility and Wealth Maximization*, Hofstra Law Review, Vol. 8, Issue 3, Article 3.
[519] Cooter and Ulen (2014), p. 11.
[520] Cooter and Ulen (2014), p. 12.
[521] For an introduction to microeconomics see Cooter and Ulen (2014), pp. 11-54. As a relevant comment, please note that welfare economics is a branch of economics aimed at evaluating well-being (welfare) at the aggerated (economic-wide) level.
[522] Cooter and Ulen (2014), p. 12.
[523] Cooter and Ulen (2014), p. 12-13.

Economic approaches to efficiency are mainly of four types: i) Productive efficiency, ii) Pareto optimality, iii) Pareto superiority, and iv) Kaldor-Hicks efficiency.[524]

In microeconomic theory, there is a productive or production efficiency when a system cannot produce more output of a certain good without sacrificing the production of another good or changing the operative inputs.[525] In other words, production is productively efficient if either of the following two conditions holds:[526]

i) It is not possible to produce the same amount of output using a lower-cost combination of inputs, or

ii) It is impossible to produce more output using the same combination of inputs.

Take an example used by Cooter and Ulen:

'Consider a firm that uses labor and machinery to produce a consumer good called a widget. Suppose that the firm currently produces 100 widgets per week using 10 workers and 15 machines. The firm is productively efficient if

i) It is not possible to produce 100 widgets per week by using 10 workers and fewer than 15 machines, or by using 15 machines and fewer than 10 workers, or

ii) It is not possible to produce more than 100 widgets per week from the combination of 10 workers and 15 machines.'

The other types of efficiencies, called Pareto efficiencies, are named after their inventor, the Italian-Swiss political scientist, lawyer and economist Vilfredo Pareto. These two types of efficiency are allocative and concern satisfaction of individual preferences.

[524] As alternative to these four approaches, see also Posner's concept of wealth maximisation. See Posner (1979), *Utilitarianism, Economics, and Legal Theory*, The Journal of Legal Studies, Vol. 8, No. 1, p. 103. In general, see Coleman (1980); Coleman J. L. (1980), *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, California Law Review, Vol. 68, No. 2, pp. 221-249.
[525] Sickles R. C. and Zulenyuk V. (2019), *Measurement of Productivity and Efficiency. Theory and Practice,* Cambridge University Press.
[526] Cooter and Ulen (2014), p. 13.

A Pareto optimal allocation of resources is one where a further reallocation of resources cannot enhance the welfare[527] of one person without an expense for another.[528]

A Pareto superior allocation of resources is when a further reallocation can benefit at least one person without making another person worse off. When achieving a Pareto superior status is impossible, it shall be concluded that the system is Pareto optimal.[529]

From this perspective, Pareto concepts are ‘standards for ranking or describing states of affairs’.[530] More in detail, ‘[t]he Pareto-superior criterion relates two states of affairs and says that one is an improvement over the other if at least one person’s welfare improves while no one else’s welfare is diminished. The optimality standard relates one distribution to all possible distributions and says in effect that no Pareto improvements can be made from any Pareto-optimal state. In addition, Pareto-optimal distributions are Pareto noncomparable; the Pareto-superior standard cannot be employed to choose among them. Another way of putting this last point is to say that the social choice between Pareto-optimal distributions must be made on nonefficiency grounds’.[531]

Again, take an example made by Cooter and Ulen on Pareto efficiency:

‘[A]ssume that there are only two consumers, Smith and Jones, and two goods, umbrellas and bread. Initially, the goods are distributed between them. Is the allocation Pareto efficient? Yes, if it is impossible to reallocate the bread and umbrellas so as to make either Smith or Jones better off without making the other person worse off’.[532]

Kaldor-Hicks efficiency as Pareto efficiency – and differently from productive efficiency – is a relational property of states of affairs.[533] According to this notion, ‘[o]ne state of

---

[527] The concept of welfare refers to social welfare, which shall be intended as human and social wellbeing. The assumption of economics is that welfare can be measured.
[528] Coleman (1980), pp. 4-5.
[529] Coleman (1980), p. 5.
[530] Coleman (1980), p. 5.
[531] Coleman (1980), p. 5.
[532] Cooter and Ulen (2014), p. 14.
[533] Pareto efficiency use in economic approaches has been harshly crested. The criticism has been directed at the benefits assumed by laws and policies aimed at increasing allocative efficiency when these assumptions are modelled on 'first best' (Pareto optimal) general equilibrium conditions. According to second-best theory, for example, if the satisfaction of a subset of optimal conditions cannot be achieved under any circumstances, it is incorrect to conclude that the satisfaction of any subset of optimal conditions will necessarily lead to an increase in allocative efficiency.

affairs (E') is Kaldor-Hicks efficient to another (E) if and only if those whose welfare increase in the move from E to E' could fully compensate those whose welfare diminishes with a net gain welfare'.[534] The difference with the Pareto superiority is that in Kaldor-Hicks, the compensation for the detriment in welfare is only hypothetical, hence – factually – a Kaldor-Hicks efficient state of the affair does not need to either Pareto superior or optimal, as it creates an individual to be worse off.[535]

In other terms, Kaldor-Hick's efficiency 'allows changes in which there are both gainers and losers but requires that gainers gain more than the losers lose'.[536] Kaldor-Hicks, or potential Pareto improvement, is a cost-benefit technique.

Making again reference to a Cooter and Ulen example:

'Suppose that the plant announces that it is going to move from town A to town B. There will be gainers—those in town B who will be employed by the new plant, the retail merchants and home builders in B, the shareholders of the corporation, and so on. But there will also be losers—those in town A who are now unemployed, the retail merchants in A, the customers of the plant who are now located further away from the plant, and so on. If we were to apply the Pareto criterion to this decision, the gainers would have to pay the losers whatever it would take for them to be indifferent between the plant's staying in A and moving to B. If we were to apply the potential Pareto criterion to this decision, the gainers would have to gain more than the losers lose but no compensation would actually occur'.[537]

Consequently, any expression of public policy whose presumed purpose is an unequivocal increase in allocative efficiency (e.g., the consolidation of research and development costs through increased mergers and acquisitions resulting from a systematic relaxation of antitrust laws) is, according to critics, fundamentally flawed, since there is no general reason to conclude that an increase in allocative efficiency is more likely than a decrease. In essence, the neoclassical first-best analysis does not adequately account for various types of general equilibrium feedback relations that arise from inherent Pareto imperfections. Another criticism stems from the fact that there is no single optimal outcome. Warren Samuels, in his 2007 book The Legal-Economic Nexus, argues that 'efficiency in the Pareto sense cannot be applied dispositively to the definition and allocation of rights themselves, because efficiency requires an antecedent determination of rights'.

[534] Coleman (1980), p. 5; Calabresi G. and Bobbitt P. (1978), *Tragic Choices*, W. W. Norton & Company, pp. 85-86.

[535] In fact, is sometimes referred to as 'potential Pareto-superiority'.

[536] Cooter and Ulen (2014), p. 42.

[537] Cooter and Ulen (2014), pp. 42-43.

In complex systems such as ISDS, where there is an interaction of maximising actors and goals to be maximised, it is claimed that a regulatory policy pursuing the maximisation of diversity shall pass a three-steps analysis:

i) Utility: it is aimed at assessing if a certain regulatory policy — or figuring out which regulatory policy — improves diversity by incentivising actors to pursue it.

ii) Necessity: it should be ascertained that between two or more regulatory policies, the preferred one would be the one that minimizes the comprehensive disincentive for other goal norms while incentivising at the same level the pursuance of diversity.

iii) Proportionality *stricto sensu*: the benefit of pursuing the goal outweighs the costs.

The so-called utility analysis concerns the abstract suitability of the regulatory policy to incentivise the pursuit of the goal (diversity), i.e. assess the existence of a causal link between the relevant variables.

The analyses of necessity and proportionality call for efficiency analysis. The former is an analysis based on productive efficiency, i.e. given the same output (diversity incentive), which requires less input (costs on the system). The second case is an analysis based on Kaldor-Hick's efficiency. That is, assessing whether the system's benefits are greater than the costs created on the system at stake.

6.3 An economic theory of legal process

The idea of proposing a proportionality analysis to implement policies in pursuit of a goal norm recalls Alexy's idea of proportionality and raises further prominent questions.[538]

[538] The analysis recalls the proportionality developed by Alexy. See Alexy R. (2014), *Constitutional Rights and Proportionality*, Journal for Constitutional Theory and Philosophy of Law, Vol. 22, 51-65.

In particular, for the purposes of this thesis, there is one striking issue. Is there an ultimate goal that ISDS should maximise and, hence, that any goal norm should maximise or, at least, not jeopardise?[539]

To assume that there is a criterion of the right for any goal to be (or that could be) pursued in ISDS, it is essential to address the issue of the cost of not pursuing a goal to the end of maximising the criterion of the right (as a form of ultimate goal). Indeed, if a criterion of the right can be established, it can be further argued that the lack of diversity may impair ISDS. In other words, the mere fact of not incentivising diversity may jeopardise the maximisation of the ultimate goal of ISDS.

Therefore, it is necessary to investigate which is the criterion of the right in the ISDS or, at least, if a criterion of the right could be established.[540] Secondly, it is necessary to inquire whether and to what extent the lack of diversity (and not the regulatory policies maximising diversity) influences the same ISDS ultimate goal.

To answer the abovementioned questions, it is necessary to analyse the economic theory of the legal process.

A process is, in a broad sense, a procedure composed of several steps that starts with the assessment by the economic agent of the existence of an injury and ends: i) with the decision of a third adjudicator,[541] ii) with an agreement, iii) with the parties' waiver to the dispute, or iv) with the impossibility of continuing the procedure.[542]

Furthermore, in order to approach a legal process economically, it is necessary to define the goal of this system. Following Cooter and Ulen's approach, it here assumed that legal processes are instruments to apply substantive law. In this sense, procedural law has a substitutive and instrumental nature.

---

[539] The concept of criterion of the right exposed in this section recall the idea of ultimate goal norm that each goal norm pursues. From this perspective, the latter goal norms act as factors for achieving the ultimate goal of the system, which instead act as criterion of the right to determine if a certain action is worth to be performed or not.
[540] See note 1 on utility as criterion of the right.
[541] Decision is here referred in the broad sense to any fact through which an adjudicative body allocate a request made by an individual.
[542] With reference to ISDS, see chapter three.

Substitutive in the sense that procedural law comes at stake when there is a dispute on the application of substantive law.

Instrumental in the sense that the adjudicators apply substantive law, mirroring its allocation of resources among the economic agents.[543]

Using the instrument has a cost: Cooter and Ulen's 'administrative costs'. Administrative costs mean '[t]he sum of the costs to everyone involved in passing through the stages of a legal dispute, such as the costs of filing a legal claim, exchanging information with the other party, bargaining in an attempt to settle, litigating, and appealing'.[544] In this sense, the administrative cost is related to the substitutive nature of the legal process. It is the cost of the activity aimed at replacing spontaneous compliance.

However, there is not only an administrative cost to consider.

