Legalization Through Adjudication:
The Case of Investor-state Dispute Settlement

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TABLE OF CONTENTS

ABSTRACT

The reform of the Investor-State Dispute Settlement (ISDS) mechanism has provoked much debate among legal scholars and practitioners. The critiques of ISDS mainly arise from concerns regarding the legitimacy of the mechanism such as the perceived tolerance for the lack of impartiality and consistency. To allay these concerns, there have been proposals to reform ISDS by establishing investment courts with tenured judges and appellate tribunals. However, international adjudication systems like ISDS cannot be fully analogized to domestic courts in common law countries: ISDS falls into a broader international regime where there are neither hierarchical/centralized decision-making and enforcement authorities nor a multilateral investment treaty, and the rules and principles on foreign investment protection are fragmented in around three thousand Bilateral Investment Treaties (BITs). Against this backdrop, this thesis argues that, although there is a general agreement among the international community to further legalize international investment law, the process of legalization via the specific avenue of reforming the adjudication mechanism (i.e. ISDS) is subject to (1) the institutional constraint of international investment law, especially the lack of shared understanding among the international community regarding the treatment of foreign investments, and (2) the internal constraints of adjudication as a mode of social ordering. It further cautions that pursuing predictability while disregarding the low level of shared understandings regarding investment protection may cause more legitimacy problems than it solves.

RESUMÉ

La réforme du mécanisme de règlement des différends entre investisseurs et États (RDIE) a suscité de nombreux débats parmi les juristes et les praticiens. Les critiques du RDIE découlent principalement de préoccupations concernant la légitimité du mécanisme, comme la tolérance envers un faible niveau d'impartialité et de cohérence décisionnelle. Pour dissiper ces inquiétudes, des propositions ont été faites pour réformer le RDIE en créant des tribunaux d'investissement avec des juges titulaires et des tribunaux d'appel. Cependant, les juridictions internationales comme le RDIE ne peuvent pas être assimilées aux tribunaux nationaux des pays de *common law*: le RDIE s'inscrit dans un régime international plus large où il n'y a ni aucun système décisionnel hiérarchique/centralisé, ni traité multilatéral d'investissement, les règles et principes sur la protection des investissements étrangers étant fragmentés dans environ trois mille traités bilatéraux d'investissement. Dans ce contexte, cette thèse soutient que, bien qu'il y ait un consensus au sein de la communauté internationale en faveur d'une institutionnalisation plus approfondie du droit international des investissements, le processus d'institutionnalisation via la voie spécifique de réforme du RDIE est soumis à (1) la contrainte institutionnelle du droit international des investissements, en particulier le manque de commune entente au sein de la communauté internationale concernant le traitement des investissements étrangers, et (2) les contraintes internes de l'arbitrage en tant que mode d'ordonnancement social. Elle prévient en outre que rechercher la prévisibilité tout en ne tenant pas compte du faible niveau de commune entente concernant la protection des investissements peut entraîner plus de problèmes de légitimité qu'il n'en résout.

ABBREVIATIONS AND ACRONYMS

AB	Appellate Body
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FCN Treaties	Friendship, Commerce, and Navigation Treaties
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
MAI	Multilateral Agreement on Investment
MFN	Most-favored-nation
MST	Minimum Standard of Treatment
NAFTA	North America Free Trade Agreement
NGO	Non-governmental Organization
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the. Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
IR	International Relations
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organization
OECD	Organization for Economic Co-operation and Development
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
WGIII	Working Group III
WTO	World Trade Organization

INTRODUCTION

International investment law and its dispute settlement mechanism constitute a fascinating area in which to explore the dynamic role of adjudication in international law-making processes: states failed to enter into a multilateral treaty for international investment law, yet they were able to create a relatively de-politicized dispute settlement mechanism – the investor-state dispute settlement mechanism (ISDS) – which has made a significant contribution to the fertilization of rules and principles relating to foreign investment protection. This is described – as the thesis title succinctly summarizes – as a process of "legalization through adjudication". The aim of this thesis, therefore, is to delineate, on the one hand, the influence of international adjudication – with its dispute settlement and law-making functions – on the legalization of international investment law, and on the other hand, the internal and external constraints on such influence arising from the institutional context as well as the internal features of ISDS.

International investment law consists of a broad range of substantive and procedural rules and principles peculiar to foreign investment protection. They can be found in customary international law, general principles of law, domestic legislation, and international treaties such as bilateral investment treaties (BITs), free trade agreements (FTAs),[1] the Energy Charter Treaty,[2] the Agreement on Trade-Related Investment Measures,[3] the Convention on the Settlement of

[1] For example, the previous *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].
[2] *Energy Chater Treaty*, 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998).
[3] *Agreement on Trade-Related Investment Measures*, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 186 (entered into force 1 January 1995).

Disputes Between States and Nationals of Other States (the ICSID Convention)[4] etc.[5] The past three decades have witnessed a remarkable proliferation of investment treaties (mainly BITs), and up to now, more than three thousand investment treaties have been concluded – 2654 of which are still in force.[6] Despite their enormous number and their bilateral form, the BITs have almost identical structures and contents: most of them prescribe investment liberalization provisions such as national treatment and most-favored-nation treatment, as well as investment protection provisions regarding fair and equitable treatment and expropriation.[7] Moreover, most of them provide ISDS as a key avenue for dispute resolution.[8]

ISDS clauses normally stipulate that, if an investor and the host state failed to resolve their dispute via consultation or negotiation within a specified period of time (which is known as the "cooling-off period"), the investor may directly submit to arbitration a claim that the host state has violated one or several obligations under the investment treaty.[9] The arbitration may be *ad hoc* or administered by arbitral institutions such as the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration, the Stockholm Chamber of Commerce, etc. The most frequently applied rules governing investment arbitration procedures are the ICSID rules (including the ICSID Convention and the ICSID Additional Facility Rules) and the UNCITRAL

[4] *Convention on the Settlement of Disputes Between States and Nationals of other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [*ICSID Convention*].
[5] See José E Alvarez, *The Public International Law Regime Governing International Investment* (Leiden, The Netherlands: Brill | Nijhoff, 2011) at 27.
[6] UNCTAD, *World Investment Report 2020*, UNCTAD/WIR/2020 (New York: UNCTAD, 2020) at 106.
[7] See e.g. *2012 U.S. Model Bilateral Investment Treaty*, available online at:< https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [*the US Model BIT*]. For an empirical study of the contents of investment treaties, see Wolfgang Alschner & Dmitriy Skougarevskiy, "Mapping the Universe of International Investment Agreements" (2016) 19:3 J Int Econ L 561.
[8] See *ibid* at 26.
[9] See *ibid*.

Arbitration Rules.[10] To be clear, the term ISDS *per se* does not specify a particular means of dispute settlement between investors and states, thus one may conceive it to encompass conciliation and mediation as well; while in this thesis, ISDS is used in its narrower sense – i.e. referring only to investment arbitration as well as the investment court system (which can be deemed a reformed version of investment arbitration).

The inclusion of ISDS clauses in investment treaties is a milestone in the development of international investment law as it offers foreign investors a relatively depoliticized alternative to traditional avenues of dispute settlement such as local courts[11] and diplomatic protection.[12] Investment tribunals generally enjoy a high degree of discretion in terms of interpreting and applying the vague obligations in investment treaties and the relevant rules of international law. Moreover, after winning the case, an investor can directly bring the arbitral decisions to a local court or a third state court for enforcement under the ICSID Convention or the New York Convention.[13] On the other hand, ISDS does not represent a highly judicialized international adjudicative mechanism like that of the World Trade Organization (WTO) or the European Court of Human Rights (ECtHR). The form – arbitration – more closely resemble commercial arbitration where party autonomy plays a leading role in terms of, *inter alia*, the selection of arbitrators and

[10] See "Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub", online: <https://investmentpolicy.unctad.org/investment-dispute-settlement>. According to UNCTAD's statistics, among the 1023 known treaty-based ISDS cases, 603 are under ICSID rules and 326 are under the UNCITRAL Arbitration Rules.

[11] Compared to ISDS, local courts of the host state may give rise to concerns about the efficiency of dispute settlement, the potential bias against foreign investors, and the incapacity to apply international laws. See Gabrielle Kaufmann-Kohler & Michele Potestà, "Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future Outlook" in Gabrielle Kaufmann-Kohler & Michele Potestà, eds, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Cham: Springer International Publishing, 2020) 7 at 20.

[12] Won-Mog Choi, "The Present and Future of The Investor-State Dispute Settlement Paradigm" (2007) 10:3 J Int Econ Law 725 at 735–36.The disadvantages of diplomatic protection will be discussed in Chapter 1 below.

[13] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 October 1958, 330 UNTS 3 (entered into force 7 June 1959) [*New York Convention*]. Although, there is the risk that the decision may be annulled, set aside, or refused enforcement on grounds of procedural flaws or public policy.

the design of arbitral proceedings.[14] Viewed against the broader historical backdrop of ISDS's creation, such an arrangement might be the optimal choice to compromise, on the one hand, the vast diversification among the international community regarding the proper standards of investment protection and on the other hand, the need to establish an international legal framework promoting and protecting foreign investment.[15]

Despite the many advantages, as will be discussed in Chapter 1, ISDS has long been subject to various critiques. Some commentators appear to be uncomfortable with the idea that ISDS is dealing with public international law issues with a private formula of dispute settlement where party autonomy and flexibility dominate rule-design.[16] Recent years have witnessed a rise in the public law paradigm which examines ISDS through the lens of sovereign immunity and public interests.[17] Accordingly, there have been increasing demands that ISDS must be more "court-like" to advance public values such as coherence of investment law and the protection of human rights.[18] It is generally recognized that many legitimacy flaws of ISDS – especially the lack of coherence – should not be attributed to the dispute settlement procedures alone but are related to the fragmentation of substantive investment law as well; however, as it is well-acknowledged that a multilateral investment treaty is unlikely to exist in the near future, much hope has been pinned to the reform of ISDS to back up the legalization of international investment law. Those radical reform approaches, unsurprisingly, have triggered many controversies. One of the widely-shared

[14] For example, the ICSID Convention, art. 37(2)(b) "… one arbitrator appointed by each party and the third … appointed by agreement of the parties"; UNCITRAL Arbitration Rules, art. 9 "… each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal".
[15] See Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2012) at 9.
[16] See e.g. Gus Van Harten, "A Case for an International Investment Court" (2008) Society of International Economic Law (SIEL) Inaugural Conference. This public-private debate will be introduced in detail in Chapter 1.
[17] Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" (2013) 107:1 AJIL 45 at 63–65.
[18] See Chapter 1.II below.

concerns is the desirability of having an investment court system – which is likely to exert a stronger influence on investment law-making with its "coherent" decisions – given the fact that the international community itself could not agree upon the proper standards of investment protection.

This thesis aims to contribute to the debate on the reform of ISDS. Unlike previous reform proposals, however, this thesis approaches ISDS and international investment law from a more interdisciplinary point of view: it does not limit the analysis to legal rules and principles but critically examines international investment law against its social and political contexts. This is realized via the introduction of the International Relations (IR) theories – especially the constructivist theory – in explaining the dynamic relationship between ISDS and international investment law. It argues that the role of investment tribunals in terms of promoting the legalization of international investment law is subject to (1) the institutional constraints embodied in the lack of *shared understandings* among the international community regarding foreign investment protection, and (2) the internal constraints arising from adjudication as a mode of social ordering. As such, ISDS is better viewed as a platform for various actors to practice law and reinforce shared understandings. To be more specific, this thesis unfolds as follows.

Chapter 1 serves as the background chapter for this thesis. It introduces the evolution of ISDS and reviews four main types of legitimacy criticism relating to the mechanism, namely independence and impartiality, consistency, transparency and public participation, and regulatory space of the host states. Then, it points out the limits of traditional legal approaches to studying the reform of ISDS and explains the merits of the IR constructivist approach.

Chapter 2 critically reviews the notion of legalization in the context of international investment law. The term "legalization" was initially elaborated by several international law and

IR scholars as consisting of three dimensions, namely obligation, precision and delegation. By contrast, Chapter 2 interprets the term from a constructivist perspective and emphasizes *legitimacy* as a core component of legalization. This new analytical framework is fleshed out through a close examination of many aspects of the law and practice of the international investment legal regime.

Chapter 3 discusses the institutional constraint – i.e., the lack of shared understanding among the international community – on legalizing international investment law through ISDS. It highlights the important role of shared understandings in institutional evolution and argues that currently, international investment law is underpinned by a rather thin level of shared understandings. Further, based on Jutta Brunnée and Stephen Toope's interactional law theory, the chapter posits that ISDS should at best be conceived as a critical avenue of legal practice where various actors interact and reinforce their understandings of law.

Chapter 4 examines the inherent limits of ISDS as an adjudicative system to tackle issues of international law in light of Lon L. Fuller's theory about polycentric problems. It argues that international investment law concerns by its nature polycentric problems while ISDS – due to the limited parties involved in the decision-making process, the rights-based arguments and the low time-efficiency – is ill-equipped to tackle public issues such as human rights and environmental protection without the explicit support of investment treaties.

As the goal of this thesis is not only to point out the institutional and internal constraints but also to explain how they interact with the evolution of ISDS, Chapter 5 moves on to tackle the specific question of how ISDS should be reformed under the constructivist framework. It identifies three core processes of legalization, namely the formation of shared understandings through practice, the stabilization of shared understandings in the form of legal norms, and the application of legal norms to practice. It argues that, firstly, the "quantity" and "quality" of practice can be

improved to stimulate the formation of shared understandings; secondly, when the gap between the "required level of shared understandings" and the "actual level of shared understandings" is considerable, the institution should embrace more flexibility than predictability; and lastly, pursuing predictability while disregarding the low level of shared understandings may trigger more severe legitimacy problems such as non-compliance and reinforced political intervention.

In a word, integrating international law and IR theories, this thesis offers a more holistic theoretical framework to study the reform of international investment law. International legal regimes are by nature embedded in highly complex political settings, while conventional legal research on the reform of ISDS tends to be normative (e.g. focusing on values such as coherence and impartiality) but oversimplifying the reality as they overlook the broader social and economic context constraining it. By introducing IR theories that explain, *inter alia*, how states make decisions and how normative understandings within international communities are formed, this research carries out a more systematic study of the issue and provides a better understanding of the dilemma of ISDS. Apart from its interdisciplinarity, the thesis will conduct comparative research between various international organizations (e.g. the WTO and ICSID). These organizations encompass different institutional structures and fulfill different functions, thus comparing them can shed light on ISDS's reform.

CHAPTER 1 TAKING STOCK: ISDS, LEGITIMACY CRITICISMS, AND THEORETICAL APPROACHES

This Chapter serves as a background chapter. It will first introduce how the means of international investment dispute settlement has evolved from diplomatic protection to investment arbitration. Then it will analyze four prominent legitimacy criticisms of ISDS, namely the perceived lack of independence and impartiality, inconsistent arbitral decisions, insufficient transparency and public participation and the erosion of host states' regulatory space. In the last part, it will explain why an external perspective from the discipline of IR – especially the constructivist theory – is valuable in understanding the role of ISDS in the legalization of international investment law.

I. FROM DIPLOMATIC PROTECTION TO INVESTMENT ARBITRATION

During the colonial era, the emerging rules relating to the protection of foreign investment were not specified in bilateral investment treaties but were either roughly mentioned in commercial agreements like the Friendship, Commerce, and Navigation Treaties (FCN Treaties) or being asserted to exist in customary international law.[19] During that time, diplomatic protection, meaning the process whereby the home state "espouses the claim of its national against another State and pursues it in its own name",[20] was broadly considered to be an "elementary principle of international law".[21] It thus played an important role in the enforcement of obligations relating to foreign investment protection. On the other hand, diplomatic protection as a paradigm of dispute settlement is fraught with controversies: it was frequently criticized by developing countries,

[19] Kenneth J Vandevelde, "A Brief History of International Investment Agreements Symposium: Romancing the Foreign Investor: BIT by BIT" (2005) 12 UC Davis J Intl L & Pol'y 157 at 158–59.
[20] Christoph H Schreuer et al, *The ICSID Convention: A Commentary* (Cambridge, United Kingdom: Cambridge University Press, 2009) at 415.
[21] Choi, *supra* note 12 at 726; R B Lillich, "The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack" (1975) 69:2 AJIL 359–365.

especially Latin American countries, for politicizing investment disputes through the arbitrary exercise of power.[22] Neither is it favourable for some investors because the home state's exercise of protection is "discretionary" – the right of suit does not belong to the investors but to the home states, and the latter "may refuse to pursue the claim or may abandon it at any stage".[23]

FCN Treaties concluded after World War II expanded on foreign investment protection obligations and provided a more legalized form of dispute settlement – the adjudication of the International Court of Justice (ICJ).[24] The jurisdiction of the ICJ covered "any dispute between the Parties as to the interpretation or the application of the present Treaty which the Parties do not satisfactorily adjust by diplomacy or some other agreed means shall be submitted to arbitration or, upon agreement of the Parties, to the International Court of Justice".[25]

Since the 1940s, there have been multiple attempts to conclude multilateral instruments to protect foreign investment, yet all of them failed.[26] The reasons are multi-faceted: developed countries struggling with conflicting positions regarding the protection of specific industries; developing countries being against the idea of liberalizing investment; human rights and environment Non-Governmental Organisations (NGOs) objecting to the protection of multinational corporations, and the general concern about the treaty's infringement of a state's right to regulate.[27] In contrast to the frustrations of the negotiation of multilateral substantive rules,

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[22] Choi, *supra* note 12 at 728.
[23] Dolzer & Schreuer, *supra* note 15 at 296.
[24] Vandevelde, "A Brief History of International Investment Agreements Symposium", *supra* note 19 at 166.
[25] *United States of America and Federal Republic of Germany Treaty of Friendship, Commerce and Navigation (with Protocol and exchange of notes)* (29 October 1954) available online at: <https://treaties.un.org/doc/publication/unts/volume%20273/volume-273-i-3943-english.pdf>.
[26] For example, the OECD Multilateral Agreement on Investment, investment-related provisions in the Havana Charter prepared for the International Trade Organization, etc. *Multilateral Agreement on Investment, Draft Consolidated Text*, DAFFR/MAI(98)7/REVI (22 April 1998); *Havana Charter for an International Trade Organization*, (24 March 1948).
[27] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment*, 4th ed (Cambridge; New York: Cambridge University Press, 2010) at 257–61; Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009) at 57.

the World Bank's proposal on a multilateral dispute settlement mechanism was quickly accepted by the states. The idea was first proposed by the General Counsel of the World Bank, Aron Broches, in 1961, and after a series of meetings with legal experts and government representatives, the final text of the ICSID Convention was concluded in 1965.[28] Indeed, before the creation of ICSID, the World Bank had already worked on facilitating international investment by foreign investors (e.g. the International Investment Insurance Agency) and had assisted in settling investor-state disputes by mediation or conciliation.[29] These experiences are believed to have helped "convince [the Bank's] management to pursue the dispute settlement approach to the encouragement of foreign investment", which further led to the proposal of the multilateral investment dispute-settlement mechanism.[30] The proposed agreement made it clear that the Center would only have jurisdiction under parties' consent and that substantive rules would not be addressed[31] – this can partially explain the quick success of the initiative.

The proliferation of Bilateral Investment Treaties (BITs) since the 1970s further stimulated the use of the ISDS mechanism.[32] As of 2019, more than a thousand ISDS cases have been initiated by investors.[33] According to the Organisation for Economic Co-operation and Development's (OECD) statistics in 2012, 93% of the BITs and FTAs with investment chapters mentioned ISDS, and 56% of the concerned treaties allow investors to choose from among at least two arbitration

[28] Schreuer et al, *supra* note 20 at 2–3.
[29] Antonio R Parra, *The History of ICSID*, 2nd ed (Oxford, New York: Oxford University Press, 2017) at 20–21.
[30] *Ibid* at 23.
[31] *Ibid* at 23–24.
[32] Zachary Elkins, Andrew T Guzman & Beth A Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000" (2006) 60:4 International Organization 811–846 (arguing that the proliferation of BITs was driven by competition for capital).
[33] UNCTAD, "Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub", online: <https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1000>.

fora, among which ICSID and tribunals established under the UNCITRAL Arbitration Rules are proposed most frequently.[34]

II. LEGITIMACY CRITIQUES OF ISDS

Along with the explosion of ISDS cases came the rise of legitimacy criticisms of the mechanism. In the widely-cited article *The Legitimacy Crisis in Investment Treaty Arbitration*, Susan Franck cautions,

> the lack of determinacy and coherence in treaty arbitration has raised the specter of a legitimacy crisis. There are a variety of institutions that complain about particular aspects of the investment treaty process, including stated concerns about the transparency and privacy of the decision-making process, which lead to a lack of representation, the "chilling effect" upon important local regulation and subsequent impact on sovereignty, and the supposed bias of arbitrators. Many of these concerns are symptoms of a larger problem: the ability to determine with certainty the respective rights and obligations of investors and Sovereigns in a given situation.[35] [footnotes omitted]

While numerous commentators share similar concerns,[36] others deem that the legitimacy deficiencies of ISDS may have been exaggerated.[37] The sections below will elaborate on four frequently-discussed legitimacy issues, namely (1) independence and impartiality, (2) coherence, (3) transparency and public participation and (4) states' regulatory space.[38]

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[34] *Dispute Settlement Provisions in International Investment Agreements*, by Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, online:<www.oecd-ilibrary.org>, 2012/02 (OECD, 2012).
[35] Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions" (2004) 73 Fordham L Rev 1521 at 1586–87.
[36] See e.g. Gus Van Harten, "ISDS in the Revised CETA: Positive Steps, But Is It a 'Gold Standard'?" (2016) Centre for International Governance Innovation, online: <https://works.bepress.com/gus_vanharten/73/>.
[37] See e.g. Charles N Brower & Stephen W Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law Symposium: International Judges" (2008) 9 Chi J Intl L 471.
[38] Apart from these issues, there are also concerns regarding abuse of interim measures, investors' forum shopping, unfairness to small and medium companies, abusive interpretation, parallel proceedings, time and costs, etc. For a comprehensive summarization of relevant criticisms, see David Gaukrodger & Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community" (2012) OECD Working Paper No. 2012/3; Armand De Mestral, "Investor-State Arbitration between Developed Democratic Countries" in Armand De Mestral, ed, *Second Thoughts: Investor-State Arbitration between Developed Democracies* (Waterloo, Canada: Centre for International Governance Innovation, 2015) 9; Andrea Bjorklund, "The Legitimacy of the International Centre for Settlement of Investment Disputes" in Nienke Grossman et al, eds, *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018) 234.

A. Independence and impartiality

Many aspects of investment arbitration proceedings have attracted criticisms relating to independence and impartiality. One stream of critiques concerns the selection of arbitrators: since ISDS cases are mainly resolved by *ad hoc* tribunals rather than court-like adjudicative bodies,[39] the arbitrators are not tenured adjudicators but legal professionals nominated by the disputing parties.[40] This entails the risk of "double hatting", where the individual who serves as the arbitrator in one case simultaneously acts as counsel in another similar case.[41] The empirical study by Langford, Behn, and Lie shows that there is a core group of individuals who are influential in the system, and double hatting, although not a widespread practice across the 1000-plus studied cases, is practiced consistently by these core individuals.[42] Double-hatting may give rise to concerns over issue conflict, where the arbitrator might arguably fail to keep a neutral mind in drafting arbitral awards when switching from her role as a legal counsel in a case involving similar issues.[43] In such circumstances, the public may reasonably suspect that the arbitrator may be tempted to create precedent in favor of the case that she is defending as counsel. Therefore, the phenomenon of double-hatting impairs the public's *perception* of the impartiality of ISDS proceedings, hence giving rise to legitimacy challenges of the mechanism; as such, it is broadly recognized as an issue that must be addressed in the reform of ISDS.[44] Another issue that gives rise to similar impartiality

[39] One exception is the investment courts established between the EU and its trade partners.
[40] See e.g. ICSID Rules of Procedure for Arbitration Proceedings, Rule 3[*ICSID Arbitration Rules*].
[41] Fernando Dias Simões, "Hold on to Your Hat! Issue Conflicts in the Investment Court System" (2018) 17:1 The Law and Practice of International Courts and Tribunals 98 at 106.
[42] Malcolm Langford, Daniel Behn & Runar Hilleren Lie, "The Revolving Door in International Investment Arbitration" (2017) 20:2 J Int Econ L 301 at 328.
[43] Philippe Sands, "Conflict and conflicts in investment treaty arbitration: Ethical standards for counsel" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 19 at 5.
[44] See e.g. Steven R Ratner, "International Investment Law through the Lens of Global Justice" (2017) 20:4 J Int Econ L 747–775 at 769; Philippe Sands, "Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel" (2013) Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2012) 28–49. Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016) at 245.

and independence concerns about arbitrators is third party funding, meaning a third party's financing of "a part or all of the costs of the arbitral proceedings for one of the parties to the dispute" in return for "a certain percentage of the compensation obtained by award or settlement".[45] It may entail the problem of conflict of interests when, for example, the arbitrator of the case being funded has worked as adviser to or has a recurring business relationship with the funder.[46]

Another stream of critiques that has triggered many controversies relates to ISDS's perceived bias against host states. Some scholars find support for this argument in the arbitrator nomination procedures: they speculate that the fact that only investors can raise claims may incentivize arbitrators to rule in favor of investors in order to "keep the pipeline of cases open".[47] Another alleged incentive for tribunals to make pro-investor decisions is the fact that arbitrators are paid on an hourly or daily basis, which may entice arbitrators to favor the admissibility of claims to maximize their income from the cases.[48] On the other hand, there is the counter-argument that the reputation for impartial and independent judgment is critical for arbitrators to earn appointments in the future, which incentivises them to avoid reaching arbitrary or biased decisions.[49]

There do exist empirical studies of investment tribunals' perceived bias conducted by analyzing arbitral awards. For example, Van Harten examines investment tribunals' interpretation

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[45] Eric De Brabandere & Julia Lepeltak, "Third-Party Funding in International Investment Arbitration" (2012) 27:2 ICSID Rev 379 at 381.
[46] UNCITRAL Secretariat, "Possible reform of investor-State dispute settlement (ISDS) Third-party funding" (2019), online:<A/CN.9/WG.III/WP.157> at 5.
[47] Ratner, *supra* note 44 at 769. See also Gus van Harten, "Perceived Bias in Investment Treaty Arbitration" in Michael Waibel et al, eds, *The Backlash against Investment Arbitration* (The Netherlands: Kluwer Law International, 2010) 433.
[48] Chiara Giorgetti et al, "Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options" (2020) 21:2–3 The Journal of World Investment & Trade 441 at 464.
[49] Brower & Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law", *supra* note 37 at 492.

approaches to fourteen debated issues (e.g. the scope of MFN treatment, the content of fair and equitable treatment, etc.) in 140 awards and labels them as "expansive" or "restrictive", reflecting "positions that tended to enhance or reduce, respectively, the compensatory promise of the system for claimants and the risk of liability for states".[50] The study concludes that, generally, there is a systemic bias to favor: foreign investors over states; foreign investors from major Western capital-exporting states over other foreign investors; and the U.S. as a respondent state over other respondent states.[51] By contrast, Susan Franck and Lindsey Wylie's statistics of the *results* of investment tribunals' decision on compensation shows that, of the 144 studied cases, 60.4% found no state liability (which means no compensation for investors); even for the roughly 40% of investors who obtained damages, only around 30% of their claimed amount of damages were awarded.[52] To briefly sum up, it appears that different approaches to the empirical studies have led to different conclusions regarding the systemic bias of ISDS.

It is not surprising that scholarly opinions vary as to how to address these independence and impartiality concerns. Currently, the United Nations Commission on International Trade Law (UNCITRAL) and the ICSID are working on a Code of Conduct to set more explicit standards for the practice of investment arbitrators regarding issues such as conflicts of interests and double-

[50] Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012) 50:1 Osgoode Hall LJ 211 at 226. The author identifies specific criteria for the expansive and restrictive interpretation of each issue. For example, with regards to the issue of the national security exception, if the tribunal interprets it as "exclud[ing] emergency measures to address a domestic financial and economic crisis", then the tribunal is deemed to adopt an expansive approach; if not, then the tribunal is deemed to adopt a restrictive approach (at 552). However, the author did not elaborate the reasons for the selection of each criterion.

[51] Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration" (2016) 53:2 Osgoode Hall LJ 540 at 540.

[52] Susan Franck & Lindsey Wylie, "Predicting Outcomes in Investment Treaty Arbitration" (2015) 65:3 Duke LJ 459 at 490–95. The authors further identify several variables that can be expected to influence the result of awards, for example, whether the investor is a human being or a corporation, whether the investor ranks in the Financial Times 500 and relevant experience of the investor's counsel.

hatting.[53] However, some commentators believe that these incremental reforms might be insufficient if basic features of arbitration (e.g., party-appointed arbitrators) are preserved;[54] instead, they prefer more drastic changes such as replacing arbitration with permanent courts and tenured judges.[55] On the other hand, it is doubtful whether highly judicialized standards of independence and impartiality – which are mainly based on domestic public law practices – fit into the institutional feature of international adjudication where party control is held in high regard.[56]

B. Consistency

Another popular critique of the legal regime is different tribunals' inconsistent decisions on similar legal and factual issues. Numerous studies of ISDS cases have demonstrated the existence of this problem when vague terms such as indirect expropriation are being interpreted.[57] One of the most well-known examples of inconsistencies would be the parallel cases *CME v. Czech Republic* and the *Lauder v. Czech Republic,* where two investment tribunals reached opposite decisions

[53] UNCITRAL, "Code of conduct | United Nations Commission On International Trade Law", online: <https://uncitral.un.org/en/codeofconduct>.
[54] E.g. Kurtz, *supra* note 44 at 277.
[55] E.g. Van Harten, *supra* note 16 at 9–10.
[56] See Fabien Gélinas, "The Independence of International Arbitrators and Judges: Tampered with or Well-Tempered?" (2011) 24:1 New York Intl L Rev 1 at 47–48.
[57] See e.g. Anders Nilsson & Oscar Englesson, "Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?" (2013) 30:5 J Intl Arb 561–579 (studying interpretations relating to indirect expropriation and concluding that "there is evidence of a lack of consistency"); Gabrielle Kaufmann-Kohler, "Is Consistency a Myth?" in Emmanuel Gaillard & Yas Banifatemi, eds, *Precedent in International Arbitration* (Huntington N.Y.: Juris Publ., 2008) 137 at 142–43 (showing inconsistencies in the interpretation of the umbrella clauses and state of necessity); David M Howard, "Creating Consistency through a World Investment Court" (2017) 41:1 Fordham Intl LJ 1 at 27–32 (identifying four situations of inconsistency, namely "(1) disputes involving the same facts, parties and similar investment rights; (2) disputes involving similar situations and similar investment rights; (3) disputes involving different parties, different situations, but the same investment rights, and (4) explicit disagreements with a prior arbitral award"); Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (The Netherlands: Brill Nijhoff, 2017) at 157–63; Julian Arato, Chester Brown & Federico Ortino, "Parsing and Managing Inconsistency in Investor-State Dispute Settlement" (2020) 21:2–3 The Journal of World Investment & Trade 336 at 348–67 (analysing inconsistencies in the interpretation of full protection and security, fair and equitable treatment, the treaty-contract problem and the most favored nations clauses); Carlos G Garcia, "All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration" (2004) 16 Fla J Intl L 301 at 348.

regarding expropriation on the basis of the same set of facts and mostly identical treaty languages.[58] Some commentators attribute the problem of the lack of consistency to the flexibility of the ISDS mechanism, which is embodied in *ad hoc* arbitration with a high degree of party autonomy.[59] As such, they call for the establishment of a court-like system with an appellate mechanism to create a more coherent body of investment law.[60] Notably, some commentators' confidence about the prospect of an investment court regime seems to have been further boosted by the relatively successful experience of the WTO (although, as Chapter 3 will discuss, currently the WTO itself is suffering from an adjudication crisis). It is believed that, since investment law is a public legal regime like trade law, it should learn from the WTO experience and attach more weight to

[58] Mr. Lauder was the shareholder of CME and they initiated two parallel proceedings against the same measure of the Czech Republic. *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 September 2001), para 201 (holding that Czech Republic "did not take any measure of, or tantamount to, expropriation of the Claimant's property rights"); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para 609 (finding the actions and inactions of the agency constituting expropriation). The two cases will be further discussed in Chapter 5.

[59] See e.g. Nilsson & Englesson, "Inconsistent Awards in Investment Treaty Arbitration", *supra* note 57 at 574.

[60] See e.g. Howard, *supra* note 57. Anna Joubin-Bret, "Why We Need a Global Appellate Mechanism for International Investment Law" (2015) Columbia Center on Sustainable Investment, Columbia FDI Perspectives No. 146; Deepu Jojo Sushama, "Appellate Structure and Need for Legal Certainty in Investment Arbitration" (1 May 2014), online: *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2014/05/01/appellate-structure-and-need-for-legal-certainty-in-investment-arbitration/>; Franck, "The Legitimacy Crisis in Investment Treaty Arbitration", *supra* note 35 at 1617–20 (proposing that a single investment appellate court, rather than the treaty-by-treaty approach, should be created to review errors of law and legal interpretation so that the legitimacy of the system as a whole can be preserved). Asif H Qureshi, "An Appellate System in International Investment Arbitration?" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford; New York: Oxford University Press, 2008) 1155 at 1167 (believing that a Supreme Investment Court "could perform a fundamental, overarching, and above all constitutional role in international investment relations"); Frank J Garcia et al, "Reforming the International Investment Regime: Lessons from International Trade Law" (2015) 18:4 J Int Econ L 861; Barton Legum, "Appellate Mechanisms for Investment Arbitration: Worth a Second Look for the Trans-Pacific Partnership and the Proposed EU-U.S. FTA?" in Jean E Kalichi & Anna Joubin-Bret, eds, *Reshaping the Investor-State Dispute Settlement System* (Leiden, Netherlands ; Boston, Massachusetts: Brill Nijhoff, 2015) 437 (discussing the potential benefits for bilateral or regional treaties such as the TPP [the now CPTTP] and the future EU – US FTA to include an appellate mechanism); Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals - An Empirical Analysis" (2008) 19:2 Eur J Intl L 301 (arguing that the interpretative approaches of ICSID tribunals are quite diversified and calling for centralized appellate mechanisms) .

distributive justice and the rule of law in system design.[61] It is further argued that the WTO can serve as a viable model for the ISDS to establish an appellate mechanism.[62]

Unsurprisingly, the ideas to radically reform ISDS are subject to various challenges. The first challenge arises from the argument that inconsistency *per se* is unavoidable and sometimes could even be desirable in the context of investment arbitration. Some features of international investment law, for example, the fragmented investment treaties, the ambiguous legal terms, and the complex facts may suggest that the legal regime should allow for more flexibility and contextuality rather than predictability.[63] In addition, it is inevitable that different arbitrators have different preferences for interpretative approaches: for example, some may conduct more textual analysis while others may lend significant weight to the purpose of the treaty.[64] The following chapters of this thesis will also discuss why a high degree of predictability is undesirable for ISDS from the perspective of shared understandings.