There are the costs associated with the misapplication of the law and the fact that the legal process may 'sometimes make[…] errors in applying substantive law'.[545] As indicated by Cooter and Ulen, '[e]rror distorts incentives and imposes a variety of costs on society'.[546] In more detail, the cost of error is the difference between the decision made in a case (or usually made in similar cases) and the perfect abstract decision in law that would have been given by a judge perfectly informed of the facts.[547]

---

[543] It needs to be remembered that disputes considers violation of allocation made by law and not by market. In addition, they try to restore allocation made by law and not by market. To the end of this thesis, it is assumed that the allocation made by law is efficient as an allocation made by a perfect market.
[544] Cooter and Ulen (2014), p. 385.
[545] Cooter and Ulen (2014), p. 385.
[546] Cooter and Ulen (2014), p. 379.
[547] Using the example of Cooter and Ulen (2014), p. 379: 'the difference between the perfect-information judgment, j*, and the actual judgment, j, equals the extent of the court's error concerning damages To illustrate by Example 2, the perfect information judgment j* might award the owner of an automobile the exact cost of replacing the engine destroyed by a defective fuel additive, which equals, say, $2500. If the actual judgment equals $2000, then the extent of the error equals (As we noted, there are deviations from a perfect information judgment other than an error in the computation of damages. Many of those other deviations can be expressed as errors in damages. For instance, if the defendant should have been found not liable but was found liable and assessed damages, then and the error costs are equal to . And if the plaintiff should have won and received j*, but the court mistakenly excused the defendant from liability and, therefore, gave the plaintiff no damages, then the error costs are equal to j*. The extent of the error, however, does not necessarily equal its social cost. The social cost of an error depends additionally upon the distortions in incentives caused by the error. To illustrate, if perfect compensation equals $2500 and actual compensation equals $2000, the error of $500 may cause the manufacturer of fuel additives to lower quality control. Lowering quality control saves the manufacturer, say, $1000 and causes, say, an additional

It follows that the goal of the legal process, in an economic sense, assuming its dual instrumental and substitutive nature, is to minimise administrative costs and error costs to arrive at a legal process that is as equivalent as possible to spontaneous compliance.

The reason for the above is twofold:

i) A substitutive system with low or no costs may incentivise parties to comply with the law. On the contrary, a process with very high costs (especially of error) may lead to forms of 'free riding', in the sense of economic agents consciously deciding not to fulfil or at least not to repair their breach trusting in the inability of the system to sanction their conduct effectively;

ii) From an instrumental point of view, a system with very high error costs fails to realise the distribution of resources for which substantive law is intended (assuming that this distribution is efficient).

Using the very simple denotation constructed by Cooter and Ulen, one can represent the above as follows:

$$\min SC^{548} = C_{(a)} + C_{(e)}^{549}$$

$C_{(a)}$ are the administrative costs of all the economic agents in the process. $C_{(e)}$ are the costs of error. The sum of those two determines the social costs of the system. The criterion of the right in the legal process is to minimise the social costs.[550]

$10,000 in losses to the owners of automobiles. In this example, the social cost of the error c(e) equals the net loss of $9000 from lower quality control: c($500)= $9000'.

[548] As it explicated in the model, the minimisation of Social Costs is the social welfare criterion. This work will address the question regarding which are the costs of the legal process? In particular, if lack of diversity and lack of legitimacy are costs (or better efficiency factors / social welfare factors).

[549] The function should be read that minimise social costs, denoted with SC, means minimise the sum of administrative costs, denoted with $C_{(a)}$, and the costs of errors, denoted with $C_{(e)}$.

[550] With reference to private and social costs of legal process, as noted by Shavell, it possible to distinguish the private costs and benefits to social costs and benefits. Whereas the two are interrelated, as they depend from the same inputs, plaintiff's costs for examples involves own legal expenses whereas the social costs includes the defendant's legal counsel expenses. It follows, that by its very nature, the private costs for each economic agent is less than the social costs. Also between social costs it can be casted a difference between the private party and social benefit. A private party, as a plaintiff, has a benefit (for instance) the expected payment from the defendant. Social benefit (for examples) 'inheres in an "externality-its effect on the behaviour of potential defendants generally'. As noted by Shavell '[t]here is no necessary connection between the private benefit of suit and this social benefit. It may be that the social benefit exceeds the benefit, that is, suit may lead to a reduction in losses caused by potential defendants that is greater than a

Although useful, these measurement needs to be accompanied by other concomitant evaluations. From the outset, it should be clear that what follows does not contradict the idea of legal process costs minimisation. On the contrary, it is intended to add another measurement tool suitable for understanding certain economic events that may nevertheless impact the functioning of the legal process and that are misrepresented above. More in detail, if the above addresses the social value of the lawsuit, another issue is to calculate its private value of it. Indeed, an analysis that focuses on the minimisation of administrative costs and the costs of error in the terms set forth above fails to provide a useful theory to explain why an agent decides to get into a legal process and pass through each of its stages.

In order to understand this question, it seems useful to follow the reasoning proposed by Cooter Ulen, starting with an illustration of the economic functioning of a decision tree.[551]

Taking the example proposed by the same authors, let us imagine that Titius asks his lawyer Caius to pursue his case, agreeing to pay the latter 30% of what he would get if he were successful. Suppose we denote the favourable judgment in j. we can say that the lawyer can obtain .3j (30% of J). Let us imagine that, *ex ante*, the probability of winning the case is 50%.[552] Furthermore, imagine that in the event of defeat, the lawyer gets 0 (there are no partial victories or defeats) and that the proceedings require him to spend 15 (as an absolute value) as a time resource to counsel in the case (the amount that Titius

---

plaintiff's expected gains, or it may be that the opposite holds true'. The model referred in here does not considered benefit directly and it is not the goal of this work to address the topic in detail. However, in a nutshell, the assumption is that minimisation of social costs entail a general positive externalities, whereas increasing social costs creates negative externalities. In any case, during the work it would be considered (without providing any general models) also how minimisation of costs may act as incentive for economic agents. With reference to social and private costs of legal process, and minimisation of social costs in legal process, see: Shavell S. (1982), *The Social versus the Private Incentive to Bring Suit in a Costly Legal System* , The Journal of Legal Studies, Vol. 11, No. 2, pp. 333-339; Landes W.M. and Posner R. A. (1979), *Adjudication as a Private Good*, 8 J. Legal Stud. 235; Manell P. S. (1983), *A Note on Private versus Social Incentives to Sue in a Costly Legal System*, The Journal of Legal Studies, Vol. 12, No. 1, pp. 41-52; Posner R. A. (1973), *An Economic Approach to Legal Procedure and Judicial Administration*, The Journal of Legal Studies, Jun. 1973, Vol. 2, No. 2, pp. 399-458. The concept of social costs applied in this work is (primarily) built on social cost notion construed by Shavell, Cooter, Ulen (and the authors mentioned above. Of course in mentioning the concept of social costs, reference should be made to R. H. Coase. However, some distinction should be drawn between social cost as identified in this work and the analysis of Coase in famous work Coase R. H. (1960), *The Problem of Social Cost*, Journal of Law & Economics Vol. 3.

[551] See Cooter and Ulen (2014), p. 380.

[552] It is true that assessing the chance of winning in terms of percentage is a particularly complex exercise, but not - to a certain approximation - impossible; on the contrary, it is particularly common in practice.

could be awarded). The question is, which is the minimum value of the case for which it makes economic sense for the lawyer to assist the client (and get the 30% of the award?). The answer is 100.

More precisely, the lawyer may choose not to accept the case, with the consequence that he or she will get zero. Accept the case, assuming a cost of 15, with a probability of losing 0.5, receiving a loss of 15. Alternatively, accept the case and win it, receiving a loss of 15 to be detracted from the amount obtained.

A rational lawyer will only accept the case if the probability of gain is greater than loss. This means that the case value must be such that the excluded value is (at least) zero.

Therefore, the function to calculate the expected value will be .5(0.3j - 15) + .5(15)=0. Through this function, it will be necessary to calculate the value of j. The value of j represents the minimum value below which the judgment will not be at a loss. In this case, this value is equal to 100.

This concept of expected value is the same as the plaintiff/defendant used to initiate or resist arbitration proceedings. For example, it will value the damage allegedly suffered by the other party, which we imagine to be 100, and the settlement demand, which we imagine to be 50. It will then evaluate the costs of the arbitration process, which we imagine to be equal to 10.

In numerical values, the probability that the plaintiff investor loses is equal to (1-p). The gain of not reaching an agreement equals -10p - (110)(1-p). In detail, -10p is the cost of the procedure multiplied by the chance of winning. From this is subtracted the cost of defeat -110 (-10 cost over -100 damage) multiplied by the percentage of defeat which is equal to 1 minus the percentage chance of winning (being specular). In the present case, p must be at least equal to -50, which is the value of the proposed deal.

The solution of this equation is 0.6. In other words, to decide to go to trial, the plaintiff must have a 60% probability of winning.

The so-called Expected Value of the Legal Claim (EVC) can be calculated on this theoretical basis. This computational system makes it possible for the economic agent to assess how much it is worth to proceed with each individual procedural step.

The measurement of the expected value no longer concerns the efficiency of the legal process itself but rather the usefulness for the agent in taking or being part of the proceedings. This clearly does not detract from the fact that there is a connection between cost minimisation and expected value for the parties. An ideal cost-free world system is one in which the party in the 'right' always has a 100% chance of winning, and the parties have no costs to initiate proceedings.[553]

In light of the abovementioned possible definition of the criterion of the right in the legal process and possible measurement of it, the questions are i) is it efficient a system devoid of legitimacy? ii) is it efficient a system devoid of diversity?

The answer is that those states of affairs probably create an inefficient regime, not incentivising economic agents to abide by the law and to 'apply for justice' and hindering the minimisation of social costs. This is because legitimacy and diversity impact administrative and error costs. Hence, from a different perspective, it impacts the EVC.[554]

6.4 Topics in the economics of the ISDS

Before analysing legitimacy and diversity in terms of efficiency, it is useful to contextualise the economic approach to ISDS.

As noted by Cooter and Ulen '[t]he legal process is an incentive system […]. Its basic logic reduces the injustice from resolving disputes on terms different from those required by the law and the facts. Reducing these legal errors requires costly procedures.'[555]

The simple measurement method referred to in section 6.2 can be applied to ISDS in general and as a paradigm to analyse each legal stage. From filing an arbitration request to the enforcement stage, any step of ISDS should answer the concept of minimisation of costs.

Most of the concepts applied by Cooter and Ulen can be translated from the general category of legal process to the most specific framework of ISDS (and ITA more in particular). However, it is not the case to underestimate the peculiarity of this system.

---

[553] The simple method of minimising administrative costs and error costs also works if a different purpose is given to the legal process, as a more generic concept of 'justice' (or any other criterion of the right).
[554] From this perspective, lack of legitimacy and lack of diversity represent both a social and private cost.
[555] Cooter and Ulen (2014), p. 419.

Indeed, not everything beneficial for domestic in-court proceedings and commercial arbitration is – by itself – also efficient for traditional ISDS. It is not a case that economic literature has usually focused its attention on criticisms of investment arbitration in comparison with litigation and commercial arbitration and on the attempt to substantiate the arguments usually made to justify the emergence of ISDS as a prominent dispute resolution mechanism in IIL (without addressing all investment arbitration criticalities such as, for example, lack of legitimacy and diversity).[556]

This section will analyse some of the specificities of ISDS to have an idea of the economic debate on ISDS.[557] The foregoing would be essential to understand how the present work tries to contribute to the said literature.

The first important topic on legal process efficiency is: do arbitrators are better than judges?

Economic approaches to arbitration highlight that arbitrators are better than domestic court judges in light of their specialization, which reduces the costs of error.[558]

The foregoing is also true with investment arbitration. Indeed, often investment arbitrators are individuals highly specialised also with reference to public international law.[559] Hence, it does no surprise that the ISDS arbitrator community is significantly smaller than the commercial arbitrator one.[560]

---

[556] Two important gaps are: (i) economic analysis of legitimacy and diversity; (ii) bridging theory and empirical data (save from Faure and Ma's work).

[557] It should be noted that economic approach (in the empirical sense) has not deal insofar with every criticism to ISDS, and that the list below is not exhaustive. There are no systemic analysis of ISDS. In addition, save from Faure and Ma's work economic analysis are pretty theoretical and not based on empirical data.

[558] Rubino-Sammartano M. (2008), *The Decision-making Mechanism of the Arbitrator Vis-à-Vis the Judge*, J. International Arbitration, Vol. 25 p. 168.

[559] Faure and Ma (2020), p. 50. Böckstiegel K.H. (2012), *Commercial and Investment Arbitration: How Different Are They Today?, The Lalive Lecture*, Arbitration International Vol. 28, p. 582. To give an example, background research on the fifteen elite arbitrators identified by Eberhardt and Olivet shows that all these big names have a long track record of experience in state-state disputes or have received education or training about public international law. See Eberhardt P. and Olivet C. (2018), *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom*, TrTRANSNAT'L INST. & CORP. EUR. OBSERVATORY, p. 36,

[560] Faure and Ma (2020), p. 50. Böckstiegel (2012), p. 582.

Besides specialisation, investment and commercial arbitration are generally praised for being quicker instruments to settle disputes.[561] In particular, the combination of specialization (thus lower cost of errors)[562] and quickness (an important administrative cost factor) are often considered the main economic arguments in favour of arbitration in international investment.[563]

However, some other features are comparatively inefficient or do not create a comparative advantage as they do with commercial arbitration.

Investment arbitration is allegedly not less adversarial than litigation.[564] '[F]oreign investor almost always file claims directly against host states at the international level. That sovereign states have to bear the liability as a result of ISA, even if it was a state's political sub-division that breached that state's treaty obligations toward foreign investors under IISAs, could even exacerbate the antagonism between the disputing parties.'[565]

Confidentiality poses similar doubts.

If confidentiality is often claimed as a positive feature of commercial arbitration, it is heavily criticised in investment arbitration. In this sense, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[566] and the United Nations

---

[561] Faure and Ma (2020), p. 50.

[562] Faure and Ma (2020), p. 51. Karl-Heinz Böckstiegel, p. 582. Brown mentioned a striking phenomenon: The qualification requirements of many international tribunals seem to echo those of the International Court of Justice. Brown C. M. (2017), *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, ICSID Review of Foreign Investment Law Journal, Vol. 32, p. 682 ("The Court shall be composed of a body of independent judges, elected regardless of their nationality among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults or recognized competence in international law."). Benson B. L. (1999), *To Arbitrate or To Litigate: That Is the Question*, 8 EUR. J. L. & ECON. 91, 94,

[563] To the knowledge of this author, there are no research on other elements as de-politization of disputes.

[564] See Salacuse J. W. and Sullivan N. P. (2005), *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol 46, 67, 77.

[565] Faure and Ma (2020), p. 51. See also, Herman L. L. (2011), *Federalism and International Investment Disputes*, International Institute for Sustainable Development.

[566] The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration aim to increase the level of transparency in investment arbitral proceedings conducted pursuant to the UNCITRAL Arbitration Rules through provisions focusing on publication of information at the commencement of arbitral proceedings, publication of documents, submission by a third person, submission by a non–disputing party to the treaty and hearings. See G.A. Res. 68/109, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, arts. 2-6 (Dec. 16, 2013). In addition, article 1(3)(a) of the Rules effectively constricts disputing parties' ability to keep their disputes and the dispute resolution process under the carpet.

Convention on Transparency in Treaty-based Investor-State Arbitration[567] exemplify the attempts to improve transparency in the system.[568]

Economic literature also highlighted flaws in investment arbitration, making the system less advantageous than litigation. For example, the incentive to party-appointed arbitrators makes them not the best-suited actors for adjudicating disputes. In particular, as noted by Faure and Ma, '[g]iven the broad discretion that disputing parties usually have to choose adjudicators in arbitration,[569] one might imagine that disputing parties would spare no effort to appoint an arbitrator who is more likely to side with them'. Paulsson and Derains also confirmed the feature by arguing that an affiliation effect (a moral hazard consequence) exists in commercial and ICSID arbitration.[570]

According to Faure and Ma, to which the present author agrees, '[t]his innate deficiency of the party-appointed arbitrator system could drag any given investor-state dispute into a run-off between the arbitrators who were appointed by the investor party and the state party, respectively, and many frequent investment arbitrators are believed to be polarized (either biased towards investors or states). Although the presiding arbitrator could be expected to pour oil on troubled waters in such a situation, the party-appointment system casts doubt on the independence of investment tribunals and arbitrators. This is not to say that arbitrators in ISA are not figures of high moral character and good conscience or that a presiding arbitrator could not act as a check on the rest of the tribunal. However, the

---

It provides that: "The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty." Id. art. 1(3)(a).

[567] The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration is intended to expand the scope of application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. See generally G.A. Res. 69/116, The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2015).

[568] The transparency rules address a perceived issue of the mechanism, and in this sense they benefit is similar to those addressed in the next section when analysis legitimacy. Furthermore, transparency may help avoiding incentivising conducts detrimental to constituencies as the 'public opinion' (i.e. the community of the hosting state). On the other hand, as any legal measure, since it requires specific action from economic agents, it create costs, in particular administrative costs for complying to the requirement. [make a concrete example: publication of information: costs in time and costs in gathering the information, costs in reducing the plethora of individuals complying with the requiring: missing the requirements, unwilling to comply with them].

[569] Faure and Ma (2020), p 52.

[570] Faure and Ma (2020), p. 52. See also Branson D. (2010), *Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them*, ICSID Review of Foreign Investment Law Journal., Vol. 25 p. 367, p. 391.

risks associated with the partisan arbitrator system could be averted by changing the method for the appointment of adjudicators.'[571]

Furthermore, as utility maximisers, arbitrators may try to pursue the object of a constant flow of income. It follows that they are subject to market pressure to issue awards (a conclusion in line with Van Harten's findings on extensive interpretation of the law by arbitrators).[572] This incentive may lead to arbitration being prone 'to split the difference' approach, putting the parties' satisfaction before facts and applicable law.[573] In addition, the affiliation effect is enhanced by the absence of an appeal system and by the asymmetrical nature of the mechanism.[574] The trend is to have arbitrators who market themselves in a position (claimant arbitrators/defendant arbitrators).[575]

Without prejudice to the focus given by literature to specific topics of criticism in ISDS – in particular, those more familiar to the economics theory of legal process (i.e. maximisation of Judge utility)[576] – it should not be forgotten that the legal process model requires a general minimisation of social costs (as highlighted above).[577]

---

[571] Faure and Ma (2020), p. 52.

[572] Faure and Ma (2020), pp. 52-53. G. Van Harten, 'Arbitrators Behaviour in Asymmetrical Adjudication (Part two): An Examination of Hypotheses of Bias in Investment Treat Arbitration (2016), Osgoode Hall Law Journal 51.3

[573] Faure and Ma (2020), p. 53

[574] Faure and Ma (2020), p. 53.

[575] Faure and Ma (2020), p. 53; Pauwelyn J. (2015), *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, AM. J. INT'L L. Vol. 109, 761, 787.

[576] On incentive to Judges, among the others see Landes and Posner (1979), pp. 238-239.

[577] Faure and Ma in this sense affirm: 'However, in the context of ISA as it is today, this logic may not stand so firmly. First, as discussed above, the arbitration community has already taken steps to increase transparency in ISA proceedings in recent years in recognition of the considerable public interests often involved in investor state disputes. Second, as mentioned in Part III, investment tribunals in practice tend to refer to previous investment awards to either reinforce their own arguments or contradict the opinions of prior tribunals. At the same time, investment awards have become more accessible to the public, generating positive externalities similar to court precedent by enlightening disputing parties and society in general. But it is equally true that the inconsistency of outcomes in ISA has made it difficult for investors and states to predict the outcomes of their actions if arbitration is pursued. Third, a closer examination of investment awards issued by various tribunals, which not infrequently consist of dozens of pages, would pose a head-on challenge to the statement that arbitrators deliberately avoid the clarity of rules and norms by not writing down their opinions. The increased transparency in ISA proceedings as well as investment arbitrators' willingness to write down their opinions show that there are particular features of ISA that do not specifically map onto the Law and Economics analysis of commercial arbitration. Still, some of the important points mentioned in the Law and Economics literature (that arbitration does not generate positive externalities in the same way as court decisions) remain relevant today and may provide arguments for a reform of ISA toward a multilateral investment court.'

The abovementioned assumption requires some further considerations that are not typically addressed by economic approaches to ISDS:

Each feature of ISDS shall be assessed not just as an incentive to the specific agent but as an efficiency factor (i.e. a factor influencing the administrative and error costs);[578]

From this perspective, it is argued that a topic-based analysis could be easily misused if the topics are not analysed through a more structured lens, which takes into primary consideration the goal to minimise social costs in each stage of the legal process.

That clarified, this research tries to explore why legitimacy and diversity can be addressed as efficiency factors. Therefore, they can be analysed in economic terms.

6.5 An economic approach to diversity in the legal process

(a) The notion of efficiency factor

The next matter to address for determining if diversity and legitimacy can be efficiency factors is to clarify what an efficiency factor is.

The efficiency factor represents that input (of whatever nature) whose presence or absence influences the ability to achieve an objective or maximise a goal. For instance, with reference to the maximisation of diversity (as a goal norm), a diversity efficiency factor may be the regulatory policy (as an action norm) that implements it.

From this perspective, having assumed that the efficiency model proposed by Cooter and Ulen for legal processes applies to ISDS, it can be stated that an efficiency factor in ISDS is:

Any element that increases or decreases the administrative and error costs of the system. With the consequence of either increasing or decreasing the social costs of the system (as proposed by Cooter and Ulen).[579]

---

[578] The concept of factor is wider than then of incentive, as it includes also technical inputs. A factor of efficiency could be also the online management of Court's docket.