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[61] Frank J Garcia et al, "Reforming the International Investment Regime: Lessons from International Trade Law" (2015) 18:4 J Int Econ L 861 (arguing for a "complete shift of paradigm" towards "comprehensive multilateral rules, a strengthened rule of law, and clear and balanced public policy exceptions that protect necessary policy space for the discharge of a sovereign's broader social responsibilities").

[62] Mark Huber & Greg Tereposky, "The WTO Appellate Body: Viability as a Model for an Investor–State Dispute Settlement Appellate Mechanism" (2017) 32:3 ICSID Rev 545 at 591 (the authors also acknowledge that there are still issues that cannot be guided by the WTO experience, e.g. caseload, multiple treaties, etc.). See also Kurtz, *supra* note 44. See *contra* Nilsson & Englesson, "Inconsistent Awards in Investment Treaty Arbitration", *supra* note 57 at 577.

[63] Joshua Karton, "Reform of Investor-State Dispute Settlement: Lessons from International Uniform Law" (2014) 11:1 Transnational Dispute Management, online: <www.transnational-dispute-management.com/article.asp?key=204> at 9–11.

[64] For example, Waibel concludes that, "[g]iven the diversity of interpreters and epistemic communities, interpretive methodologies in international law vary considerably". Michael Waibel, "Interpretive Communities in International Law" in Andrea Bianchi, Daniel Peat & Matthew Windsor, eds, *Interpretation in International Law* (New York: Oxford University Press, 2015) 147 at 156. Similarly, Radovic finds that, despite the arbitrators' endeavors to pursue a balanced approach in treaty interpretation, their reasoning of decisive arguments are influenced by the ideals of investment treaty arbitration they adopted, namely (1) the legalistic ideal, which aims to "give effect to the terms of the treaty as intended and consented to by the States parties, based on the traditional views of public international" and (2) the teleological ideal, which aims to "give effect to investment protection as a phenomenon independent of any particular treaty". Relja Radovic, "Inherently Unneutral Investment Treaty Arbitration: The Formation of Decisive Arguments in Jurisdictional Determinations" (2018) 2018:1 Journal of Dispute Resolution, online: <https://scholarship.law.missouri.edu/jdr/vol2018/iss1/12> at 172.

Secondly, it is doubtful whether the problem of inconsistency is so severe that it must be addressed through the establishment of an appellate court. Some commentators highlight that, despite the lack of a hierarchical court system, arbitrators do take account of previous decisions, thus *de facto* practicing a doctrine of precedent.[65] For example, a tribunal may refer to decisions in similar cases to justify their own decisions or to clarify the meaning of a provision.[66] Hence, the reform of ISDS could focus on enhancing the legitimacy of a *jurisprudence constante* through, *inter alia*, the development of transparency and publicity of norms.[67] In the meantime, coherence can also be achieved by influencing tribunals' reasoning via non-binding instruments such as interpretation "guides" and scholarly commentaries.[68]

Thirdly, it is questionable to what extent the establishment of an appellate court can solve the inconsistency problem, considering that international investment law is fragmented in more than three thousand investment treaties. As Legum cautions, "the diversity of text and contexts across the 2,500 treaties is such that a truly consistent and coherent interpretation of them is neither possible nor permissible under accepted rules of treaty interpretation".[69] For example, Feldman analyzes two lines of case law regarding the interpretation of the denial of benefits provisions, i.e. the cases under the Energy Charter Treaty and those under other investment treaties, and finds that

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[65] Tai-Heng Cheng, "Precedent and Control in Investment Treaty Arbitration" (2007) 30 Fordham Intl LJ 1014. Andrea Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante" in Colin B Picker, Isabella D Bunn & Douglas W Arner, eds, *International Economic Law: The State and Future of the Discipline* (Oregon: Hart Publishing, 2008) 265. See also Piero Bernardini, "The European Union's Investment Court System - A Critical Analysis" (2017) 35:4 ASA Bulletin 812 at 822.
[66] See Schill, *supra* note 27 at 324–28.
[67] Bjorklund, *supra* note 65 at 274.
[68] See Karton, "Reform of Investor-State Dispute Settlement", *supra* note 63.
[69] Barton Legum, "Options to Establish an Appellate Mechanism for Investment Disputes" in Karl P Sauvant, ed, *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008) 231 at 235.

"consistent treaty interpretation does not ensure accurate treaty interpretation" as the interpretations are consistent within each line but are conflicting between each other.[70]

Fourthly, some commentators further warn that having a court may bring about more problems than it solves. The pursuit of consistency *per se*, whilst disregarding the institutional context of ISDS, can be problematic. As Karton points out, "[a]n overweening emphasis on consistency would fail to recognize the particularities of individual cases. It might also stifle healthy evolution of the law by inhibiting innovation among ISDS tribunals".[71] Besides, since the analysis of the appellate tribunal may rest on incomplete factual records which are chosen by the first instance tribunal to apply relevant rules, there might be the risk of "incorrect or skewed outcomes".[72] Schultz cautions that "[a] bad rule applied consistently, in a predictable way, in highly regularized patterns, may do more harm than the same rule applied inconsistently, occasionally, in an unpredictable way".[73]

Some commentators have discussed the possibility of more fundamental paradigm shifts. For example, Sergio Puig and Gregory Shaffer, in their comparative institutional analysis of alternative mechanisms for investment dispute resolution, point out that one possible institutional option is to make international adjudication mechanisms complements of local judicial proceedings.[74] For example, domestic courts could be the primary avenue of dispute settlement, and an international adjudicatory body could provide clarifications of international law as

[70] Mark Feldman, "Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power" (2017) 32:3 ICSID Rev 528 at 531.
[71] Karton, "Reform of Investor-State Dispute Settlement", *supra* note 63 at 8. See also Irene M Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration" (2012) 51 Colum J Transnat'l L 418–478.
[72] Kurtz, *supra* note 44 at 266.
[73] Thomas Schultz, "Against Consistency in Investment Arbitration" in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (New York: Oxford University Press, 2014) 297 at 316.
[74] Sergio Puig & Gregory Shaffer, "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law" (2018) 112:3 AJIL 361 at 401.

requested by domestic courts.[75] This would promote not only the coherence of the jurisprudence of international investment law but also the congruence between international and domestic laws.[76] However, as the authors note, there is the risk that local courts may be biased in favor of the local governments.[77] In the end, retreating to domestic courts may well just transfer the risk of uncertainty to foreign investors.[78]

C. Transparency and Public Participation

Unlike the two issues discussed above, opinions on transparency in ISDS are less diversified. In ISDS, the main reason for confidentiality is to protect sensitive information and to save time and cost – given that the participation of third parties may prolong the process.[79] On the other hand, improving transparency has multiple advantages. For example, as discussed above, publicity of arbitral awards contributes to the formation of a coherent jurisprudence and hence improves the predictability of ISDS decisions. Moreover, transparency and public participation *per se* are essential components of public values, which must be protected in investment arbitration given that investment disputes generally influence a wide range of international and domestic actors.[80] Bjorklund particularly discusses the participation of provincial and local governments as *amicus curiae* in ISDS: she notices that in investment arbitration, the defences by federal governments

[75] *Ibid*, at 404.
[76] *Ibid*, at 406.
[77] *Ibid*, at 407.
[78] See Arato, Brown & Ortino, *supra* note 57 at 373.
[79] Mabel I Egonu, "Investor-State Arbitration Under ICSID: A Case for Presumption Against Confidentiality?" (2007) 24:5 Journal of International Arbitration 479–489 at 482.
[80] João Ribeiro & Michael Douglas, "Transparency in Investor-State Arbitration: The Way Forward" (2015) 11:1 Asian International Arbitration Journal 49–67 at 54. See also Lucas Bastin, "The Amicus Curiae in Investor-State Arbitration" (2012) 1 Cambridge J Intl & Comp L 208 (emphasizing that the inclusion of amicus curiae should be done gradually and should first allow the norm to be a familiar part of the system); "Submission Regarding Amendments to the ICSID Arbitration Rules - Columbia Center on Sustainable Investment", online: <http://ccsi.columbia.edu/2017/04/21/submission-regarding-amendments-to-the-icsid-arbitration-rules/>.

may not fully represent the viewpoints of sub-national governments; thus, the latter may well wish to participate in the arbitration process by, for example, filing written submissions.[81]

Consistent with scholarly opinion, there has been considerable improvement in transparency rules in arbitral practice. As early as the 1990s, Canada and the United States made commitments in the North American Free Trade Agreement (NAFTA) Chapter 11, promising that where they are the disputing party, the arbitration awards will be made public.[82] Later, in the 2001 Notes of Interpretation, all three governments committed to providing public access to all documents submitted to or issued by investment tribunals.[83] At the multilateral level, *the 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, based on previous ICSID arbitral practice, explicitly allows *amicus curiae* participation.[84] They also make mandatory the publication of "excerpts of the legal reasoning" of arbitral awards.[85] In 2014, the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* entered into force, which stipulate rules on, *inter alia*, publication of information and documents and participation by non-disputing parties.[86] A comparison between the UNCITRAL Rules on Transparency and the 2006 ICSID amendments shows that the former go further in terms of the disclosure of documents, third-party submissions and open hearing.[87] However, as the UNCITRAL Rules on Transparency

[81] Andrea K Bjorklund, "The participation of sub-national government units as amici curiae in international investment disputes" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 298 at 306.
[82] NAFTA, Annex 1137.4.
[83] NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions" (July 31, 2001), available online at: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>. There are exceptions such as confidential information.
[84] ICSID Arbitration Rules, Rule 37; Aurélia Antonietti, "The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules" (2006) 21:2 ICSID Rev 427 at 433–37.
[85] ICISD Arbitration Rules, Rule 48(4); *Ibid* at 442.
[86] *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 11 July 2013, Resolution A/69/116 (entered into force 1 April 2014) [*UNCITRAL Rules on Transparency*].
[87] Laurence Boisson de Chazournes & Rukia Baruti, "Transparency in Investor-State Arbitration: An Incremental Approach" (2015) 2:1 BCDR International Arbitration Review 59.

only apply to ISDS cases initiated under the UNCITRAL Arbitration Rules pursuant to investment treaties *concluded on or after 1 April 2014* (unless the treaty parties have agreed otherwise), a vast number of investment treaties would be excluded from its application.[88] Against this background, the UNCITRAL drafted the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention), whereby the signatory states extend the UNCITRAL Rules on Transparency pursuant to investment treaties concluded before 1 April 2014.[89] However, as of November 2020, only 23 states have signed the convention and six of them have ratified it,[90] which seems to reflect a certain reluctance of the states to make further commitments to the transparency of the system. In a similar vein, the ICSID's recent amendment work attempts to include more detailed transparency and public participation rules in its arbitration rules, the content of which is quite similar to that of the UNCITRAL Rules on Transparency.[91]

There are also concerns regarding the potential political influence on tribunals' independent reasoning caused by *amicus curiae* submissions. As Knahr points out, "[i]t is not unimaginable that arbitrators may feel more inclined to take the *amicus curiae* brief of an actor

[88] Gabrielle Kaufmann-Kohler & Michele Potestà, "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?" (2016) Working Paper CIDS-Geneva Center for International Dispute Settlement, at 28. For a list of investment treaties that have incorporated the UNCITRAL Rules on Transparency, see UNCITRAL, "Status: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014) | United Nations Commission On International Trade Law", online: <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status>.

[89] *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (New York, 2014), 10 December 2014, Resolution A/69/496, (entered into force 18 October 2017) [*Mauritius Convention*]. Another significant feature of the Convention is that it also applies to arbitrations which are not initiated under the UNCITRAL Arbitration Rules. Besides, it allows the parties to make reservations on the treaty's applicability.

[90] UNCITRAL, "Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) | United Nations Commission on International Trade Law", online: <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status>.

[91] See ICSID, *Working Paper #4 Proposals for Amendment of the ICSID Rules* (2020). Nevertheless, given the compromise it has to make in front of the large number of member states, ICSID's reform is less advanced than that of the UNCITRAL Rules on Transparency on issues such as the publication of awards: in the proposed ICISD arbitration rules, awards are published only upon the consent of parties, while in the UNCITRAL Rules of Transparency, awards are automatically published. On the other hand, the ICSID's revised rules can be expected to exert broader influence given the large percentage of ISDS cases conducted under the ICSID rules.

such as the European Commission into consideration in their reasoning and decision-making processes to a greater extent than they would a brief submitted by an NGO".[92] The power-imbalance between states and investors may be further reinforced by relevant provisions in the UNCITRAL Rules of Transparency and the proposed amendments of ICSID Rules, which grant preferential treatment to submissions by states compared to other actors.[93]

D. Regulatory Space of Host States

The last category of critiques that will be highlighted here relates to the host states' regulatory space. Some commentators argue that allowing foreign investors to sue host states may interfere with the latter's ability to regulate for the benefit of the public.[94] They further argue that decisions of investment tribunals may cause a "regulatory chill", meaning that host states are discouraged from carrying out regulatory activities for fear of investment arbitration.[95] Nevertheless, these regulatory concerns are subject to a great deal of scepticism. For example, Brower and Schill argue that the concept of indirect expropriation and fair and equitable treatment as defined by investment treaties and interpreted by investment tribunals "leaves broad leeway for host states to regulate foreign investment, provided that such regulation serves a legitimate government purpose, is non-

[92] Christina Knahr, "The New Rules on Participation of Non-disputing Parties in ICSID Arbitration: Blessing or curse?" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 321 at 335.

[93] For detailed analysis of this issue, see Chen Yu, "*Amicus Curiae* Participation in ISDS: A Caution Against Political Intervention in Treaty Interpretation" (2020) ICSID Rev, advance publication online: <https://doi-org.proxy3.library.mcgill.ca/10.1093/icsidreview/siaa025>.

[94] Vera Korzun, "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-outs" (2017) 50:2 Vand J Transnat'l L 355 at 382. This has also given rise to concerns about the extent to which the proposed investment court system can solve the legitimacy problems because it does not change the substantive obligations in investment treaties. CCSI, "Position Paper in support of opinions expressed in response to the European Commission's 'Public consultation on a multilateral reform of investment dispute resolution'", (15 March 2017), online: <http://ccsi.columbia.edu/files/2017/03/CCSI-EU-Court-public-consultation-submission-15-Mar-17-FINAL.pdf?utm_source=CCSI+Mailing+List&utm_campaign=f36f793b09-UNCITRAL+Working+Group+III+Meetings+on+ISDS&utm_medium=email&utm_term=0_a61bf1d34a-f36f793b09-62932589> at 2.

[95] De Mestral, *supra* note 38 at 23; Korzun, "The Right to Regulate in Investor-State Arbitration", *supra* note 94 at 383.

discriminatory, and strikes a reasonable or proportional balance between the protection of the investor's investment and any competing public interest".[96] The issue of regulatory space and its relationship with ISDS will also be elaborated in Chapter 4 of this thesis.

Empirical studies have revealed some interesting phenomena about regulatory space in investment treaty design. A study of BIT renegotiation shows that revised treaty language, contrary to the pervasive "backlash" narrative, tends to encompass lower flexibility for host states' regulations.[97] The authors attribute this trend to Western European countries' attempt to "modernize these treaties in the 1990s and the 2000s by adding far-reaching ISDS provisions" in BITs.[98] In another study, however, the authors find that states' experience as respondents in ISDS tends to lead to greater regulatory space in the relevant renegotiated treaties.[99] This demonstrates a core argument of this thesis – states' interaction with and within ISDS may reshape their understandings about substantive obligations and lead to new treaty design.

To sum up, it is generally acknowledged that the four legitimacy issues discussed above must be addressed in the reform of ISDS; the main controversy, however, is how to address them. Supporters of a court system believe that a public legal regime like international investment law must be supplemented with a highly judicialized adjudicative mechanism that advances public values,[100] while opponents, as illustrated above, have raised various doubts over the necessity and effectiveness of radical judicialization.

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[96] Brower & Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law Symposium", *supra* note 37 at 487. See also De Mestral, *supra* note 38 at 24.
[97] Tomer Broude, Yoram Z Haftel & Alexander Thompson, "Who Cares about Regulatory Space in BITs? A Comparative International Approach" in Anthea Roberts et al eds, *Comparative International Law* (New York: Oxford University Press, 2018) at 541.
[98] *Ibid*.
[99] Alexander Thompson, Tomer Broude & Yoram Z Haftel, "Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design" (2019) International Organization 1.
[100] See e.g. Van Harten, *supra* note 16.

III. RESEARCH METHODOLOGY AND THEORETICAL APPROACH

Scholars' arguments about ISDS and international investment law tend to focus on one or several legal principles or normative goals that – they believe – must be reinforced in the legal regime (e.g. predictability and consistency). Such a principle-based approach can be quite helpful in revealing the problems of a legal system; nevertheless, when it comes to solutions, the approach may sometimes appear to be too idealized because it is not designed to take into account the broader institutional context – i.e. the social, economic and political background – against which international investment law evolves. To give an example, a common narrative in the discourse of ISDS reform is that "the lack of [value X] has caused legitimacy problems of ISDS; therefore, to solve the problems, [value X] must be addressed via [method Y]". Such narratives, nevertheless, seldom encompass the examination of the more realistic question such as "does [value X] or [method Y] fit in with the purpose of the institution?" or "do the actors within the institution have the motivation to fulfil [value X]?" – the answers to these questions may be more commonly found in social science studies such as institutional economics and international relations (IR).

It is noteworthy that in those reform-related discussions, the traditional normative approach is frequently supplemented by the comparative approach: international investment law is frequently analogized to public law regimes (e.g. the WTO regime) to justify, *inter alia*, the argument that public law values such as independence and transparency must be secured in ISDS. Comparative studies, by exploring the differences and/or commonalities among different legal regimes, can provide valuable suggestions to the reform of ISDS.[101] On the other hand, comparative studies also entail risks. As Roberts cautions, "analogies from other legal fields

[101] See e.g. John C Reitz, "How to Do Comparative Law" (1998) 46:4 Am J Comp Law 617 at 624; Stephan W Schill, ed, International Investment Law and Comparative Public Law (Oxford: Oxford University Press, 2010).

frequently point to distinct (and sometimes clashing) solutions as a result of differences in the structures, assumptions, and normative commitments of their underlying paradigms" and more importantly, "[w]ithout a theory about whether particular analogies are relevant and why one should be chosen over another, analogies become 'a way of stating a conclusion, not a way of reaching one'".[102]

A. Law and IR Interdisciplinary Study

The limits of the traditional legal research methodologies discussed above stress the necessity to enrich the understanding of law with a more "external" view. In recent years, increasing attention has been paid to the empirical study of cases and practice of international investment law, which has either revealed or manifested the interesting features of the legal regime.[103] There are also attempts to integrate the study of law with approaches from other disciplines. To give some examples: van Aaken applies economic contract theory to analyse the commitment and flexibility mechanisms in investment treaty design,[104] and Marcoux examines the notion of transnational public policy through the lens of "international practice" in IR theory.[105] Such non-traditional studies frequently provide fresh understandings about international law. This thesis represents another attempt to bring a different perspective to the study of international investment law; however, unlike previous interdisciplinary attempts which focus on specific aspects of the legal regime, this thesis makes the bold attempt to construct a *general* analytical framework integrating

[102] Roberts, "Clash of Paradigms", *supra* note 17 at 49.
[103] To give some examples, Langford, Behn & Lie, *supra* note 42 (showing the existence of double-hatting); Thomas Schultz & Cédric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study" (2014) 25:4 Eur J Int Law 1147 (studying how the function of investment arbitration has evolved); Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication", *supra* note 50 (arguing that, *inter alia*, the interpretation of investment tribunals favors investors over states); Broude, Haftel & Thompson, *supra* note 97.
[104] Anne van Aaken, "International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis" (2009) 12:2 J Intl Econ L 507.
[105] Jean-Michel Marcoux, "Transnational Public Policy as an International Practice in Investment Arbitration" (2019) 10:3 J Int Disp Settlement 496.

legal theories and IR constructivist theory to examine – or reconceptualize – the role of ISDS in international investment law-making.[106]

Despite the close nexus between the two disciplines, scholarly engagement in international law and IR interdisciplinary research emerged late. For a long period of time, IR scholars – which are dominated by realists – viewed international rules and institutions as mere "window-dressing" and international lawyers, in turn, unsurprisingly, "[saw] little point in a dialogue with adherents of this view".[107] After the Cold War, with more IR scholars paying attention to legal rules and processes, the dialogue between the two disciplines began to grow.[108] A landmark event was the Summer 2000 special issue of the journal *International Organizations* which collected a number of ground-breaking pieces relating to the concept of "legalization" in world politics.[109] The term "legalization" itself – to a great extent – requires the collaborative work of international lawyers and IR scholars as it aims to portray the legal attributes of an international institution. In this thesis, "legalization" is the lens through which international investment law is examined (which can be seen from the title of this thesis), although – as Chapter 2 will elaborate – I will propose a different interpretation of the notion that is specific to the context of international investment law.

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[106] It is observed that international law scholars have drawn on IR theories in mainly three ways, namely "(1) to diagnose international policy problems and to formulate solutions to them; (2) to explain the function and structure of particular international legal institutions; and (3) to examine and reconceptualize particular institutions or international law generally".(Anne-Marie Slaughter, Andrew S Tulumello & Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92:3 AJIL 367 at 373.) My research largely falls into category (3).

[107] Kenneth W Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers" (1989) 14 Yale J Intl L 335 at 338.

[108] Jeffrey L Dunoff & Mark A Pollack, "International Law and International Relations" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2012) 3 at 3.

[109] *Ibid*. For details about this special issue, see Judith Goldstein et al, "Preface" (2000) 54:3 International Organization xi–xiii.

B. Rationalism and Constructivism

When reviewing the IR theories that are popular among international lawyers, I found rationalism and constructivism particularly relevant to the subject of this thesis.[110] Rationalist theories regard the nation-state as a unitary actor (i.e. the "black-box" state) and assume that states are rational actors who have fixed preferences and behave strategically to maximize utility (i.e. rational choice theory).[111] Applied to the context of international law, it presumes that "states use international institutions to further their own goals, and they design institutions accordingly".[112] As such, it disagrees with the traditional international law understanding that states make and comply with international rules out of a sense of obligation.[113] Specific analytical tools such as contract theory, principal-agent theory and game theory have been found useful to explain, *inter alia*, why and how states enter into and comply with international agreements.[114] For example, the evolution of customary international law has been explained as a result of states' cooperative strategy, rather

[110] Slaughter, Tulumello and Wood identify three subfields of law and IR interdisciplinary research, namely rationalism, liberalism and constructivism. See Slaughter, Tulumello & Wood, "International Law and International Relations Theory", *supra* note 106.

[111] Anne van Aaken, "Rationalist and Behavioralist Approaches to International Law" (2018) SSRN Scholarly Paper ID 3237033 at 6.

[112] Barbara Koremenos, Charles Lipson & Duncan Snidal, "The Rational Design of International Institutions" (2001) 55:4 International Organization 761 at 762. In this paper, the authors approach institutions as "rational design" among multiple participants, based on which they draw the conclusion that the degree of centralization of an institution increases with the number of states, the uncertainty of members' behavior and the state of world, and the severity of the enforcement problem. See also Kenneth W Abbott & Duncan Snidal, "Hard and Soft Law in International Governance" (2000) 54:3 International Organization 421 at 422 ("By using hard law to order their relations, international actors reduce transactions costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting").

[113] See e.g. Abbott & Snidal, *supra* note 112 at 422 ("By using hard law to order their relations, international actors reduce transactions costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting").

[114] van Aaken, *supra* note 111 at 2. To give an example, Goldsmith and Posner disagree with the traditional explanation that states comply with international agreements out of a sense of obligation; instead, they apply rational choice theory and argue that states comply for self-interest (for example, the fear for retaliation as a result of treaty violation). Jack L Goldsmith & Eric A Posner, "International Agreements: A Rational Choice Approach" (2003) 44 Va J Int'l L 113–144.

For more examples of these kinds of research, see Abbott & Snidal, *supra* note 112; Barbara Koremenos, "Contracting around International Uncertainty" (2005) 99:4 American Political Science Review 549–565; Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008).

than a result of *opinio juris* as traditionally believed by international law scholars.[115] Similarly, the rationalist approach views the establishment of international courts and tribunals as well as compliance with decisions therefrom as part of states' strategic arrangements to maximize their interests.[116]

Unsurprisingly, rationalist approaches to international law have been subject to serious challenges. Their fundamental theoretical assumption that social actors' preferences are "constant, transitive, and exogenously given" can be problematic in describing the real-world – some social psychology studies have shown that preferences can be changed through social interactions.[117] Besides, treating states as "black-box" may neglect the important influence of other actors and domestic legal and political processes.[118] This means that the theory is seriously limited in analysing ISDS, which grants investors direct access to international adjudication. As Keohane – a pioneer of rationalist IR research – himself cautions, the application of the rational choice approach to international law "can lead to arrogance and error, when it prompts analysts to assert

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[115] Jack L Goldsmith & Eric A Posner, *The Limits of International Law* (Cary, United States: Oxford University Press, 2005) at 30. The authors argue that "the payoffs from cooperation or deviation are the sole determinants of whether states engage in the cooperative behaviors that are labeled customary international law".

[116] For example, Andrew T Guzman, "International Tribunals: A Rational Choice Analysis" (2008) 157:1 U Pa L Rev 171 at 235 ("International tribunals are simply tools to produce a particular kind of information"); Paul B Stephan, "Courts, Tribunals, and Legal Unification - The Agency Problem" (2002) 3:2 Chicago J Intl L 333 at 343 (applying the game theory and arguing that "centralized adjudicatory body might achieve coherence over the short run, but over time it would tend to cycle its outcomes and otherwise respond to shifting preferences on the part of powerful states").

[117] Niels Petersen, "How Rational is International Law?" (2009) 20:4 Eur J Int Law 1247 at 1258–59. See also Michael L Barnett, "Constructivism" in Alexandra Gheciu & William C Wohlforth, eds, *The Oxford Handbook of International Security* (New York: Oxford University Press, 2018) at 4 ("Rational choice is a social theory that offers a framework for understanding how actors operate with fixed preferences that they attempt to maximize under a set of constraints. It makes no claims about the content of those preferences; they could be world domination or religious salvation"); Claire Hill, "The Rationality of Preference Construction (and the Irrationality of Rational Choice)" (2008) 9 Minn JL Sci & Tech 689 at 699 ("[t]he more formal articulations tend to emphasize stability and coherence: as Matt Rabin notes, '[e]conomics has conventionally assumed that each individual has stable and coherent preferences'").

[118] van Aaken, *supra* note 111 at 15.

findings when they only have hypotheses, or when it induces them to ignore historical context, overlook the role of values, or dismiss variations in preferences as unimportant".[119]

Constructivism is one of the major sources of criticisms against the theoretical framework of rationalism – especially regarding the assumption that actors have fixed preferences.[120] Constructivist theory generally describes the social world as "intersubjectively and collectively meaningful structures and processes" and emphasizes *interpretation* as an intrinsic part of social science.[121] A constructivist understanding of law thus focuses on the formation of norms by "shared understandings" generated through social practice and interactions.[122] Such understandings constitute the structure of a legal system, and in turn, the existence and evolution of the system constrain the actors' understanding.[123] In the context of international law, "actors" may refer to states – which are traditionally conceived by IR scholars to be the primary subject of study – as well as non-state actors such as individuals and domestic groups as emphasized by liberalism or constitutionalism scholars.[124]

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[119] Robert O Keohane, "Rational Choice Theory and International Law: Insights and Limitations Rational Choice and International Law" (2002) 31:1-Part 2 J Legal Stud 307 at 318.

[120] Another influential strand of criticisms comes from liberalism, whose theoretical assumption is that "the relationship between states and the surrounding domestic and transnational society in which they are embedded critically shapes state behavior by influencing the social purposes underlying state preferences". (Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics" (1997) 51:4 International Organization 513 at 216.) In other words, it does not view state preferences as fixed and it breaks the "black-box" by examining how domestic political and social actors influences state behaviours. See also Andrew Moravcsik, "The New Liberalism" in Christian Reus-Smit & Duncan Snidal, eds, *The Oxford Handbook of International Relations* (New York: Oxford University Press, 2008) 235 at 236.

[121] Emanuel Adler, "Constructivism in International Relations: Sources, Contributions, and Debates" in Walter Carlsnaes, Thomas Risse & Beth A Simmons, eds, *Handbook of International Relations* (London: SAGE Publications Ltd, 2013) at 10 & 11.

[122] Jutta Brunnée & Stephen J Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum J Transnat'l L 19 at 50.

[123] See Barnett, *supra* note 117 at 4; Brunnée & Toope, "International Law and Constructivism", *supra* note 122 at 31 ("Constructivists do not argue that ideas, shared knowledge, and norms operate as direct causes of action, rather that social structures constrain and enable actors in their choices, and thus help to shape world politics").

[124] See Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis" (2004) 15:5 Eur J Int Law 907 at 917.

Constructivism can provide valuable insights when legal scholars seek to enrich the understanding of law beyond the traditional legal positivist framework. Particularly, its emphasis on social interactions and international legal practice helps lawyers to explore the sociological background of law behind those legal rules and processes.[125] An eminent strand of work of this kind is Brunnée and Toope's interactional theory of international law, which integrates the constructivist theory and Fuller's legal theories of interactional law and legality.[126] They stress that "the first step in building interactional law is the creation of *social* legitimacy through the emergence of widely shared understandings. To create *legal* legitimacy, however, the criteria of legality must also be substantially met".[127] This theory will be discussed in more detail in Chapter 3 because it is key to this thesis's approach to the reform of ISDS.

To a significant extent, IR constructivist theory coincides with legal interpretivist theory in terms of emphasizing the social construction of law. Dworkin is among the leading scholars on legal interpretivism. His identification of the key characteristics of interpretive concepts can be summarized as follows:

> 1. there exists a shared practice in which a group participates; 2. participants in the group treat the concept as interpretive by disagreeing about what the practice really requires; 3. interpreters assign value and purpose to the practice and they form views about what particular propositions about the practice are true or false in the light of the values and purposes of the practice; 4. the interpreter is

[125] Jutta Brunnée & Stephen J Toope, "Constructivism and International Law" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2012) 119 at 129.
In constructivist IR studies, there is also a specific branch of research called "international practices" which portrays practice to be "socially meaningful patterns of action which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world". Emanuel Adler & Vincent Pouliot, "International practices" in Emanuel Adler & Vincent Pouliot, eds, *International Practices: Introduction and Framework* (Cambridge: Cambridge University Press, 2011) 3 at 6.
[126] See Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge studies in international and comparative law (Cambridge: Cambridge University Press, 2010).
[127] Jutta Brunnée & Stephen J Toope, "Interactional international law: an introduction" (2011) 3:2 International Theory 307–318 at 308.

> constrained by the history or the shape of the object of the practice in understanding its purpose.[128]

Dworkin uses the example of "rules of courtesy" to explain the interpretive attitude: at the beginning, all members of a community follow a set of rules called "courtesy" without doubting or varying them; while after a time period, they start to interpret the rules – they assume that the rules have value and that the requirements of courtesy are not necessarily what they are at the beginning but must be "understood or applied or extended or modified or qualified or limited" by that value.[129] It is crucial that both components, i.e. the value and the content, are adopted by the members. For Dworkin, the law is an interpretive concept and its application depends on such normative or evaluative ideas in legal practice rather than on fixed criteria or procedures.[130]

In political science, sometimes the terms constructivism and interpretivism are used interchangeably.[131] Nevertheless, there still exist nuanced differences in terms of the analytical structure: the former is more of an ontological theory that focuses on the nature of the social; while the latter studies the epistemological question of "the conditions of establishing knowledge and understanding that leads it to the inherently perspectival and interpretive character of all social understanding".[132] This distinction is not systematically recognized by scholars; for convenience, however, I will use the term "constructivism" instead of "interpretivism" in the remaining parts of this thesis because my key research question – how ISDS as a legal practice has shaped or reshaped the shared understandings regarding international investment law – tends to be an ontological one.

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[128] Başak Çali, "On Interpretivism and International Law" (2009) 20:3 Eur J Int Law 805 at 808. The author summarizes these characters on the basis of Dworkin's book, *Justice in Robes*.
[129] Ronald Dworkin, *Law's empire* (Cambridge, Mass.: Belknap Press, 1986) at 47.
[130] David Plunkett & Timothy Sundell, "Dworkin's Interpretivism and the Pragmatics of Legal Disputes" (2013) 19:3 Legal Theory 242 at 243.
[131] See e.g. Thomas Schwandt, "Constructivist, Interpretivist Approaches to Human Inquiry" in Norman K Denzin & Yvonna S Lincoln, eds, *The Landscape of Qualitative Research: Theories and Issues* (Thousand Oaks, California: SAGE Publications, 1998) 221.
[132] Colin Hay, "Constructivist Institutionalism" in Sarah A Binder, R A W Rhodes & Bert A Rockman, eds, *The Oxford Handbook of Political Institutions* (New York: Oxford University Press, 2009) at 110.

Moreover, IR constructivism, by spotlighting the *intersubjectivity* of certain understandings in the process of norm evolution (which is generally less emphasized in interpretivist legal theories), provides a handy framework to study institutional evolution.

Unlike their interest in legal norms, constructivists generally have paid less attention to international adjudication. As Pollack notices, "it is striking that constructivist scholars have thus far focused primarily on the emergence and effects of such discourse in inter-state settings, with less attention to the workings of international courts or arbitrators, which represents an obvious next step in the constructivist research program".[133] Despite the relatively thin literature on international adjudication, constructivism has great potential in terms of explaining the role of adjudicative bodies in international law-making processes: an interactional account of law means that investment courts and tribunals are not merely tools designed by states for the purpose of coercive compliance or interest-maximization as depicted by realists or rationalists; rather, they are themselves essential parts of legal practice where various actors' understandings of law are being formed and tested. This point will be further detailed in Chapter 3, which examines ISDS through the lens of interactional law and delineates the contribution and limits of investment tribunals in the formation of shared understandings relating to certain substantive and procedural standards.

Another subject of research that has not attracted much attention from constructivists concerns legal regimes that are established primarily for economic purposes, for example, the WTO and international investment law. Constructivists have long been perceived by other IR scholars to have "a bias towards progressive norms" because most of their studies focus on "good"

[133] Mark A Pollack, "Political Science and International Adjudication" in Cesare PR Romano, Karen J Alter & Chrisanthi Avgerou, eds, *The Oxford Handbook of International Adjudication* (Oxford, United Kingdom: Oxford University Press, 2013) 357 at 368.

norms such as human rights, environment protection, and democracy.[134] The fact that constructivism has more advantages than other theories in explaining those "progressive norms", however, by no means indicates that it is less valuable in explaining those interest-dominated legal regimes which are conventionally considered to be the domain of realists or rationalists. Constructivist theories do not necessarily preclude considerations of power and economic and political interests in their analytical frameworks; they simply do not take the actors' preferences or motivations as static and independent from their social context. For example, as Chapter 3 will show, in institutions like the WTO which were initially formed by reciprocity, after decades of practice, certain norms which were originally designed by some actors for economic benefits (e.g. most-favored-nation treatment) have been internalized and shared intersubjectively as legal obligations that must be obeyed within the institution, which can be described as a shift from the logic of consequences to the logic of appropriateness.