[579] See section 6.2.

In light of this definition, and given the nature of diversity, the first question is: can legitimacy (particularly its absence) be translated into economic terms?[580]

(b) *Legitimacy and diversity as efficiency factors*

Legitimacy can be seen from two perspectives:[581] i) as an element that incentivises a subject to consent, fairly participate[582] and accept the output of an institution; ii) as an element that creates administrative costs and costs of error in decision-making.

In the first case, a decision-making system (an institution), such as the ISDS, is seen as a system whose role is also to incentivise economic agents to use it to achieve the best (possible) allocation of resources (as far as procedural law is of concern, by following the concepts of substitution and instrumentality).

Since a rational economic agent would decide whether to litigate in light of the expected value of the claim, an illegitimate system may distort the EVC. An illegitimate system is expected to have higher compliance (and administrative) costs and potentially higher error costs (as legitimacy is often fuelled by the belief that the adjudicator is incapable of exercising that function). In other words, lack of legitimacy – by altering agents' behaviour and creating a more or less real perception of a high probability of error – disincentivises the economic agent from using it.

Secondly, in related terms, legitimacy is to be analysed as a tool that impacts administrative and error costs and thus impacts social costs (in Cooter and Ulen terms). From this perspective, it can be said that:

i) The lack of legal, normative, and sociological legitimacy reduces the incentive to consent to arbitration. Indeed, one may assume that a party does not rely on an arbitration system whose decisions are not entrusted with clear rules or, again, whose rules are systematically disregarded. At the same time, one can

[580] As said above, this does not entail that the EVC is irrelevant. However, ISDS actors behaviour (and their private costs) are a consequence also of ISDS social costs.
[581] These two perspectives recall the two aims of economic analysis: i) to provide a behavioural theory (law as incentives); ii) to be a normative standards (efficiency). See Cooter R. D. and Rubinfeld D. L. (1989), *Economic Analysis of Legal Disputes and Their Resolution*, Journal of Economic Literature, Vol. 27, No. 3, 1067-1097.
[582] In the sense of complying in good faith to the rules.

imagine that a rational agent does not rely on an arbitration process whose authority the agent does not recognise;[583]

ii) Any constituency/economic agent participating in the ITA process can act in various ways within the process. It may strive to ensure that it operates as streamlined and consistent as possible or, within the realm of its discretion, behave in a way that – even if legitimate – increases its administrative costs. To give an example, even the mere dilatory technique of one of the parties may fall within the realm of administrative costs, understood as costs due to loss of time, which is a choice that may be 'incentivised' by the non-recognition of legitimacy of the system;[584]

iii) The lack of legitimacy may lead to a choice not to comply with arbitral decisions or not to allow (by national courts) the parties to comply with such decisions, resulting in higher enforcement costs and also costs of error if the judicial victory does not turn into concrete utility.

The consequence of the above is of being able to consider legitimacy as an efficiency factor and coming to the same conclusion with diversity.

In particular, diversity is relevant in two terms in ISDS.

Firstly, potentially, as an element that can influence the quality of the decision. One can indeed argue – or rather investigate – the possibility that non-diverse tribunals (according

---

[583] Clearly, the assumption that economic agents are always rational is far from being truth. In particular, in IIL, it is apparent the difficulties of certain states (in particular, capital-importing one) to develop a coherent and strategic approach to IIL and negotiations. As noted in the second chapter, an example of this has been the South African case. In addition, it should not be underestimate the *fictio iuris* concerning the capabilities of the state to represent the national interests in an unitary way,

[584] Lack of legitimacy should not be seen as a black or white situation. A low level of legitimation of a system may cause a reaction that is not the complete rejection of it, but the increase trend to act in contrast to the expected behaviours or, in any case, to challenge as much as possible the reliability of the system. From this perspective, also the strategic and legitimate use of certain instrument conferred by the system could be signal of low legitimation. An example in this sense can be considered the use of dissenting and concurring opinion by arbitrators as a mean to contest the majority and dominant perspective (it is interesting to note that arbitrators from non-Western countries tend to use more dissenting opinion). In other words, lack of legitimacy should not be seen as having as only outcome the complete rejection of an institution/system and the deny of any acceptance of its power. The foregoing also because compliance may be forced (as often happen for weaker actors) or be the product of opportunistic analysis, instead of being the product of the acceptance of the system.

to the definition of sustainable diversity given in this thesis) cannot produce perfect decisions.[585] More specifically, there is a greater likelihood of incorrect decisions. This consequence acts, not unlike what was seen before with legitimacy, both as a matter of incentive for economic agents (by modifying the EVC) and directly as a cost in the ISDS efficiency model (as the cost of error). Secondly, the lack of diversity impacts sociological legitimacy, triggering a cost increase in terms of lack of legitimacy.

6.6 Conclusions

In light of the above, there are reasons to consider diversity an efficiency factor, as it impacts the social costs (and also the private costs) of ISDS.

The nature of an efficiency factor is justified by the possibility of determining a criterion of the right in ISDS and by the ability to calculate the cost of diversity, not only in terms of the regulatory policies that implement it, but also as the cost of the lack of diversity. In this sense, the lack of diversity can be empirically analysed in terms of error cost and administrative cost (in social cost analysis). More in detail, it can be investigated whether and in what terms the lack of diversity causes wrong decisions as a result of a structural bias and the costs resulting from the delegitimisation of the system due to the lack of diversity.

Working on diversity is thus ‘in good part’ empirical work. Namely, i) the analysis of the costs of the lack of diversity in terms of administrative and error costs, ii) the design of regulatory policies that maximise diversity in ISDS (not only geographically, and not only among arbitrators) in order to increase (also) the efficiency of the system.

[585] As noted in chapter five, the present author is aware of the challenges and the bulk of research against the hypothesis of relevance of arbitrators identity on the outcome of arbitral decisions. However, as noted in that chapter, it is here argued that those findings are not conclusive. Indeed, to name a few: i) they often consider specific aspects, without taking into consideration the wider framework; ii) they approach exclusive arbitrators role, without considering other factors as the entire IIL bubble (made by arbitral centres, counsels and law firms, policy-makers, scholars); they approach jurisprudence without taking (usually) in consideration radical indeterminacy theories:

7. CONCLUDING REMARKS

At the conclusion of this work, it can be argued that there are economic reasons to extend the analysis of ISDS to diversity as well.

As it turns out, economic approaches to the legal process and investment arbitration are not new. However, with reference to ISDS and ITA, there has often been a piecemeal approach and little attempt to build general models or make connections between empirical data and theoretical economic model predictions.

Indeed, the economic literature on ISDS has usually taken as its focus some particularly criticised issues, such as the rationality of arbitration, whether investment arbitration is preferable to in-court litigation, whether there are differences between commercial and investment arbitration, and so on. Although these questions play a central role, such analyses err on the side of not broadening their scope to include one of ISDS's major critical issues: the lack of diversity. With the idea of the need to broaden the economic approach to this issue as well, and thus with the further aim of participating in the work to construct a general economic model for investment arbitration, this thesis has reconstructed the issue of the lack of diversity in ISDS, in a particular attempt to emphasise how it represents a cost in the system.

To this end, the debate was first contextualised in order to understand the current critical issues in ISDS and IIL and how diversity fits into it.

In light of this, it was possible to test how diversity is intrinsically connected to the legitimacy of ISDS (and the ITA) as an institution, as well as to support the claim that there is room for further research into whether there is also a direct connection between diversity and the quality of decision-making.

Furthermore, by illustrating in what terms legitimacy and quality of decision-making could be translated in economic terms, it has been argued that diversity is an efficiency factor, and its lack has a cost in itself (unrelated to the cost of taking measures to implement it).

In conclusion, it has been argued and supported the hypothesis that an economic approach is a useful instrument to analyse the interconnection between diversity and ISDS and to

provide an additional justification for pursuing (and how pursuing) diversity in ISDS through regulatory policy. In this sense, it has been argued that the economic approach could be used to design an ISDS mechanism that avoids a reform being structured in a way that prevents excessive costs and, hence, inefficiency (and, arguably, ineffectiveness).

Besides those main considerations, other findings can also gauge interest in this work.

It has been argued that legitimacy is primarily a sociological discourse, thus necessitating an empirical analysis, in which diversity plays an essential role.

The present work also sought to highlight the possibility of creating a legitimation strategy in terms of economic efficiency. In fact, by being able to calculate the cost of legitimacy on a system, it is deemed possible to assess in what terms a certain measure can maximise legitimacy (pursuing a legitimation strategy) and decrease the costs of its absence without outweighing them with costs on other goals.

The connection between diversity and legitimacy has also the merit of making it possible to identify a definition of diversity, the lack of which is one of the most evident problems in the related debate. Moreover, as diversity is strictly related to constituencies beliefs, it can be further argued that the most suitable forum to debate about regulatory policies on diversity in ISDS are not UNICTRAL Working Groups, ICSID or other multilateral fora. On the opposite, BITs and IIAs are the best instrument to deal with peculiarities of constituencies case-by-case (besides being more aligned to the actual structure of IIL).[586] In this regard, a further takeaway is that the maximisation of diversity, in order to maximise efficiency, would be highly simplified by an IIAs/BITs-based approach so as to evaluate the preferences of the relevant constituency effectively.

According to the present author, the above findings are the gateway for supporting the role of economics in a more interconnected and heterogenous world. More in detail, this thesis would like to support the claim that in crafting new models for global ethics, global institutions and global law (including the global legal process), economic approaches to

[586] It is evident that such a proposal does not touch on the nitty-gritty points, such as the costs of negotiating such agreements, and the difficulties of an empirical analysis, as well as the problems due to older generation agreements, where diversity is not taken into account at all.

the law are capable of providing arguments to address notions as abstract as diversity and legitimacy. The present work has tried to substantiate this argument by (attempting) to translate into economic factors the lack of diversity and legitimacy in ISDS.