To be clear, by recognizing the important role of interests in international law, this thesis does not intend to conflate the two competing IR theories – i.e. rationalism and constructivism, given that they have two non-reconcilable sets of theoretical assumptions. However, this does not mean that the two theories must exclude each other in whole when being applied to international law, as Finnemore and Sikkink point out,

> The opposition of constructivist and "rationalist" arguments that has become widespread in the discipline implies that the issues constructivists study (norms, identities) are not rational and, similarly, that "rationalists" cannot or do not treat norms or identities in their research programs. However, recent theoretical work in rational choice and empirical work on norm entrepreneurs make it abundantly clear that this fault line is untenable both empirically and theoretically.[135]

[134] Martha Finnemore & Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4:1 Annual Review of Political Science 391 at 403.
[135] Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 International Organization 887 at 909. The authors further explain that, "[r]ational choice theorists have been

Rationalist analysis is based on the assumption that an individual's motivation is "a calculus of psychological benefits and costs," but this calculation should not be static.[136] The legal norms can be *internalized* by individuals in their rational decision-making process, which means the acknowledgment of a norm provides a new impulse that may influence the motivational balance of costs and benefits and thus influence their preferences.[137] In this process, rationality is still the core assumption, but an individual's preference is no longer deemed to be fixed but is interacting with the shift of social structure. It in turn constitutes the cornerstone of a collective common understanding within the community.

As such, this thesis reaches out to IR constructivism not only because the theory better grasps the dynamic nature of international law but also because of its inclusiveness. As Finnemore and Sikkink point out,

> Constructivism is not a substantive theory of politics. It is a social theory that makes claims about the nature of social life and social change. Constructivism does not, however, make any particular claims about the content of social structures or the nature of agents at work in social life. Consequently it does not, by itself, produce specific predictions about political outcomes that one could test in social science research.[138]

Therefore, as later chapters will show, although this thesis adopts a constructivist framework, it never hesitates to refer to other legal and political theories (e.g. the three-dimensional notion of legalization, delegation theory, Fuller's notion of polycentric problems, etc.) to assist the analysis of ISDS reform.

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working on problems related to norm-based behavior for more than two decades now and have begun working on identity problems as well"; "similarly, empirical research on transnational norm entrepreneurs makes it abundantly clear that these actors are extremely rational and, indeed, very sophisticated in their means–ends calculations about how to achieve their goals".

[136] Robert D Cooter, "Structural Adjudication and the New Law Merchant: A model of decentralized law" (1994) 14:2 International Review of Law and Economics 215 at 220–21.

[137] *Ibid.*

[138] Finnemore & Sikkink, "Taking Stock", *supra* note 134 at 393.

To briefly sum up, by applying the constructivist approach to the reform of ISDS, this thesis makes an innovative contribution to both IR and international law literature: it expands the research scope of constructivism to issues of international *adjudication* that are intertwined with norms and *interests*; as for international law study, it provides an external and a more holistic perspective to better understand the role of ISDS in the legalization of international investment law.

CHAPTER 2. THE NOTION OF LEGALIZATION IN THE CONTEXT OF INTERNATIONAL INVESTMENT LAW

To analyze the role of international adjudication mechanisms in the legalization of international investment law, it is important to first delineate the notion of "legalization". Most arguments reviewed in Chapter 1 on the legitimacy concerns and reform proposals relating to ISDS – despite the divergence of opinions between radical reforms versus incremental reforms – are supporting a more legalized investment law regime.[139] Indeed, "legalization" is more of an institutional concept than a legal concept – it encompasses the observation and description of various dimensions of an institution, including the norms, decision-making procedures, interests, behaviour of actors, etc.,[140] which is different from traditional legal studies of international law that place more emphasis on the fulfillment of legal principles or values. Borrowing the term "legalization" from IR, this Chapter chooses not to immediately join the normative debate over ISDS's reform but to first holistically examine the various aspects of international investment law in a re-interpreted framework of legalization. It undertakes two tasks: to explain – with a constructivist approach – what this thesis means by the term legalization, and to assess the evolution and *status quo* of international investment law through the lens of legalization.

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[139] Except arguments that international investment disputes should be resolved by domestic courts of host states instead of international tribunals. For example, in 2011, the Australian Government adopted a Trade Policy Statement which intends to exclude ISDS in its future trade agreements. See Leon E Trakman & Kunal Sharma, "Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified" in Steffen Hindelang & Markus Krajewski, eds, *Jumping Back and Forth between Domestic Courts and ISDS: Mixed Signals from the Asia-Pacific Region* (Oxford: Oxford University Press, 2016) 316 at 317. Another example is the new India Model BIT, which requires the investors to "first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party" before submitting the claim to investment arbitration. Model Text for the Indian Bilateral Investment Treaty, art 15.1, available online at:< https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>.

[140] Judith Goldstein et al, "Introduction: Legalization and World Politics" (2000) 54:3 International Organization 385 at 387.

I. THE MEANING OF LEGALIZATION

The ordinary meaning of legalization in the context of law is to "[make] something that was previously illegal permissible by law" – for example, "the legalization of cannabis".[141] By contrast, in the context of IR, the term has an entirely different meaning: it generally refers to a trend of de-politicization, where rule-based arrangements among states are viewed as preferable alternatives to traditional political conversations. One popular IR theory – institutionalism – holds that legalization is one form of institutionalization which reduces uncertainty and transaction costs.[142] Some scholars further identify three dimensions of legalization, namely obligation, precision, and delegation:

> *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.[143]

According to this definition, if an institution encompasses high levels of all three dimensions, it can be deemed to be highly legalized. An example the authors give as a "full legalization" institution is the WTO because it has "a remarkably detailed set of legally binding international agreements" as well as "a dispute settlement mechanism, including an appellate tribunal with significant—if still not fully proven— authority to interpret and apply those agreements in the course of resolving particular disputes".[144]

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[141] Oxford English Dictionary, sub verbo "legalization", online: <https://www.lexico.com/definition/legalization>.
[142] Goldstein et al, "Introduction", *supra* note 139 at 392.
[143] Kenneth W Abbott et al, "The Concept of Legalization" (2000) 54:3 International Organization 401–419.
[144] *Ibid* at 405. By contrast, political summit meetings such as the Group of 7 represents the other end of the spectrum.

The three-dimensional model provides a valuable framework for the analysis of international law but its merit is greatly limited by its positivist understanding of law, as it confines its objects of observation only to rules provided by the treaties and to the establishment of authorities relating to dispute settlement, rule-making and implementation. For example, although "obligation" and "precision" appear to describe different aspects of a legal regime, the two terms essentially look at the same source of international laws, i.e. the rules that are written in legal instruments. Moreover, with regards to "obligation", the model merely considers whether states' commitments are legally binding and whether there are contingent obligations or escape clauses that may weaken that bindingness,[145] while customary international law, which plays particularly important roles in public international law, is entirely ignored.[146] As a result of this limited understanding, as pointed out by Finnemore and Toope, the concept of legitimacy is entirely absent from the three-dimensional model of legalization:

> Under a broader view of law, the legalization of politics encompasses more than just the largely technical and formal criteria of obligation, precision, and delegation. It encompasses features and effects of legitimacy, including the need for congruence between law and underlying social practice. It attends to the purposive construction of law within inherited traditions, the way participating in law's construction contributes to legitimacy and obligation, and to the continuum of legality from informal to more formal norms. Indeed, without this broader view of law that causes us to pay attention to legal procedures, methodologies, institutions, and processes generating legitimacy, the authors' three components of legalization lack theoretical coherence and raise more questions than they answer, as we show.[147]

The notion of "legitimacy" *per se*, of course, is subject to various interpretations. Thomas Franck gauges the legitimacy of a rule by its ability to exert a "pull to voluntary compliance" and he identifies four indicators accordingly, namely determinacy, symbolic validation, coherence and

[145] *Ibid* at 410.
[146] Martha Finnemore & Stephen J Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics" (2001) 55:3 International Organization 743 at 746.
[147] *Ibid* at 744.

adherence.[148] Jutta Brunnée and Stephen Toope, drawing from Fuller's legal theory, believe that when the internal moralities of law are satisfied, law "will tend to attract its own adherence" and thus can be viewed as legitimate.[149] A constitutionalist approach to legitimacy may highlight elements such as the principle of subsidiarity and the principle of adequate participation and accountability in the notion of legitimacy;[150] by contrast, political scientists may simply describe legitimacy as "the right to govern".[151] A prevalent categorization of legitimacy is "normative legitimacy" on the one side and "sociological legitimacy" on the other side: the former delineates the right to rule according to "predefined standards" – whether the standards derive from positivist law or the morality of law – and the latter is embedded in the "perceptions or beliefs" that an institution has the right to rule.[152]

The notion of sociological legitimacy sheds significant light on this thesis's constructive approach to legalization. International law generally lacks coercive enforcement mechanisms like those of domestic systems, thus the *perception* of legitimacy constitutes a significant pull towards compliance.[153] Moreover, it is not only the perception of states that matters but also the perception of all the other actors affected – the latter may influence states' international activities through domestic processes. For international investment law particularly, the lack of sociological

[148] Thomas M Franck, *The Power of Legitimacy among Nations* (Cary, United States: Oxford University Press, 1990) at 49. In the following chapters of the book, the author explains that (1) determinacy can mean textual clarity of rules or a legitimate process that clarifies the rules (e.g. interpretations by courts or other authorities); (2) symbolic validation occurs when there is a cue that signals the validity of a rule or rule-maker by authenticating it symbolically; (3) coherence refers to the "connectedness" of a rule both internally among its different parts and purposes and externally between the rule and other rules; (4) adherence means the capacity of a rule to exert compliance pull upon states.
[149] See Brunnée & Toope, "International Law and Constructivism", *supra* note 122 at 53.
[150] Kumm, "The Legitimacy of International Law", *supra* note 124.
[151] Daniel Bodansky, "Legitimacy in International Law and International Relations" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisicplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013) 321 at 324.
[152] Harlan Grant Cohen et al, "Legitimacy and International Courts – A Framework" in Nienke Grossman et al, eds, *Legitimacy and International Courts* (Cambridge: Cambridge University Press, 2018) 1 at 4.
[153] Franck, *supra* note 148 at 25.

legitimacy is manifest in many criticisms of ISDS, for example, public interests – where investment tribunals are accused of favoring investors and impairing local interests, although in most cases they were mainly interpreting and applying investment treaties concluded by states.[154]

To fully take into account the issue of legitimacy necessitates a reappraisal of the three-dimensional model of legalization: binding and clear rules or centralized third-party dispute settlement mechanisms are merely externalized arrangements of a legal regime, and it is the perception of legitimacy that drives every institutional reform. In other words, it is not correct to conclude that a legal regime is highly legalized when the rules and decision-making processes deviate significantly from the community's general perception of justice.

Before moving on to the next section, it will be helpful to clarify the meaning of legalization here in light of other concepts, including institutionalization, constitutionalization, centralization, and multilateralization: they frequently appear in the discourse of investment law reform and their meanings overlap with the term legalization to certain extents. The term "institutionalization" is frequently used in political science and can be defined as "the process by which the international organization becomes differentiated, durable, and autonomous".[155] In such processes, the institution and the individuals thereof are bound together into tighter interdependence by stabilized rules, processes and formalities.[156] Legalization can be one form of institutionalization; while a highly institutionalized organization is not necessarily highly legalized – "legalization" highlights the role of *law* in institutional governance.

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[154] See Bjorklund, *supra* note 38 at 280.
[155] Robert O Keohane, "Institutionalization in the United Nations General Assembly" (1969) 23:4 International Organization 859 at 861–62.
[156] Alec Stone Sweet, Neil Fligstein & Wayne Sandholtz, "The Institutionalization of European Space" in Alec Stone Sweet, Neil Fligstein & Wayne Sandholtz, eds, *The Institutionalization of Europe* (Oxford: Oxford University Press, 2001) 1 at 10.

The term "constitutionalization" is more of a legal concept that depicts the advancement of values relating to liberal constitutions such as the rule of law, the balance of powers and the protection of rights.[157] As such, the term is quite broad and vague in scope: it may encompass the emergence of "a new higher order norm" promoting coherence and unity of law through centralized or hierarchical structures, the support for sociological legitimacy, or the protection of public interests through the creation and regulation of public institutions.[158] It reflects an entirely different approach (i.e. constitutionalist approach) to international law compared to the term "legalization" – although sometimes the two may necessitate the same sorts of institutional developments.

Another related term is "centralization". In the context of domestic laws or political procedures, the discussions of centralization/ decentralization mainly refer to the allocation of power between the central government (including legislation and execution) and the sub-governments.[159] It may also refer to the general distribution of power within an organization that is "signified by the hierarchy of authority and the degree of participation in decision making".[160]

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[157] Anthony F Lang & Antje Wiener, "A Constitutionalising Global Order: An Introduction" in Anthony F Lang & Antje Wiener, eds, *Handbook on Global Constitutionalism* (Cheltenham, UK: Edward Elgar Publishing, 2017) 1 at 2–3. Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford; New York: Oxford University Press, 2005) at 28.

[158] See Cass, *supra* note 157 at 32–48; Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (Oxford; New York: Oxford University Press, 2009) at 18. See also Jutta Brunnée & Stephen J Toope, "Interactional Legal Theory, the International Rule of Law and Global Constitutionalism" in Anthony F Lang & Antje Wiener, eds, *Handbook on Global Constitutionalism* (Cheltenham; Northhampton, MA: Edward Elgar Publishing, 2017) 170 at 174.

[159] See e.g. F A Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Abington: Routledge, 2012) at 466. See also Gerald E Frug, "Against Centralization Symposium on Regionalism" (2000) 48 Buff L Rev 31 (observing that centralization can be conducted in the form of federal legislation, state governance initiatives, and also in the form of state and federal court decisions).

[160] Rhys Andrews et al, "Centralization, Organizational Strategy, and Public Service Performance" (2009) 19:1 J Public Adm Res Theory 57 at 58.

As such, one may claim that a legal regime with multilateral administrative and adjudicative organs to be a centralized one.[161]

Lastly, the term "multilateralization" has gained notable popularity in scholarly discussion of international law, especially international investment law. According to Stephen Schill, multilateralization does not merely mean that, in the formal sense, three or more states enter into coordinative agreements; more importantly, "the core characteristic of multilateral rules is their generalized and non-discriminatory application to all participating actors".[162] Therefore, although international investment law is fragmented in three thousand bilateral and regional treaties, it still has a significant degree of multilateralization because the overlaps and structural interconnections of these treaties have created a "uniform and treaty-overarching regime for international investments".[163] This kind of multilateralization may also take place at the procedural level, where it is observed that there is an "increasing homogeneous body of rules applied by international courts and tribunals relating to issues of procedure and remedies".[164] As will be discussed below, multilateralization can be an important signal of legalization.

Underpinned by the constructivist approach and based on the three-dimensional model, the following sections will examine the notion of legalization in the context of international investment law from two aspects, namely (1) laws directly generated from state and other actors' activities, including negotiated rules, customary international law and legal principles; (2) laws developed via adjudication. This categorization establishes a convenient analytical framework for this thesis's subject of research – i.e. "legalization through adjudication".

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[161] See e.g. Hans Kelsen, *General Theory of Law & State* (Abington: Routledge, 2017) at 327.
[162] Schill, *supra* note 27 at 9.
[163] *Ibid* at 15.
[164] Chester Brown, *A Common Law of International Adjudication* (New York: Oxford University Press, 2007) at 5.

II. STATES AS THE LAW-MAKING BODY

As mentioned above, Abbott and other scholars' work on the concept of legalization identifies two dimensions relating to the legalization of international law at the treaty level, namely *obligation* and *precision*. According to the authors, obligation describes the extent to which actors are bound by legal obligations, with one extreme being "[u]nconditional obligation; language and other indicia of intent to be legally bound" and the other being "[e]xplicit negation of intent to be legally bound".[165] Most treaties are somewhere between the two extremes as states frequently adopt techniques to "soften" the bindingness of rules, for example, specifying circumstances under which they shall be exempted from the obligations or using aspirational language.[166] The other dimension, "precision", has a more straightforward meaning – if the rules are clear and unambiguous and leave little room for interpretation, they are precise.[167]

These two dimensions set up a holistic framework to observe the degree to which legal rules constrain state activities. However, they merely focus on the characteristics of positive rules and procedures and thus treat international law as a social fact independent of states' conceptions. As the authors clarify, legalization is not defined in terms of *effects* of the rules, for example, "the degree to which rules are actually implemented domestically or to which states comply with them", nor does it consider "the substantive content of rules or their degree of stringency".[168] This is understandable given that the framework is designed for empirical IR studies rather than normative legal analysis of international law.[169] For the purpose of this thesis, however, the perspective must be switched – a constructivist approach requires that the analysis

[165] Abbott et al, *supra* note 143 at 410.
[166] *Ibid* at 411.
[167] *Ibid* at 412.
[168] *Ibid* at 402.
[169] *Ibid* at 403.

of "obligation" and "precision" take into account how the actors within the community conceive of the norms as reflected by their practice. The following two subsections unfold based on this understanding.

A. Obligation

From the perspective of states, committing to be bound by more and stricter obligations essentially means subjecting their autonomy over the prescribed issues to the regulation of rules of law. As an indispensable element of the notion of legalization, obligation cannot be simply equated to giving up sovereignty – although the latter frequently happens in the process of legalization – as it is more concerned with the form than the content of the commitments. For example, the Calvo doctrine argues that foreigners shall not be given better treatment than host state nationals and shall only be governed by the laws and courts of the host state, which reflects a strong position against foreign intervention in a state's regulation of investments.[170] Nevertheless, if the Calvo doctrine, hypothetically, gains the status of customary international law or is codified in investment treaties, this process can still be viewed as contributing to the legalization of international investment law, despite the fact that the doctrine itself maintains a rather high level of regulatory autonomy for the state.

Legalization of international investment law at the obligation level can be realized from three main aspects: the creation of *international* obligations, codification, and multilateralization. As stated in the Commentary to Article 12 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), "[i]nternational obligations may be established by a customary rule of international law, by a treaty or by a

[170] Andrew Paul Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Austin: Kluwer Law International B.V, 2009) at 13. The Calvo doctrine is not widely accepted as a customary international law.

general principle applicable within the international legal order". [171] For international investment law, bilateral and regional investment treaties are the key sources of international obligations. In the history of world economic development, a notable phenomenon was the shift of ideology in the late 1980s, at which time liberalism, which asserts that free movement of trade and investment contributes to economic growth, became prevalent. As such, states started to work on attracting foreign investments by promising to provide a friendly legal and political environment in terms of investment regulation.[172] There could be multiple legal instruments available to enhance the credibility of such promises, for example, investment contracts, domestic legislation, and treaties. Among them, concluding international investment treaties embodies the strongest form of commitment as it directly brings those promises to the level of *international* legal obligations that fall into the scope of international law.[173] By contrast, a state's violation of an investment contract does not *per se* constitute a violation of international law.[174] In this sense, investment treaties provide a more stable legal framework for investment protection that is relatively immune from the host state's unilateral alteration via domestic legislative or administrative activities. Therefore, as far as this section is concerned, the

[171] International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" (2001), art 12 commentary para (3), online: <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. While this does not exclude other possible sources of international obligation.

[172] Vandevelde, "A Brief History of International Investment Agreements Symposium", *supra* note 19 at 178; Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press, 2016) at 79.

[173] See e.g. Oscar Schachter, "Towards a Theory of International Obligation" (1967) 8 Va J Int'l L 300 at 308..

[174] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 Aug 2003), para 167), although in certain circumstances (e.g. umbrella clauses) contracts may give rise to international obligations as well. See James Crawford, "Treaty and Contract in Investment Arbitration" (2008) 24:3 Arbitration International 351 at 357–58; Patrick Dumberry, "International Investment Contracts" in Tarcisio Gazzini & Eric De Brabandere, eds, *International Investment Law: The Sources of Rights and Obligations* (Leiden, The Netherlands: Brill Nijhoff, 2012) 215 at 219. See also ILC Articles with commentary (2001), art. 2 commentary para (7) ("The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations").
On the other hand, because investment contracts are negotiated between the host state and the foreign investors on a specific investment, it may provide more detailed and clearer rules than investment treaties; in this circumstance, investment contracts may be deemed to be more legalized in the "precision" dimension than treaties.

adoption of BITs as a major legal instrument to provide investment protection embodies a significant step towards the legalization of international investment law.

In addition to treaties, as Article 38 of the Statute of the International Court of Justice provides, international custom and general principles of law are important components of international law as well.[175] In the context of international investment law, some widely recognized customary rules, for example, the minimum standard of treatment (MST), played a leading role in foreign investment protection for decades before the rise to prominence of BITs.[176] Indeed, bilateral investment treaties have long been viewed as "vehicles that entrench customary principles of international law relating to the protection of foreign investment".[177] General principles of law (e.g. good faith, the right to be heard, etc.) also play an important role in assisting investment tribunals in the interpretation of vague or ambiguous treaty terms.[178]

On the other hand, custom and general principles can encompass a high level of indeterminacy.[179] For example, there are always controversies over whether a norm belongs to customary international law and even if it does, what the specific meaning of that norm is.[180] Writing them down in treaties greatly mitigates such indeterminacy by (1) affirming the legality of the rule and (2) transferring the general ideas into concrete treaty language. This can be said to be a process of codification, although it only exists at the bilateral and regional levels. Indeed, the term "codification" may not be fully accurate in this scenario as it is generally believed that

[175] *Statute of the International Court of Justice* (1945 June 26), 59 Stat. 1055, 33 UNTS 933 (entered into force 31 August 1965), art. 38 [*ICJ Statute*]. The article also mentions that judicial decisions and scholarly opinions can serve as subsidiary means for the determination of rules of law.
[176] Dumberry, *supra* note 172 at 60. See also Dolzer & Schreuer, *supra* note 15 at 17.
[177] Bernard Kishoiyian, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law" (1993) 14 Nw J Int'l L & Bus 327 at 327.
[178] Dolzer & Schreuer, *supra* note 15 at 18.
[179] Indeed, the issue of determinacy has a closer relationship with the "precision" dimension. I discuss it here for the continuity of analysis, since custom and general principles fall into the scope of "international obligation".
[180] For example, the status of "prohibition of expropriation without compensation" as a customary rule has been contested by some developing states. See Dumberry, *supra* note 172 at 69–79.

"the content of custom and the thousands of BITs are simply not the same";[181] nevertheless, it is the process of transferring the subjective *opinio juris* into positive law encompassed in the meaning of the term that matters for the purpose of this subsection – a higher level of obligation essentially means less discretion of states and a greater role for law. In terms of investment protection, important customary rules such as the MST have already been codified in investment treaties.[182] In addition to treaties, codification can also be performed by informal instruments, such as guidelines and principles drafted by international institutions, scholarly commentaries, arbitral awards, etc.[183] Not all these instruments can increase the predictability of the legal system instantly but they generally contribute to the incremental harmonization of rules and interpretations.

The discussion above explains two aspects of obligation in the notion of legalization, i.e. the creation of international obligations and the codification of customary rules and general principles of law. However, it seems that there is always an upper limit for the legalization of international investment law in its obligation dimension, which is the fact that the laws governing investment protection are fragmented in more than three thousand bilateral and regional treaties. Therefore, the third aspect of obligation this section will highlight is the

[181] Patrick Dumberry, "Are BITs Representing the New Customary International Law in International Investment Law" (2009) 28 Penn St Int'l L Rev 675 at 693; See also Kishoiyian, *supra* note 177 at 372 ("[t]he main objective of the treaties is to create a separate legal regime of investment protection quite apart from the 'customary' international law on foreign investment protection which though not fully agreed upon, it is also not sufficiently developed to afford protection to the new forms of foreign investment").

[182] Although the definition of MST varies to a great extent among different BITs and the treaty parties themselves frequently dispute about the meaning of the term, codification still creates more certainty compared with the original customary rules. Notably, the discussion here does not mean that customary international law is a static concept; rather, customary international law is always evolving, and codification itself may constitute a practice of law that forms new customs. See e.g. Jan Paulsson & Georgios Petrochilos, "Neer-ly Misled?" (2007) 22:2 ICSID Review - Foreign Investment Law Journal 242–257.

[183] August Reinisch & Andrea K Bjorklund, "Soft Codification of International Investment Law" in Andrea K Bjorklund & August Reinisch, eds, *International Investment Law and Soft Law* (Cheltenham, UK ; Northampton, MA: Edward Elgar Publishing, 2012) 305 at 311–13.

transformation from bilateralism to multilateralism. It is necessary to clarify before further discussion that this chapter is by no means *normative* but is *descriptive*. In other words, by "multilateralization", it is not suggested that a multilateral investment treaty *should* be concluded. It is merely to point out that multilateralization is one indispensable element in the notion of legalization.

Multilateralization means more than an increase in the number of treaty parties. An institutionalist definition proposed by Ruggie describes multilateralism as a "generic institutional form" that "coordinates relations among three or more states on the basis of 'generalized' principles of conduct".[184] These principles "specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence".[185] The latter element of the definition, the "generalized principle", is the key to distinguishing multilateralism from bilateralism and regionalism.[186] Multilateralism means that there exists a genuine interest of the treaty parties, despite their divergent opinions of specific legal issues, to be bound by uniform rules.[187] The initial motivations behind such interests may be complicated and varied – different IR schools have given different explanations to multilateralization, for example, mitigation of transactional costs, political considerations, a sense of obligation, etc. Nevertheless, those initial shared understandings eventually transform into fundamental norms underpinning the formation of a multilateral institution. By contrast, a legal regime dominated by bilateralism is largely

[184] John Gerard Ruggie, "Multilateralism: The Anatomy of an Institution" (1992) 46:03 International Organization 561 at 571.
[185] *Ibid.*
[186] Notably, not all institutionalist definitions take into account the "principles" underpinning multilateral institutions. For example, Keohane defines multilateralism as "the practice of co-ordinating national policies in groups of three or more states, through *ad hoc* arrangements or by means of institutions". Robert O Keohane, "Multilateralism: An Agenda for Research" (1990) 45:4 International Journal 731 at 731.
[187] Schill, *supra* note 27 at 106.

premised on reciprocity, i.e. the specific quid pro quo between two parties.[188] For example, in FTA negotiations, the EU imposed higher pressure on Vietnam than Singapore in terms of the adjustment of regulatory standards but at the same time granted Vietnam more favorable conditions in terms of market access.[189] Therefore, we can see that in bilateral treaties like the EU-Vietnam FTA, a party may agree to establish a more judicialized dispute settlement mechanism even though it is the party that is more likely to be sued in the bilateral relationship.[190] The formation of preferential agreements does not necessarily require the existence of shared understandings on specific legal issues between the two parties; on the contrary, further institutionalization of such bilateral arrangements may deter the endeavors to develop shared understandings at the global level.[191]

To summarize, this part has broken down the dimension of obligation into three perspectives, namely the creation of *international* obligations, codification, and multilateralization.[192] Such an interpretation, unsurprisingly, has deviated from what Abbott

[188] Ruggie, "Multilateralism", *supra* note 184 at 571–572.
[189] Ha Hai Hoang & Daniela Sicurelli, "The EU's preferential trade agreements with Singapore and Vietnam. Market vs. normative imperatives" (2017) 23:4 Contemporary Politics 369 at 370.
[190] See Michael P Daly & Jawad Ahmad, "The EU-Vietnam FTA: What Does It All Mean? What Does It Mean for the Future?", (14 December 2015), online: *Kluwer Arbitration Blog* <http://arbitrationblog.kluwerarbitration.com/2015/12/14/the-eu-vietnam-fta-what-does-it-all-mean-what-does-it-mean-for-the-future/>. In this blog, the authors observe that, by 2015, "Vietnam increasingly embraces arbitration" given its recent practice in investment arbitration and treaty-making. This stands in clear contrast to its fully acceptance of the investment courts system proposed by the EU.
[191] See Alvin Hilaire & Yongzheng Yang, "The United States and the New Regionalism/Bilateralism" (2004) 38:4 J of World Trade 603 at 608. The authors study trade policies of the United States regarding FTAs and warn that, *inter alia*, "[the US's] focus on bilateralism/regionalism may influence other countries to reduce their willingness to offer concessions on a multilateral basis, and instead save their offers for bargaining at a regional level" and that it may cause the competing conclusion of FTAs – rather than a multilateral agreement – among some countries. See *contra*, Rochelle Cooper Dreyfuss, "Harmonization: Top down, Bottom Up — And Now Sideways? The Impact of the IP Provisions of Megaregional Agreements on Third Party States" (2018) NYU School of Law Public Law Research Paper No. 17-21. The counter-argument is that bilateral treaties may serve as a template for the harmonization of norms; while it is doubtful to what extent this argument is tenable, especially in the case of investment law – up to now, there has been around three thousand BITs (the contents of which still vary to a notable extent) and no multilateral investment treaties involving more than a few states.
[192] There certainly exist other factors to measure the strength of obligation, for example, the time length of the commitments: it can be argued that a commitment designed to be in force for ten years is stronger than a temporary one.

and other scholars originally meant by the term. One may argue that higher levels of obligation, for example, concluding a multilateral treaty with a large number of member states, always causes the adoption of treaty language with higher degrees of generality, which creates more uncertainty in a legal system and thus impedes the process of legalization. This calls for the analysis of another dimension of legalization – precision.

B. Precision

According to the three-dimensional model of legalization, "[a] precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances".[193] To explain the concept, the model refers to what Thomas Franck calls "determinacy", which means not only the clarity of a rule's plain texts but also the rule's ability to offer a noncontradictory framework for the disputing parties to effectively apply it case-by-case.[194] Thomas Franck uses the term determinacy to explain his idea of legitimacy as he emphasizes that, whatever the rules' degree of clarity, they "may not achieve much determinacy and will lack legitimacy" if they fail to describe the realities of state conduct, thus lacking an "effective pull to compliance".[195] In the three-dimensional model, nevertheless, it seems that the relationship between determinacy and legitimacy – not to mention the perception of legitimacy – was not considered in the authors' definition of precision.

Another issue with the notion of precision is that the bar seems to be rather high for most legal systems – few rules could satisfy a "full precision" contention. International investment law is apparently no exception. A typical example is "fair and equitable treatment"

[193] Abbott et al, *supra* note 143 at 412.
[194] *Ibid* at 413; Franck, *supra* note 148 at 84 ("how effectively it communicates with the parties to a dispute").
[195] Franck, *supra* note 148 at 90.

– which will be discussed in more detail in Chapter 3: although states have generally incorporated it in investment treaties, there are still controversies over the specific content of the standard. For example, is it the same as the MST in customary international law?[196] or should the term be interpreted as encompassing general principles of international law?[197] Indeed, vagueness in law is inevitable – it is important to note that precision is simply a matter of degree. The extent to which a rule can be precise is limited not only by the rule-makers' willingness or capability to specify rules but also the generality of the right to be protected and the complexity of the issues. Even under domestic legal systems like the United States – where the protection of property against takings is explicitly stipulated in the Fifth Amendment – for decades, the Supreme Court has been struggling to clarify key notions such as regulatory takings and due process.[198] Therefore, adopting imprecise terms can be deemed as a strategy of states to allow for a certain degree of flexibility and avoid unfavorable outcomes caused by the rules in the future.[199] In a word, precision is not an absolute and freestanding concept; it must be understood in light of the broader legal context of the rules as well as the purpose of promoting legitimacy.

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[196] *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (New York and Geneva: United Nations, 2012) at 23–24 ("The relationship between fair and equitable treatment and customary international law has been at the heart of the NAFTA debate"); Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39 Int'l Law 87 at 92–94; See also Alireza Falsafi, "International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard" (2006) 30 Suffolk Transnat'l L Rev 317–364 at 335–62; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (New York: Oxford University Press, 2013).

[197] See Todd J Grierson-Weiler & Ian A Laird, "Standards of Treatment" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford Handbooks Online.: Oxford University Press, 2008) 260 at 272–74; Charles H II Brower, "Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105" (2005) 46 Va J Int'l L 347–364 at 358–63.

[198] Robert Meltz, "Takings Decisions of the U.S. Supreme Court: A Chronology" (2015) Congressional Research Service 7–5700.

[199] Koremenos, *supra* note 107 at 562 ("negotiate agreements that include the proper amount of flexibility and thereby create for themselves a kind of international insurance"). Abbott & Snidal, *supra* note 105 at 442 ("uncertainty makes precision less desirable as well as less attainable"). Accordingly, some states may set a duration of the treaties with the possibility of renegotiation so that they can clarify some treaty rules in future.

In the context of international investment law, leaving rules unclear creates unique legal risks: it is investors who have the right to sue. For treaties that provide state-state dispute settlement mechanisms, the two parties may opt for adjudication because they fail to reach consensus on the interpretation of a rule; while for investment disputes, even if the treaty parties are able to agree on the meaning of a rule, the investors may bring a case to an investment tribunal arguing for other interpretations, in which case investment tribunals are empowered to determine the meaning. For example, the MST is stated in the NAFTA with rather general and vague words: "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".[200] As a result, in a series of cases brought by investors, tribunals interpreted the MST so broadly that states were easily found to violate the obligation.[201] In response, the NAFTA Free Trade Commission, which is composed of representatives of the three countries, issued the controversial *Notes of Interpretation* to clarify the interpretation of the MST, which explicitly narrows the scope of the obligation to only the customary international law MST (as

[200] NAFTA, art. 1105 para1.

[201] Brower, *supra* note 197 at 352. In the *Metalclad Corporation v. The United Mexican States* case, the tribunal found that "[p]rominent in the statement of principles and rules that introduces the Agreement [in NAFTA Article 102(1)] is the reference to 'transparency'". Therefore, it interprets MST as including the requirement of transparency. Nevertheless, this broad approach was criticized by the Supreme Court of British Columbia, causing the award to be partially set aside. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000); *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, (2 May 2001) In *S.D. Myers, Inc. v. Government of Canada*, the tribunal found that "Article 1105 imports into the NAFTA the *international law requirements* [emphasis added] of due process, economic rights, obligations of good faith and natural justice". *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para 134.

opposed to all the related international laws).[202] This clarification was codified in later model BITs of the United States[203] as well as the recent United States-Mexico-Canada Agreement.[204]

The analysis in this part shows that embracing imprecision in international obligations has both pros and cons – in whichever case it is unavoidable. Indeterminacy does not necessarily impair the coherence of a legal system if complemented by legitimate adjudicating bodies who interpret and clarify the rules in a consistent manner.[205] In this sense, international courts are empowered with not only the function of dispute settlement but also, directly or indirectly, the function of law-making as they contribute to incremental development of law. Therefore, institutional arrangements relating to international adjudication constitute another essential element in the analysis of legalization.

III. ADJUDICATIVE LAW-MAKING

In the three-dimensional model of legalization, adjudication falls into the dimension of "delegation". According to the authors, delegation describes "the extent to which states and other actors delegate authority to designated third parties—including courts, arbitrators, and

[202] NAFTA Free Trade Commission, *supra* note 83 ("The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens"); *Ibid* at 354; UNCTAD, *supra* note 196 at 24.
[203] USTA, "Treaty Between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment" (2012) art. 5.2, online:<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>; USTA, "Treaty Between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment" (2004) art. 5.2, online:<https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf>.
[204] *The Agreement between the United States of America, the United Mexican States, and Canada* (30 November 2018), art.14.6, available online at <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14_Investment.pdf>.
[205] See Franck, *supra* note 148 at 61 ("[a] rule with low textual determinacy may overcome that deficit if it is open to a process of clarification by an authority recognized as legitimate by those to whom the rule is addressed"). Franck describes it as "process determinacy" to complement the "textual determinacy" in terms of enhancing a rule's "pull to compliance".

administrative organizations—to implement agreements".[206] It seems that the framework draws a clear line between institutions that exercise the function of dispute resolution (e.g. courts and tribunals) and institutions that have a rule-making function (e.g. the EU Commission) but it does not take into account the law-making function of the former group.[207] Such an understanding is obviously narrow as international tribunals inevitably participate in the law-making process by interpreting and applying treaties. That international adjudication mechanisms exercise broader functions than merely dispute settlement has been recognized by IR studies of the relationship between states and international judicial bodies: applying the principle-agent/trustee theory, some scholars argue that independent tribunals are delegated by states as *trustees* to interpret treaties, thus contributing to enhancing the certainty of international legal systems.[208] In a word, the discussion in this section will consider both the

[206] In another article which is in the same issue of the journal, delegation to courts and tribunals is further unfolded as three sub-dimensions: (1) independence, measuring the extent to which the adjudicators can deliberate and reach legal decisions independently of national government, which is further reflected by the tribunal members selection and tenure, legal discretion and control over material and human resources; (2) access, measuring "the range of social and political actors who have legal standing to submit a dispute to be resolved" or "the range of those who can set the agenda"; and (3) legal embeddedness, measuring who controls the formal implementation of tribunal decisions. Similarly, Smith summarizes five dimensions to measure where a dispute settlement system locates in the spectrum from diplomacy to legalism, namely (1) the tribunal's right to review disputes, (2) the bindingness of tribunal decisions, (3) the number, term, and method of selecting arbitrators or judges, (4) actors that have standing and (5) remedies. The criteria in the two articles basically cover the same aspects of a dispute settlement mechanism. Robert O Keohane, Andrew Moravcsik & Anne-Marie Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54:3 International Organization 457 at 458; James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts" (2000) 54:1 International Organization 137 at 139–44.

[207] See Abbott et al, *supra* note 143 at 416.

[208] See Laurence Helfer & Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93 California L Rev 899 ("Independent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts"); Alex Stone Sweet & Thomas L Brunell, "Trustee Courts and the Judicialization of International Regimes" (2013) 1 JL & Cts 61 ("[trustee courts] perform an oracular function, giving meaning to incomplete treaty provisions and making law in other ways"); Karen J Alter, "Agents or Trustees? International Courts in their Political Context" (2008) 14:1 Eur J Intl Relations 33 ("[international court] rulings can shift the political status quo by providing an authoritative [re]interpretation of what the law means, and by providing incentives and resources for actors within and outside of powerful states to pressure governments to change their policy").

By contrast, some scholars view international tribunals as *agents* of states whose establishment and operation is dependent upon states' interests. See, for example, Eric Posner & John Yoo, "Judicial Independence in International Tribunals" (2005) 93:1 California L Rev 1 ("[w]e view tribunals as simple, problem-solving devices. They do not

dispute settlement function and the law-making function of international investment tribunals. Although the two functions are discussed in two separate sections here, they will not be treated as two independent aspects: the legitimacy of the dispute-settlement process is the premise and cornerstone of an adjudicative body's law-making function. Discussing these two functions as well as the pertinent procedural issues, this section aims to show that international courts and tribunals also play an important role in the process of legalization.

A. Dispute Settlement

IR scholars have widely discussed the institutional factors influencing the legalization of international dispute settlement mechanisms, for example, the independence of the tribunals, actors that have legal standing, enforcement of tribunal decisions, etc.,[209] which is of great value for the discussion here. Nevertheless, unlike the institutionalist approach which views these institutional designs as mere rational choices of treaty parties to maximize political or economic interests, this subsection highlights *legitimacy* as a primary motivation of states to opt for certain institutional features over others. It thus highlights how the demand for compliance with the rule of law and the expectations of the community shape key features of a dispute settlement mechanism.[210] This angle does not necessarily conflict with the rationalist explanation – in the long-term, a higher degree of legitimacy may contribute to economic or political ends by

transform the interests of states; nor do they cause states to ignore their own interests for the sake of a transnational ideal").

There are also studies, instead of joining the trustee/agent debate, focusing on establishing a framework to approach the independence of international organizations. For example, Haftel and Thompson identify three institutional features of an international organization which can be used as indicators of independence, namely the autonomy, neutrality and delegation. Yoram Z Haftel & Alexander Thompson, "The Independence of International Organizations: Concept and Applications" (2006) 50:2 Journal of Conflict Resolution 253.

To be clear, as will be explained below, this thesis views international courts and tribunals as neither agents nor trustees as it does not conceive the relationship between states and adjudicative bodies as unidirectional but rather *interactional*.

[209] See e.g. Keohane, Moravcsik & Slaughter, "Legalized Dispute Resolution", *supra* note 206.

[210] See Bodansky, *supra* note 151; Deborah D Avant, Martha Finnemore & Susan K Sell, "Conclusion: authority, legitimacy, and accountability in global politics" in Deborah D Avant, Martha Finnemore & Susan K Sell, eds, *Who Governs the Globe?* (Cambridge: Cambridge University Press, 2010) 356 at 360–61.

enhancing the community's compliance with laws. The following paragraphs will examine four elements that are essential for maintaining the legitimacy of a tribunal's dispute settlement function, namely, access to justice, procedural impartiality, the quality of awards and enforcement.

1. access to justice

To evaluate the degree of "access" to an international dispute settlement mechanism is essentially to ask two questions: (1) who has legal standing before the tribunal? And if non-state actors are entitled to legal standing, (2) what are the conditions (or obstacles) for them to initiate a case?[211] Notably, a higher degree of access in the notion of legalization does not simply mean that a larger scope of actors is granted the right of standing; instead, it demands that the actors who are *directly* influenced by the action in dispute should have the opportunity to sue. With regard to individuals or organizations that are indirectly influenced or have future interests, their understandings of the law may still constitute a legitimacy constraint on the tribunal's reasoning.

Traditionally in international law, it is states that are entitled to international legal personality and the right to request standing before international tribunals.[212] Private parties may ask home states for espousal, by which means their claims may be presented by states. The deficiency of such an arrangement is obvious: out of political or economic concerns, states may refuse to espouse; and even if they agree, they may not fully present the private parties'

[211] Smith, "The Politics of Dispute Settlement Design", *supra* note 204 at 143; Keohane, Moravcsik & Slaughter, "Legalized Dispute Resolution", *supra* note 206 at 462–64.
[212] Roger P Alford, "The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance" (2000) 94 Proceedings of the ASIL Annual Meeting 160 at 162; Smith, "The Politics of Dispute Settlement Design", *supra* note 206 at 141.

claims.[213] Therefore, granting non-state actors direct access to international tribunals is an important step to address the demands of the impacted actors for legal justice and to further depoliticize international dispute settlement. The development of international investment dispute settlement has witnessed great progress in this respect. As discussed in Chapter 1, in the nineteenth and early twentieth centuries, the leading principle regarding the protection of foreign investment was diplomatic protection of aliens through espousal of claims.[214] Later, a series of FCN Treaties concluded between the United States and a few developed countries provided state-state dispute settlement.[215] Under these regimes, investors do not have the opportunity to directly claim their damages.[216] It was not until the mid-1960s when ISDS was introduced in BITs and adopted by ICSID that investors were granted direct access to adjudication by independent investment tribunals.[217]

With respect to the second question, which concerns the conditions required to initiate cases, the international investment dispute settlement mechanism has also made significant progress towards legalization. A typical example is the customary international law doctrine of exhaustion of local remedies, meaning that foreign investors must first seek remedies before domestic courts in the host states before seeking diplomatic protection or international adjudication.[218] The doctrine was strictly adhered to in the diplomatic protection era. .[219] Indeed,

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[213] See Alford, *supra* note 212 at 162; Dolzer & Schreuer, *supra* note 15 at 296.
[214] See Chapter 1.I. See also Vandevelde, "A Brief History of International Investment Agreements Symposium", *supra* note 19 at 160; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013) at 47.
[215] Vandevelde, "A Brief History of International Investment Agreements Symposium", *supra* note 19 at 166; Choi, *supra* note 12 at 731–32. For example, Article XXVII of the FCN between the United States and Germany, available online at: <https://treaties.un.org/doc/publication/unts/volume%20273/volume-273-i-3943-english.pdf>.
[216] Besides, although the FCNs provided independent third-party adjudication to resolve investment disputes, it was rarely used. Choi, *supra* note 12 at 731–32.
[217] Vandevelde, "A Brief History of International Investment Agreements Symposium", *supra* note 19 at 174–75.
[218] Martin Dietrich Brauch, "Exhaustion of Local Remedies in International Investment Law" (2017) International Institute for Sustainable Development, IISD Best Practices Serious, at 2.
[219] Choi, *supra* note 12 at 726.

even where local remedies were exhausted, the home state could still refuse to espouse the claim out of political concerns, which brings about considerable uncertainties. Currently, although still retaining the status of customary international law, the doctrine does not feature in the vast majority of BITs.[220] Article 26 of the ICSID Convention, which stipulates that "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy", has been interpreted by investment tribunals as waiving the doctrine of exhaustion of local remedies.[221] Some tribunals have also extended this waiver to non-ICSID arbitrations.[222] By such an arrangement, a state forgoes part of its sovereignty regarding the jurisdiction of local courts over investments within its territory and thus is offering a more neutral and convenient avenue for foreign investors to claim damages.

Another prominent feature of modern investment treaties that facilitates investors' access is related to states' consent to international arbitration. Although the existing investment arbitration institutions such as ICSID *per se* do not have compulsory jurisdiction over investment disputes (as they require both parties' consent to arbitration),[223] investment treaties provide a forum where states can unilaterally offer investors consent to arbitration by

[220] See Sornarajah, *supra* note 27 at 255. According to the author, there are still a few investment treaties which explicitly require the exhaustion of local remedies, for example, the 2007 Albania-Lithuania BIT and the East African Community Model Investment Treaty. Another example is the new India Model BIT as discussed above.
[221] ICSID Convention, art 26; Brauch, *supra* note 216 at 7–21.
[222] *Ibid*.
[223] ICSID Convention, art 25 (1), "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre"; Christoph H Schreuer et al, *supra* note 20 at 190.

investment tribunals.[224] This appears to be more convenient than negotiating the arbitration clauses in investment contracts case-by-case. [225]

Nevertheless, there still exist significant obstacles in the current ISDS mechanism for investors to bring claims before an investment tribunal, for example, the "cooling-off" period, which requires that the investors and states "should initially seek to resolve the dispute through consultation and negotiation" before going to arbitration.[226] The length of the period varies among treaties and can range from three months to eighteen months (while the most common one is six months).[227] The original objective of the cooling-off provision is to enable amicable resolution of disputes and to maintain a good business relationship between the two parties,[228] while in practice, some treaty language may imply that the cooling-off period is a *compulsory* precondition before submitting the claim to arbitration.[229] In other words, an investor's attempt

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[224] Unilateral consent may also be made through domestic legislation. See Makane Moise Mbengue, "Consent to Arbitration Through National Investment Legislation – Investment Treaty News", online: *IISD* <https://www.iisd.org/itn/2012/07/19/consent-to-arbitration-through-national-investment-legislation/>.

[225] Although, with regards to some issues, relying on treaties may have more uncertainties than contracts. For example, it is observed that the issue of denial of justice – especially that relating to the review of domestic legal proceedings by investment tribunals – has not been sufficiently addressed by investment treaties; by contrast, a case-by-case negotiation of contracts may mitigate this uncertainty. See Andrea K Bjorklund, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims" (2004) 45:4 Va J Int'l L 809.

[226] US Model BIT 2012, available online at:<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> art. 23. See also art 8.22 of the CETA.

[227] Aravind Ganesh, "Cooling Off Period (Investment Arbitration)" (2017) MPILux Working Paper 7, at 2.

[228] See *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (English) (15 Dec 2010), at para 151.

[229] For example, the tribunal in *Murphy Exploration and Production Company International v. Republic of Ecuador* interpretated Article VI of the Ecuador – US BIT (one provision being "the parties to the dispute should initially seek a resolution through consultation and negotiation") and held that:

> it is not about a mere formality, which allows for the submission of a request for arbitration although the six-month waiting period requirement has not been met, and if the other party objects to it, withdraws and resubmits it. It amounts to something much more serious: an essential mechanism enshrined in many bilateral investment treaties, which compels the parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration.

Murphy Exploration and Production Company International v. Republic of Ecuador, ibid at para 154. See also Ganesh, *supra* note 227 at 5–8; Gary Born & Marija Šćekić, "Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'" in *Practising Virtue: Inside International Arbitration* (Oxford, United Kingdom: Oxford University Press, 2015) 227 at 237.

to eschew the cooling-off period, even out of cost concerns or being aware of the impossibility of reaching agreement, has a significant chance of not being supported by the tribunals. This thus constitutes a *de facto* obstacle in the sense of legalizing investment dispute settlement. Another factor indirectly impacting access to justice is the cost of arbitration: the high fees and costs may deter some small and medium-sized companies from seeking remedies through ISDS.

2. procedural impartiality

This section adopts the term "impartiality" rather than the term "independence" because the latter, as broadly used in the IR literature, describes the objective relationship between parties and tribunals while the former essentially reflects a *conception* by the community, which is consistent with the approach to legalization in this thesis. It is well recognized that procedural impartiality is a core pillar of the legitimacy of international adjudication as it not only ensures that the disputing parties are treated fairly but also secures public confidence in the system.[230] It has been a regular ground to challenge the legitimacy of international arbitration.[231] Prominent institutional features of an impartial adjudicative body may include, among others, unbiased and qualified adjudicators, and/or neutral processes of the selection of adjudicators.[232]

[230] See e.g. Nienke Grossman, "Legitimacy and International Adjudicative Bodies" (2009) 41 Geo Wash Int'l L Rev 107 at 123–42 ("international actors are unlikely to view a tribunal as legitimate unless it contains a core set of provisions guaranteeing [1] fair process; [2] impartial, competent, and independent individual adjudicators;[3] impartial and independent benches and panels; and [4] unbi- ased secretariats and registries"); Marc Bühlmann & Ruth Kunz, "Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems" (2011) 34:2 West European Politics 317–345 (the authors conduct empirical research regarding whether judicial independence affects political confidence and came to positive results). Ratner, *supra* note 44 at 768; Ruth Mackenzie & Philippe Sands, "International Courts and Tribunals and the Independence of the International Judge Focus: Emerging Fora for International Litigation" (2003) 44 Harv Intl LJ 271.

[231] As the literature review in Chapter 1 shows, some scholars believe the lack of impartiality have caused the "legitimacy crisis" of international investment law. In other areas of international law there are also concerns regarding the impartiality of judiciary bodies, see e.g. Geir Ulfstein, "The Human Rights Treaty Bodies and Legitimacy Challenges" in Nienke Grossman et al, eds, *Legitimacy and International Courts*, (Cambridge, United Kingdom; New York, USA: Cambridge University Press, 2018) 284.

[232] Grossman, *supra* note 230 at 129–32.

In the context of international investment law, as Chapter 1 shows, critiques regarding the impartiality of investment arbitrators are mainly driven by concerns relating to the tolerance of double-hatting as well as the appointment of arbitrators by the disputing parties rather than by an independent institution. Generally, the double-hatting problem as a deficiency of ISDS is less disputed among scholars (although some practitioners may disagree) – it is hard to imagine that an arbitrator's interpretation of a legal issue would not be influenced by his dealing with similar issues as a legal counsel.[233] There have been various endeavors at both bilateral and multilateral levels to address the issue. For example, Article 8.30 of the CETA requires that "[the Members of the Tribunal] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement".[234] The Code of Conduct for the judges of the CETA investment court further specifies that former members of the Tribunal "shall not act as representatives of any disputing parties" for a period of three years after the end of their term.[235] The UNCITRAL and ICSID, as mentioned in Chapter 1, are also moving forward with a Code of Conduct where double-hatting is intended to be addressed.

As to arbitrator appointment, it is true that a procedure where arbitrators are appointed by arbitration institutions instead of the disputing parties is conventionally considered as a sign of higher impartiality; nevertheless, it does not necessarily lead to the conclusion that a tribunal

[233] See Langford, Behn & Lie, *supra* note 42; Malcolm Langford, Daniel Behn & Runar Lie, "The Ethics and Empirics of Double Hatting" (2017) 6:7 ESIL Reflection, online: <https://papers.ssrn.com/abstract=3008643>; Simões, *supra* note 41 (the author believes that double-hatting causes the problem of "issue conflict", which means "a conflict of interests stemming from an arbitrator's relationship to the subject matter of the dispute, rather than his/her relationship with the disputing parties"); Sands, "Conflict and Conflicts in Investment Treaty Arbitration", *supra* note 44.

[234] *Canada-European Union Comprehensive Economic and Trade Agreement*, 30 October 2016, art 8.30 para 1 [*CETA*].

[235] *Code of conduct for the judges of the Investment Court System*, available online at:< https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159403.pdf>, art. 5.2.

consisting of party-appointed arbitrators is *a priori* biased. In the latter circumstance, impartiality can be enhanced under institutional constraints such as disclosure of arbitrators' information and publication of arbitral documents, which significantly increases the reputational risk if an arbitrator makes (apparently) biased judgments.[236] In other words, as far as this subsection is concerned, becoming "court-like" is one but not the only way to facilitate procedural impartiality of ISDS – what matters is to enhance the perception of legitimacy by the disputing parties and the public.

3. the quality of awards

In relevant IR and international law literature, the quality of a judgment is rarely analyzed as an independent aspect influencing the legalization of international adjudicative institutions. A conception that the rules are reasonably interpreted and correctly applied to the given facts is a vital pillar underpinning the community's faith in the adjudicative body. This not only shows that the case in dispute is resolved in a fair and just manner but also enhances the public ascertainability of law which is a fundamental requirement of normative legitimacy. [237]

With regards to international arbitration, the quality of awards is not merely determined by the capability of arbitrators; it can be improved by institutional arrangements such as, *inter alia*, formal requirements of awards, review of awards, and publication of relevant documents. A basic formal requirement is that arbitrators must state the reasons in writing, the content of

[236] Brower & Schill, "Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law Symposium", *supra* note 37 at 489–95. The authors argue that it is an arbitrator's reputation for impartial and independent judgement rather than his/her possibility of favoring the nominating party that earns appointments.
[237] See Kumm, "The Legitimacy of International Law", *supra* note 124 at 919; Brunnée & Toope, "International Law and Constructivism", *supra* note 122 at 56 ("[t]he conditions of internal morality ensure that rules are compatible with one with another, that they ask reasonable things of the people to whom they are directed, that they are transparent and relatively predictable, and that officials treat known rules as shaping their exercise of discretion."); Thomas Schultz, "The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences" (2011) 2:1 J Int Disp Settlement 59 at 73 ("a rules system whose norms are not typically ascertainable by their addressees ought not to be considered law").

which shall include the identification of issues in dispute and "the thought-process underlying its decision".[238] Another *ex ante* measure to ensure the quality of awards is to set expertise and ethical thresholds regarding the selection of arbitrators. For example, Article 8.27 of the CETA requires that the Members of the Tribunal shall "possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence".[239]

In addition, review of awards by an independent tribunal, standing or *ad hoc*, can provide an *ex post* opportunity to address major procedural or substantive errors relating to legal reasoning. Under the framework of the ICSID Convention, a party can request the review of an award by an *ad hoc* annulment tribunal on the ground that "the award has failed to state the reasons on which it is based".[240] The provision seems to be general in scope: "failed to state the reasons" may refer to the absence of reasons, insufficiently stated reasons and contradictory reasons.[241] The annulment of the award may cause the case to be decided by a new tribunal.[242] It is clear that the provision aims to address an arbitral tribunal's violation of rules of *procedure* rather than reviewing the substantive merits of the award; nonetheless, in practice, the boundary between the two can be quite blurred.[243] In this respect, a court system appears to have more

[238] Gary B Born, *International Arbitration: Law and Practice*, 2nd ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016) at 291.
[239] CETA, art. 8.27. "Members of the Tribunal" refers to a pool of fifteen standing arbitrators appointed by the CETA Joint Committee who will constitute arbitral tribunals to resolve investment-state disputes.
[240] ICSID Convention, art. 52(1)(e).
[241] Christoph H Schreuer et al, *supra* note 20 at 998–1013.
[242] ICSID Convention, art. 52(6).
[243] Christoph H Schreuer et al, *supra* note 20 at 1003 ("[t]he formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal ... becomes blurred").

advantages in controlling the quality of awards since the appellate tribunals generally have the clear authority to correct errors regarding the interpretation and application of laws.[244]

The last institutional arrangement to be discussed here is the publication of documents in arbitral proceedings, for example, information about arbitrators, the statement of claim, transcripts of hearings, awards, etc. They may have an indirect influence over the quality of judgments – the fact that the awards and relevant background documents can be accessed and appraised by the public can impose informal pressure upon the arbitrators to avoid erroneous or biased reasoning.[245] Besides, it also means that there are more awards available for arbitrators to make reference to in their own reasoning, which assists them in making better-informed decisions. As Chapter 1.II.C has introduced, ISDS has witnessed great progress in this respect.

4. enforcement

Institutional arrangements relating to the implementation of adjudicative decisions play an irreplaceable role in backing the efficacy and legality of dispute-settlement.[246] Enforcement issues may occur at various stages of a dispute-settlement procedure (e.g., remedial orders, interim orders and orders to assist investigation) and may be executed by different genres of bodies (e.g., a centralized third party, domestic courts or members' self-implementation).[247] In addition, a tribunal decision may be implemented unconditionally by the responsible

[244] For example, Article 8.28 of the CETA stipulates two more grounds in addition to that provided in ICSID Convention for the appellate tribunal to uphold, modify or reverse an award, namely (1) errors in the application or interpretation of applicable law; (2) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law.
[245] Ribeiro & Douglas, "Transparency In Investor-State Arbitration", *supra* note 80 at 57–58.
[246] See Alexandra Huneeus, "Compliance with Judgments and Decisions" in Cesare Romano, Karen J Alter & Yuval Shany, eds, *The Oxford Handbook of International Adjudication*, 1st ed (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2014) 437 at 440–42 (in explaining why compliance with judgements matters for the purpose of legality, the author states that "[j]udges care about whether their strictures receive compliance, regardless of other effects they may have, because it conforms to their understanding of who they are and what law is").
[247] Alexandra Huneeus, *supra* note 246. Examples of the three types of enforcement bodies are respectively the ICJ, ICSID and the WTO.

institutions or may be subject to challenges by the disputing parties or domestic courts before implementation.

It is hard to tell which means of enforcement represent higher degrees of legalization – centralized or decentralized enforcement, unconditional or conditional implementation, recommending or compulsory decisions, etc. – it depends on the form of dispute-settlement as well as the broader legal and political context of the regime. Ultimately, it is whether the disputing parties actually comply with the adjudicative decisions that matters.[248] For example, in the WTO legal system, the findings of the panels and appellate body are "recommendations" which are self-implemented by the respondent states under the surveillance of the Dispute Settlement Body (DSB). Failing to comply with them can result in paying compensation or the other party's retaliation.[249] Despite these *prima facie* features of "weak" enforcement – especially compared to domestic legal systems – the records of states' compliance with DSB decisions are generally considered satisfactory.[250]

Enforcement of investment arbitration awards is also decentralized as it depends on the recognition and enforcement of local authorities of the contracting states. An important pillar of the enforcement of investment arbitral awards is the New York Convention, which requires that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in

[248] Factors such as international and domestic political pressures and the nature of the issue at dispute may also influence states' compliance with tribunal judgements. See Colter Paulson, "Compliance With Final Judgments of the International Court of Justice Since 1987" (2004) 98:3 AJIL 434 at 456–57.
[249] *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 UNTS 401, 33 I.L.M. 1226 (1994), arts. 19-22[*DSU*].
[250] See e.g. Bruce Wilson, "Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date" (2007) 10:2 J Int Econ Law 397; William J Davey, "The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges" (2014) 17:3 J Int Econ Law 679. On the other hand, some studies point out there are still problems of the WTO enforcement mechanism, see William J Davey, "Compliance Problems in WTO Dispute Settlement" (2009) 42:1 Cornell Intl LJ 11 (the author generally recognizes the compliance record of the WTO but believes that "considerable room for improving the quality and timeliness of compliance exists"); Benjamin H Liebman & Kasaundra Tomlin, "World Trade Organization Sanctions, Implementation, and Retaliation" (2015) 48:2 Empir Econ 715.

accordance with the rules of procedure of the territory where the award is relied upon".[251] Meanwhile, the New York Convention allows domestic courts to refuse recognition and enforcement of a foreign award at the request of a party on grounds of procedural deficiencies or public policy concerns.[252] Moreover, an award may be set aside by the court of the seat according to local laws on grounds that are similar to those of the New York Convention.

In contrast to the New York Convention, the ICSID Convention – despite strong opposition by some countries at the negotiation stage – does not leave opportunities for local courts to set aside or refuse recognition of awards.[253] Article 54 stipulates that "[e]ach 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

[251] New York Convention, art III.

[252] New York Convention, art V:

> 1. Recognition 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.

[253] Christoph H Schreuer et al, *supra* note 20 at 1139–43.

final judgment of a court in that State".[254] As such, the ICSID Convention can be said to have taken a bold step towards facilitating the implementation of tribunal decisions. This arrangement is not unreasonable given that ICSID has a self-contained award review mechanism, e.g. the revision or annulment of awards, to address procedural unfairness in the arbitration process, which means a second review by domestic courts is no longer necessary.[255] However, unlike the New York Convention, the public policy issue was intentionally left unaddressed in the ICSID Convention,[256] which leaves no discretion for local courts to address it at the enforcement stage. This, unsurprisingly, has given rise to the dissatisfaction of some actors.[257] Therefore, a more legalized international investment regime should manage to strike a balance that allows for reasonable public policy considerations of the local community (especially those of third states) while preventing the host states from abusing the clause as an excuse to escape from the obligation of recognition and enforcement.[258]

Another factor that may weaken the effectiveness of ISDS's enforcement mechanism is the doctrine of state immunity, which originates from the principle of sovereign equality of states and requires that "no sovereign state can exercise its sovereign power over another

[254] ICSID Convention, art 54(1).
[255] ICSID Convention, art 52. See Christoph H Schreuer et al, *supra* note 20 at 1118 ("Mr. Broches argued successfully in favour of limiting or eliminating the grounds for review contained in the New York Convention, especially in view of the internal review system provided by the ICSID Convention").
[256] *Travaux préparatoires* of the ICSID Convention shows that the idea of allowing third states to refuse enforcement on the ground of public policy was proposed in two drafts but was eventually rejected. Schreuer et al, *supra* note 20 at 1140.
[257] *Ibid* at 1141.
[258] Herbert Kronke, "Introduction: The New York Convention Fifty Years on: Overview and Assessment" in Herbert Kronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2010) 1 at 8–10. To be clear, here, local communities in third states are relevant not because they might be influenced by the investment dispute but because their conception of law and justice – which is reflected in the notion of "public policy" – should be respected in investment law design. This issue will be further discussed in Chapter 3 below.

equally sovereign states".[259] The ICSID Convention explicitly provides that the execution of award shall be governed by laws relating to state immunity as well.[260] It is widely acknowledged that if the assets to be enforced are non-commercial and serve governmental purposes, the doctrine of state immunity should apply.[261] However, as there is no uniform criterion to distinguish non-commercial assets from commercial assets and the specific criteria vary according to different domestic laws, the application of the doctrine may give rise to considerable uncertainties.[262] Moreover, states may transfer their assets to public entities that are presumed to enjoy sovereign immunity (for example, central banks) to avoid executing the awards.[263] Therefore, providing clearer guidance on the application of immunity from execution in investment treaties or other international instruments could be an important step to further de-politicize ISDS.[264]

To briefly summarize, this subsection has discussed four aspects of international adjudication that may influence the legalization of dispute-settlement function, namely access, procedural impartiality, the quality of awards and enforcement. The aspects are selected based on their relationship to both the depoliticization of dispute settlement and the community's conception of legitimacy. It is without a doubt that their significance is not confined to the

[259] Olga Gerlich, "State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?" (2015) 26:1 American Review of International Arbitration 47 at 61.
[260] *ICSID Convention*, art. 55 ("Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution"). As for New York Convention, although state immunity is not explicitly stipulated, it may arise via public policy exception or Article III which states that awards shall be enforced "in accordance with the rules of procedure of the territory where the award is relied on". Andrea Bjorklund, "State Immunity and the Enforcement of Investor-state Arbitral Awards" in Christina Binder, Ursula Kriebaum & Stephan Wittich, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) 302 at 308–9.
[261] Christoph H Schreuer et al, *supra* note 20 at 1158.
[262] *Ibid* at 1158–59.
[263] Gerlich, *supra* note 259 at 82.
[264] See Bjorklund, *supra* note 260 at 321 (proposing that including waiver of immunity provisions in BITs could be a possible solution).

function of dispute settlement – the settlement of each individual case in a legitimate manner contributes to the accumulation of a legalized caseload, which eventually forms a coherent body of jurisprudence. The next subsection will move on to discuss two more aspects – namely (1) transparency and public participation and (2) precedent – they overlap to a certain extent with the aspects in this subsection but they will be discussed from the perspective of the law-making function.

B. Law-making

To be clear, generally international courts and tribunals do not create "case law" in the sense of common law because theoretically their decisions are binding on the disputing parties rather than on later tribunals.[265] On the other hand, however, the participation of international tribunals in law-making is inevitable.[266] International laws always encompass some degrees of uncertainty which requires adjudication bodies to interpret and clarify them when disputes arise; such gap-filling activities in each specific case can be a core basis underpinning the legal reasoning in future cases.[267] The issue of how ISDS contributes to international investment law-making will be examined separately in Chapter 3. Here, I will discuss how institutional

[265] See Hugh Thirlway, *The Sources of International Law*, 2d ed (Oxford: Oxford University Press, 2019) at 134. Moreover, according to Article 38 of the ICJ Statute, judicial decisions are "subsidiary means for the determination of rules of law". ICJ Statute, art. 38.1(d).

[266] See Armin von Bogdandy & Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (Oxford, United Kingdom: Oxford University Press, 2014) at 101 ("[a]djudicating means making law… not only for a concrete case, but also for the future"); Frédéric Bachand & Fabien Gélinas, "Legal Certainty and Arbitration" in Thomas Schultz & Federico Ortino, eds, *The Oxford handbook of International Arbitration* (New York: Oxford University Press, 2020) 377.

[267] Bogdandy & Venzke, *supra* note 266 at 106; José E Alvarez, *International Organizations as Law-makers* (Oxford; New York: Oxford University Press, 2006) at 460 (in the page the author briefly reviews explanations for the development of adjudicative "precedents"); See general Armin von Bogdandy & Ingo Venzke, "Beyond Dispute: International Judicial Institutions as Lawmakers" in Armin von Bogdandy & Ingo Venzke, eds, *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2012) 3; Tom Ginsburg, "Bounded Discretion in International Judicial Lawmaking" (2004) 45 Va J Intl L 631 at 635; Marc Jacob, "Precedents: Lawmaking through International Adjudication Beyond Dispute: International Judicial Institutions as Lawmakers: I. Framing the Issue" (2011) 12 German LJ 1005–1032.

arrangements relating to public participation and the formation of precedents influence the legalization – especially the legitimacy – of adjudicative law-making.

a. transparency and public participation

A legitimate international adjudicative body must be one whose authority is *perceived* as justified.[268] Increasing transparency and public participation in international adjudication is the key to forming such a perception: transparency allows related parties to appraise the decision-making and functioning of a tribunal, and public participation provides a chance for non-disputing parties whose interests are impacted to influence the outcomes of tribunals' law-making.[269] In other words, due to the inevitability of judicial law-making, a tribunal's legal reasoning must not be narrowed to only considering the interests of the two disputing parties. This is a basic requirement of legitimacy and thus is also a basic component of the notion of legalization.

It has been discussed above in the subsection on dispute settlement that transparency imposes informal pressure on arbitrators which fastens quality on their awards – it influences the development of case law likewise. Knowing that the decisions will be subject to the evaluation of the public and later tribunals, adjudicators are under more pressure to justify their judgements and prove their qualifications as adjudicators, especially when similar issues have been decided in previous cases or there are relevant rules or principles in other areas of international laws.

[268] Grossman, *supra* note 230 at 115.
[269] Nienke Grossman, "The Normative Legitimacy of International Courts" (2013) 86 Temp L Rev 61 at 81. See also See also Chi Carmody, "Beyond the Proposals: Public Participation in International Economic Law" (1999) 15 Am U Intl L Rev 1321 at 1346 ("the institutions of international economic law must recognize what has happened and look beyond for genuine popular support"). Bjorklund, *supra* note 75.

The other issue, public participation, can be incorporated into the adjudication process in various forms, for example, *amicus curiae* submissions by non-state actors, submissions by non-disputing state actors and participation in hearings. Generally, compared to common law systems, *amicus curiae* participation by non-disputing parties is not a prevalent practice in international adjudication.[270] In those international regimes that allow *amicus curiae* participation, the issue is largely at the discretion of tribunals.[271] It thus requires the tribunals to holistically review the nature of disputes and the significance and benefits of third-party participation relative to the consent of the parties.[272] A legalized dispute settlement mechanism should provide explicit rules or develop consistent decisions regarding the criteria for allowing *amicus curiae* participation and the extent to which a tribunal should consider their opinions. Besides, the degree of public participation as reflected in the rules or decisions should be weighed against the social impact of the disputes: for example, it is generally accepted that public participation in a commercial dispute is less imperative than that in a dispute relating to human rights.

In this respect, international investment arbitration has made considerable process towards greater legalization, which can be observed via both the tribunals' attitudes and the arbitration rules. A review of investment arbitration cases shows that initially, the tribunals lent

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[270] Gary Born & Stephanie Forrest, "Amicus Curiae Participation in Investment Arbitration" (2019) 34 ICSID Rev 621 at 629.

[271] For example, ICSID Arbitration Rules, Rule 37 (2) ("After consulting both parties the Tribunal may allow a person or entity that is not a party to the dispute … to file a written submission with the Tribunal regarding a matter within the scope of the dispute").
While in some cases, tribunals are obliged to allow third-party submissions. For example, Article 5 of the UNCITRAL Rules on Transparency requires that "[t]he arbitral tribunal shall, subject to paragraph 4, allow…submissions on issues of treaty interpretation from a non-disputing Party to the treaty". See also G Marceau & M Stilwell, "Practical suggestions for amicus curiae briefs before WTO adjudicating bodies" (2001) 4:1 J Int Econ Law 155 (the authors review practices relating to *amicus curiae* submission in different international adjudication systems).