BIBLIOGRAPHY

- Abi-Saab G. (2008), The Security Council as Legislator and as Executive in Its Fight against Terrorism and against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy, in Wolfrum R. and Röben V., *Legitimacy in International Law*, Springer;
- Acconci P. (2005), *Is There Room for Customary Law in International Investment Law? (The Requirement of Continuous Corporate Nationality in the Loewen Case)* (2005), Transnational Dispute Management, www.transnational-dispute-management.com/article.asp?key=479 (last access 8 January 2023);
- Acconci P. (2013), *The Unexpected Development -friendly Definition of Investment in the 2013 IDI Resolution*, The Italian Yearbook of International Law, Brill Academic Publishers, Vol. XXIII, 2013;
- Afilalo A. (2004), *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, Georgetown Intl Envir Law Review Vol. 17;
- Afilalo A. (2005), *Meaning, Ambiguity and Legitimacy: Judicial (Re-)construction of NAFTA Chapter 11*, Nw J Intl L & Bus;
- Akinkugbe O. D. (2019), *Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law*, ICSID Review;
- Alexy R. (2014), *Constitutional Rights and Proportionality*, Journal for Constitutional Theory and Philosophy of Law, Vol. 22;
- Alschner W. (2022), Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration through Large-Scale Citation Analysis, in Behn D., Fauchald O. K. and Langford M., *The Legitimacy of Investment Arbitration* Cambridge University Press;
- Alvarez A. (1909), *Latin America and International Law*, AJIL, Vol. 3;
- Anghie A. (1999), *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, Harvard International Law Journal;
- Asante S. K. B. (1981), *Transnational Investment Law and National Development*, Faculty of Law, University of Lagos by the Lagos University Press;
- Bacchus K., and Sachs J. (2020), *Why we need a moratorium on investment disputes during COVID-19*, The Hill, https://thehill.com/opinion/international/501872-why-we-need-a-moratorium- on-trade-disputes-during-covid-19 (last access 8 January 2023);
- Baetens F. (2013), *Investment Law within International Law: Integrationist Perspectives*, Cambridge University Press;
- Beattie A. (2017), *Arbitration on trial: the US and UK's fear of the supranational*, Financial Times, https://www.ft.com/content/e607c6b2-28f5-11e7-bc4b-5528796fe35c (last access 8 January 2023);
- Behn D., Fauchald O. K. and Langford M. (2022), *The Legitimacy of Investment Arbitration*, Cambridge University Press;
- Behn D., Langford M. and Létourneau-Tremblay L. (2020), *Empirical Perspectives on Investment Arbitration: What do We Know? Does it Matter?*, Journal of World Investment and Trade;
- Benson B. L. (1999), *To Arbitrate or To Litigate: That Is the Question*, 8 EUR. J. L. & ECON;

- Benson B. L. (2000), *Arbitration*, in Encyclopedia of Law & Economics;
- Bernardini P. (2008), *L'Arbitrato nel Commercio e negli Investimenti Internazionali*, Giuffrè Editore;
- Bernardini P. (2010), ICSID Versus Non-ICSID Investment Treaty Arbitration, in Miguel Fernández-Ballesteros A. and David Arias D., *Liber Amicorum Bernardo Cremades*, La Ley;
- Bjorklund A. K. (2013), *The Role of Counterclaims in Rebalancing Investment Law*, Lewis and Clark Law Review, Vol. 17, No. 2;
- Bjorklund A. K. (2018), The National Treatment Obligation, in Yannaca-Small K., *Arbitration Under International Agreement*;
- Bjorklund A. K. (2019), *The Diversity Deficit in Investment Arbitration*, EJIL:Talk https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/ (last accessed 8 January 2023);
- Bjorklund A. K. and others (2020), *The Diversity Deficit in International Investment Arbitration* The Journal of World Investment & Trade, Vol. 21, No. 2-3;
- Böckstiegel K.H. (2012), *Commercial and Investment Arbitration: How Different Are They Today?, The Lalive Lecture*, Arbitration International;
- Bonnitcha J. and Aisbett E. (2013), An Economic Analysis of Substantive Protections Provided by Investment Treaties, in Sauvant K. P. (ed) *Yearbook on International Investment Law and Policy 2011-2012*, Oxford University Press, New York;
- Bonnitcha J., Poulsen L. and Yackee J. (2021), A Future Without (Treaty-Based) ISDS: Costs and Benefits, in Elsig M., Polanco R. and van den Bossche P., *International Economic Dispute Settlement: Demise or Transformation*, Cambridge University Press;
- Born G. (2012), *International Arbitration: Law and Practice*, Kluwer Law International;
- Botchway F. N. (2019), *Consent to Arbitration: African States' Practice*, ICSID Review;
- Branson D. (2010), *Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them*, ICSID Review of Foreign Investment Law Journal., Vol. 25;
- Breeze, R. (2012), *Dissenting and Concurring Opinions in International Investment Arbitration: How the Arbitrators Frame Their Need to Differ*, International Journal for the Semiotics of Law – Revue Internationale de Sémiotique Juridique;
- Breeze, R. (2016), *Balancing neutrality and partiality in arbitration: discursive tensions in separate opinions*, Text & Talk;
- Brekoulakis S. (2013), *Systemic Bias and Institution of International Arbitration: A New Approach To Arbitral Decision-Making*, Journal of International Dispute Settlement;
- Brickhill J. and Du Plessis M. (2011), *Two's Company, Three's a Crowd: Public InterestIntervention in Investor-State Arbitration (Piero Foresti v. South Africa)*, South African Journal on Human Rights;
- Broadman H. (2020), *Time to Modernize Investor Dispute Arbitration*, Financial Times https://www.ft.com/content/fca34d7f-0080-4b80-87ec-c47432887b2e, last access 8 January 2023;

- Broches A. (1972), *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Recueil des Cours de l'Académie de La Haye;
- Broude T. (2015), *Behavioural International Law*, University of Pennsylvania Law Review;
- Brower C. N. (2002), *A Crisis of Legitimacy*, Natl L J B9;
- Brower C. N. and Schill S. W. (2009), *Is Arbitration a Threat or a Boon to The Legitimacy of International Investment Law?*, Chicago Journal of International Law;
- Brower C. N., Brower C. H. and Sharpe J. (2003), *The Coming Crisis in the Global Adjudication System*, Arbitration International;
- Brown C. and Miles K. (2011), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press;
- Brown C. M. (2017), *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, ICSID Review of Foreign Investment Law Journal;
- Brownlie I. (2019), *Principle of Public International law*, Oxford Edition;
- Brubaker R. (2012), An interview with Rogers Brubaker, Max Plank Institute for the Study of Religious and Ethnic Diversity, https://www.mmg.mpg.de/50980/interview-with-rogers-brubaker (last access 8 January 2023);
- Buchanan A. and Keohane R. (2006), *The Legitimacy of Global Governance Institutions*, Ethics and International Affairs;
- Buchanan A. and Keohane R. (2006), *The Legitimacy of Global Governance Institutions*, Ethics and International Affairs;
- Buchanan A. and Keohane R. (2008), The Legitimacy of Global Governance Institutions, in Wolfrum R. and Röben V., *Legitimacy in International Law*, Springer;
- Bungerberg M. and others (2015), *International Investment Law*, Bloomsbury Collection;
- Burns J. H. and Hart H. L. A. (1996), *The Collected Works of Jeremy Bentham. An Introduction to the Principles of Morals and Legislation*, Claredon Press, New York;
- Calabresi G. (1961), *Some Thoughts on Risk Distribution and the Law of Torts,* Yale Law Journal;
- Calabresi G. (2016), *The Future of Law and Economics. Essay in Reform and Recollection*, Yale University Press, Online Edition, New Haven;
- Calabresi G. and Bobbitt P. (1978), *Tragic Choices*, W. W. Norton & Company;
- Calvo C. (1868), *Derecho International Teorico y Pratico de Europa y America*, D'Amyot, Paris;
- Campbell C. (2013), *House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law* 30 J.
- Capogrossi G. (2004), *Pensieri vari su economia e diritto*, Carabba;
- Carbado D. W. and Gulati M. (2003), *The Law and Economics of Critical Race Theory*, The Yale Law Journal;
- Carnelutti F. (1951), *Teoria Generale del diritto*, Foro Italiano;
- Caron D. (2009), *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, Suffolk Transnational Law Review;
- Carreau D., Juillard P. and Flory T. (1990), *Droit International èconomique*, Librairie géneérale de droit et de jurisprudence;

- Chappe R. (2012), *Pleasure, Happiness, and Fulfillment: The Trouble with Utility*, Institute for New Economic Thinking, https://www.ineteconomics.org/perspectives/blog/pleasure-happiness-and-fulfillment-the-trouble-with-utility (last access on 8 January 2023);
- Charlotin, D. (2019), *A Data Analysis of the Iran–US Claims Tribunal's Jurisprudence—Lessons for International Dispute-Settlement Today*, Journal of International Dispute Settlement;
- Chen R. (2021), *The Substantive Value of Diversity in Investment Treaty Arbitration*, Virginia Journal of International Law;
- Chetty R. (2013), Yes, Economics Is a Science, *The New York Times*, https://www.nytimes.com/2013/10/21/opinion/yes-economics-is-a-science.html (last access on 8 January 2023);
- Chmini B. S. (1999), *Marxism and International Law*, Econ & Pol Wkly;
- Choudhury B. (2020), *Investor Obligations for Human Rights*, ICSID Review – Foreign Investment Law Journal;
- Clifford Chance (2019), *United Kingdom nationalisation: the law and the cost – 2019 update*, https://www.cliffordchance.com/briefings/2019/07/uk_nationalisationthelawandthecost-201.html (last access 8 January 2023);
- Coase R. H. (1960), *The Problem of Social Cost*, Journal of Law & Economics;
- Coleman J. L. (1980), *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, California Law Review;
- Coleman J. L. (1980), *Efficiency, Utility and Wealth Maximization*, Hofstra Law Review;
- Collier J. and Lowe V. (2000), *The Settlement of Disputes in International Law, Institutions and Procedures*, Oxford University Press;
- Columbia Center for Sustainable Investment (2020), *Call for ISDS moratorium during Covid-19 crisis and response*, https://ccsi.columbia.edu/2020/05/05/isds-moratorium-%20during-covid-19 (last access 8 January 2023);
- Cooter R. and Ulen T. (2014), *Law and Economics*, Pearson New International Edition, Sixth Edition, Edinburgh;
- Cooter R. D. and Rubinfeld D. L. (1989), *Economic Analysis of Legal Disputes and Their Resolution*, Journal of Economic Literature;
- Cotula L. (2017), *Democracy and International Investment Law*, Leiden Journal of International Law;
- Croce B. (2016), *Riduzione della Filosofia del Diritto alla Filosofia dell'Economia*, Giuffrè Francis Lefebvre;
- Csikszentmihalyi M. (1990), *Flow: the psychology of optimal experience*, Haper & Row, first edition, New York;
- De Luca A. and Sacerdoti G. (2019), Investment Dispute Settlement, in Krajewski M. and Hoffmann T. R., *Research Handbook of Foreign Direct Investment*, Edward Elgar Publishing;
- de Vattel E. (1844), *The Law of Nation*, J Chitty Translation;
- Del Vecchio G. (1954), *Diritto ed Economia*, Studium;
- Delaume G. R. (1982), *Le Centre International pour le Règlement des Différends relatifs aux Investissements*, CIRDI, 109 JDI ;