[272] See Eugenia Levine, "*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation" (2011) 29 Berkeley J Intl L 200 at 214–23.

considerable weight to the disputing parties' opinions on whether to allow *amicus curiae* participation, while in the more recent cases, there is an increasing trend that the tribunals exercise their inherent power and allow a broader range of actors to participate as *amici*.[273] In 2006, in response to the situation that in several cases *amicus* participation petitions were submitted by NGOs while there are no clear rules governing the issue,[274] ICSID adopted an amendment to explicitly allow a non-disputing party to file written submissions and to specify the criteria to determine whether to allow such filings.[275] The UNCITRAL Rules on Transparency adopted in 2014 provide similar criteria, except that it further stipulates rules on the formal requirements of the submissions as well as the disclosure of information regarding the connections of the third-party to the disputing parties (e.g., financial support or affiliations).[276] On the other hand, there is the latent risk that submissions by different groups of third parties may exercise an imbalanced influence on a tribunal's decision. For example, submissions by a "political heavyweight" like the EU might carry greater weight than those by NGOs,[277] which may give rise to doubts on the impartiality of the arbitral decisions. Therefore, such risks must be fully considered in the design of rules relating to *amicus curiae* participation.

b. precedent

A tribunal's interpretation and application of vague rules fill gap in law in an immediate case and it may constitute the basis of decisions in future cases, in which circumstances the previous

[273] *Ibid* at 208–14. See also Knahr, *supra* note 92 at 320–21. For example, in the case *Biwater v. Tanzania*, despite the objection of the claimant, the tribunal allowed *amicus* submission of several NGOs. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5.
[274] Antonietti, *supra* note 84 at 433–34.
[275] The criteria mainly focus on the extent to which the submission will assist the tribunal as well as the significance of interest the third-party has in relation to the case. See ICSID Arbitration Rule, Rule 37(2).
[276] UNICITRAL Rules on Transparency, art 4.
[277] Knahr, *supra* note 92 at 335–36.

decisions are referred to as *precedents*.[278] Precedents are frequently cited to justify a tribunal's decisions; in turn, they also constrain the tribunal's freedom of legal reasoning given the existence of the normative expectation from the community that similar cases shall be decided in a consistent manner.[279] This imposes considerable pressure on later tribunals to avoid deviating from or even denying the ruling of previous tribunals, even if there is no doctrine of *stare decisis*. As far as this subsection goes, a legalized international adjudicative system should develop a body of precedent in a way that encompasses a high degree of predictability while at the same time tolerate an appropriate degree of flexibility to adapt to new situations in future cases. This is a demand of normative legitimacy given that predictability and flexibility are two basic requirements of the rule of law. To reach this end, two institutional arrangements are particularly relevant, namely, appellate mechanisms and (again) transparency.

The establishment of an appellate mechanism creates a hierarchy within the adjudicative body where the first-tier tribunals are obligated to follow previous decisions of appellate tribunals on similar issues. At the same time, the appellate tribunals reinforce the precedents by citing and explaining previous decisions consistently. A typical example is the WTO, which does not contain formal rules of precedent while the panels tend to follow the appellate body's findings in earlier disputes to "create legitimate expectations among WTO Members".[280]

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[278] See Jacob, "Precedents", *supra* note 267 at 1007 ("[p]recedents are situations - in a legal context, usually decided cases - in which an issue at hand has already been decided elsewhere").

[279] von Bogdandy & Venzke, *supra* note 267 at 13; Jacob, "Precedents", *supra* note 267 at 1014–18; Raj Bhala, "The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)" (1999) 9 J Transnat'l L & Pol'y 1 at 4.

[280] WTO, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea* (Panel Report) WT/DS402/R, VII.3.1:

> there is not a system of precedent within the WTO dispute settlement system and panels are not bound by Appellate Body reasoning. However, we agree with Korea that adopted reports create legitimate expectations among WTO Members and that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".

Besides, an adjudicative mechanism with appellate tribunals is capable of adapting to changing social economic environments through the incremental development of case law, especially for international adjudicative bodies whose law-making is less constrained by a legislative body as is the case of domestic legal systems.[281]

With regards to investment dispute settlement, as discussed in Chapter 1, the EU has been a major advocate in promoting the establishment of an investment court system with an appellate court because it believes that "[p]redictability and consistency can only be effectively developed through the establishment of a standing mechanism with permanent, full-time adjudicators."[282] The EU has successfully introduced appellate courts to resolve investor-state disputes with its trade partners.[283] In those bilateral FTAs, the countries committed to "pursue with each other and other interested trading partners, the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of international investment disputes".[284] Establishing an appellate court for ISDS like that of the WTO can be expected to enhance the consistency of tribunal decisions.[285] However, since there is no uniform set of

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Joost Pauwelyn, "Minority rules: precedent and participation before the WTO Appellate Body" in Joanna Jemielniak, Laura Nielsen & Henrik Palmer Olsen, eds, *Establishing Judicial Authority in International Economic Law* (Cambridge: Cambridge University Press, 2016) 141 (the author conducts empirical study on precedents in the WTO and finds that "[t]he network of cross-references between AB reports is both large and dense").

[281] Irene M Ten Cate, "International Arbitration and the Ends of Appellate Review" (2011) 44 NYU J Int'l L & Pol 1109 at 1186–87.

[282] UNCITRAL Secretariat, "Submission of the European Union and its Member States to UNCITRAL Working Group III", 18 January 2019, available online at:< http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf>, at para 41 [*EU Submission*].

[283] Notably, the Court of Justice of the European Union has confirmed that the investment court system is compatible with the EU law. The Court of Justice of the European Union, *Opinion 1/17 of the Court (Full Court)* (30 April 2019).

[284] EU-Singapore Trade and Investment Agreements, online at :< https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF#page=29>, art 3.12. There are also similar provisions in FTAs between the EU-Canada (CETA), EU-Mexico, and EU-Vietnam.

[285] See Howard Mann, "Transparency and Consistency in International Investment Law: Can the Problems be Fixed by Tinkering?" in Michael Chiswick-Patterson, ed, *Appeals Mechanism in International Investment Disputes* (New York: Oxford University Press, 2008) 213 at 220.

substantive rules on foreign investment protection and because investment disputes are highly fact-specific,[286] the tribunals may frequently find it necessary to distinguish the case in front of them from previous cases and refuse to apply precedents. Moreover, as the following Chapters will detail, imposing the doctrine of *stare decisis* to ISDS increases the risk that the investment law jurisprudence deviates from the community's shared understandings, thus causing further backlashes against the mechanism.

To conclude, this Chapter critically assessed the notion of "legalization" through the lens of constructivism and applied the re-interpreted framework to international investment law. It is clear from this Chapter's discussion that international investment law is so complicated that it cannot be simply labelled as "highly legalized" or "modestly legalized" – despite the lack of a multilateral investment treaty, the legal regime is supplemented by a relatively de-politicized dispute settlement mechanism. This Chapter has also shown, on the other hand, that there is still room for further improvement, while the real challenge faced by the community (including the UNCITRAL WGIII) is how to improve given the diversified interests and understandings underpinning the system. The following Chapters will dig deeper into the relationship between the understandings of the community and the legalization of international investment law.

[286] See Andrea K Bjorklund, "Practical and legal avenues to make the substantive rules and disciplines of international investment agreements converge" in Roberto Echandi & Pierre Sauvé, eds, *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge: Cambridge University Press, 2013) 175 at 197 ("[e]stablishing an appellate body whose decisions are precedential in the absence of a multilateral agreement might be especially risky given the lack of consensus about key issues in investment law").

CHAPTER 3 SHARED UNDERSTANDINGS AND INTERACTIONAL LAW-MAKING

Previous chapters have discussed the fact that recent developments and proposed reforms indicate the international community's general intention to legalize international investment law further; however, the appropriate degree of legalization is still open to dispute. Chapter II of this thesis provided a descriptive account of the key characteristics of a legalized international investment legal regime, one of which is to have a judicialized dispute settlement mechanism. This chapter digs deeper into the proper role of international adjudication in the dynamic process of legalization. It argues that ISDS serves as an important avenue to enhance shared understandings of international investment law, while it should not be expected to radically change the current shared understandings. To develop this argument, this chapter adopts the interactional law theory developed by Brunnée and Toope.

To be more specific, this chapter unfolds as follows: Section 1 highlights the importance of ideational factors in the study of institutions; Section 2 reveals the role of shared understandings in the formation and evolution of international legal regimes; Section 3 argues that international investment law-making demands a high level of shared understandings within the international community, which is currently hard to be achieved; Sections 4 and 5 show that shared understandings of investment protection rules can be reinforced through the practice in ISDS; Section 6, however, cautions that judicializing ISDS to achieve consistency and coherence goals while disregarding the lack of shared understandings may jeopardize the sustainable interaction between shared understandings and the investment jurisprudence.

I. IDEAS AND INSTITUTIONS

The study of institutions and their evolution has attracted great interest from scholars in various disciplines.[287] At the beginning of his seminal paper *Institutions*, North defines institutions as "the humanly devised constraints that structure political, economic and social interaction; they consist of both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)".[288] For North, an effective institution reduces transaction and production costs and thus enables the realization of economic gains.[289] As a typical Rational Choice Institutionalist theory, the definition is based on the assumption that individuals are rational (although it does not fully agree with the substantive rationality assumption of the classical economic analysis)[290] and that they react to the rules and inducements of the institutions for the purpose of maximizing their utilities.[291] Nevertheless, North does not simply assume rationality in institutional analysis as a matter of course but attempts to open the black box by highlighting the role of mental models that induce players' choices.[292] According to a paper he co-authored with Denzau:

> Mental models, institutions and ideologies all contribute to the process by which human beings interpret and order the environment. Mental models are, to some degree, unique to each individual. Ideologies and institutions are created and provide more closely shared perceptions and ordering of the environment. The

[287] For explanation of different schools and theories of institutionalism (e.g. normative/sociological institutionalism, empirical institutionalism, rational choice institutionalism, etc.), see e.g. B Guy Peters, *Institutional Theory in Political Science: The New Institutionalism*, 3rd ed (New York and London: Bloomsbury Publishing USA, 2012).
[288] Douglass C North, "Institutions" (1991) 5:1 The Journal of Economic Perspectives 97–112 at 97.
[289] *Ibid* at 98.
[290] Arthur T Denzau & Douglass C North, "Shared Mental Models: Ideologies and Institutions" (1994) 47:1 Kyklos 3 at 10 ("we have (for the most part implicitly) sometimes made the erroneous assumption that we can extend without explicit consideration the scope of the substantive rationality assumption to deal with the problems of ambiguity and uncertainty that characterize most of the interesting issues in our research agenda and in public policy"). For more explanation of substantive rationality, see Herbert A Simon, "From Substantive to Procedural Rationality" in TJ Kastelein et al, eds, *25 Years of Economic Theory* (Boston, MA: Springer, 1976) 65 at 66 ("Behavior is substantively rational when it is appropriate to the achievement of given goals within the limits imposed by given conditions and constraints".
[291] Peters, *supra* note 287 at 20.
[292] Douglass C North, "Institutions and Credible Commitment" (1993) 149:1 Journal of Institutional and Theoretical Economics 11 at 21.

> connection between mental models and both ideologies and institutions crucially depends on the product and process of representational redescription.[293]

Besides, mental models are not static – they incrementally evolve through the process of learning, leading to the evolution of ideologies and institutions.

The cognitive aspect behind actors' choices is also appreciated in other schools of institutional studies – a typical one being the normative institutionalist school. It recognizes rules as a component of institutions but places more emphasis on the cardinal role of norms and values.[294] One of its fundamental differences from other schools of new institutionalist theories (including rational choice institutionalism), as pointed out by March and Olsen, lies in its arguments against the utilitarian assumption that political actors' behaviour is motivated by calculated and self-interested decisions.[295] The scholars further draw a distinction between the "logic of consequences" and the "logic of appropriateness". The former views political order as "arising from negotiation among rational actors pursuing personal preferences or interests in circumstances in which there may be gains to coordinated action".[296] The logic of rational choice institutionalist theory, by presuming that individuals have fixed preferences and act for the purpose of maximizing utilities, clearly falls into the category of the logic of consequences. By contrast, the "logic of appropriateness" presumes that an individual's action "involves evoking an identity or role and matching the obligations of that identity or role to a specific situation", and "[t]he

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[293] Denzau & North, "Shared Mental Models", *supra* note 290 at 21.
[294] Peters, *supra* note 287 at 21.
[295] James G March & Johan P Olsen, "The New Institutionalism: Organizational Factors in Political Life" (1984) 78:3 The American Political Science Review 734 at 737–38; James G March & Johan P Olsen, "Elaborating the 'New Institutionalism'" in Sarah A Binder, R A W Rhodes & Bert A Rockman, eds, *The Oxford Handbook of Political Institutions* (Oxford: Oxford University Press, 2008) 3 at 6.
[296] James G March & Johan P Olsen, "The Institutional Dynamics of International Political Orders" (1998) 52:4 International Organization 943 at 949.

pursuit of purpose is associated with identities more than with interests, and with the selection of rules more than with individual rational expectations".[297]

Rational choice institutionalism and normative institutionalism are only two illustrations of the extensive studies of institutions. Despite the distinctions in terms of the ontological and epistemological assumptions, none of these approaches would simply equate institutions with objective structures embedded in staffing, hierarchies or procedural rules – they all notice or highlight, to different degrees, the role of actors' "ideas" within institutions. The main theoretical approach of this thesis, i.e., the constructivist approach, is obviously no exception: the ideational elements in institutional evolution are strongly spotlighted by constructivist institutionalism, as the theory conceives institutions as "codified systems of ideas and the practices they sustain".[298] It recognizes that actors behave strategically to achieve certain goals under environments that are frequently fraught with uncertainty, while it does not see motivations and preferences as given facts but rather as "irredeemably ideational, reflecting a normative (indeed moral, ethical, and political) orientation towards the context".[299] It thus highlights the interaction between actors' ideas and the surrounding social structures. Constructivist institutionalist theories can provide valuable explanations regarding institutional reforms. For example, Blyth points out that,

> Agents must argue over, diagnose, proselytize, and impose on others their notion of what a crisis actually *is* before collective action to resolve the uncertainty facing them can take any meaningful institutional form… Crisis thus becomes an act of intervention where sources of uncertainty are diagnosed and

[297] *Ibid* at 951. However, although the term "logic of appropriateness" is adopted as a basis of action distinct from the "logic of consequence", the former does not necessarily exclude the circumstance where an actor takes an action or follows a rule for consequential purposes. For example, if an actor believes that whatever he does should best serve the realization of a moral aim, he is still acting on a consequentialist basis, even though the moral aim is derived from his identity (See Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1986) at 24–25). Therefore, the distinction drawn by March and Olsen here, in terms of analyzing the motivation of individual acts, should at best be viewed as a distinction between "interests as a motivation" as opposed to "identities as a motivation".
[298] Hay, *supra* note 132 at 60.
[299] *Ibid* at 63–64.

> constructed. Given this, the set of available ideas with which to interpret the environment, reduce uncertainty, and make purposeful collective action possible becomes crucially important in determining the form of new institutions.[300]

Besides, according to Blyth, ideas not only enable collective actions and coalition-building but also serve as weapons to replace current institutions because agents can delegitimize the institution by contesting the ideas underpinning them.[301] The current situation of international trade and investment legal regimes is a vivid example of how the shift of ideas has given rise to legitimacy doubts about the institutions: both the trade and investment law regimes blossomed with the prevalence in the 20th century of a neo-liberalism that cherishes the value of free market and globalization; and now, there is a visible rise of nationalism, being accompanied by some countries' retreat from international or regional arrangements that were designed to promote freer movement of goods or investments.[302]

Adopting the constructivist approach to study international investment law, this chapter attaches more importance to how the international community's *conception* of international investment law interacts with its institutional evolution. Further, it does not focus on the long-lasting debate over whether it is interests or identities that motivate individuals to form institutions and obey rules. As highlighted by Finnemore and Sikkink, "[c]onstructivism is not a substantive theory of politics. It is a social theory that makes claims about the nature of social life and social change… [I]t offers a framework for thinking about the nature of social life and social interaction, but makes no claims about their specific content".[303] In other words, this chapter recognizes that

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[300] Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*, (New York: Cambridge University Press, 2002) at 9–10.
[301] *Ibid* at 37–40. Blyth proposes five hypothesises about the casual effects of ideas in periods of economic crisis, namely "uncertainty reduction, coalition building, institutional contestation, institutional construction and exceptional coordination".
[302] On the shift to neo-conservatism, see David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2007) at 81.
[303] Finnemore & Sikkink, "Taking Stock", *supra* note 134 at 393.

actors such as states and investors can follow both normative ideas or rational strategies (e.g., to pursue economic or political goals) in their decision-making; but unlike the traditional rational choice theories, it does not assume their desires to be static and exogenous but views them instead as interacting with the institutional context. Actors' perception of interests and the perception of normative obligations are not necessarily two opposed explanations of behavior;[304] rather, as will be explained below, they may co-influence the actors' decisions and they can have different weights at different stages of the institutional evolution. As March and Olsen themselves note, the relationship between the logic of consequences and the logic of appropriateness can be interpreted in a developmental way: the former might be the initial reason why an institution emerges, while after a period of accumulated practice, with the actors' increasing sense of identities, their actions may become more rule-based.[305]

II. SHARED UNDERSTANDINGS

Having emphasized the important role of ideas in institutions, this section moves on to discuss a particular type of idea that forms the basic normative structures of an institution, that is, shared understandings. At first glance, the term seems to be similar to what Denzau and North call "shared perceptions" (or "shared mental models") that may eventually grow to ideology – both terms highlight the intersubjective status of a particular interpretation of the reality shared within an institution. However, the notion of "shared perception" does not encompass a normative attribute but is a shared mental model within a community that assists the actors in making rational decisions.[306] Therefore, it still falls into the broader analytical framework of rational choice,

[304] Finnemore & Sikkink, "International Norm Dynamics and Political Change", *supra* note 135 at 910 ("instead of opposing instrumental rationality and social construction we need to find some way to link those processes theoretically").
[305] March & Olsen, *supra* note 296 at 958.
[306] Denzau & North, *supra* note 290 at 16–18.

although it attempts to break down the individual decision-making process and to study its interaction with the external environment. By contrast, a constructivist account of shared understandings has a much broader meaning: they are defined as "collectively held background knowledge, norms or practices".[307] These shared understandings, in turn, serve as important components of the interests and identities of individuals.[308] Compared to its content, the more important connotation of shared understandings is their interactive nature – as highlighted by Brunnée and Toope, "they are generated and maintained through social interaction".[309]

A. Shared Understandings and Norms

Norms are an important component of shared understandings, and the formation of shared understandings is an essential precondition for the formation of new norms within an institution. Finnemore and Sikkink argue that, in the international arena, the successful creation of norms is contingent upon two elements: firstly, norm entrepreneurs who "[have] strong notions about appropriate or desirable behavior in their community" and secondly, organizational platforms where norm entrepreneurs can promote their norms.[310] In this process, each participating actor may learn about the norms and contribute to enriching their connotation through social practice.[311] The participating actors may include a broad scope of individuals and groups, including legislators, judges, lawyers, commentators, NGOs, and other actors affected by relevant rules. It is only once norms proposed by entrepreneurs get diffused, recognized and internalized among a significant number of actors that they become institutionalized and form a part of the normative structure of the whole institution.

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[307] Brunnée & Toope, *supra* note 126 at 64.
[308] See Finnemore & Sikkink, "Taking Stock", *supra* note 134 at 393.
[309] Brunnée & Toope, *supra* note 126 at 64.
[310] Finnemore & Sikkink, "International Norm Dynamics and Political Change", *supra* note 135 at 896–901.
[311] Brunnée & Toope, *supra* note 126 at 62.

B. The Evolution of Shared Understandings Within an Institution

Normally, shared understandings exist from the very beginning of the formation of institutions, although they may not exist as norms. The typology of the forms of social ordering proposed by Fuller can shed light on our discussion here. According to Fuller, there are two basic forms of social ordering, namely organization by reciprocity and organization by common aims.[312] In cases of association by reciprocity, an actor exchanges and coordinates with others to gain his own benefits; while in cases of association by common aims, an actor coordinates because he appreciates the values of the institution.[313] This to a large extent coincides with the logic of consequence/ logic of appropriateness typology of the normative institutionalist theory: reciprocity embodies the process of calculating gains and losses resulting from a particular activity in the actor's mind; while common aims highlight how belief and identities guide the actor's decision-making. The main difference is that Fuller's approach principally focuses on the organizational level rather than the individual level.

An institution might be initially formed by common aims or reciprocity (or mixing common aims and reciprocity).[314] A typical example of the former can be found in arrangements related to human rights. International cooperation on human rights issues is clearly driven more by shared values and principles than economic interests.[315] For example, the aim of adopting and implementing the Genocide Convention was to safeguard the common good of humanity by

[312] Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353 at 357.
[313] *Ibid* at 357–62.
[314] This is also consonant with Cass Sunstein's discussion of "incompletely theorized agreements" which depicts the circumstance where people may agree on a more concrete rule or principle without sharing the same theoretical foundation of it. (Cass R Sunstein, "Incompletely Theorized Agreements" (1995) 108:7 Harvard Law Review 1733–1772.) For example, some actors may agree on a rule because they appreciate the moral value underlying it, while others may agree because of the benefit brought by it.
[315] Kathryn Sikkink, "Human Rights, Principled Issue-networks, and Sovereignty in Latin America" (1993) 47:3 Int Org 411 at 438.

criminalizing and preventing genocidal activities.[316] By contrast, the formation of the GATT system can be said to be largely driven by reciprocity because the immediate motivation of the states to cooperate was the economic benefits brought by the exchange of goods. As demonstrated by the Preamble of the GATT 1947, trade-liberalizing rules were drafted and applied as "reciprocal and mutually advantageous arrangements" to improve the contracting parties' economic conditions.[317]

The members' initial motivations to form an institution may gradually be institutionalized as rules and principles emerging with the accumulation of practice. Fuller names this phenomenon "creeping legalism", where in an aging association "dominance by the legal principles feeds on itself and becomes accelerative".[318] This phenomenon may occur in both institutions associated by reciprocity and common aims. It reflects, to use IR terms, a shift from the logic of consequence to the logic of appropriateness at both the individual level and institutional level. The WTO is an interesting case to observe this ideational shift. As discussed above, in the GATT era, reciprocity was the primary motivation behind multilateral cooperation, which means that members' decisions about whether to comply with the rules are largely determined by their self-interests rather than the normative pull to comply with the shared values. This can be particularly manifested in the GATT's dispute settlement and enforcement mechanism: the GATT rules *per se* do not establish

[316] See Joost Pauwelyn, "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?" (2003) 14:5 Eur J Int Law 907–951 at 909–10. As the author citing the ICJ reports, "[i]n such a Convention [as the Genocide Convention] the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention".

[317] General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948), Preamble [*GATT 1947*].

[318] Lon L Fuller & Kenneth I Winston, *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham N.C: Duke University Press, 1981) at 78. To be clear, the term "shared commitment" here is different from "common aims" as discussed above: according to Fuller, the latter describes a form of association, while the former is a *principle* of human association where an institution is held together for "the achievement of shared *ends* or *purposes*" rather than by "formal rules of duty and entitlement".

an independent adjudicatory body to resolve disputes;[319] although the later-adopted *1979 Understanding* confirmed that disputes arising out of the GATT could be adjudicated by *ad hoc* panels, the function of the panels is defined as "assist[ing] the CONTRACTING PARTIES in discharging their responsibilities under [GATT] Article XXIII:2", that is, making recommendations to the defendant on behalf of the plaintiff.[320] Such an arrangement shows that, in the system, ensuring members' compliance with the rules was a less appreciated goal compared to achieving mutual satisfaction of the two disputing parties.

By the time the WTO was established in 1995, after decades of practice, the members had developed a notable level of shared understandings. This is particularly embodied in their express recognition of fundamental principles underlying the system.[321] Those principles, whether derived from the treaty rules or other areas of public international law, are also playing an increasing role in the Dispute Settlement Body's interpretation and application of rules.[322] This trend shows an increase in the logic of appropriateness within the institution: by adhering to principles, a member's primary motivation to obey the rules is a sense of obligation rather than a calculation of benefits.

In the trade law context, the evolution of the MFN obligation is an interesting example to observe the shift of ideas underlying the process of norm creation. MFN is currently a "cornerstone

[319] GATT 1947, art XXIII provides that if one contracting party's interest is impaired or nullified as a result of another contracting party's violation, the former may "make written representations or proposals" to the latter; if the latter still fails to make satisfactory adjustment, the former "shall make appropriate recommendations" to the latter, or "give a ruling on the matter".
[320] *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveilance*, Adopted 28 November 1979 (L/4907), para 16.
[321] *Marrakesh Agreement Establishing the World Trade Organization* (15 April 1994) 1867 UNTS 154, 33 ILM 1144 (entered into force 1 January 1995), Preamble ("The Parties to this Agreement… [are] [d]etermined to preserve the basic principles and to further the objectives underlying this multilateral trading system") [*Marrakesh Agreement*]. By contrast, the GATT 1947 does not include similar provisions.
[322] See M Hilf, "Power, rules and principles - which orientation for WTO/GATT law?" (2001) 4:1 J Int Econ L 111–130. The article examines the use of principles in Appellate Body reports and found that "there is a remarkable development towards the use of principles in WTO law".

of the GATT" and "one of the pillars of the WTO trading system" that promotes the value of non-discrimination and fair competition.[323] Nevertheless, the genesis of the obligation was not quite about moral principles. In history, the form and usage of the MFN clauses were clearly tied to states' conception of international politics.[324] The modern form of the MFN clause developed in the eighteenth century.[325] In some treaties it served reciprocity purposes between two states, while in others (e.g. capitulation agreements) MFN treatment was unilateral and non-reciprocal as they were used by the European rulers to ensure their privilege on a broad range of issues.[326] Moving on to the twentieth century, with the outbreak of the First World War, the idea of treating different states equally was seriously challenged; while the 1920s economic crisis – during which time major trading states reintroduced restrictive trade measures – triggered new research interest in the value of MFN.[327] Since the 1920s, the League of Nations Economics Committee's endeavor to further study and codify MFN played a critical role in promoting the idea of liberalized and equal trade.[328] Eventually in GATT, the unconditional form of MFN beat the conditional form and got codified in the agreement.[329]

There is thus an obvious shift of member's motivations for compliance – at the beginning, MFN treatment served more like a tool to achieve particular economic or political outcomes; while

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[323] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R WT/DS401/AB/R, 22 May 2014, para 5.86; WTO, "Principles of the Trading System", available online at:<https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>.
[324] For a review of different forms of MFN clauses, see "The Most-Favored-Nation Clause" (1909) 3:2 The American Journal of International Law 395–422.
[325] Endre Ustor, "First report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur" (1969) in Yearbook of the International Law Commission, A/CN.4/213 Vol.II, available online at:<https://legal.un.org/ilc/documentation/english/a_cn4_213.pdf>, at 160-61
[326] *Ibid*, at 160-62. See also John A C Conybeare, "Leadership by Example?: Britain and the Free Trade Movement of the Nineteenth Century" in Jagdish N Bhagwati, ed, *Going Alone: The Case for Relaxed Reciprocity in Freeing Trade* (Cambridge, Mass: The MIT Press, 2003) 33 at 44–49.
[327] *Ibid*, at 162-63.
[328] *Ibid*, at 169-74; William J Davey, "Non-discrimination in the World Trade Organization: The Rules and Exceptions (Volume 354)" (2012) 354 Collected Courses of the Hague Academy of International Law 189 at 230.
[329] Davey, *supra* note 328 at 230.

after decades of practice it gradually gained the status of norm with its merits being valued intersubjectively.[330] MFN was not initially proposed and conceived as a moral standard, while during decades of trade practice its meaning was reinterpreted by states and the international community, and eventually it got internalized as a fundamental norm in international trade. .[331] In other words, the standards can be deemed to gain a "taken for granted" quality among the members, which makes their compliance "almost automatic".[332] This also means that the members start to evaluate or justify a specific activity with the principle itself rather than the economic consequences that the activity leads to.

C. Shared Understandings and Legalization

Before further discussion, it would be helpful to have a brief review of the relationship between shared understandings and the theme of this thesis – legalization. Chapter II reinterpreted the meaning of legalization in the context of international investment law from a constructivist perspective by highlighting the importance of actors' "perception of legitimacy" in the notion of the term. The discussion of shared understandings above, then, gives a more concrete illustration of what that perception means at the cognitive level: it is an internalized sense of obligation that drives the actors to follow the rules of the institution and to evaluate the legitimacy of relevant activities. As such, legalization is embodied in the increase of the logic of appropriateness shared by the community. Moreover, with the accumulation of practices, the content of this type of normative shared understandings can be further enriched and clarified as a result of their

[330] For discussion of the definition of social norms, see e.g. Henning Boekle, Volker Rittberger & Wolfgang Wagner, "Constructivist Foreign Policy Theory" in Volker Rittberger, ed, *German Foreign Policy Since Unification: Theories and Case Studies* (Manchester and New York: Manchester University Press, 2001) 105 at 107. The authors summarize three characteristics of social norms that distinguish them from other ideational variables, namely immediate orientation to behavior, intersubjectivity, and counterfactual validity.
[331] See Jeffrey T Checkel, "International Institutions and Socialization in Europe: Introduction and Framework" (2005) 59:4 International Organization 801 at 812 (discussion of internalization).
[332] Finnemore & Sikkink, *supra* note 135 at 904.

application to specific social contexts. In this sense, institutional arrangements that have been deemed to be signs of legalization by some IR scholars, for example, compulsory obligations and delegation to international courts, are only externalized practices that reflect the appreciation of the normative shared understandings.

III. SHARED UNDERSTANDINGS IN THE CONTEXT OF INTERNATIONAL INVESTMENT LAW

The next question is how to delineate the role of shared understandings in international investment law. Several institutional characteristics of the legal regime suggest that it has a relatively lower level of shared understandings which are underpinned by reciprocity and a modest level of common aims – the most straightforward evidence is the difficulty of securing a multilateral investment treaty.

There have been several unsuccessful endeavors led by international organizations to conclude a multilateral investment treaty. As early as the 1920s, the League of Nations initiated a series of endeavors to codify state responsibility rules for damage done to the person or property of aliens.[333] The work was continued by the International Law Commission in the 1950s and early 1960s, which eventually failed due to the disagreement between developed countries and newly independent states.[334] There was also the 1957 Abs-Shawcross Draft led by the OECD and the United Nations Commission on Transnational Corporations Code of Conduct, both of which failed as well. [335] A more recent attempt was the negotiation of a multilateral agreement on investment

[333] United Nations, Yearbook of the International Law Commission 1956 Volume II, available online at < https://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf>, 177.
[334] James Crawford, "Investment Arbitration and the ILC Articles on State Responsibility" (2010) 25:1 ICSID Rev 127 at 127.
[335] See Andreas F Lowenfeld, "Investment Agreements and International Law: The Regulation of Foreign Direct Investment: Essay" (2003) 42:1 Colum J Transnat'l L 123 at 123–25; Dolzer & Schreuer, *supra* note 15 at 8–11.

(MAI) launched by the OECD in 1995. The background of this initiative was the anticipated failure within the GATT/WTO regime to agree on substantive rules on investment protection during the First Ministerial Meeting; thus, several developed countries sought to go back to the OECD to continue the mission.[336] The goal of the initiative, probably inspired by the success of the WTO, was ambitious, which was to "provide high standards for the liberalisation of investment regimes and investment protection, with effective dispute settlement".[337] Nevertheless, multiple issues caused the failure of the project. Apart from the commonly recognized north-south divide regarding standards for investment protection, the negotiations were criticized for deliberately suppressing the voices of developing countries.[338] Along with a mass anti-globalization movement, there were also objections raised by human rights and environmental NGOs against the protection of multinational corporations.[339] As UNCTAD's report commented, "the fate of the MAI was the result of a convergence of forces of a political, policy, social and economic nature, not all of which were foreseen when the negotiations began".[340] Leaving those external elements aside, states could not even agree on a general idea of the appropriate degree of protection. They, including those advocating liberalization, sought a wide range of exceptions to national treatment, MFN treatment and other provisions via negative lists, which raised considerable controversies throughout the negotiation process.[341]

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[336] Schill, *supra* note 27 at 53–54.
[337] OECD, "OECD Begins Negotiations on a Multilateral Agreement on Investment", SG/PRESS(95)65, 27 September 1995, online:<http://www.oecd.org/investment/internationalinvestmentagreements/43389907.pdf>.
[338] Schill, *supra* note 27 at 55; See also Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford, New York: Oxford University Press, 2018) at 113.
[339] Sornarajah, *supra* note 27 at 257–61; Peter T Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" (2000) 34:3 The International Lawyer 1033 at 1039.
[340] UNCTAD, "Lessons from the MAI" (1999) UNCTAD Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/MISC.22, at 23.
[341] *Ibid* at 12–13; Peter T Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" (2000) 34:3 The International Lawyer 1033 at 1043–44.

To understand why the MAI failed to establish a multilateral framework for investment protection, it is important to distinguish between two types of commitments. The first one is market access commitments, which basically specify the sectors open for foreign investment and relevant conditions; the second one is treatment-related commitments, for example, national treatment, fair and equitable treatment, etc.[342] The former is underpinned by negotiating parties' general acknowledgment of liberalism – as long as they recognize the economic prospects brought by exchanges of market access, they are very likely to reach a deal after rounds of bargaining. Therefore, forming a multilateral framework for this type of commitment does not require a high level of shared understandings among the members. This partly explains the successful establishment of the GATT regime as it fundamentally focuses on the removal of barriers relating to market-access (such as tariffs and quotas).[343] In comparison, GATS is less successful given that the market access commitments (under the category "commercial presence") are on an opt-in basis, which is the result of a necessary compromise between developed countries and certain developing countries that initially saw no economic benefits in joining a multilateral trade in service framework.[344]

By contrast, the second type, treatment-related commitments, requires more than a general understanding of liberalization but touches the core of a government's regulatory rights. Under the trade law regimes, the GATT has largely avoided this type of obligations, unless the related measures can significantly impair trade opportunities (e.g., the national treatment obligation);[345]

[342] Of course, the boundary between the two types of treatments is not crisp.
[343] Nicholas DiMascio & Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102:1 AJIL 48 at 54 ("the trade regime is about overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities—not individual rights").
[344] See general Juan A Marchetti & Petros C Mavroidis, "The Genesis of the GATS (General Agreement on Trade in Services)" (2011) 22:3 Eur J Intl L 689.
[345] Joost H B Pauwelyn, "Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS" (2005) 4:2 World Trade Rev 131 at 134–135 (the author distinguishes between "market access" and "domestic regulation" under the WTO laws). .

as for GATS, obligations relating to domestic regulation apply only if the member made relevant commitments.[346] However, the situation of international investment law is totally different: the central task for investment treaties is exactly to ascertain standards of treatments.[347]

In a word, although states generally recognize the benefit of investment liberalization, they lack shared understandings with regards to the appropriate degree of investment protection. As a result, they opt for bilateral or regional arrangements. Smaller groups of states may gather together because they share the same goals regarding investment protection or simply because they see the economic prospects of cooperation – in whichever case, bilateralism provides more flexibility than multilateralism.[348] Especially for reciprocity purposes, bilateral treaties serve as an ideal instrument: the specific levels of commitments regarding investment protection can be bargained between the two parties to ensure the fulfillment of economic or political goals. Taking the recently signed EU-Vietnam FTA and EU-Singapore FTA for example, despite the almost identical structure of the "Investment Protection Agreement" under the two FTAs, the two agreements encompass different requirements for host states in terms of, *inter alia*, the standard of treatment: the EU-Vietnam FTA explicitly includes "targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief" as a ground for the violation of fair and equitable treatment, while the provision was not included in the EU-Singapore FTA.[349] Discrimination has been found

[346] *Ibid* at 140. See *General Agreement on Trade in Services*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 ILM 1167 (1994), arts XVII, VI & XVIII [*GATS*].
[347] Some investment treaties or FTA investment chapters may include provisions which prohibits certain types market access constraints (e.g. the number of enterprises accessible to a sector), for example, CETA article 8.4.
[348] See Alexander Thompson & Daniel Verdier, "Multilateralism, Bilateralism, and Regime Design" (2014) 58:1 Int Stud Q 15 at 23 ("BIT provisions are tailored to the political and economic needs of signatories (in particular, of the developing-country parties) in terms of what is counted as an 'investment,' the standards of treatment and protection that are applied, and the nature of dispute settlement") ; van Aaken, "International Investment Law Between Commitment and Flexibility", *supra* note 97 at 523–31.
[349] EU-Vietnam Investment Protection Agreement, art. 2.5.2; EU-Singapore Investment Protection Agreement, art. 2.4.2. The EU-Singapore FTA lists four grounds for the violation of fair and equitable treatment, namely denial of justice, breach of due process, manifest arbitrariness, and bad faith conduct. As for the EU-Vietnam FTA, in

by several ISDS tribunals to violate the fair and equitable treatment standard;[350] besides, the provision appears in the CETA as well as the draft EU-Mexico FTA[351] – it thus can be speculated that the absence of the provision in the EU-Singapore FTA is a deliberate choice of the two treaty parties.