- Delaume G. R. (1982), *Le Centre International pour le Règlement des Différends relatifs aux Investissements*, CIRDI, 109 JDI;
- Depalma A. (2001), *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, New York Times, https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html (last access 8 January 2022);
- Dickerson H. (2013), Minimum Standards in Wolfrum R., *The Max Planck Encyclopedia of Public International law*, Oxford University Press;
- Dings J. and de Pous P. (2014), *As it stands, the TTIP could threaten democracy*, Financial Times https://www.ft.com/content/d49b7bb6-94de-11e3-af71-00144feab7de (last access 8 January 2023);
- Dolzer R. and Schreuer C. (2008), *Principles of International Investment Law*, Oxford University Press;
- Dolzer R. and Stevens M. (1995), *Bilateral Investment Treaties,* Kluwer Law International;
- Dolzer R., Kriebaum U. and Schreuer C. (2022), *Principles of International Investment Law*, Oxford Public International Law;
- Donald R, and Shea R. (1955), *The Calvo Clause: A Problem of Interamerican and International Law and Diplomacy*, University of Minnesota Press;
- Douglas Z. (2009), *The International Law of Investment Claims*, Cambridge University Press;
- Drago L. (1907), *State Loans in Their Relations to International Policy*, AJIL;
- Driver, J. (2022), *The History of Utilitarianism*, Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/archives/win2022/entries/utilitarianism-history/ (last access on 8 January 2023);
- Dunoff J. L. and Pollack M. A. (2013), *Interdisciplinary Perspectives on International Law and International Relations*, Cambridge University Press;
- Dunoff K. L. and Trachtman J. P. (1999), *Economic Analysis of International Law*, Yale Journal of International Law;
- Dupuy P. M., Francioni F. and Petersmann E. U. (2009), *Human Rights in International Investment Law and Arbitration*, Oxford University Press;
- Easton D. (1975), *A Re-Assessment of the Concept of Political Support*, British Journal of Political Science;
- Eberhardt P. and Olivet C. (2018), *Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fueling an Investment Arbitration Boom*, TrTRANSNAT'L INST. & CORP. EUR. OBSERVATORY;
- Eid D. (2019), No, Economics is Not a Science, *The Harvard Crimson*, https://www.thecrimson.com/article/2019/10/17/eid-economics-not-science/ (last access on 8 January 2023);
- El Kady H. and De Gama M. (2019), *The Reform of the International Investment Regime: An African Perspective*, ICSID Review;
- Elsig M., Polanco R. and van den Bossche P. (2021), *Part II – Current Challenges in Invernational Investment Dispute Settlement*, in Elsig M., Polanco R. and van den Bossche P., International Economic Dispute Settlement: Demise or Transformation, Cambridge University Press;
- Eriksen T. H., *Interview with Thomas Hylland Eriksen* (2009), Max Plank Institute for the Study of Religious and Ethnic Diversity,

https://www.mmg.mpg.de/53772/interview-with-thomas-hylland-eriksen (last access 8 January 2023);

- European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (last access 8 January 2023);
- Evans J. and Osborne N. (2022), *The Diversity Problem in Arbitration,* Global Legal Post, https://www.globallegalpost.com/news/the-diversity-problem-in-arbitration-339877594 (last access 8 January 2023);
- Ewald W. (1988), *Unger's Philosophy: A critical Legal Study*, Faculty Scholarship at Penn Law;
- F. Baetens, *Investment Law within International Law: Integrationist Perspectives* (2013), Cambridge University Press;
- Fairbank J. K. (1959), *The United States and China*, Cambridge, Mass: Harvard University Press;
- Faist T. (2009), *Diversity – A New Mode of Incorporation?*, Ethnic and Racial Studies, Vol. 32;
- Fallon R. H. Jr. (2005), *Legitimacy and the Constitution*, Harvard Law Review, Vol. 118;
- Farrelly M. J. (1894), *Recent Questions of International Law: Japan and European Consular Jurisdiction*, LQ Review;
- Fatouros A. A. (1976), *On Domesticating Giants: Further Reflections on the Legal Approach to Transnational Enterprise*, U Western Ontario Law Review;
- Faure M. and Ma W. (2020), *Investor-State Arbitration: Economic and Empirical Perspective*, Michigan Journal of International Law;
- Feris J. (2014), *Challenging the status quo – South Africa's termination of its bilateral trade agreements*, DLA Publications, https://www.dlapiper.com/en/germany/insights/publications/2014/12/international-arbitration-newsletter-q4-2014/challenging-the-status-quo/, (last access 9 November 2021);
- Focarelli C. (2016), *Economia Globale e Diritto Internazionale*, Il Mulino;
- Føllesdal A. (2020), *Survey Article: The Legitimacy of International Courts*, Wiley Online Library onlinelibrary.wiley.com/doi/pdf/10.1111/jopp.12213 (last access 20 October 2022);
- Fontoura Costa J. A. (2011), *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, Oñati Socio-Legal Series;
- Forere M. A. (2017), The New South African Protection of Investment Act, in Morosini F. and M. R. Sanchez Badin M. R., *Reconceptualizing International Investment Law from the Global South*, Cambridge University Press;
- Franck S. D. (2005), *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent* Decisions, Fordham Law Review;
- Franck S. D. (2005), *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, Fordham Law Review;
- Franck S. D. and others (2015), *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, Columbia Journal of Transnational Law;

- Franck T. (1990), *The Power of Legitimacy Among Nations*, Oxford University Press.
- Friedman A. (2010), *Flexible Arbitration for the Developing World: Piero Foresti and the Future of Bilateral Investment Treaties, the Global South*, Brigham Young University International Law & Management Review;
- Garcia Bielsa J. J. (2022), *Indeterminacy, Ideology and Legitimacy in Investment Arbitration: Controlling International Private Networks of Legal Governance?*, International Journal for the Semiotics of Law;
- Gaukrodger D. (2014), OECD working paper No. 2014/02, Paris: OECD, https://www.oecd.org/daf/inv/investment-policy/WP-2014_02.pdf (last access 8 January 2023);
- Gaukrodger, D. (2016), *The legal framework applicable to joint interpretative agreements of investment treaties*, OECD working paper No. 2016/01, https://www.oecd-ilibrary.org/docserver/5jm3xgt6f 29w-en.pdf (last access 8 January 2023);
- Georgescu-Roegen N. (1968), *Utility*, International Encyclopedia of the Social Sciences, New York, Macmillan;
- Gershon (2022), *Fighting Apartheid with Sports*, JSTOR Daily, https://daily.jstor.org/fighting-apartheid-with-sports/, (last access 8 January 2023);
- Gert B. and Gert J. (2020), *The Definition of Morality*, Stanford Encyclopedia of Philosophy at https://plato.stanford.edu/entries/morality-definition/ (last access on 5 November 2022);
- Ghai Y., Luckham R., and Snyder F. (1987), Introduction in Ghai Y., Luckham R., and Snyder F., *The Political Economy of Law*, Oxford: OUP;
- Gibson J., Karlen D. and Smentkowski B. P. (2019), *Court*, Encyclo, https://www.britannica.com/topic/court-law (last access 8 January 2023);
- *Gingerphobia: Carrot-tops see red* (2000), BBC News, http://news.bbc.co.uk/1/hi/special_report/1999/02/99/e-cyclopedia/686977.stm (last access 10 January 2023);
- Goldsmith J. L. and Posner E. A. (1999), *A theory of Customary International Law*, University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 63;
- Gómez K. F. (2018), *Diversity and the Principle of Independence and Impartiality in the Future Multilateral Investment Court*, The Law & Practice of International Courts and Tribunals;
- Grewal D. and Adkins C. (2016), *Democracy and Legitimacy in Investor- State Arbitration*, The Yale Law Journal;
- Grigsby W. E. (1986), *The Mixed Court of Egypt*, LQ Review;
- Grossman N. (2009), *Legitimacy and International Adjudicative Bodies*, George Washington International Law Review;
- Guandalini B. (2020), *Economic Analysis of Arbitrator's Function*, International Arbitration law Library, Kluwer Law International;
- Guntrip E. (2014), *International Human Rights Law, Investment Arbitration and Proportionality Analysis: Panacea or Pandora's Box*?, EJIL: Talk, https://www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/ last access on 8 January 2023;

- Gurria, A. (2016), The growing pains of investment treaties in Love, P. (2016), *Debate the Issues: Investment*, Paris: OECD, https://www.oecd-ilibrary.org/docserver/9789264242661-12-en.pdf. (last access 8 January 2023);
- Guzman T. (2008), *How International Law Works: A rational Choice Theory*, Oxford,;
- Hart H. L. A. (1961), *The Concept of Law*, Oxford;
- Haynes J. (2013), *The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries' Concerns – The Case for Regulatory Rebalancing*, The Journal of World Investment & Trade;
- Heiskanen V. (2008), Arbitrary/Unreasonable or Discriminatory Measures in Reinisch A., *Standards of Investment Protection*, Oxford University Press;
- Hepburn, J., Paparinskis, M., Poulsen, L. and Waibel, M. (2020), *Investment law before arbitration*, Journal of International Economic Law;
- Herman L. L. (2011), *Federalism and International Investment Disputes*, International Institute for Sustainable Development;
- Hilf M and Geiß R. (2012), Most-Favoured-Nation Clause, in Wolfrum R, *Max Planck Encyclopedia of Public International Law*, Oxford University Press;
- Hill S. M. (1990), *Growth of International Law in Africa* 16 LQ Rev 249;
- Hobsbawm E. (1968), *Industry and Empire, the making of modern English society, 1750 to the Present Day*¸ Pantheon Books;
- Hodgson M. Kryvoi Y. and Hrcka D. (2021), *2021 Empirical Study. Costs, Damages and Duration in Investor-State Arbitration*, British Institute of International and Comparative Law and Allen & Overy, https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf (last access 9 January 2023);
- Hofman R. (2015), The Protection of Individuals under Public International Law, in Bungerberg M. and others, *International Investment Law*, Bloomsbury Collection;
- Hood M. (1975), *Gunboat Diplomacy 1895–1905*¸ London: George Allen & Unwin;
- ICSID (1993), *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965*, ICSID Reports;
- *Investor-State Dispute Settlement (ISDS)*, Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com/0-624-6147?transitionType=Default&contextData=(sc.Default)&firstPage=true (last access 8 January 2023);
- Jevons W. S. (1871), *The Theory of Political Economy*, Kelley, fifth edition, New York;
- Jevons W. S. (2013), *The Theory of Political Economy*, Palgrave Classics in Economics, London;
- John T. St., Behn D., Langford M. and Lie R. (2018), *Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration*, PluriCourts Working Paper;
- Johnston W. R. (1973), *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century*, Durham, NC: Duke University Press;
- Kabre R. J. (2021), *The Interplay Between International and National Institutions in Fighting Corruption. Lesson From the Pietro Foresti, Laura de Carli & Others v. The Republic of South Africa*, Verfassungsblog on Matters Constitutional,

https://verfassungsblog.de/the-interplay-between-international-and-national-institutions-in-fighting-corruption/ (last access 8 January 2023);