This inconsistency between the two investment agreements regarding treatment standards is only one tiny example of the diverging contents of investment protection provisions fragmented in the more than three thousand investment treaties. Nevertheless, this does not mean that having a multilateral investment agreement in the future is a pipe dream. With the rapid increase of foreign direct investment outflows from developing economies since the last decade, the conventional North-South divide is turning blurry,[352] and states traditionally embracing liberalism are paying increasing attention to the reservation of regulatory space.[353] Besides, as will be discussed in section IV below, the accumulation of ISDS cases can also contribute to facilitating shared understandings regarding international investment law.

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addition to these four grounds, there are two more grounds, namely (1) targeted discrimination as mentioned in the main text and (2) "a breach of any further elements of the fair and equitable treatment obligation" relating to the notification of state-investor written agreements that are concluded and have taken effect prior to the date of entry into force of the FTA.

[350] UNCTAD, *supra* note 196 at 81–82. For example, the tribunal in *CMS v. Argentina* stated that "[t]he standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment". *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005), para 290.

[351] Modernisation of the Trade part of the EU-Mexico Global Agreement, Chapter XX art. 15.2, https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156812.pdf; CETA, art. 8.10(2). Notably, Canada adopts very different approaches in other BITs. For example, the 2014 Canada Model BIT uses the term "minimum standard of treatment" without specifying its components. See Canada Model Foreign Investment Promotion and Protection Agreement (2014), available online at:< https://www.italaw.com/sites/default/files/files/italaw8236.pdf>, art. 6.

[352] UNCTAD, "World Investment Report 2019 Special Economic Zones, Country fact sheet: China" (2019) online:< https://unctad.org/system/files/official-document/wir2019_en.pdf>.

[353] See general Wenhua Shan, "From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law Symposium on International Energy Law" (2006) 3 Nw J Int'l L & Bus 631–664; Armand de Mestral, "When Does the Exception Become the Rule? Conserving Regulatory Space under CETA" (2015) 18:3 J Int Econ L 641–654 (the article studies the exceptions provisions in CETA and explains that the objective is "to reach a very high level of bilateral cooperation in trade regulation, but at the same time to preserve regulatory space for governments to adopt the policies they deem conducive to the protection of the public interest").

The lack of shared understandings can also be manifested by the renegotiation clauses prescribed in investment treaties. Duration and renegotiation clauses can be deemed to be *ex-ante* arrangements of states to secure flexibility and mitigate uncertainty in future implementation of treaties.[354] The vast majority of BITs set an initial validity period (most commonly ten years), after which the treaty may be tacitly renewed for an unlimited period or for fixed terms.[355] For BITs that can be renewed tacitly for an unlimited period, there is normally an additional controlling mechanism that allows one party to unilaterally denounce after the end of the initial validity period.[356] Although the number of actually renegotiated or terminated BITs is not significant compared to the total number of existing BITs,[357] these clauses do, to a certain extent, reflect the parties' tentative attitude towards their commitments written in the treaties.

To briefly sum up, this section demonstrates the gap between the required level of shared understandings and the *status quo* in international investment law: to reach consensus on rules governing the protection of foreign investors and investment (or, more generally speaking, the treatment of aliens), there must be shared understandings of what the states' obligations are in this regard. Nevertheless, currently, the international community only shares a loose understanding of

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[354] See Barbara Koremenos, "Loosening the Ties That Bind: A Learning Model of Agreement Flexibility" (2001) 55:2 International Organization 289 at 290; Laurence R Helfer, "Flexibility in International Agreements" in Jeffrey L Dunoff & Mark A Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge: Cambridge University Press, 2012) 175 at 179.

[355] Joachim Pohl, "Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions" (2013) OECD Working Papers on International Investment 2013/04, at 7–12. The paper studies 2061 BITs to which the 55 economies participating in the Freedom of Investment Roundtable are one of the treaty parties. According to its statistics, 92% of the sample BITs include an initial validity period.

[356] *Ibid* at 7–8.

[357] See the statistics in Kathryn Gordon & Joachim Pohl, "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World" (2015) OECD Working Papers on International Investment 2015/02 at 35–36. Notably, on 5 May 2020, 23 EU Member States signed an agreement to terminate a huge number of intra-EU BITs as well as their accompanying sunset clauses. See Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, SN/4656/2019/INIT.

principles such as fair and equitable treatment but lacks consensus as to the specific content of the principles, which is insufficient to actuate further degrees of legalization of the regime.

IV. INTERACTIVE INVESTMENT LAW-MAKING

The next task of this Chapter is to delineate how the ISDS mechanism – which is the subject of this thesis's study – can contribute to the formation of shared understandings and thus facilitate the legalization of international investment law. A quick answer is that ISDS, as an indispensable mechanism for investment adjudication, serves as a platform for legal practice which can enhance the community's shared understandings regarding investment protection; in turn, the new shared understandings may reshape tribunals' decision-making, thus enabling a sustainable interaction between shared understandings and practice.

A. The Function of International Adjudication

As discussed in Chapter 2, international investment law is relatively less legalized in both the obligation and the precision dimensions. Further, because of the insufficient shared understandings about the proper treatment to foreign investors, the law-making ability through a top-down process can be greatly limited. As a result, in many circumstances, international investment law-making is reactive and context-based. In these circumstances, to borrow Damaška's words, the maintenance of order tends to collapse into dispute settlement.[358] International laws cannot be fully analogized to domestic laws as analyzed by Damaška's but the rhetoric of "genuine extremes of reactive ideology" does shed light on our discussion here:

> because the state has no interests apart from society, it also has no rights as such that can be violated apart from the violation of a "private" right; any breach of order originates in a violation of somebody's right, so that the state springs into

[358] Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) at 73 (the author frames the "reactive states" in the context of municipal laws, while his findings are valuable for studying international laws).

> protective action only when somebody complains, seeking redress, and somebody else refuses to meet his demands. To protect order is therefore to settle disputes.[359]

International law generally does not emphasize the latent conflict between law-makers and the society to which the law is applied – states make laws to bind their own behaviors. However, there still exists the ideational distinction between *present* rule-making and *future* rule-making: lacking shared understandings upon the degree of investment protection at the time of treaty negotiation, states may well opt for more general rules and principles, seeking to at least establish a skeleton of investment protection that can be fleshed out through future dispute settlement procedures.[360]

What, then, is the role of adjudication mechanisms in this reactive law-making process? Traditional IR theories approach the relationship between states and international courts as a delegation of judicial functions (such as law enforcement and dispute settlement) from the former to the latter.[361] Based on this understanding, some scholars further incorporate the principal-agent theory and define this delegation as "a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former".[362] It further contends that, due to the difficulty of considering all future conditions in treaty negotiations, states delegate the dispute

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[359] *Ibid.*

[360] See Jutta Brunnée, "Sources of International Environmental Law: Interactional Law" in Jean d'Aspremont & Samantha Besson, eds, *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2018) 960 at 967 (the author introduces the international environmental treaties and found that "[t[he initial framework agreement is focused upon the articulation of overarching goals and principles, and the creation of decision-making rules and procedures; it is constitutive, rather than regulatory. The framework's provisions are designed to create background rules that enable shared understandings to be cultivated and more specific normative structures to be created").

[361] See Karen J Alter, "The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review" (2012) Buffett Center for International and Comparative Studies Working Paper Series Working Paper No. 12-002; Curtis A Bradley & Judith G Kelley, "The Concept of International Delegation" (2008) 1 Law & Contemp Probs 1–36 at 3 ("we define international delegation as a grant of authority by two or more states to an international body to make decisions or take actions").

[362] Darren G Hawkins et al, "Delegation under Anarchy: Sates, International Organizations, and Principal-Agent Theory" in Darren G Hawkins & David A Lake, eds, *Delegation and Agency in International Organizations Political Economy of Institutions and Decisions* (Cambridge, United Kingdom: Cambridge University Press, 2006) 3 at 7; see also Daniel L Nielson & Michael J Tierney, "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform" (2003) 57:2 International Organization 241 at 247.

resolution function to impartial agents to secure cooperation and mitigate uncertainties in the future.[363] In this process, states may retain their autonomy through certain institutional arrangements, for example, *ex-ante* selection of judges that represent their interests or *ex-post* non-compliance actions.[364] In a word, the principal-agent theory views the lack of shared understandings among states as "incomplete contracts" and the establishment of adjudication bodies as an arrangement to ease transaction costs arising from it.

The principal-agent approach to international adjudication is at large instrumentalism: the whole meaning of the existence of international courts and tribunals is to serve the interests of states. Like other approaches underpinned by rational choice theory, it does not take into account in its epistemological assumptions the states' (or the international community's) conception regarding the legitimacy of their behaviors.[365] Besides, by presuming that states' preferences are fixed and thus focusing on why and how they maximize their interests through the contractual delegation relationship, it ignores the interaction between states and international adjudication mechanisms – the influence is not unidirectional, given that tribunal decisions do contribute to reshaping states' understandings of substantive rights and obligations. These drawbacks of the principal-agent approach point to the importance of introducing a more comprehensive approach to studying international investment law – the interactional law theory.

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[363] Hawkins et al, *supra* note 362 at 18.

[364] See Andrew T Guzman & Jennifer Landsidle, "The Myth of International Delegation Essay" (2008) 6 Calif L Rev 1693 at 1712–22; Manfred Elsig & Mark A Pollack, "Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization" (2014) 20:2 European Journal of International Relations 391.

[365] See Alter, "Agents or Trustees?", *supra* note 208. The author argues that international courts work more as "trustees" of states rather than "principles". According to her, an important function of trustees is to "enhance the legitimacy of political decision-making" and they act on behalf of beneficiaries rather than principals.

B. An Interactional Account of International Investment Law-making

In their book *Legitimacy and Legality in International Law: An Interactional Account*, Brunnée and Toope integrate the constructivist IR theories with Fuller's insights into the internal legality of law and develop an interactional theory of international law.[366] It highlights an important promise for international law-making: among the actors, there must be some degrees of shared understandings that are generated through their social practice.[367] To be considered as interactional law, the shared understandings must be transferred to shared *legal* understandings via the "practice of legality", which means the creation and application of norms must meet Fuller's eight criteria of legality, namely "generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action".[368] The congruence of legal norms with underlying shared understandings as well as the sustained practice of legality are important foundations of actors' fidelity to law and thus of their compliance to law.[369] The practice of legality can, in turn, reinforce the actors' shared understandings and shape their conception of norms.[370] As the authors summarize,

> Our description of the hard work of international law underscores that law is not a product that is manufactured in centralized, hierarchical systems and merely distributed to social actors for consumption. Citizens in domestic systems, and states and other actors at the international level are not consumers; they are active agents in the continuing enterprise of law-making, through the elaboration of custom, treaty and soft law.[371]

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[366] Brunnée & Toope, *supra* note 126.
[367] According to the authors, shared understandings "are collectively held background knowledge, norms or practices; but these understandings do not simply exist, or miraculously emerge as agreed among actors. They are *shared understandings* precisely because they are generated and maintained through social interaction". *Ibid* at 64.
[368] *Ibid* at 6–7.
[369] *Ibid* at 124. As such, the authors argue that "the foundations for compliance can be built in the law-making process" and "'enforcement' is not merely a method for imposing compliance … [it] can be an important element of the practice of legality".
[370] *Ibid* at 54.
[371] *Ibid* at 55.

The authors do not go much into discussing the role of international adjudication in the interactional law-making process, while their theoretical framework undoubtedly sheds light on the study of ISDS here. Under an interactional law framework, dispute settlement mechanisms are not simply an instrument of states to ensure compliance with rules, nor are they passive followers of the existing shared understandings within the community. Instead, they are themselves "elements of a practice of legality".[372] As Fuller stated,

> … we are not talking about disembodied "values" but about human purposes actively, if often tacitly, held and given intelligent direction at critical junctures. In working out the implications of federalism or of a regime of exchange, a court is not an inert mirror reflecting current mores but an active participant in the enterprise of articulating the implications of shared purposes.[373]

Moreover, the forms of the practice in international adjudication are not limited to formal state actions such as filing a dispute or intervening in disputes; it can also be an expression of voice by actors such as government officials, NGOs and commentators. As such, there is a broad range of epistemic communities[374] at stake: states, investors, legal counsel and arbitrators directly participate in investment arbitration and practice by way of presenting arguments and stating reasons; local communities that are affected may express opinions via *amicus curiae* submissions; commentators may reshape the understanding of law with academic publications. As for the public, their conception of law also matters as they may influence a states' stance on treaty obligations through domestic political processes.[375] On the other hand, the existing shared understandings within the epistemic community are not static: they may be reshaped through the interactions in

[372] *Ibid* at 91.
[373] Fuller, *supra* note 312 at 378.
[374] In an "epistemic community", the actors share a set of normative beliefs and adopt specialized vocabulary, which directly or indirectly influence their interpretation of laws. Waibel, *supra* note 64 at 149–50; Alan Scott Rau & Andrea K Bjorklund, "BG Group and 'Conditions' to Arbitral Jurisdiction" (2016) 43:5 Pepperdine Law Review 577 at 625–26.
[375] The extent of the influence may vary as states have different political systems relating to public decision-making. The issue of how to ensure equal and sufficient participation of different groups, however, is a challenging issue in all areas of legal practice and study.

ISDS.[376] For example, as will be discussed below, investment tribunals frequently cite scholars' commentaries about treaties and previous cases to justify their reasoning, and their reasoning might in turn influence the content of newer investment treaties. In a word, the interactions can happen between various actors at various stages.

Before further discussions, it is necessary to clarify the relationship between the interactional theory and customary international law theories, given that both highlight the practice of states. It is generally accepted that custom encompasses two elements: general and consistent state practice and a belief of legal obligations (i.e., *opinio juris*).[377] Except for the obvious distinction that the interactional law theory considers a broader range of actors while custom primarily focuses on state activities, the former can be applied to enrich the conception of the latter. The idea of *opinio juris* has long been criticized for being too vague and "mysterious" given its subjective nature.[378] In this regard, as Brunnée and Toope explain,

> Interactional law is not dependent upon practice alone, for that would undermine any distinction between social and legal norms. But neither does it require reference to an artifice – *opinio juris* – that refers to 'belief' on the part of a social construct, thereby upholding the fiction of consent. Instead, we are frank that it is practice itself that grounds continuing obligation, but practice rooted in the criteria of legality. Thus, we provide a more objective, less mystical, account of how customary legal norms become binding.[379]

Besides, an interactional account of legitimacy requires that the practice should be inclusive, which involves "active participation of relevant social actors", and should adhere to the criteria of legality.[380] Thus, it reveals the legitimacy deficit of customary international law caused

[376] See Brunnée & Toope, *supra* note 126 at 111.
[377] Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95:4 American Journal of International Law 757 at 757.
[378] See Dumberry, *supra* note 172 at 292.
[379] Brunnée & Toope, *supra* note 126 at 47.
[380] *Ibid* at 54.

by "limited participation in norm building and insufficient attention to the requirements of legality".[381]

To briefly sum up, an interactional account for ISDS calls for a new interpretation of the role of ISDS in international investment law: its function is not merely that of an agent to resolve disputes or a trustee to fulfill certain functions on behalf of potential principals or beneficiaries; it serves as a platform for states, investors and other international and domestic actors to practice and nourish their understandings of relevant rules and principles. When a new understanding becomes stabilized and broadly accepted, they may well be codified in new treaties or be recognized as customs.[382]

It is important to clarify that the discussion above is not asserting that interactional law-making is the sole and immediate purpose of states' delegation to international tribunals. In fact, the interactions frequently occur implicitly before they eventually get crystallized via the amendment or conclusion of treaties. In earlier ages, the primary motivation for some states to include ISDS clauses in BITs despite the vague investment-protection obligations might simply be, for example, the eagerness to attract foreign investments.[383] Overestimating the economic paybacks of BITs and wholly accepting the model BITs provided by developed countries, sometimes they cannot even be deemed to be fully rational in the treaty negotiation stage.[384] Besides, securing the implementation of rules and thus reducing uncertainty, as the principal-agent theory explains, can also be an important consideration leading to the inclusion of the ISDS

[381] *Ibid*.
[382] In this process, states inevitably play dual roles: one as disputants and one as law-makers. Importantly, a state's law-making power must not be exercised to influence the outcome of the instant ISDS case where it is the disputant (as per the principle *nemo judex in causa sua*).
[383] See Elkins, Guzman & Simmons, "Competing for Capital", *supra* note 32.
[384] See Lauge N Skovgaard Poulsen, "Bounded Rationality and the Diffusion of Modern Investment Treaties" (2014) 58:1 Int Stud Q 1–14.

mechanism. This chapter does not deny the value of these theories in terms of explaining states' initial reasons to establish the ISDS mechanism – all the aforementioned elements can play a role in states' decision-making process.[385] Adopting the interactional law theory, this chapter attempts to show that, no matter what those initial reasons are, ISDS joins the interactive law-making process the moment it was created, and those initial reasons may well shift with the accumulation of legal practice relating to ISDS.

The practice of legality may reinforce shared understandings via various avenues. For example, in the area of international environmental law, states were initially only bound by the general goal of controlling greenhouse gas emission but they could not agree upon the specific standards for the determination of responsibilities (especially between developed and developing states).[386] Nevertheless, practice relating to procedural rules such as information exchange, reporting requirements and decision-making has formed a body of procedural interactional law that promotes substantive shared understandings within the epistemic community.[387] This pattern can be summarized as "common aims – procedural interactional law – substantive interactional law". Another example is international commercial law, where private actors such as enterprises and lawyers constitute a solid community of practice that generates and reinforces understandings of law. This is frequently described as a "bottom-up" law-making process,[388] embodied in the notable trend of codifying the transnational contractual rules by various transnational

[385] There are of course other valuable explanations of the behaviour of states in this regard, for example, those focusing on the influence of domestic political actors and processes on a state's international activities. (see e.g. Helen V Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (Princeton, N.J.: Princeton University Press, 1997).
[386] Brunnée & Toope, *supra* note 126 at 176.
[387] *Ibid* at 271.
[388] See Janet Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments" (2005) 30:1 Yale J Intl L 125 (the author discusses bottom-up law-making in three areas of practice, namely letter-of-credit, export credit insurance, and official support for export credits).

institutions.[389] The general rules and principles derived from relevant practice may also work as background norms in commercial arbitrations that influence parties' argumentation as well as arbitrators' reasoning.[390]

There are, obviously, many other forms of interactions that are not mentioned in this section.[391] The particular interaction this chapter focuses on is that involving international adjudication. The reason is not only that ISDS is the subject of this thesis's research, but more importantly, ISDS is actively used by various actors, which shows its indispensable value to reshape the shared understandings relating to foreign investment protection and thus facilitating the reform of the whole legal regime. Another critical reason lies in the widely recognized law-making function of international adjudication. The application of relevant rules encompasses great complexities and uncertainties due to, *inter alia*, states' diversified legal systems and investors' variegated practices. Furthermore, there are also inherently vague obligations or values the content of which cannot be specified in treaties. This calls for the inclusion of general treaty terms that are adaptive enough for unpredictable future circumstances.[392] Associated with the thin understanding that a legal framework of foreign investment protection should be established, treaty negotiators thus have to leave some key provisions unclarified, which consequently creates a large space of discretion for tribunals. It is important to note that this cause of vagueness is different from that of a lack of shared understanding as discussed above: it is a demand for flexibility that cannot be eliminated even if the parties have a high level of shared understandings. Earlier versions of some

[389] Alec Stone Sweet, "The new Lex Mercatoria and transnational governance" (2006) 13:5 Journal of European Public Policy 627 at 633–35.
[390] Fabien Gélinas, "Trade Usages as Transnational Law" in Fabien Gélinas, ed, *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford; New York, NY: Oxford University Press, 2016) 253 at 269.
[391] For example, the implementation of international law in domestic legal systems (see Brunnée & Toope, *supra* note 67 at 114–21).
[392] See van Aaken, "International Investment Law Between Commitment and Flexibility", *supra* note 104 at 517.

states' model BITs, which can be deemed to reflect their unilateral conception of an ideal investment legal framework, can be a telling example of this inherent demand, given that terms such as "fair and equitable treatment" and "full protection and security" were adopted without further elaboration.[393] In practice, of course, there is always a mix of the two motivations for adopting these vague and general terms.

V. ISDS IN THE INTERACTIONAL PROCESS

A review of the current literature shows that much has been discussed about the interaction between different tribunals and the evolution of the investment jurisprudence. As Schill properly concluded, "investment treaty arbitration is in a state of self-institutionalization and self-constitutionalization as a system of investment protection in which the resolution of individual disputes is interconnected and embedded into a treaty-overarching system of dispute settlement".[394] However, less attention has been paid to another perspective of the interaction that can also facilitate shared understandings, that is, the interaction between the various actors and the investment jurisprudence. The international investment jurisprudence does not grow without constraints but is framed by and in turn frame shared understandings. The following paragraphs will first demonstrate the interactions between states and investment tribunals by examining the evolution of key standards relating to investment protection. After that, it will discuss the interactions between other actors.

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[393] For example, Art.2(2) of the UK BIT 1991, online:<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2846/download>; Art. 4 of the Chile Model BIT, online:<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2841/download>; Art. 2(1) of the German Model BIT 1991, online: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2864/download>; Art. II.3(a) of the US Model BIT 1994, online:<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2867/download>. BITs in the 21st century are not discussed here because they started to clarify some rules after a number of ISDS cases, which will be discussed in detail later.

[394] Schill, *supra* note 27 at 338. For more discussions of the self-evolution of investment jurisprudence, see e.g. Brown, *supra* note 164; Bjorklund, *supra* note 65.

A. States as a Key Interactor in ISDS

The interactions between states and investment tribunals are not difficult to be observed because they can be reflected by the changes of wordings in various versions of investment treaties.[395] They can take place at various stages of ISDS: in respondent submissions, host states actively cite previous tribunals' findings to justify their arguments; similarly, for home states, in *amicus* submissions, they may also justify their interpretation of the treaties with previous cases.[396] These arguments inevitably influence investment tribunals' understandings of treaties. In turn, tribunals' interpretation and application of rules to the specific context of the disputes may reshape or enrich states' understandings, which consequently can be crystallized in newer treaties. Paragraphs below will take the evolution of fair and equitable treatment and full protection and security as examples to demonstrate this type of interaction.

a. Example 1: fair and equitable treatment

A comparison between BITs in the 90s and those signed recently shows that states have clarified the content of fair and equitable treatment to a great extent.[397] The newer generation of investment treaties provides more clarifications than simply stating that "each party shall accord to nationals and companies of the other party fair and equitable treatment".[398] For example, Article 2.4 paragraph 2 of the Investment Protection Agreement under the EU–Singapore FTA specifies that,

> A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if its measure or series of measures constitute: (a) denial of justice [footnote omitted] in criminal, civil and administrative proceedings; (b) a

[395] Recently, novel analytical approaches such as coding treaty contents as data have greatly facilitated the study of investment treaty evolution. See Alschner & Skougarevskiy, *supra* note 7.
[396] Both the ICSID Arbitration Rules (Rule 37(2)) and the UNCITRAL Rules on Transparency (art.5.1) allows home state submissions on issues relating to treaty interpretation.
[397] There have been different opinions regarding the relationship between fair and equitable treatment and minimum standard of treatment. see Paparinskis, *supra* note 196 at 5. For better clarity, to simplify discussion, here I use the term "fair and equitable treatment" to refer to both standards.
[398] For example, Art. 3.2 of the Czech Republic - Singapore BIT (1995), online:<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/981/download>.

> fundamental breach of due process; (c) manifestly arbitrary conduct; (d) harassment, coercion, abuse of power or similar bad faith conduct.[399]

Similarly, the US Model BIT 2012 specifies that the fair and equitable treatment provision does not require treatment in addition to or beyond that is required by the *customary* international law minimum standard of treatment of aliens and that it "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world".[400]

By applying the standard to different facts, investment tribunals play an irreplaceable role in reshaping, positively or negatively, states' understandings of fair and equitable treatment. One important contribution of the case law in this sense lies in the tribunals' repeated emphasis on the significance of procedural fairness embedded in the standard.[401] As the Tribunal in *Merrill and Ring Forestry* noted, "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention on the part of the state".[402] In investor-state disputes, issues of denial of justice and due process frequently arise when, in judicial or administrative procedures, investors did not receive proper notification or lacked the opportunity to be heard in important meetings,[403] or a host state's conduct lacks the transparency of decision-making or is not consistent with the procedural requirements of its relevant domestic

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[399] Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part, art. 2.4.2, online:<https://trade.ec.europa.eu/doclib/press/index.cfm?id=961> [*EU-Singapore Investment Agreement*].
[400] 2012 U.S. Model Bilateral Investment Treaty, art. 5.2., online:<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.
[401] Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours" (2013) 12:1 Santa Clara J Int'l L 7 at 30.
[402] *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/, Award (31 March 2010) para 208.
[403] Jeswald W Salacuse, *The Law of Investment Treaties*, 2nd ed (Oxford, United Kingdom: Oxford University Press, 2015) at 154–56; Dolzer & Schreuer, *supra* note 15 at 264–65.

laws.[404] These issues, as can be illustrated by the examples of the EU-Singapore FTA and the US Model BIT above, have largely been codified in the newer generation of investment treaties.

Sometimes tribunal decisions also make states reflect on what is undesirable in the notion of fair and equitable treatment. A typical example is the doctrine of "legitimate expectations" which serves as a common ground for investment tribunals to find the host state's violation of fair and equitable treatment.[405] For example, between 2012-2014, Spain introduced a series of tax and remuneration related measures impacting the energy generators; as a result, a number of ISDS cases were brought by foreign investors against the government under the Energy Charter Treaty and the tribunals generally found that Spain's revocation of the original subsidy program has infringed investors' legitimate expectations.[406] Since the *Tecmed v Mexico* case in 2003, where the

[404] See e.g. *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award (25 May 2018) para 347 ("the lack of transparency of the Libyan authorities' decision-making process … and the failure to issue the Expropriation Order in compliance with the Libyan Investment Law, led the Tribunal to reach the conclusion that the Respondent did not meet the requirements of administrative due process").

[405] For discussions of the roots and application of the doctrine of legitimate expectation in investment arbitration, see Michele Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept" (2013) 28:1 ICSID Rev 88.

[406] See, for example, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018), para 399 ("the Claimants had, when they made their investments, a legitimate expectation to get a reasonable return on their investments. Such expectation did not include a guarantee to have the legal regime in place unchanged until the end of the operation of the plants, but it did include to have any modifications reasonable and equitable") [*RREEF v. Spain*]. See also, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award (English) (4 May 2017), para 387; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award (15 June 2018) paras 535-73; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles (12 March 2019), paras 582-601; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018) para 521*; SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award (31 July 2019), paras 454-63; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award (15 February 2018), paras 691-97; *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award and Partial Dissenting Opinion of Arbitrator Raül Vinuesa (14 November 2018), paras 389-98; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (19 February 2019), paras 423-28 [*Cube v. Spain*]; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (English) (31 May 2019), para 307. Despite the same conclusion, the reasoning in these cases supporting a violation of legitimate expectations is not the same.

tribunal first referred to legitimate expectations in its analysis of fair and equitable treatment,[407] the concept has generally been deemed as an integral element of the standard.[408] Particularly, legitimate expectations are quite likely to be found to exist when the host state's representatives made explicit or implicit commitments to induce the establishment of the investment.[409]

However, the meaning of the doctrine of legitimate expectations and its relationship to the fair and equitable treatment standard is not uncontroversial. It is doubtful whether investors can be deemed to enjoy the right to stability, as conferred by the fair and equitable treatment provision *per se* or general international law, even if the host states did not make explicit *ex-ante* commitments (for example, commitments relating to the stability of the regulatory framework) which would give rise to the expectations.[410] There is also the critique that viewing the doctrine as part of the fair and equitable treatment standard has no "legitimate support in treaty texts or in international law" and is an "invention" of arbitrators.[411] In *RREEF v. Spain*, the tribunal recognizes that the protection of investors' legitimate expectations is not explicitly mentioned in Article 10(1) of the Energy Charter Treaty but argues that it is "implied" by the provision and thus is part of the fair and equitable treatment standard.[412]

Against this backdrop, it is not surprising that states would envisage the vague doctrine as a latent threat to their rights of regulation, despite investment tribunals' general effort to carefully

[407] Potestà, "Legitimate Expectations in Investment Treaty Law", *supra* note 405 at 91.
[408] See e.g. *Cube v. Spain*, Decision on Jurisdiction, Liability and Partial Decision on Quantum (19 February 2019), para 386 ("the concept of legitimate expectations is familiar in the context of analyses of claims of breaches of FET provisions and it is convenient to use that concept here").
[409] Potestà, "Legitimate Expectations in Investment Treaty Law", *supra* note 405 at 121; Dolzer & Schreuer, *supra* note 15 at 145.
[410] Potestà, "Legitimate Expectations in Investment Treaty Law", *supra* note 405 at 115. According to the author, the tests proposed by different tribunals vary to a great extent.
[411] Christopher Campbell, "House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law" (2013) 30:4 Journal of International Arbitration 361 at 379.
[412] *RREEF v. Spain*, *supra* note 406, para 260.

contour the boundary of the doctrine and conduct context-based analysis.[413] In recent FTAs concluded between the EU and its trade partners, legitimate expectation is not listed as a component of fair and equitable treatment *per se* (like due process) but is treated as an element that a tribunal *may* "take into account" in its reasoning. For example, CETA Article 8.10 paragraph 4 provides that,

> When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.[414]

Notably, in the EU-Singapore FTA, unlike CETA and EU-Vietnam FTA, there is an additional footnote to the legitimate expectation provision which states that "[f]or greater certainty, the frustration of legitimate expectations as described in this paragraph does not, by itself, amount to a breach of paragraph 2 [fair and equitable treatment], and such frustration of legitimate expectations must arise out of the same events or circumstances that give rise to the breach of paragraph 2".[415] This seems to make legitimate expectations a supplementary element to assist tribunals in evaluating whether a regulatory activity has violated the listed standards of fair and equitable treatment such as due process and misuse of power.

The interaction between the NAFTA states and investment tribunals over the minimum standard of treatment is another example that must be mentioned. Article 1105 paragraph 1 of NAFTA requires a host state to provide foreign investments "treatment in accordance with international law, including fair and equitable treatment and full protection and security".[416] Due

[413] For example, in those cases against Spain mentioned above, tribunals repeatedly emphasize that they recognize states rights to modify their legal regimes, provided that the reforms are not unreasonably radical.
[414] CETA, Article 8.10.4. Similar provisions also appear in the EU-Vietnam FTA and EU-Singapore FTA.
[415] EU-Singapore Investment Agreement, art. 2.4.3 and footnote 2.
[416] NAFTA, art. 1105 para 1.

to the vagueness of the provision, in a series of cases brought by investors, tribunals interpreted fair and equitable treatment expansively to include a broad range of rules of international law and consequently found host states violate the standard.[417] In response, the NAFTA Free Trade Commission issued the Note of Interpretation on 31 July 2001 which narrowed the scope of fair and equitable treatment to "customary international law minimum standard of treatment of aliens".[418] This thus raised intense debates over the legitimacy of such an interpretative activity,[419] especially against the background that there were ongoing cases between NAFTA states and investors.[420] Despite the controversies, the interpretative note is generally deemed by later tribunals as a binding source of interpretation.[421] The narrow definition specified in the note has also been incorporated in later BITs (including the US Model BITs).[422] As Section VI below will discuss, this can be deemed as an example where the dramatic divergence between investment tribunals' understanding of obligations and that of treaty parties causes a severe backlash against ISDS, which consequently harms the sustainability of interactional law-making.

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[417] Brower, *supra* note 197 at 352.
[418] NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions", *supra* note 83, art. 2.2
[419] See Stefan Matiation, "Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes" (2003) 24 U Pa J Intl Econ L 451–508; Brower, *supra* note 197.
[420] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002), para 3. Pursuant to the issue of the Interpretive Note, the tribunal asked the treaty parties to clarify the effect of the note on the case and Canada contended the interpretation shall be binding on tribunals. Similar problems appeared in the *Methanex Corporation v. United States of America* and *Waste Management, Inc. v. United Mexican States* cases.
[421] See *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), para 432.
[422] For example, Article 5.2 of the 2004 US Model BIT states that,

> For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.

b. Example 2: Protection and Security

In BITs, the term "(full) protection and security" normally appears immediately after the term "fair and equitable treatment".[423] Like fair and equitable treatment, the vagueness of the term has stirred up great uncertainties and controversies. A key focus of relevant debates is whether its scope is limited to the protection of physical security: some investment tribunals interpret the term as a duty to only provide physical protection to the extent that due diligence is paid by the host state,[424] while others extend its application to non-physical factors such as the legal and commercial environment of the investment.[425] In the famous case *CME v Czech Republic*, the tribunal states that "[t]he host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued",[426] thus finding the host state violate the obligation of full security and protection. The *CME* case seems to have served as an important precedent for some later tribunals' decision-making.[427] On the other hand, there are also tribunals refusing to follow this broader interpretation. For example, the tribunal in *Olin Holdings v. Libya* followed the more traditional approach adopted by *Saluka v. Czech* and concluded that, since "the physical integrity and the use of force were not directly at stake here", the host state did not violate the full

[423] For example, Article 8.10 paragraph 1 of CETA ("Each party shall accord … fair and equitable treatment and full protection and security"). The articulation may slightly vary in different treaties, for example, "full and complete protection", "constant protection and security", etc. See Salacuse, *supra* note 403 at 231.
[424] For a review of relevant cases, see e.g. Christoph Schreuer, "Full Protection and Security" (2010) 1:2 J Int Disp Settlement 353 at 354–58. For example, the *Saluka v Czech Republic* tribunal stated that, "[t]he practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force". *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (English) (17 March 2006), para 484.
[425] For a review of relevant cases, see *ibid* at 358–62.
[426] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (14 March 2003) para 613.
[427] Salacuse, *supra* note 403 at 236–39. For example, in *Siemens v. Argentina*, the tribunal states that "the obligation to provide full protection and security is wider than 'physical' protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, 'security' is qualified by 'legal' … It is clear that in the context of this meaning the Treaty refers to security that it is not physical". *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 January 2008), para 303.

protection and security obligation.[428] These divergent attitudes of investment tribunals consequently cause great uncertainty in the application of the standard.