- Kahneman D. and Tversky A. (1979), *Prospect Theory: An Analysis of Decision under Risk*, Econometrica, Vol. 47;
- Kaufmann-Kohler G. and Potestà M. (2016), *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? Analysis and Roadmap*, CISD First Report, https://www.cids.ch/images/Documents/CIDS_First_Report_ISDS_2015.pdf (last access on 8 January 2023);
- Kaufmann-Kohler G. and Potestà M. (2020), Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future Outlook, in Baumler and others, *European Yearbook of International Economic*, Law Springer;
- Kessedjian C. (2021), *Rebalancing Investors' Rights and Obligations*, The Journal of World Investment, Vol 22;
- Kidane W. (2019), *The Culture of Investment Arbitration: An African Perspective*, ICSID Review;
- King A. S. (2021), *Global Civil Procedure*, Harvard Law Journal, Vol. 62, No.1;
- Kirby J. (2015), *Efficiency in International Arbitration: Whose Duty Is It?* Journal of International Arbitration, Vol. 32;
- Kläger R. (2011), *Fair and Equitable Treatment*, Cambridge University Press;
- Kovacs R. B. (2012), *Efficiency in International Arbitration: An Economic Approach*, (2012), 23(1) American Review of International ;
- Krajewski M. (2020), *A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty Application*, Business and Human Rights Journal;
- Kriebaum U. (2006), *Privitazing human rights. The interface between international investment protection and human rights*, Transitional Dispute Management, https://www.transnational-dispute-management.com/article.asp?key=947 (last access on 8 January 2023);
- Krisch N. (2005), *International Law in Times of Hegemony*, EJIL;
- Kryvoi Y. (2012), *Counterclaims in Investor-State Arbitration*, Minnesota Journal of International Law;
- Kryvoi Y. (2021), *Private or Public Adjudication? Procedures, Substance and Legitimacy*, Leiden Journal of International Law;
- Landau L. (2009) *Diversity Interview*, Max Plank Institute for the Study of Religious and Ethnic Diversity, https://www.mmg.mpg.de/63553/interview-with-loren-landau (last access 8 January 2023);
- Landes E. M. and Posner R. (1978), *The Economics of the Baby Shortage*, The Journal of Legal Studies;
- Landes W.M. and Posner R. A. (1979), *Adjudication as a Private Good*, 8 J. Legal Stud. 235;
- Landreth H. and Colander D. C. (1994), *History of Economic Thought*, Houghton Mifflin;
- Langford M., Behn D. and Usynin (2022), The West and the Rest: Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration;

- Latané J. H. (1907), *Address*, American Society of International Law;
- Latter A. M. (1903), *The Government of Foreigners in China*, LQ Review;
- Lazo R. P. and Desilvestro V. (2018), *Does an Arbitrator's Background Influence the Outcome of an Investor-State Arbitration?*, The Law and Practice of International Courts and Tribunals;
- Leibold A. M. (2016), *The Friction between Investor Protection and Human Rights: Lessons from Foresti v. South Africa* (2016) 38 Houston Journal of International Law;
- Lester S., Mercurio B., Davies A. (2018), *World Trade Law*, Bloomsbury;
- Lester S., Mercurio B., Davies A. (2018), *World Trade Law*, Bloomsbury;
- Lew J. D. M., Mistelis L. A. and Kroll S. M. (2003), *Comparative International Commercial Arbitration*;
- Lipson C. (1985), *Standing Guard-Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* Berkeley: University of California Press;
- Loveday H., and Lavers T. (2019), *Feminist Judgments in International Law*, Oxford: Hart Publishing, Bloomsbury Collections;
- Lowe V. (2004), *Some Comments on Procedural Weaknesses in International Law*, American Society of International Law;
- Mackay E. (2000), History of Law and Economics, in Bouckaert B. and G. De Geest (ed), *Encyclopedia of law and economics*, Vol. 1, Edward Elgar Pubishers;
- Manell P. S. (1983), *A Note on Private versus Social Incentives to Sue in a Costly Legal System*, The Journal of Legal Studies;
- Mann H. and others (2005), *IIS Model International Agreement on Investment for sustainable development*, IISD, https://www.italaw.com/sites/default/files/archive/ita1027.pdf (last access on 8 January 2023);
- Marceddu M. L. and Ortolani P. (2020), *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments*, The European Journal of International Law;
- Martinez-Fraga, P. J. and Harout J. S. (2012) *A defense of dissents in investment arbitration*, The University of Miami Inter-American Law Review;
- Mauro M. R. (2003), *Gli Accordi Bilaterali sulla Promozione e la Protezione degli Investimenti* Giappichelli;
- Mayeda G. (2007), *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment. Treaties*, The Journal of World Investment & Trade;
- Mbengue M. M. (2019), *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, ICSID Review;
- Mbengue M. M. and Schacherer S. (2017), *The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime*, The Journal of World Investment & Trade;
- Mercuro N. and Medema S. G. (2006), *Economics and the Law. From Posner to Post-Modernism and Beyond* (2006), Princeton University Press;
- Miceli T. J. (2017), *The Economic Approach to Law*, Stanford University Press, Third Edition, Stanford;
- Mill J.S. (1863), *Utilitarianism*, https://www.loc.gov/item/11015966/ (last access on 8 January 2023);
- Moore J. B. (1906), *A digest of International Law*, Govt. Print. Off., Washington;

- Morolong M. and Malesa G. (2021), *The Requirement For Empowerment in the South African mining Sector: Looking for Legal Certainty from the Courts*, International Bar Association, https://www.ibanet.org/empowerment-south-africa-mining, last access 10 October 2022;
- Morón G. (1964), *A History of Venezuela*, London: George Allen & Unwin;
- Muchlinski P. T. (2000), *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?*, International Lawyer;
- Nandy A. (2012), *The Idea of Happiness*, Economic and Political Weekly;
- Nelson M. (2021), *Biden's court commission is worried about Supreme Court 'legitimacy.' So what is 'legitimacy,' exactly'*, https://www.washingtonpost.com/politics/2021/10/22/bidens-court-commission-is-worried-about-supreme-court-legitimacy-so-what-is-legitimacy-exactly/, Washington Post, last access 8 January 2023);
- Newcombe A. and Paradell L. (2009), *Law and Practice of Investment Treaties: Standards of Treatment* Kluwer Law International,;
- Offe C. (2009), *Governance: An 'Empty Signifier?'*, Constellations;
- Ofodile U. E. (2019), *African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges*, ICSID Review;
- Onyema E. (2005), *Selection of Arbitrators in International Commercial Arbitration*, SOAS, https://eprints.soas.ac.uk/4424/1/Selection_of_arbitrators.pdf (last access 9 January 2023);
- Onyema E. (2019), *African Participation in the ICSID System: Appointment and Disqualification of Arbitrator*, ICSID Review;
- Paparinskis M. (2020), *A Case Against Crippling Compensation in International Law of State Responsibility*, Modern Law Review;
- Parisi F. (2005), *Scuole e Metodologie nell'Analisi Economica del Diritto*, Rivista Critica del Diritto Privato;
- Parra A. R. (2019), *The Participation of African States in the Making of the ICSID Convention*, ICSID Review;
- Parra A. R. (2020), *ICSID: An Introduction to the Convention and Centre*, Oxford University Press;
- Pastore B. and Tuzet G. (2016), *Il Pragmatismo fra Diritto ed Economia*, Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno, pp. 361-489;
- Patl A. (2022), *How Companies Can Improve the Pipeline of Diverse Lawyers in Arbitration*, Burford, https://www.burfordcapital.com/insights/insights-container/blog-nylj-diversity-arbitration/ (last access 8 January 2023);
- Paulsson J. (1995), *Arbitration without Privity*, ICSID Review – Foreign Investment Law Journal;
- Paulsson J. (2005), *Denial of Justice in International Law*, Cambridge: CUP;
- Pauwelyn J. (2015), *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, AM. J. INT'L L.;
- Perera S. M. (2012), *Equity-Based Decision-Making and the Fair and Equitable Treatment Standard: Lessons From the Argentine Investment Disputes – Part I,* The Journal of World Investment & Trade;
- Perterson L. E. (2010), *Discontinuance of Bilateral Investment Treaty Claim Leave Some Questions Unresolved for South Africa; Future Shape of BIT Programs Still Up in the Air*, IAREPORTER, https://www.iareporter.com/articles/discontinuance-

of-bilateral-investment-treaty-claim-leave-some-questions-unresolved-for-south-africa-future-shape-of-bit-program-still-up-in-the-airlast/ (last access on 8 January 2023);

- Peter W. (1995), *Arbitration and Renegotiation of International Investment Agreements*, The Hague: Kluwer Law International;
- Peterson L. E. (2009), *Argentine Crisis Arbitration Award Pile Up, but Investors Still Wait for a Payout*, Bilaterals.org, https://www.bilaterals.org/?argentine-crisis-arbitration&lang=fr. (last access on 8 January 2023);
- Peterson L.E. (2005), *Argentine bondholders girding for multi-billion dollar investment treaty claim*, Investment Law and Policy News Bulletin https://www.iisd.org/itn/wp-content/uploads/2010/10/investment_investsd_june10_2005.pdf (last access on 10 January 2023);
- Picherack J. R. (2008), *The expanding scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone too Far*, 9 JWIT 225-291;
- Pogatchnik S. (2022), *Ireland's Top Court Rejects Canada-EU Trade Deal as Unconstitutional*, https://www.politico.eu/article/irelands-top-court-rejects-canada-eu-trade-deal-as-unconstitutional/ (last access 8 January 2023);
- Polonskaya K. (2018), *Diversity in the Investor-State Arbitration: Intersection Must Be Part of the Conversation*, Melbourne Journal of International Law Vol. 9;
- Posner R. A. (1973), *An Economic Approach to Legal Procedure and Judicial Administration*, The Journal of Legal Studies;
- Posner R. A. (1973), *Economic Analysis of Law*, Little Brown and Company;
- Posner R. A. (1979), Utilitarianism, Economics, and Legal Theory, The Journal of Legal Studies;
- Posner R. A. (2011), *Economic Analysis of Law* (2011), Aspen Published;
- Poulsen L. (2011)*, Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded rationality*, PhD Thesis, The London School of Economics and Political Science, http://etheses.lse.ac.uk/141/ (last access on 8 January 2023);
- Poulsen L. (2015), *Bounded Rationality and Economic Diplomacy: The Political Economy of Investment Treaties in Developing Countries*, Cambridge University Press;
- Poulsen L. and Gertz G. (2021), *Reforming the Investment Treaty Regime, A 'Backward-looking' Approach*, Chatham House https://www.brookings.edu/research/reforming-the-investment-treaty-regime/?fbclid=IwAR0Q7US5zzXc3e6mmr9JoPVFcEtgoHFPXRh_kr6UQnFmxcMlJ23bSvEycXY (last access 8 January 2023);
- Previti G. (2022), *Companies Are Key To Driving Diversity in* Arbitration, Burford, https://www.burfordcapital.com/insights/insights-container/companies-key-to-diversity-in-arbitration/ (last access 8 January 2023);
- Puig S. (2014), *Social Capital in the Arbitration Market*, The European Journal of International Law
- PWC (2021), *PWC Code of Conducts*, https://www.pwc.com/gx/en/ethics-business-conduct/pdf/pwc-code-of-conduct-april-2021-v2.pdf (last access 4 December 2022);
- Reinisch A. (2010), Enforcement of Investment Awards, in Yannaca-Small K., *Arbitration under International Investment Agreements*, Oxford University Press;

- Robbins L. (1935), *An Essay on the Nature and Significance of Economic Science*, https://milescorak.files.wordpress.com/2020/02/robbins-essay-nature-significance-economic-science.pdf (last access on 8 January 2023);
- Roberts J. A. G. (1999), *A History of China*, London: Macmillan;
- Rohrer F. (2007), *Is Gingerism as Bad as Racism?*, BBC News, http://news.bbc.co.uk/1/hi/magazine/6725653.stm (last access 10 January 2023);
- Rubino-Sammartano M. (2008), *The Decision-making Mechanism of the Arbitrator Vis-à-Vis the Judge*, J. International Arbitration;
- Sacerdoti G. (1997), *Bilateral Treaties and Multilateral Instruments on Investment Protection*, in Recueil de scours de l'Académie de La Haye (1997);
- Sacerdoti G. (2004), *Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, ICSID Review;
- Sacerdoti G. (2014), *Havana Charter (1948)*, Max Planck Encyclopedia of Public International Law;
- Sacerdoti G., Acconci P., Valenti M. and De Luca A. (2014), *General Interest of Host States in International Investment Law*, Cambridge University Press;
- Salacuse J. W. (2015), *The Law of Investment* Treaties, Oxford University Press;
- Salacuse J. W. and Sullivan N. P. (2005), *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, Harvard International Law Journal, Vol 46;
- Salzbrunn M. (2012), *Vielfalt/Diversity/Diversité*, Soziologische Revue;
- Sasse J. P. (2011), *An Economic Analysis of Bilateral Investment Treaties*, Gabler Verlag, Wiesbden;
- Schill S. (2009), *Multilateralizing Investment Treaties through Most-Favoured-Nation Clause*, 27 Berkeley J. Int'l L. 496;
- Schill S. W. (2011), *W(h)ither Fragmentation? On the Literature and Sociology of international Investment Law*, European Journal of International Law;
- Schill S. W. (2022), *Schreuer's Commentary on the ICSID Convention, The ICSID Convention: A commentary on the Convention of the Settlement of Investment Disputes between States and Nationals of Other States*, Cambridge University Press;
- Schreuer C. (2005), *Fair and Equitable Treatment in Arbitral Practice*, The Journal of World Investment & Trade;
- Schwartz A. and Scott R. E. (2003), *Contract Theory and the Limits of Contract Law* (2003), Yale Law Journal;
- Schwarzenberger G. (1967), *The Principles and Standards of International Economic Law*, Brill, Leiden;
- Sciso E. (2012), *Appunti di diritto internazionale dell'Economia*, Giappichelli;
- Sciso E. (2021), *Appunti di diritto internazionale dell'Economia*, Giappichelli;
- Scitovsky T. (1976), *The Joyless Economy*, Oxford University Press USA, Revised Edition, New York;
- Searle J. (1969), *Speech Acts – An essay in the Philosophy of Language*, Cambridge University Press;
- Searle J. R. (2015), *What is an Institution*, Cambridge University Press;
- Seidl-Hohenveldern I. (1961), *The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table*, Journal of Public Law;
- Sen A. (1977), *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, Philosophy and Public Affairs,;

- Sen. A. (1997), *Maximization and the Act of Choice*, Econometrica;
- Shabtai R., Elements of International Procedural Law (2006), in Shabtai R. *The Law and Practice of the International Court*, *1920-2005*, Brill Nijhoff;
- Shavell S. (1982), *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, The Journal of Legal Studies;
- Sickles R. C. and Zulenyuk V. (2019), Measurement of Productivity and Efficiency. Theory and Practice, Cambridge University Press;
- Siegel D. (2004), *Using free trade agreements to control capital account restrictions: Summary of remarks on the relationship to the mandate of the IMF*, ILSA Journal of International and Comparative Law;
- Simson, C. (2020), *Biden comes out against 'special tribunals' for corporations*, Law360, https://www.law360.com/articles/1295978/biden-comes-out-against-special-tribunals-for-corporations (last access 8 January 2023);
- Sinclair A. C. (2004), *Nationality of Individual Investors in ICSID Arbitration*, International Arbitration Law Review;
- Sornarajah M. (2008), A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration, in Sauvant K., *Appeals Mechanism in International Investment Disputes*, Oxford University Press;
- Sornarajah M. (2010), *The International Law on Foreign Investment* (2010), Cambridge University Press;
- *South Africa begins withdrawing from EU-member BITs* (2012), Investment Treaty News, https://www.iisd.org/itn/en/2012/10/30/news-in-brief-9/ (last access on 8 January 2023);
- Spierman O. (2004), *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties*, Arbitration International;
- Stiglitz J. (2002), *Argentina, Shortchanged Why the Nation That Followed the Rules Fell to Pieces*, Washington Post, https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Argentina.pdf, (last access on 8 January 2023);
- Stiglitz J. (2016), *Beware of TPP's Investor–State Dispute Settlement Provision*, Rosevelt Institute, https://rooseveltinstitute.org/publications/beware-of-tpps-investor-state-dispute-settlement-provision/ (last access 8 January 2023);
- Stone Sweet A. and Grisel F. (2014), The Evolution of International Arbitration: Delegation, Judicialization, Governance, in Mattli W. and Dietz T., *International Arbitration and Global Governance: Contending Theories and Evidence* (2014), Cambridge University Press;
- Strezhnev A. (2016), *Detecting Bias in International Investment Arbitration*, 57th Annual Convention of the International Studies Association, Atlanta;
- Summa B. (2011), *Foreign Investment Arbitration: A Place for Human Rights?*, The International and Comparative Law Quarterly;
- Sunstein C. R. (2014), *Why Nudge? The Politics of Libertarian Paternalism*, Yale University Press;
- Sykes A. O. (2019), *The Economic Structure of International Investment Agreements with Implications for Treaty Interpretation and Design*, Cambridge University Press;
- Sykes A. O. and Guzman A. (2017), Economics of International Law, in Parisi F., *The Oxford Handbook of Law and Economics*, Oxford University Press, Oxford;

- Sykes A. O. and Posner E. A. (2013), *Economic Foundations of International Law*, Cambridge: Harvard University Press;
- *The Arbitration Game* (2014), The Economist https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game last access 8 January 2023;
- The Editors of Encyclopaedia Britannica, *Apartheid* Britannica, https://www.britannica.com/topic/apartheid/Opposition-to-apartheid (last access on 8 January 2023;
- *The Hague Rules on Business and Human Rights Arbitration* (2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (last access 9 January 2023);
- Thomas C. (2014), *Uses and Abuses of Legitimacy in International Law*, Oxford J. Legal Studies, Vol.34 No. 4;
- Titi C. (2014), *Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas*, SSRN, https://ssrn.com/abstract=2690775 (last access 8 January 2022);
- Titi, C. (2018), *Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion*, The Law & Practice of International Courts and Tribunals;
- Treves T., Seatzu F. and Trevisanut S. (2014), *Foreign Investment, International Law and Common Concerns*, Routledge;
- Trimble P. R. (1990), *International Law, World Order, and Critical Legal Studies*, Stanford Law Review;
- Tudor I. (2008), *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford University Press;
- Tuzet G. (2018), *L'analisi economica come argomentazione giuridica*, Teoria Juridica Contemporanea;
- UNCTAD (2022), ILA Monitor, Issue 1, July 2022, https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf (last access 8 January 2023);
- Unger R. (1983), *The Critical Legal Studies Movement*, pp. 561-657;
- Vadi V. S. (2011), *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law* (2011), Columbia Human Rights Law Review;
- Van Aaken A. (2008), *Perils of Success? The Case of International Investment Protection*, Eur Bus Org L Rev 1, 14;
- Van Aaken A. (2014), *Behavioral International Law and Economics*, Harvard International Law Journal;
- Van Aaken A. and Broude T. (2016), *Arbitration from a Law & Economics Perspective*, Hebew University of Jerusalem Legal Studies Research paper Series;
- Van Den Bossche P. (2005), *The Origins of the WTO. The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press;
- Van Den Bossche P. (2005), *The Origins of the WTO. The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press;
- Van Harten G. (2016), *Arbitrators Behaviour in Asymmetrical Adjudication (Part two): An Examination of Hypotheses of Bias in Investment Treat Arbitration*, Osgoode Hall Law Journal;

- Van Harten G., (2007) *Investment Treaty Arbitration and Public Law*, Oxford University Press;
- Vandevelde K. J. (2005), *A Brief History of International Investment Agreements* (2005), U.C. Davis Journal of International Law & Policy 12 U. C., Vol. 12 Fall 2;
- Vandevelde K. L. (2000), *The Economics of Bilateral Investment Treaties*, Harvard International Law Journal;
- VerLoren van Themaat P. (1981), *The Changing Structure of International Economic Law*, Springer;
- Vertovec S. (2012), *'Diversity, and the social Imaginary*, European Journal of Sociology;
- Vertovec S. (2014), Introduction, in *Routledge International Handbook of Diversity Studies*, Routledge;
- Vis-Dunbar D. (2009), *South African court judgment bolsters expropriation charge over Black Economic Empowerment legislation in the mining sector*, Investment Treaty News, https://www.iisd.org/itn/en/2009/03/23/south-african-court-judgment-bolsters-expropriation-charge-over-black-economic-empowerment-legislation/ (last access 10 October 2022);
- Voeten E. (2013), *Public Opinion and the Legitimacy of International Courts*, Theoretical Inquiries in Law;
- Waibel M. & Wu Y. (2012), *Are Arbitrators Political? Evidence from International Investment Arbitration*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101186 (last access 8 January 2023);
- Waibel M. (2009), BIT by BIT – The silent liberalization of the capital account, in Binder C., Kriebaum U., Reinisch A., and Wittich S., *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, Oxford: Oxford University Press;
- Waibel M. and others (2010), *The Backlash Against Investment Arbitration: Perceptions and Reality*, Kluwer;
- Walker H. (1956), *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, American Journal of Comparative Law;
- Weber M. (1964), *The Theory of Social and Economic Organization*, Free Press;
- Whiteman M. M. (1967), *Digest of International Law* 63 Michigan Law Review;
- Widdows H. (2011), *Global Ethics: An Introduction*, Routledge;
- Williams R. A. Jr. (1987), *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, Minnesota Journal of Law and Inequality;
- Wilson R. R. (1949), *Post-War Commercial Treaties of the United States*, AJIL;
- Wimmer A. (2009), *Interview with Andreas Wimmer*, Max Plank Institute for the Study of Religious and Ethnic Diversity, https://www.mmg.mpg.de/65148/interview-with-andreas-wimmer (last access 8 January 2023);
- Xin Yuan L. (2020), *Utilitarianism in Mill and Bentham: a comparative analysis*, Frontiers in Educational Research;
- Yong L. (2018), *Lighthizer justifies opposition to ISDS in NAFTA*, Global Arbitration Review, https://globalarbitrationreview.com/article/lighthizer-justifies-opposition-isds-in-nafta (last access 8 January 2023);

- Zachary D. (2003) , *The Hybrid Foundation of Investment Treaty Arbitration*, British Yearbook of International Law, Vol. 74 BYIL;
- Zarra G. (2018), *The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?*, Chinese Journal of International Law;
- Zeyl T. J. (2011), *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, Alberta Law Review.