In this respect, similar to the fair and equitable treatment clause, there has also been an endeavor to clarify the term in the newer generation BITs. The 2004 US Model BIT limits the host states' obligation under this clause to "provid[ing] the level of *police protection* [emphasis added] required under customary international law", standing in bright contrast to the simpler expression of the provision in the 1994 US Model BIT.[429] This format has been kept in the later versions of the US Model BITs as well as BITs to which the United States is a party. The recent EU-involved FTAs also explicitly limit the obligation to "physical security of investors and covered investments".[430] These developments can be expected to increase the predictability of relevant ISDS cases.

Developments around fair and equitable treatment and full protection and security are only two examples of an interactional process of international investment law-making where investment tribunals shed light on or motivate the states to clarify core provisions of investment protection. In this process, further shared understandings within the community are formed and reinforced through the practice of investment arbitration, particularly through the statements and arguments submitted by the states and the reasoning of investment tribunals, and eventually crystallized in

[428] *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award (25 May 2018), paras 364-65. Similarly, in *BG v. Argentina*, the tribunal observed that the notion of full protection and security "have traditionally been associated with situations where the physical security of the investor or its investment is compromised"; it recognized that "other tribunals have found that the standard of 'protection and constant security' encompasses stability of the legal framework applicable to the investment", however, the tribunal deemed it "inappropriate to depart from the originally understood standard". *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007), paras 324 & 326.
[429] US Model BIT 2004, art. 5.2(b), online: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2872/download>; US Model BIT 1994, art. II.3(a), online:<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2868/download>.
[430] See e.g. CETA, art. 8.10.5; EU-Singapore FTA, art. 2.4.5; EU-Vietnam FTA, art. 2.5.5.

investment treaties. These understandings, in turn, confine the discretion of investment tribunals and thereby, in the long term, promote the consistency and coherence of arbitral decisions.

B. Other key actors

Apparently, states are not the only important actors in the interactional law-making process. Other actors such as lawyers, commentators and NGOs can also contribute from different aspects – although their influence on treaty laws may not be as straightforward as that of states. For example, in arbitral practice, scholarly commentaries on treaties and cases are frequently cited by the disputing parties and investment tribunals (e.g., commentary books such as *Principles of International Investment Law* by Professor Dolzer and Scheuer[431]), which serve as an important basis for the actors to justify their understanding of the laws. As for the environmental or human rights organizations or other domestic groups, they can express their opinions as *amici curiae* in ISDS, provided that they meet the conditions stipulated in the procedural rules. The significance of their submissions is far more than assisting tribunals' reasoning – their opinions may draw the attention of the international community to social issues that were previously overlooked or downplayed in the dialogue, which can accelerate the formation of a more balanced international investment law. In a word, ISDS provides a legal platform at the international level (i.e., beyond domestic political processes) for these actors to express voices and exert influence on the international community's shared understandings regarding foreign investment protection.

[431] For example, in *Micula v. Romania*, the tribunal cited the work several times in the analysis of fair and equitable treatment. *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013), paras 518 & 519 & 667. In some cases, however, tribunals may refer to the book and discuss why they disagree with the analysis there.

VI. SUSTAINABLE INVESTMENT LAW-MAKING

Having demonstrated the role of adjudication in terms of enhancing shared understandings of international investment law, this section moves on to make a further argument: any attempts to legalize a legal regime must ensure sustainable interactions within the community of practice and promote the formation of a coherent body of shared understandings. The notion of sustainable interaction encompasses, to borrow Glenn's logic and terms in his discussion of the sustainable diversity in law, on the one hand, taking positive actions for sustaining the interaction rather than just going with the flow; and on the other hand, respecting the diversified appeals within the international community rather than focusing on one single goal.[432] It approaches law-making as a bottom-up process generated from legal practice, which has no "given end point" other than the sustainable interaction itself.[433] This has an important implication for ISDS reform: a norm entrepreneur may lead the process (e.g., the EU in the UNCITRAL WGIII discussion), while the plural or even competing policy goals of other actors must be equally respected in the discourse.

A. To Take Action

To recognize and accept interactional law-making does not mean leaving the *status quo* as it is and waiting for the law to evolve on its own. The reason is quite apparent: as explained in Chapter 1, the current ISDS has been subject to broad criticism from various groups of actors, and the autonomous evolution of the international investment jurisprudence can be slow and inefficient. The discussion above regarding the scope of full protection and security treatment is a telling example of how investment tribunals may fuel the unpredictability of investment arbitration, especially if the tribunals themselves give up elaborating the clauses but simply picking one

[432] H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed (Oxford, United Kingdom: Oxford University Press, 2010) at 376–79.
[433] H Patrick Glenn, "Sustainable Diversity in Law" (2011) 3:1 Hague Journal on the Rule of Law 39 at 52.

plausible interpretation in the face of several conflicting "precedents".[434] In addition, taking positive actions also means to withhold an apologist attitude that wholly denies the existence of the many legitimacy flaws of the current system.

With regards to the second aspect, the international community's expectation of international investment law, especially of the investment dispute resolution mechanisms, is fraught with dualities: on the one hand, there is the widespread criticism against the uncertainty of decisions caused by the form of arbitration, while on the other hand, the demand for procedural flexibility brought by arbitration never ceases to exist;[435] on the one hand, bilateral appellate investment courts will be established to judicialize investment dispute settlement, while on the other hand, "treaty committees" are established concurrently to ensure state control over the interpretation of investment treaties;[436] on the one hand, there is a frequent complaint of the time length and costs of ISDS proceedings, while on the other hand, other expectations of the mechanism including, *inter alia*, public participation and quality of awards, will inevitably prolong the process and thereby increase the cost.[437] Different appeals from different groups of actors, for example, human rights and environmental protection from the public, business facilitation from multinational enterprises, rights of regulations from governments, etc., further complicate the

[434] For example, in *Olin Holdings Ltd v. Libya*, although the investor cited the interpretation of the *CME v. Czech Republic* tribunal to argue that the scope of full protection and security is broader than physical protection, the tribunal simply stated that it concurred with the narrower interpretation of the tribunal in *Saluka Investments BV v. The Czech Republic* without elaborating its reasons. *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award (25 May 2018), para 365.

[435] One example is China's submission to the UNCITRAL Working Group III regarding the reform of ISDS: China holds a positive attitude towards the establishment of a permanent appellate mechanism, while it also hopes to reserve the right of parties to appoint arbitrators given that "investment disputes often involve complex factual and legal issues at the first-instance stage of legal proceedings". UNCTAD, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of China"(18 July 2019), available online at <https://undocs.org/en/A/CN.9/WG.III/WP.177>.

[436] The dual existence of appellate courts and treaty committee mainly appears in the recent FTAs between EU and its trade partners.

[437] See UNCTAD, "Possible Reform of Investor-State Dispute Settlement (ISDS)" (30 July 2019), available online at < https://undocs.org/en/A/CN.9/WG.III/WP.166>.

problem. However, the fact that some goals inevitably conflict with others does not mean that we can only make binary choices between them – that is – to compare and determine which one prevails the others; rather, a reform based on sustainable interaction should strive to balance these goals through practice and find the dynamic equilibrium.

This also requires us to grasp the bigger picture of international investment law as an integrated institution: the different means to achieve different ends shall be selected and incorporated in a harmonized manner. To use the CETA as an example, it aims to establish a bilateral appellate court that can review the merits of first-instance tribunals' awards, while at the same time it prescribes that interpretations issued by the CETA Joint Committee (which consists of representatives of the treaty parties) will be binding upon the tribunals as well.[438] In this scenario, the interpretative power of the Committee must be exercised in conformity with basic requirements of the rule of law – especially the principle of non-retrospectivity – so that it will not impact tribunals' independent decision-making in the ongoing cases. Otherwise, the dispute settlement mechanism will be fraught with uncertainties.

B. To Promote Shared Understandings

The Oxford Dictionary defines "sustainable" as "able to be maintained at a certain rate or level".[439] This definition is rather broad – it seems to be much clearer to delineate what is an "unsustainable" interacting process, that is, failing to promote nor even maintain the congruence between institutionalized norms and shared understandings. The result of such a failure is the weakening of the legitimacy of laws (either treaty laws or jurisprudence) as perceived by the community,

[438] CETA art.8.31.3 ("[a]n interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section"). 3.13.3 ("[a]n interpretation adopted by the Committee shall be binding on the Tribunal and the Appeal

[439] Oxford Dictionary of English (App version), sub verbo "sustainable".

externalized in actors' activities such as criticizing, refusing to comply with the law, or even exiting the institution – these are frequently called backlashes against international courts.[440]

To be clear, here, I did not use the term "congruence of *legal norms* with social practice" as Brunnée and Toope did,[441] because doing so can cause ambiguities: it would be difficult to distinguish between "legal norms" and "pre-legal norms", especially in the context of international law. As Brunnée and Toope themselves noted, an interactional account of international law "opens up law-making to a diversity of participants, indeed requires it, because of the need for reciprocity in the construction of law",[442] and this further requires us to rethink the traditional formalist account of international law which distinguishes the legality of norms on the basis of their sources.[443] Despite this understandings, however, the authors still attempt to identify legal norms from general social norms by examining whether there exists "a sense of obligation generated by fidelity to law" that can be generated from the practice of legality.[444] Although they emphasize that the standard is a requirement of "formality" rather than "formalism" – as the latter "treats form as the only indicator of law" – such an attempt entails the risk of overlooking the substance of the norms embedded in social practice, which should have been the essence of the interactional theory of law. This is not to say that the practice of legality is irrelevant to the discussion here; on the contrary, the practice of legality (for example, the promulgation of rules) can reinforce the legitimacy of the institution to a greater extent than other forms of social practices and thus better

[440] Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, "Backlash against international courts: explaining the forms and patterns of resistance to international courts" (2018) 14:2 International Journal of Law in Context 197 at See (the authors conduct a systematic study of the backlash against international courts).
[441] See Brunnée & Toope, *supra* note 126 at 32. [emphasis added]
[442] *Ibid* at 45.
[443] *Ibid* at 46.
[444] *Ibid*. For example, the authors explains that treaties are important for international law because sometimes the treaty-making process is "a means by which parties simply enable particular forms of the practice of legality to play out within a regime" (see page 50).

promote the formation of shared understandings; the argument here is simply that it should not be viewed as a test to identify legal norms.

Nevertheless, this thesis does not deny that in international law, some norms can exert more influence on the actors' practice than others. Therefore, it adopts the term "institutionalized norms", which is purely descriptive rather than normative, to describe the type of norms that have gained more institutional supports for their creation, application and enforcement.[445] These norms, as well as the secondary rules supporting them, might be underpinned by shared understandings or may not – the key point is that some institutional arrangements have lent more weight to their importance than others. To give an example, if an investment court is successfully established to replace the current ISDS mechanism, the former would be a more institutionalized dispute settlement mechanism and its decisions can exert greater influence on the practice of the entire community than those of the latter (inasmuch as the new procedural rules indicate that the decisions of appellate tribunals shall be binding on first instance tribunals), although the level of the community's shared understanding regarding investment protection may remain the same.

The ECtHR is an interesting case to illustrate how the divergence between institutionalized norms and shared understandings may cause a backlash against international adjudication. Compared with international investment law, the normative environment of the ECtHR encompasses a much higher level of shared understandings given that its jurisdiction is underpinned by one unified convention – the European Convention on Human Rights. Besides, it operates against a highly institutionalized and integrated institutional background where the ECtHR's judgments are directly binding upon the parties.[446] Notwithstanding, the ECtHR has been

[445] The term is similar to the notion of legal norms as conceived by legal positivists but it encompasses a broader scope of norms, for example, those addressed in the rulings of adjudicators.
[446] ECHR, art. 46.

criticized for "encroaching upon national sovereignty" given, among others, its expansionary interpretation of the Convention rights while narrowing the margin of appreciation.[447] As a result, there have been attempts by some member states (mostly unsuccessful), via legislation or political initiatives, to diminish or circumvent the influence of the Convention on domestic policies.[448] The fundamental reason for these legitimacy challenges lies in the divergence between the ECtHR's evolutive interpretation of the Convention and the understandings shared by states and civil societies regarding the weight of human rights protection vis-à-vis public policies.[449] This led to the Brighton Declaration, which emphasizes, among other things, the interaction between the ECtHR and national authorities, particularly highlighting the importance of the principle of subsidiarity and the margin of appreciation.[450] Empirical research suggests that, following the Brighton Declaration, the ECtHR does increasingly take the margin of appreciation into account, especially with regards to the right to privacy and access to the court.[451]

Another example that must be discussed is the WTO crisis. The WTO Dispute Settlement Mechanism has long been seen as an example of how international adjudication successfully

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[447] Sarah Lambrecht, "Assessing the Existence of Criticism of the European Court of Human Rights" in Patricia Popelier, Sarah Lambrecht & Koen Lemmens, eds, *Criticism of the European Court of Human Rights*, 1st ed (Intersentia, 2016) 505 at 511. See also "Justice as Legitimacy in the European Court of Human Rights" in Nienke Grossman et al, eds, *Legitimacy and International Courts*, 1st ed (Cambridge University Press, 2018) 83 at 91–99.. The debate is particularly intense in the UK, see Merris Amos, "The Value of the European Court of Human Rights to the United Kingdom" (2017) 28:3 Eur J Int Law 763–785 at 763–65.

[448] Lambrecht, *supra* note 447 at 531–32..

[449] See Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015) at 145.

[450] *Ibid* at 157. European Court of Human Rights, *High Level Conference on the Future of the European Court of Human Rights Brighton Declaration* (2012), para 11:

> the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

[451] Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?" (2018) 9:2 Journal of International Dispute Settlement 199 at 221.

(although not perfectly) fits into and contributes to a highly legalized international regime, until 2016 when the United States started to block the reappointment of new Appellate Body members. This radical measure has paralyzed the whole appellate review mechanism, given that currently there are not enough Appellate Body members to review a case, which has consequently given rise to worries about the risk of the members' non-compliance with the multilateral obligations.[452] Although the aggressive action of the United States has attracted sharp criticisms from the international community,[453] some of its underlying concerns, particularly those relating to "panels and the Appellate Body adding to or diminishing rights or obligations of under the WTO Agreement", have been acknowledged by a number of other members as well.[454] Among the various suggestions to reform the system and maintain its normal operation,[455] a notable one is the proposal to establish the annual "Meetings with the Appellate Body" mechanism where "any Member may express its views on adopted Appellate Body reports".[456] This proposal, although not without controversies,[457] does reflect the latent insufficiency of communication between the

[452] See Giorgio Sacerdoti, "Solving the WTO Dispute Settlement System Crisis: An Introduction" (2019) 20:6 The Journal of World Investment & Trade 785 at 786. Normally the AB is composed of seven members and three of them will hear an appeal, but currently there is only one member is in service. See "Members urge continued engagement on resolving Appellate Body issues", online: <https://www.wto.org/english/news_e/news19_e/dsb_18dec19_e.htm>.

[453] As Peter Van den Bossche said in his farewell speech to the WTO Dispute Settlement Body on 28 May 2019, "History will not judge kindly those responsible for the collapse of the WTO dispute settlement system". "WTO | Farewell speech of Appellate Body member Peter Van den Bossche", online: <https://www.wto.org/english/tratop_e/dispu_e/farwellspeech_peter_van_den_bossche_e.htm>.

[454] WTO, "Adjudicative Bodies: Adding to or Diminishing Rights or Obligations under the WTO Agreement - Communication from Australia, Singapore, Costa Rica, Canada and Switzerland to the General Council" WT/GC/W/754/Rev.2 (11 December 2018) at 1. To be more specific, these concerns are mainly related to: (1) the 90 days timeline for appellate proceedings; (2) the AB review of the panel findings relating to the meaning of municipal laws; (3) the AB making findings on issues not necessary to resolve disputes; (4) the precedent effect of AB reports. WTO, "Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico, Costa Rica and Montenegro to the General Council", WT/GC/W/752/Rev.2 (11 December 2018) [WTO, "Communication from the EU and et al."]

[455] For a review on possible and impossible avenues of reform, see Joost Pauwelyn, "WTO Dispute Settlement Post 2019: What to Expect?" (2019) 22:3 J Intl Econ L 297–321.

[456] WTO, "Communication from the EU and et al.", *supra* note 454, at 4.

[457] Joshua Paine, "The WTO's Dispute Settlement Body as a Voice Mechanism" (2019) 20:6 The Journal of World Investment & Trade 820 at 851 (the controversies are mainly over the impact on the AB's impartiality and independence).

WTO dispute settlement mechanism and the member states. Members such as the United States seem to be using the WTO Dispute Settlement Body as a "voice" mechanism to express their dissatisfaction with the system.[458] Behind this dissatisfaction is probably the underlying divergence, gradually enlarged through the members' participation in cases, between the understanding of treaty obligations as conceived by some members and that as interpreted by panels and the Appellate Body. This requires more communications between the judicial body and political body but also poses the serious challenge as to how to "strike an appropriate balance" between the Appellate Body's judicial independence and judicial accountability to member States.[459]

The ECtHR and WTO's crisis can be an alert to the reform of the ISDS. Thanks to the strong common aim regarding human rights protection and the deep cooperation and integration within the EU, the backlash against the ECtHR has not caused the breakdown of the legal regime. By contrast, although underpinned by a holistic set of multilateral agreements, the WTO dispute settlement mechanism is facing a critical survival crisis. Compared with these two adjudicative bodies, the situation for international investment law is even more challenging: as explained in Section III above, the creation of a multilateral investment legal framework requires a high level of shared understandings within the international community, a standard that the *status quo* is far from satisfying.

The problem gets more severe if public interests are involved in investment disputes – investment tribunals may fail to satisfy general expectations of states and the public in their decision-making. Some commentators criticize that ISDS "completely circumvents the very

[458] Paine, *supra* note 457.
[459] *Ibid* at 359.

balance between private and public rights that has developed in the domestic context".[460] Experts from the United Nations Human Rights also expressed their concern that ISDS may have put many states' ability to regulate for the public interest at risk.[461] The discussion here does not intend to blame the tribunals for not taking sufficient account of public interests – as will be explained in the next chapter, their interpretations of treaties are greatly bounded by party consent and the applicable laws. In fact, it is observed that "no ISDS tribunal has ever found a legitimately environmental or health law or regulation of a State to have breached a BIT or a multilateral investment treaty".[462] Nonetheless, the divergence between laws as interpreted by adjudicators and that conceived by the public inevitably exists, and when reaching a tipping point, it endangers the legitimacy cornerstone of the system.

From this perspective, establishing a multilateral investment court seems to be an undesirable choice. As Chapter 5 will elaborate, such an attempt to judicialize investment adjudication and enhance its law-making power entails the risk of multiplying the divergence between the investment jurisprudence and shared understandings: an appellate mechanism with the authority to create stronger precedent can significantly limit the interactions between the judicial body and other actors. This may consequently cause a stronger backlash against the system. As Alvarez warns, the design of legal institutions reflects the preferences of the actors and

[460] Lise Johnson, Lisa E Sachs & Jeffrey D Sachs, "Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law" (2015) Columbia Center on Sustainable Investment, at 4.
[461] "UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights", (2 June 2015), online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031>.
[462] Charles H II Brower & Jawad Ahmad, "From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court" (2018) 41:4 Fordham Intll L J 791 at 814.

"[j]udges or arbitrators who get ahead of that rational design risk their own de-legitimation or even defiance of their rulings".[463]

Indeed, even at the bilateral and regional treaty level, there have already been backlashes against the rulings of investment tribunals due to the divergent understandings of treaty obligations between tribunals and states – the NAFTA Free Trade Commission as discussed above is one telling example. Such a radical counter-act by states may reinforce political control over investment treaty interpretation, but the price is the infringement of key principles of the rule of law.[464] In addition to the NAFTA example, another well-known form of backlash against ISDS would be some states' withdrawal from the ICSID and termination of BITs.[465]

C. An Investment Court?

The foregoing discussion gives rise to the necessity to re-examine the multilateral investment court initiation led by the EU. In an early submission to the UNCITRAL WGIII, the EU contends that "the contemporary investment regime is strongly characterized by repeat disputes, relative indeterminacy and vertical relationships in a context of public international law and public law situations" and that the more common practice in this context is to establish permanent standing bodies to resolve disputes.[466]

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[463] José E Alvarez, "'Beware: Boundary Crossings' – A Critical Appraisal of Public Law Approaches to International Investment Law" (2016) 17:2 The Journal of World Investment & Trade 171 at 216.
[464] See Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free Trade Commission and the Rule of Law" in *Fifteen Years of NAFTA Chapter 11 Arbitration* IAI Series No. 7 (New York, USA: JurisNet, LLC and International Arbitrtion Institute, 2011) 175.
[465] For example, Ecuador withdrew from the ICSID in 2009 and then denounced a number of BITs with states such as the United States, Canada, Spain and China.
[466] UNCITRAL Working Group III, "Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union", (12 December 2017) A/CN.9/WG.III/WP.145, online: *United Nations* <https://undocs.org/en/A/CN.9/WG.III/WP.145>, para 37.

Political feasibility is only a peripheral problem of the initiative – an investment court or appellate body at the multilateral level encompasses a high risk of impairing the sustainable interactional law-making. In other words, it will multiply the risk of the divergence between the court's decisions (which may generate highly institutionalized norms) and shared understandings. Investment treaties are mainly in bilateral forms while the practice has shown that investment tribunals tend to not confine their interpretation to the bilateral treaties at issue but analyzing against an overarching legal framework that includes customary international law, general principles of law and other relevant treaties.[467] This might lead to a more harmonized interpretation of investment rules by the court, especially those appearing repetitively in each treaties (e.g., fair and equitable treatment). Additionally, the fact that the rulings are from appellate tribunals will impose heavier pressure on first-instance tribunals to distinguish and deviate from previous cases, even if they are dealing with a different investment treaty. This does create a more "consistent" investment jurisprudence, but is it desirable for the sustainable evolution of law?

Moreover, what is more severe than the risk of conceptional divergence is the difficulty of *ex-post* adjustment. Under the current ISDS, tribunals bear no obligations of following precedents and in practice, they also repeatedly deny that they are bound by previous decisions.[468] Instead, previous decisions are frequently cited as a means of persuasion – a reference to justify their arguments.[469] This leaves the opportunity for later tribunals to critically reflect upon previous findings, especially upon those triggering great controversies within the community, and render decisions that might be conceived as more legitimate. This avenue of interaction will be blocked if a hierarchical court system is established: as mentioned above, in this circumstance, the first-

[467] Schill, *supra* note 27 at 294.
[468] Judith Gill, "Is There a Special Role for Precedent in Investment Arbitration?" (2010) 25:1 ICSID Rev 87 at 93.
[469] *Ibid* at 94.

instance tribunals may be under more pressure to follow decisions of the appellate tribunal than making innovative or adaptive findings.

VII. CONCLUSION

Based on the interactional law theory, this chapter has argued that shared understanding is the premise for international law-making. The unique nature of international investment law – i.e., it concerns how states conceive the value of foreign investment protection against their rights of regulation – determines that the establishment of a multilateral investment law framework requires a high level of shared understandings within the community. In the development of international investment law, ISDS serves as a critical avenue for relevant actors to practice law and hence reinforce their shared understandings. Therefore, securing the sustainability of this interaction is important for the successful reform of ISDS.

As such, this chapter offers a clear answer to the core research question of this thesis: adjudication plays an irreplaceable role in the process of legalization; however, this role is largely limited by the degree of shared understandings within the institution. One may contend that this chapter's approach is unduly counterposing shared understandings against adjudication – adjudicators may make laws that are perfectly consistent with shared understandings (even understandings that are not previously realized by the actors themselves), and thus play a leading role in the legalization of international investment law. The next chapter will explain how this argument is untenable by discussing the internal limitations of adjudication as a mode of social ordering to address problems of international law.

CHAPTER 4 INTERNAL CONSTRAINTS: ADJUDICATION AS A MODE OF SOCIAL ORDERING

Chapter 2 has affirmed that legitimacy, particularly sociological legitimacy, is a core parameter of legalization. For international investment law, a typical criticism from sociological legitimacy lies in the alleged favorable treatment of investors against host states' regulatory rights (especially those relating to the protection of human rights and the environment).[470] These criticisms, which are mainly about the overall normative regime of investment protection, unsurprisingly aggravate the dissatisfaction with the legitimacy of ISDS.[471] They also give rise to another important question relating to the reform of international investment law: can investment tribunals be expected to address those legitimacy "flaws" of treaty design in their arbitral decisions? Chapter 3 gives the question a negative answer by arguing that tribunals' exceeding shared understandings will trigger a backlash against ISDS and consequently endanger the sustainable interaction between shared understandings and the investment jurisprudence. This explanation is mainly from an external perspective, i.e., referring to adjudication as a whole to analyze its role in the evolution of international norms. This Chapter, in turn, offers an explanation from an internal perspective by zooming into the typical features of adjudicative processes that constrain the role of ISDS in the legalization of international investment law. The analysis is underpinned by Fuller's theory about the limits of adjudication in terms of solving polycentric issues. It argues that, in many investment cases, especially those encompassing a potential conflict between the protection of investor's rights and public interests, the real problems underlying the disputes are frequently polycentric problems that are beyond the ability of investment tribunals to solve. This limit is caused by the

[470] Bjorklund, *supra* note 38.
[471] *Ibid* at 272.

form of participation that is characteristic of adjudication – the disputing parties participate by presenting rights-based arguments. It further argues that, under the current procedural rules and principles, there is little scope for going beyond this limit without the support of party consent.

I. POLYCENTRICITY OF INTERNATIONAL LEGAL PROBLEMS

In the discussion of the limits of adjudication, Fuller pointed out that there are certain types of social tasks that are inherently unsuitable to be adjudicated. Particularly, he referred to polycentric tasks, which can be analogized to spider webs where "[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole … [I]t is 'many centered' – each crossing of strands is a distinct center for distributing tensions".[472] For complex tasks like deciding the allocation of resources (e.g., wages and prices) within a society, a court may be faced with multiple plausible solutions and choosing different ones will trigger different sets of repercussions upon the relationship between the many possibly affected parties.[473] The key reason for the limit, according to Fuller, lies in the uniqueness of adjudication as a mode of social ordering: the affected parties participate by way of presentation of proofs and reasoned arguments, and in cases involving polycentric tasks, it is impossible to "afford each affected party a meaningful participation through proofs and arguments".[474] Therefore, when the polycentricity of a case reaches a significant degree, decisions are better made through top-down managerial direction (such as resolving economic

[472] Fuller, *supra* note 312 at 395.
[473] *Ibid* at 394–95. Fuller did not provide an explicit definition of polycentric tasks but he explained the term with examples. According to him, one typical example is the task of deciding the wages and prices within a society, which cannot be successfully carried out by adjudicators because "courts move too slowly to keep up with a rapidly changing economic scene" and more fundamentally, "the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages". Another example is the assignment of players on a football team where "each shift of any one player might have a different set of repercussions on the remaining players". However, Fuller emphasized that feature such as multiplicity of affected actors and rapid changes, although frequently exist in polycentric tasks, are not invariable characteristics of polycentricity; rather, the key characteristic is the existence of multiple "interacting centers".
[474] *Ibid.*

problems using mathematical models) or negotiation and contracts by the potentially affected parties themselves.[475]

It is important to note that Fuller's insight that polycentric problems are not suitable to be solved through adjudication is, in essence, a matter of degree. As he highlighted,

> There are polycentric elements in almost all problems submitted to adjudication … It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.[476]

Therefore, it would be too absolute to say that Fuller is categorically denying courts' legitimacy in terms of public norm creation.[477] Fiss's argument that "[v]irtually all public norm creation is polycentric" is impeccable.[478] However, courts do not "create" the norms from scratch; instead, they draw their intellectual sustenance from shared understandings embedded in, in Fuller's terms, the two forms of social ordering (e.g., common aims and reciprocity).[479] To emphasize the incapability of adjudication to cope with highly polycentric problems is not to challenge courts' participation in public norm creation, nor to view adjudication in isolation from the broader

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[475] *Ibid* at 398–99.
[476] *Ibid* at 397–98.
[477] Robert G Bone, "Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation" (1995) 75:5 BU L Rev 1273 at 1319–20. Bone's discussion is a response to Fiss's critique that:

> [Fuller's individual participation] axiom would render structural reform illegitimate, true enough, but more importantly, it would render illegitimate almost all adjudication constitutional variety – both of the common law and the constitutional variety – in which the courts were creating public norms. It would reduce courts to the function of norm enforcement, and reduce adjudication to a high-class (but subsidized) form of arbitration.

Owen M Fiss, "Foreword: The Forms of Justice Supreme Court 1978 Term, The" (1979) 93:1 Harv L Rev 1 at 42–43. Nevertheless, Fuller admitted that he had not fully polished in written his theory about adjudication to respond to various critics. See J W F Allison, "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication" (1994) 53:2 The Cambridge L J 367–383 at 378.
[478] Fiss, "Foreword", *supra* note 477 at 43.
[479] Fuller, *supra* note 312 at 377.

political system in which it is established.[480] Polycentricity, instead, is best viewed as a reminder that in certain circumstances, legislative and executive branches and other possibly affected parties in the society are also needed to resolve complex social problems.[481]

The limited capacity of adjudicating mechanisms in terms of handling polycentric problems is particularly salient in international disputes. It is often found that the "real" underlying causes of international disputes are more complicated than the legal issues presented by the parties.[482] The complexity does not merely lie in the multiplicity of actors and issues involved in those cases,[483] but more importantly, in the interconnection of political and economic interests between the actors in the international arena. For example, a norm guiding international cooperation against climate change does not solely serve the goal of environmental protection but is frequently entangled with complex and competing social and economic appeals. To give a more specific example, in the context of international environmental law, although there is the general recognition of the principle of common but differentiated responsibilities (CBDR) which admits differentiated capabilities of individual states in terms of environmental protection, there has long been the debate between developing countries and developed countries as to the specific content of the principle: the former argues for a historical and *per capita* approach to the allocation of greenhouse gas emission shares, while this approach cannot be accepted by the latter.[484] For

[480] Fiss criticizes that Fuller's understanding of the legitimacy of adjudication is limited as "[t]he legitimacy of each institution within the system does not depend on the consent of the people who are subjected to it … in the individualized sense suggested by Professor Fuller … but rather upon the competence of an institution to discharge a social function within that system". Owen M Fiss, "The Social and Political Foundations of Adjudication." (1982) 6:2 Law and Human Behavior 121 at 125.
[481] Kent Roach, "Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response" (2016) 66:1 University of Toronto Law Journal 3 at 51.
[482] See Richard B Bilder, "Some Limitations of Adjudication as an International Dispute Settlement Technique" (1982) 23 Va J Int'l L 1 at 4.
[483] See Lars Kirchhoff, *Constructive Interventions: Paradigms, Process and Practice of International Mediation* (Kluwer Law Online: Kluwer Law International, 2008) at 137–38.
[484] Jutta Brunnée & Charlotte Streck, "The UNFCCC as a negotiation forum: towards common but more differentiated responsibilities" (2013) 13:5 Climate Policy 589 at 592–93.

developing countries, their approach will ease the burden of emission cut, thus leaving more room for economic development – a goal that is no less urgent than deterring climate change for them. In circumstances like this, the meaning of the international principles concerned is clearly not suitable to be defined by adjudicators – they require treaty negotiators to clarify them through rounds of negotiations based on their understandings and practice.[485]

In addition to issues affecting the allocation of resources at the international level, potential challenges from domestic laws add another dimension of complexity to the web of polycentricity of many international disputes. International judicial decisions inevitably influence domestic legislation – indeed, in many international legal regimes, it is precisely domestic laws and legal processes that are subject to the adjudication of tribunals.[486] For state representatives negotiating international rules, they can frequently find avenues to avoid directly challenging the diversified domestic laws and seek harmony in rule-making by, for example, adopting soft legal instruments such as model laws,[487] reconciling and integrating rules from different legal systems,[488] making commitment-based rules[489] or contingent rules,[490] etc. These techniques not only facilitate consensus at the multilateral level but also assure adherence to values embedded in democratic

[485] See Ole W Pedersen, "An International Environmental Court and International Legalism" (2012) 24:3 J Environmental Law 547 at 556 ("many environmental problems – in particular climate change – are multi-scalar and comprehensive problems which arguably require responses on multiple scales ... a focus on legal solutions that emphasise legal responsibility and blameworthiness is likely to prove insufficient").
[486] For example, WTO laws and human rights laws.
[487] For example, the UNCITRAL Model Law on International Commercial Arbitration, which is "designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration". UNCITRAL, "UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 | United Nations Commission On International Trade Law", online: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.
[488] For example, United Nations Convention on Contracts for the International Sale of Goods (CISG), which integrates both common law and civil law contractual rules. See e.g. Andre Janssen & Navin Ahuja, "Bridging the Gap: The CISG as a Successful Legal Hybrid betweenCommon Law and Civil Law?" in Francisco de Elizalde, ed, *Uniform Rules for European Contract Law? A Critical Assessment* (Oxford: Hart Publishing, 2018) 137.
[489] For example, the regulation of tariffs under the WTO laws is based on each member state's commitments.
[490] For example, the WTO non-discriminative rules are not absolute obligations – a member only violates MFN or national treatment clauses if it provides differentiated treatments to relevant actors.

legitimacy such as the principle of subsidiarity.[491] By contrast, adjudicators lack these tools – they make findings according to applicable laws and facts. These findings can cause ripples to the reform of domestic legal systems and to the interests of various interrelated domestic actors.

To give an example, in the controversial *Chevron v. Ecuador* case, the key matter in dispute was the Ecuadorian courts' decisions that found Chevron liable for the alleged environmental pollution and the damages to human health caused thereby.[492] In the ISDS dispute, the investor's central claims were rather narrow – an important one being that the behavior of judges in that domestic litigation, including the alleged fraud and corruption and "ghostwriting" of judgments, constituted a denial of justice and thus violated the Ecuador – US BIT.[493] The investment tribunal, after interpreting the relevant rules and evaluating the evidence, upheld the claim and found Ecuador liable to make reparations to Chevron.[494] Unsurprisingly, this decision triggered significant criticism because the public and many commentators focused on another aspect of the problem: Chevron was alleged to have caused severe damage to the area's biosystem as well as the human rights of the affected community, which the Tribunal did not address.[495] For them, these problems are more severe and urgent than the matter of due process. Moreover, some commentators doubt whether Ecuador has and can represent the interests of environmental plaintiffs and affected communities when concluding agreements with the investors and participating in the investment arbitration.[496] This has been a salient problem in ISDS proceedings

[491] Kumm, "The Legitimacy of International Law", *supra* note 124 at 920–24.
[492] *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Second Partial Award on Track II (30 Aug 2018), para 2.4.
[493] *Ibid*, para 2.4-2.7. Another main claim of Chevron is that Ecuador violated a previously signed settlement agreement, which was dealt with in a separate award.
[494] *Ibid*, para 8.78.
[495] See e.g. Nathalie Cely, "Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned from the Chevron Case" (2014) 24:2 Duke Envtl L & Pol'y F 353–374.
[496] Diane Desierto, "From the Indigenous Peoples' Environmental Catastrophe in the Amazon to the Investors' Dispute on Denial of Justice: The Chevron v. Ecuador August 2018 PCA Arbitral Award and the Dearth of

involving the interests of local communities. In an earlier case, *Glamis Gold, Ltd. v. The United States of America*, the Quechan Indian Nation emphasized in their *amicus curiae* submissions that neither of the disputants had sufficiently addressed – nor were they incentivized to address – the international and domestic rules protecting indigenous cultural resources.[497]

It is undeniable that all the problems – e.g., environmental regulation, human rights protection, the reform of the domestic judicial system, etc. – are so critical that they require immediate action. However, solving this intricate web of problems requires "comprehensive development policies" that aim to improve the country's judicial system and the regulatory framework over the protection of the environment, human rights, and investment.[498] In this regard, international adjudication bodies like ISDS can play a very limited role: the wording of investment treaties suggests that the treaty parties generally do not intent to grant investment tribunals broader jurisdiction over domestic policies.[499] Moreover, as sections II and III below will discuss, the form of adjudication and the relevant procedural rules can significantly constrain investment tribunals' ability to cope with polycentric problems. Interestingly, US courts have developed the doctrine of abstention where federal courts may exceptionally decline jurisdiction over a case or grant stay until the case is resolved in state courts.[500] Abstention might be deemed to be appropriate if, *inter alia*, the case involves federal constitutional issues that may be mooted in state courts according to state laws, or the case is intertwined with state law problems concerning important public policy

International Environmental Remedies for Private Victims", (13 September 2018), online: *EJIL: Talk!* <https://www.ejiltalk.org/from-indigenous-peoples-environmental-catastrophe-in-the-amazon-to-investors-dispute-on-denial-of-justice-the-chevron-v-ecuador-2018-pca-arbitral-award/>.

[497] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Quechan Indian Nation Application for Leave to File a Non-Party Submission (19 August 2005), at 3; Quechan Indian Nation Application for Leave to File a Non-Party Submission (16 October 2006), at 1.

[498] Cely, "Balancing Profit and Environmental Sustainability in Ecuador", *supra* note 495 at 368.

[499] Some treaties make this intent more explicit by specifying the provisions that can be adjudicated by investment tribunals. For example, CETA art. 18.8.

[500] Gaspard Curioni, "Interest Balancing and International Abstention" 93 Bosten University Law Review 42 at 623.

issues.[501] The doctrine roots in the principles of equity and judicial economy,[502] while in practice it also frees the federal courts from the task of tackling polycentric problems arising from the complex local laws and practices. It is unclear whether such an idea of deference to local courts could prosper in international adjudication given that the jurisdiction of international tribunals is largely determined by relevant treaty clauses.

Before further discussion, it is useful to sort out the scenarios where an adjudicator may encounter polycentric problems:

(i) the issues in dispute as argued by the parties are polycentric and the applicable laws are designed to resolve the disputed polycentric issues;

(ii) the issues in dispute as argued by the parties are polycentric but there are no applicable laws or the applicable laws are not designed to resolve the disputed polycentric issues;

(iii) the issues in dispute as argued by the parties are not polycentric, while the factual background against which the dispute arises is polycentric.

Among the three scenarios, scenario (i) clearly encompasses the least obstacles for the adjudicator to address polycentric issues within her jurisdiction. By contrast, in scenario (ii), the adjudicator's jurisdiction may be challenged; or even if the adjudicator affirms her own jurisdiction, she may be tempted to exceed authority by applying improper laws.[503] This is also the scenario from which many challenges about Fuller's theory of the limit of adjudication arise. The central debate is, when deciding on a dispute involving complicated public issues, what the role of courts is in terms of norm-creation. For example, as mentioned above, Fiss argues that polycentricity of disputes should not deter courts from undertaking structural reform because courts are entrusted with the "countervailing power" to fix legislative flaws.[504] Sections II-IV below will demonstrate the drawback of this argument in the context of international adjudication. The last scenario is the

[501] *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976), at page 424 U. S. 814.
[502] Curioni, *supra* note 500 at 627.
[503] This point will be elaborated in Section III.B below.
[504] Fiss, "Foreword", *supra* note 477 at 44.

one where adjudicators' conception of legitimacy and the public's conception of legitimacy may diverge and this divergence can be particularly salient in investment disputes like *Chevron v. Ecuador* as some commentators expect tribunals to address public issues such as human rights while tribunals often find themselves to have no authority in this regard.

Section II below will generally discuss how the form of adjudication, compared to other modes of social ordering, limits an adjudicator's ability to tackle polycentric issues in the context of ISDS; and Section III is premised on scenarios (ii) and (iii): it analyzes to what extent the adjudicator can go beyond applicable laws and/or party consent to address complicated public issues (i.e. to satisfy expectations of sociological legitimacy concerning public interests).

II. THE LIMITS OF INTERNATIONAL ADJUDICATION: THE FORM OF PARTICIPATION

The form of participation constitutes the central part of Fuller's polycentric theory. As he stated, "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor".[505] In the notion "the limits of adjudication", polycentricity is simply an exogenous variable that describes the factual issues in dispute; it is the form of participation that delineates the limit of adjudication. Two elements can be further extracted from this definition: the parties involved and the basis of decision-making. To give a better illustration of these elements, this section will refer to several international legal regimes but primarily focus on ISDS.

[505] Fuller, *supra* note 312 at 364.

A. Parties Involved

Since the information for the adjudicators' decision-making is provided in the form of party submissions, for the purpose of problem-solving, it is important to allow meaningful participation of impacted actors in the adjudicating process. However, a well-known feature of international adjudication is its incapability to include impacted actors like individuals in the legal proceedings: traditionally, it is states that have *locus standi in iudicio* before international courts.[506] In some adjudicative mechanisms such as the European Court of Human Rights, the African Court on Human Rights and People's Rights, the Courts of the European Union, ISDS, etc., natural and legal persons can have standing as well.[507]

Alternatively, some (potentially) impacted actors can participate as non-disputing parties under some legal regimes. Generally, compared to common law jurisdictions, the practice of *amicus curiae* participation is less prevalent in international adjudication and civil law systems.[508] Under the WTO dispute settlement mechanism, members that have substantive interests in the issues in dispute may intervene in the proceedings by attending hearings and making written submissions;[509] other actors such as individuals and organizations may be granted leave express their opinions through *amicus curiae* briefs if the panel or the Appellate Body "find[s] it pertinent and useful to do so".[510] Under the ISDS mechanism, as explained in Chapter 2, rules and practices

[506] Cesare PR Romano, Karen J Alter & Yuval Shany, "Mapping International Adjudicative Bodies, the Issues, and Players" in Cesare PR Romano, Karen J Alter & Yuval Shany, eds, *The Oxford Handbook of International Adjudication* (2013) 3 at 23.
[507] Angela Del Vecchio, "International Courts and Tribunals, Standing" in *Max Planck Encyclopedias of International Law* Max Planck Encyclopedias of International Law (2010).
[508] Born & Forrest, *supra* note 270 at 629.
[509] DSU, art. 10.2 ("Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel").
[510] *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, 10 May 2000, para 42. However, the AB emphasizes in para 41 that "Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not Members of the WTO".

relating to *amicus curiae* are more lenient, where non-party groups are explicitly allowed to make *amicus* submissions if the tribunals believe that they have interests in the case and can provide useful information.[511] However, compared to interveners, the participation of *amici curiae* in international adjudication is subject to more limitations: *amici curiae* are generally not considered to have a right to participate; rather, their participation is contingent upon their ability to provide meaningful assistance to adjudicators.[512]

Moreover, it seems that in many international adjudicative systems, the determination of which actors can be disputing parties and which can be interveners or *amici curiae* is not primarily linked to the degree of the actors' interests in the cases. This can be exemplified by the long-lasting importance of espousal in international law, under which doctrine individuals whose rights are infringed by foreign states have no direct access to adjudication but have to convince the home state to espouse the claim.[513] An important reason for not granting standing to all directly impacted actors is judicial economy – it effectively reduces caseloads in front of international tribunals.[514] In addition, considerations like limiting the judicial power of international tribunals over certain types of disputes can also carry considerable weight in relevant institutional design.[515]

The lack of sufficient participation of key affected parties entails the risk that the amount and accuracy of information presented by the parties are not sufficient for adjudicators to solve polycentric issues. ISDS has mitigated this problem to a large extent by abandoning diplomatic

[511] See UNCITRAL Rules on Transparency, art. 4; ICSID Arbitration Rules, Rule 37(2).
[512] Olga Gerlich, "More Than a Friend? The European Commission's Amicus Curiae Participation in Investor-State Arbitration" in Giovanna Adinolfi et al, eds, *International Economic Law: Contemporary Issues* (Cham: Springer International Publishing, 2017) 253 at 262.
[513] *Draft Articles on Diplomatic Protection with commentaries* (2006), A/61/10 Yearbook of the International Law Commission, art, I commentary.
[514] William J Davey, "Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques" in Thomas Cottier & Petros C Mavroidis, eds, *The Role of the Judge in International Trade Regulation* (Ann Arbor: University of Michigan Press, 2003) 43 at 59.
[515] See *Ibid*.

protection and granting foreign investors – who are the immediate victims of host states' unlawful activities – direct access to arbitration. With regards to actors who are not investors but are (potentially) impacted by the activities of either party or the arbitral decision, the trend of relevant rules and practices in ISDS, as mentioned above, is to increasingly allow third-party submissions: the UNCITRAL Rules on Transparency as well as the current ICSID Arbitration Rules explicitly grant investment tribunals the discretion to allow third-person submissions.[516] In practice, however, there are still constraints on the opportunities for *amici curiae* to participate in ISDS. For non-ICSID arbitrations, since the UNCITRAL Rules on Transparency only automatically applies to investment arbitration under the UNCITRAL Arbitration Rules pursuant to treaties concluded after 1 April 2014, its application can be quite limited.[517] The Mauritius Convention, which attempts to extend the application of the UNCITRAL Rules on Transparency to investment treaties concluded before 2014, has only been ratified by six states.[518]

As for ISDS conducted under the ICSID, several investment tribunals have highlighted an "implicit" factor in the ICSID Arbitration Rules in determining whether to allow *amicus* participation – whether the non-disputing party is independent of the disputing parties.[519] In the case *Bernhard v. Republic of Zimbabwe*, the tribunal denied the application of the European Center

[516] UNCITRAL Rules on Transparency, art. 4; ICSID Arbitration Rules, Rule 37. See also Patrick Dumberry & Érik Labelle-Eastaugh, "Non-state Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor–state Arbitration" in Jean d'Aspremont, ed, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (London, United Kingdom: Routledge, 2011) 360.

[517] UNCITRAL Rules on Transparency, art. 1.1. It may still apply to investment treaties concluded before 2014 with the consent of the disputing parties or treaties parties (art. 1.2).

[518] Mauritius Convention, art. 2; UNCITRAL, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 | United Nations Commission On International Trade Law", online: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[519] See *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (26 June 2012), para 49. The tribunal explains that this requirement "is implicit in [ICSID Arbitration] Rule 37(2)(a), which requires that the NDP [non-disputing party] bring a perspective, particular knowledge or insight that is different from that of the Parties. Other ICSID tribunals have also considered this to be a requirement of to admit amicus submission".

for Constitutional and Human Rights as well as four indigenous communities of Zimbabwe to participate as *amici curiae* because, among other reasons, they received support from an organization that has a close relationship to the Zimbabwean government, which the tribunal considers to "give rise to legitimate doubts as to the independence or neutrality of the Petitioners".[520]

The independence factor could potentially disqualify a broad range of actors as *amicus curiae*. Moreover, even if they are allowed to participate in arbitral proceedings, they enjoy relatively limited rights and opportunities to express their opinions. For example, their submissions may be subject to length limits and are supposed to not "disrupt or unduly burden the arbitral proceedings".[521] On the other hand, it is undeniable that these are reasonable institutional designs inasmuch as the central purpose of ISDS, as an adjudicating mechanism, is dispute-solving rather than problem-solving.

B. Arguments

According to Fuller, the unique feature of adjudication is that the affected parties participate in the process by way of presenting proof and reasoned arguments;[522] more importantly, the submissions and decisions are generally in the form of "a claim of right or an accusation of fault or guilt".[523] This logic of decision-making, as will be discussed below, is different from that of problem-solving as the latter normally approaches problems with a top-down approach and against a broader social background.

[520] *Ibid*, para 56.
[521] UNCITRAL Rules on Transparency, art 4.4 & 4.5.
[522] Fuller, *supra* note 312 at 369.
[523] *Ibid*.

1. Arguments by principle v. arguments by policy

Dworkin's discussion about the distinction between arguments of principle and arguments of policy sheds significant light on the discussion here:

> Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Argument of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle.[524]

According to Dworkin, "the justification of a legislative program of any complexity will ordinarily require both sorts of argument".[525] For example, a subsidy program that is initiated as a policy will also need to consider principles (e.g., equality) to guide the detailed designs.[526] For an adjudicator, when the law is unclear and requires novel interpretations, she may also justify her decision with either arguments of principle or arguments of policy (or both, if the two do not lead to conflicting results); however, if she opts for the latter, the legitimacy of the decision reached thereby may be subject to challenge as she acted as "deputy legislature" rather than a "deputy to the legislature".[527]

The question of whether adjudicators can reason like "deputy legislatures" is particularly sensitive in the context of international law, where international tribunals are widely conceived as "agents" or "trustees" of states to carry out functions such as dispute resolution.[528] This can be manifested by the rule of interpretation set out in the Vienna Convention on the Law of Treaties

[524] Ronald Dworkin, *Taking rights seriously* (Cambridge: Harvard University Press, 1977) at 107.
[525] *Ibid*.
[526] *Ibid*.
[527] See *Ibid* at 108.
[528] See discussion in Chapter 2.III above.

(VCLT) which is recognized as the customary international law governing treaty interpretation: the rule implicitly directs – with the term "the object and purpose" of the treaty – that the ultimate goal of interpretation is to ascertain the intention of the treaty parties as reflected by the text and context of the treaty.[529] When the provision is clear, the adjudicator has no difficulty deciding whether the treaty grants the "right" asserted by the claimant, thus justifying the decision with arguments of principle.[530] When the provision is vague and requires novel interpretation, by applying the VCLT rule of interpretation, the adjudicator still justifies the decision with arguments of principles by assessing whether the treaty intends to grant the claimed rights. If she uses arguments of policy, she would have stated that her interpretation produces the best result for the benefit of the community (rather than emphasizing that it is what the treaty parties intended to mean), which can give rise to considerable legitimacy challenges to the interpretation.

2. Arguments of principle and polycentric problems

The fundamental role of arguments of principle in adjudicative reasoning significantly constrains the discretion of adjudicators. To deal with problems that involve multiple groups of actors and interrelated social issues, normally the decision-maker has to consider the affected community as a whole. The allocation of social and economic resources will inevitably fail to satisfy the individual rights of all the involved groups, as the general purpose is to maximize the aggregate welfare of the community. In such circumstances, both arguments of policy and arguments of principles are needed for the decision-maker to trade off different goals and make the optimal decisions. By contrast, adjudicative decision-making fails to meet this requirement, especially if

[529] Richard K Gardiner, *Treaty Interpretation*, 2nd ed (Oxford, United Kingdom ; New York, NY: Oxford University Press, 2015) at 168.
[530] In this scenario, as Dworkin explains, even the legislation was generated by policy concerns, judicial decisions made thereof is still justified on arguments of principle because the "statute made it a matter of principle" and the judge simply enforce the principle. Dworkin, *supra* note 524 at 107–108.

the applicable laws are clearly designed to protect individual rights. This explains why sometimes what Fuller called "a mixture of adjudication and negotiation"[531] has more advantages in terms of coping with polycentric tasks: when negotiation is involved in the process, the adjudicator can temporarily free herself from the constraint of principles and decide according to what the disputing parties agreed to be the best result.

Moreover, the fact that the parties argue with legal principles can impose a layer of inter-cases constraint on the adjudicator's discretion: the adjudicator is bounded by the rule of law to give like treatment to like cases.[532] Judicial decisions for individual cases have a prospective aspect for future conducts and it is an incremental process as the meaning of relevant principles is developed case by case.[533] This means that, in order to conduct legal reasoning, i.e., to interpret and apply the principle argued by the parties, the adjudicator will inevitably engage with precedents and expect her decision to have a prospective effect on later tribunals.[534] The price of deviating from the precedents is impairing the predictability of adjudication and further undermining the legitimacy of the legal regime.[535] As such, the adjudicator is under more pressure to refrain from deciding on policy grounds.[536] As Fuller notices, "the efficacy of adjudication as a whole is strongly affected by the manner in which the doctrine of stare decisis is applied".[537] An adjudicating mechanism with more flexibility with regards to the application of precedents enables later tribunals to accommodate the specific context of the case and thus "absorb" those "covert

[531] Fuller, *supra* note 312 at 396.
[532] *Ibid* at 368.
[533] See D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Oxford University Press, 1990) at 243.
[534] Bachand & Gélinas, *supra* note 266 at 359.
[535] *Ibid*.
[536] For example, as observed by Bachand and Gélinas, "[users of international commercial arbitration] systematically refrain from giving arbitrators the power to decide as *amiables compositeurs* or *ex aequo et bono*". *Ibid* at 390. This point will be discussed in detail in Section III.2 below.
[537] Fuller, *supra* note 312 at 398.

polycentric elements".[538] Having a strict rule of precedent, on the contrary, would further limit the ability of the judicial process to cope with polycentric problems.

3. Arguments of principle in the context of ISDS

The foregoing discussion can explain why ISDS frequently fails to meet expectations regarding the protection of public interests. Most investment treaties, by nature, unilaterally set rights for investors and obligations for host states.[539] Investors assert their rights by arguing that the host state violates treaty obligations and accordingly, arbitrators make decisions by interpreting the same treaty clauses – there is not much room for adjudicators to balance the claimed rights against broader policy considerations. For example, if an investor accuses the host state of violating fair and equitable treatment (which is an argument of principle) while the host state and other non-disputing actors emphasize the value of environmental protection (which can be either an argument of principle or policy) as a counter-claim, the tribunal will have to examine whether the term "fair and equitable treatment" itself or other provisions of the treaty (e.g., exceptions) create the opportunity for the weighing and balancing between the two competing arguments. Lacking such support, as Section III below will explain, the arbitrator may have exceeded her authority if she attempts to step out from the argued principle and conjure up a whole picture of all the social issues involved – this is a task that should be tackled by treaty negotiators.

To secure the necessary regulatory space of host states, investment treaties do adopt various types of exception clauses, for example, public policy exceptions, carve-outs of certain regulatory activities, industry-specific reservations, etc.[540] To give an example, investment treaties generally

[538] *Ibid.*
[539] Dolzer & Schreuer, *supra* note 15 at 20.
[540] Caroline Henckels, "Should Investment Treaties Contain Public Policy Exceptions?" (2018) 59:8 Boston College L Rev 2825 at 2828.

do not prohibit expropriation if it is conducted, among other requirements, for public purposes.[541] However, in practice, investors rarely challenge the legitimacy of the alleged public interests; instead, the controversies are over whether the regulatory measures violate non-discrimination or due process requirements or whether there is prompt, adequate, and effective compensation.[542] These requirements are independent of the public purpose requirement, thus leaving little room for tribunals to redress public concerns in their interpretation and application.

A possible avenue to introduce a more balanced approach is to apply the principle of proportionality to investment arbitration.[543] For example, in *Tecmed v. Mexico*, to determine whether the activities of a Mexican regulatory authority constitute indirect expropriation, the tribunal referred to the approach of the European Court of Human Rights and considered "whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments".[544] Another typical scenario where the idea of proportionality is referred to would be the interpretation of fair and equitable treatments. For example, it has been recognized by a number of investment tribunals that the protection of investors' "legitimate expectations" against states' regulatory rights shall be subject to a more

[541] For example, CETA art. 8.12.1:

> A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except:
>
> a. for a public purpose;
>
> b. under due process of law;
>
> c. in a non-discriminatory manner; and
>
> d. on payment of prompt, adequate and effective compensation.

[542] See Dolzer & Schreuer, *supra* note 15 at 99–100.

[543] For a review of the application of the principle to ISDS, see Benedict Kingsbury & Stephan W Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 75. The authors particularly discuss the use of proportionality in cases relating to expropriation, fair and equitable treatment and non-precluded measure clauses.

[544] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award (May 29, 2003), para 122. As the tribunal argues, "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure".

balanced approach that allows due consideration of the host state's reasonable public policy concerns.[545]

It is not surprising that the principle of proportionality has gradually found its way into the practice of ISDS: the principle, which originates from the protection of human rights against state actions, has been recognized by a multiplicity of dispute settlement mechanisms to constitute a general principle of international law.[546] Besides, the ICSID Convention does not *per se* exclude the application of domestic laws or international laws (beyond the investment treaties) in investment disputes.[547] When the treaty provision indicates a requirement of balance between competing purposes,[548] or it is so vague that it requires novel interpretation,[549] a tribunal may well refer to general principles of international law to assist its analysis (which is consistent with Article 31(3)(c) of the Vienna Convention on the Law of Treaties).[550] On the other hand, however, the reference to the principle of proportionality in the context of investment law must be made with great caution. The approach has been criticized as entailing the risk of raising the threshold of expropriation to a level that significantly deviates from the original intent of the treaty: following the principle of proportionality, if the public purpose to be pursued is of high importance, then there should be more tolerance for the host state's non-compliant regulatory activities.[551] It may

[545] Benedict Kingsbury & Stephan W Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality" in Stephan W Schill, ed, *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010) 75 at 96–98.
[546] Thomas M Franck, "On Proportionality of Countermeasures in International Law" (2008) 102:4 AJIL 715 at 716. See *contra* Thomas Cottier et al, "The Principle of Proportionality in International Law" (2012) NCCR Trade Regulation Working Paper No 2012/38, online: <http://www.ssrn.com/abstract=2598410> at 4 ("[i]t remains to be defined whether proportionality operates as a self-standing principle in its own right ... or whether it merely operates in the context of particular fields of international law and in different ways").
[547] ICSID Convention, art. 42.
[548] For example, those investment treaties that requires, to determine whether there exists an indirect expropriation, the consideration of "object, context and intent" of the regulatory measure. See CETA, Annex 8-A2(d).
[549] For example, "legitimate expectations" in the notion of fair and equitable treatment as discussed above.
[550] See Kingsbury & Schill, *supra* note 545 at 88.
[551] Prabhash Ranjan, "Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: a Critical Appraisal" (2014) 3:3 Cambridge Intl LJ 853 at 870.

be subject to legitimacy challenges if the structure and context of the treaties are different from that of human rights laws and the relevant clauses in the treaties do not include terms such as "reasonable" or "necessary" that invite the arbitrators to conduct proportionality analysis.[552]

Another unique characteristic that limits ISDS's ability to tackle tasks involving complex public interests is the scarce opportunities for states to bring counter-claims. Allowing host states' counter-claims can keep the arbitrator well-informed about the facts related to the case.[553] Article 46 of the ICSID Convention provides that investment tribunals shall "determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre".[554]

In practice, however, the condition for tribunals to admit counter-claims is rather strict. Two criteria are generally considered, namely (1) whether there is consent between the parties to arbitrate counter-claims and (2) whether the counter-claim is closely connected to the original claim.[555] Different investment tribunals have inconsistent understandings of the specific notion of the criteria, especially with regards to the second requirement. In *Saluka v. Czech*, since the investment treaty uses the broad term "[a]ll disputes between one Contracting Party and an investor

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[552] See Erlend M Leonhardsen, "Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration" (2012) 3:1 J Int Disp Settlement 95 at 264–65 ("The main difference lies in the structure of the different legal provisions: the expropriation clauses in applicable investment treaties and the property protection clause of the ECHR"). See general Alvarez, "'Beware", *supra* note 463.
See *contra* Alec Stone Sweet & Giacinto Della Cananea, "Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez" (2013) 46:3 NYU J Int'l L & Pol 911–954.
It is worth noting that some investment treaties do include provisions that invite proportionality analysis with phrases like "this Treaty shall not preclude the application by either Party of measures *necessary* [emphasis added] for …". Henckels, *supra* note 540.
[553] Andrea K Bjorklund, "The Role of Counterclaims in Rebalancing Investment Law Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights" (2013) 17:2 Lewis & Clark L Rev 461 at 475. The author also points out, on the other hand, procedural inefficiencies caused by counter-claims such as prolonging the arbitration process.
[554] ICSID Convention, art. 46.
[555] Anne K Hoffmann, "Counterclaims in Investment Arbitration" (2013) 28:2 ICSID Review 438 at 445.

of the other Contracting Party", the tribunal considers it to cover counter-claims;[556] however, it denies jurisdiction over the counter-claims for the reason that, *inter alia*, their legal basis lies in domestic laws, which does not have a close connexion with the primary claim which is based on investment treaties.[557] By contrast, in *Urbaser v. Argentine*, the tribunal contends that the fact that "[b]oth the principal claim and the claim opposed to it are based on the same investment" is sufficient to manifest the connection.[558]

It is doubtful whether later tribunals will follow the loose standard established by *Urbaser v. Argentine*, given that the international law jurisprudence generally emphasizes both factual and legal connections as necessary conditions for the admissibility of counter-claims.[559] A high threshold of legal connections may well block a considerable number of counter-claims based on domestic laws. In addition to the uncertain arbitral practice, at the treaty level, the wording of some newer generation treaties such as CETA does not seem to establish a strong consent for tribunals' jurisdiction over counter-claims because it only stipulates, with regards to the scope of dispute settlement, the scenario where an investor brings a claim against the state, without mentioning counter-claims.[560]

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[556] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, para 39.
[557] *Ibid*, para 79. The tribunal refers to the decision in *Klöckner v. Cameroon*, which states that the counterclaim should constitute "an indivisible whole" with the primary claim asserted by the Claimant, or invoke obligations which share with the primary claim "a common origin, identical sources, and an operational unity" or which were assumed for "the accomplishment of a single goal, [so as to be] interdependent".
[558] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (English) (8 December 2016), para 1151. The tribunal also considered the legal connection and states that "[t]he legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only".
[559] Arnaud de Nanteuil, "Counterclaims in Investment Arbitration: Old Questions, New Answers?" (2018) 17:2 The Law and Practice of International Courts and Tribunals 374 at 387.
[560] CETA Article 8.18(1). See Tomoko Ishikawa, "Counterclaims and the Rule of Law in Investment Arbitration" (2019) 113 AJIL Unbound 33 at 37. However, in EU-Vietnam FTA and EU-Singapore FTA, relevant terms are broader, for example, "a dispute between a claimant of one Party and the other Party". EU-Singapore Investment Protection Agreement, art. 3.1(1),

C. Time-Efficiency

For polycentric problems arising from rapidly changing situations, the speed to react to the problems and arrive at solutions should also be a critical criterion to evaluate the efficiency of a problem-solving mechanism. In this regard, adjudication is clearly a less desirable option given the time it takes to process cases. It has been estimated that under ICSID, the average time to process cases is 3.75 years – from registration to awards alone, and it can take another two years if annulment procedures are initiated.[561] Arbitral procedures are frequently delayed due to various reasons. For example, after registration of cases, it usually takes a much longer time to constitute tribunals than the expected 60 days because of, *inter alia*, the parties adopting complex methods to constitute tribunals.[562] Therefore, although the long duration of ISDS procedures has been subject to criticism, it seems that, in many circumstances, the delays are driven by the requests of the parties. This can also be attributed to the unique form of participation in adjudication, which is party-centered, argument-based and adversarial.

In practice, international adjudicators may seek to increase procedural efficiency by invoking doctrines such as judicial economy. They may find it unnecessary to respond to a claim for the reason that the decision of a logically anterior matter precludes or implies a solution to the claim ("absorption *stricto sensu*").[563] For example, in *Renée Rose Levy and Gremcitel v. Peru*, after finding that the investors' forum shopping constitutes an abuse of process, the tribunal rejects jurisdiction over the dispute; following this conclusion, the tribunal did not continue analyzing

[561] UNCITRAL Working Group III, "Possible reform of investor-State dispute settlement (ISDS) — cost and duration" (2018) A/CN.9/WG.III/WP.153, para 56. Another statistics by the PluriCourt's Investment Treaty Arbitration Database, after studying 635 cases, shows that the average duration of cases is 2.2 years and the average duration of annulment proceedings is 0.93 years. Holger Hestermeyer, "Duration of ISDS Proceedings" (3 April 2019), online: *EJIL: Talk!* <https://www.ejiltalk.org/duration-of-isds-proceedings/>.
[562] ICSID Secretariat, *Proposals for Amendment of the ICSID Rules — Working Paper* (2018) at para 17.
[563] Fulvio Maria Palombino, "Judicial Economy and Limitation of the Scope of the Decision in International Adjudication" (2010) 23:4 Leiden Journal of International Law 909 at 913.

another jurisdiction objection raised by the defendant because dealing with the argument would "have no impact on the award".[564]

In other circumstances, tribunals may exercise the doctrine of judicial economy by avoiding responding to certain claims for the reason that not addressing them does not impede the resolution of the dispute ("absorption *lato sensu*").[565] This practice has been explicitly recognized under the WTO dispute settlement mechanism.[566] As the Appellate Body in *US — Wool Shirts and Blouses* affirms, "[n]othing in [Article 11 of the DSU] or in previous GATT practice requires a panel to examine all legal claims made by the complaining party".[567] This ground has also been invoked by investment tribunals. For example, in *Railroad v. Guatemala*, the tribunal concluded that, for reasons of "procedural economy", it need not analyze the claimant's allegation regarding full protection and legitimacy because the relevant arguments "raise factually complex questions" and "it is difficult on this record to isolate only those aspects of the larger issue over which we have jurisdiction".[568] For international adjudicators, in addition to efficiency concerns, there are often political considerations behind exercising this type of judicial economy. Tribunals may carefully delineate their scope of jurisdiction and leave those complicated and controversial issues

[564] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (English) (9 January 2015), para 197.
[565] Palombino, *supra* note 563 at 922.
[566] *Ibid* at 925; Alberto Alvarez-Jiménez, "The WTO Appellate Body's Exercise of Judicial Economy" (2009) 12:2 J Intl Econ L 393 at 396.
[567] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (25 April 1997), WT/DS33/AB/R, at 18. Nevertheless, there is also the criticism that some panels may have exercised "false judicial economy", which causes the Appellate Body unable to complete its analysis. See Alvarez-Jiménez, *supra* note 566 at 398.
[568] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), para 238.

to treaty negotiators or domestic legislature.[569] Besides, adjudicators may use this strategy to increase the chance of the parties' compliance and reduces the risk of annulment.[570]

To sum up, the features of adjudication discussed above, including (1) the limited number of parties allowed in adjudicative processes, (2) the participation of these parties by way of forwarding principle-based arguments, and (3) the long case-processing time, limit the ability of adjudication to solve polycentric problems. This limitation is further aggravated in the context of ISDS where (1) some impacted actors have no or limited access to arbitral proceedings, (2) the treaties are by nature granting unilateral rights to investors and (3) the investment jurisprudence imposes a high threshold for states to bring counter-claims. These features of ISDS, which are not exhaustive but representative, limit both the procedural and substantive grounds for the host state to present relevant facts and laws to investment tribunals, especially those relating to domestic laws. As a result, it would be unreasonable to expect an investment tribunal to fully address all the controversial issues on its own initiative. On the other hand, one may still question: is it necessary for the tribunal to confine the basis of its reasoning to laws and facts presented by the parties? In other words, for the purpose of problem-solving, could not the tribunal exercise its inherent power to investigate more in-depth into the case and render decisions on grounds not argued by the parties? The next part will discuss this question.

III. GOING BEYOND THE LIMITS? – THE POWER OF ADJUDICATORS

Party consent is without a doubt a fundamental source of the power of adjudicators, and it is particularly so in the case of international adjudication where international courts and tribunals are

[569] Palombino, *supra* note 563 at 922.
[570] Marc L Busch & Krzysztof J Pelc, "The Politics of Judicial Economy at the World Trade Organization" (2010) 64:2 International Organization 257 at 264 ("If the panel addresses all the legal issues raised, there is potentially more for the litigants to appeal, whereas if it addresses fewer, the risk is that the litigants will make—and the AB may uphold—charges of 'false judicial economy'").

created by states via treaties or other legal instruments.[571] Nevertheless, it is not the only source of adjudicators' power.[572] It has been widely acknowledged that courts and tribunals enjoy the "inherent power" to decide on interpretative and procedural issues within its jurisdiction.[573] This power is said to have its roots in several possible sources, including "the concept of 'general principles of law'; the doctrine of implied powers; the identity of international courts as judicial bodies; and a functional justification".[574] As such, even without the request or agreements of the disputing parties, a tribunal may well conduct further investigations or make novel interpretations on its own initiative. This might ease the internal constraint of international adjudication in terms of dealing with polycentric issues. However, as the sections below will discuss, it only eases the constraint to a limited extent.

A. Going Beyond the Parties' Allegations

The first question is whether a tribunal can investigate *sua sponte* on allegations not raised by the disputing parties. Among the three scenarios in which an adjudicator may encounter polycentric tasks as mentioned above, this fits into scenario (iii) where "the issues in dispute as argued by the parties are not polycentric while the factual background against which the dispute arises is polycentric". It is generally recognized that a tribunal will restrict its decision-making to claims submitted by the parties; otherwise it may be deemed to violate the *ne ultra petita* principle,

[571] Some scholars even argue that international tribunals "must act consistently with the interests of the states that create them". Posner & Yoo, *supra* note 208 at 72.
[572] See e.g. Fabien Gélinas & Giacomo Marchisio, "The Investigative Power of Arbitrators" (2015) 46 Revista de Arbitragem e Mediação 229.
[573] See Chester Brown, "The Inherent Powers of International Courts and Tribunals" (2006) 76:1 The British Yearbook of International Law; Oxford 195–244; Andrea K Bjorklund & Jonathan Brosseau, "Sources of Inherent Powers in International Adjudication" in Friedrich Rosenfeld & Franco Ferrari, eds, *Inherent Powers in International Arbitration* (Huntington, NY: Juris, 2019) 1.
[574] Brown, *supra* note 54 at 222–29 ("functional justification" refers to the argument that "[i]nherent powers are necessary to ensure the fulfilment of the functions of international courts"); See also Bjorklund & Brosseau, *supra* note 54.

meaning a tribunal shall not decide beyond the pleadings of the parties.[575] The importance of the principle is rooted in consensual jurisdiction and party autonomy in international adjudication.[576]

Despite this widely acknowledged principle, some commentators may still expect adjudicators to address on their own initiative the issues that are of vital significance to the public. For example, some scholars argue that, for cases involving corrupt activities, an investment tribunal should initiate *sua sponte* investigations for the good of public interests even if the parties do not raise the issue.[577] Another argument supporting this position is that, in the context of ICSID, there is no mechanism to examine, either by local courts or annulment committees, whether the awards are consistent with public policies; thus, tribunals shall take the initiative to address corruption issues to counter-balance this deficiency.[578] Nevertheless, it is doubtful whether in practice investment tribunals will adopt such an interventionist approach. In the case *F-W v. Trinidad and Tobago*, the investor initially advanced allegations of corruption, dishonesty and wrong-doing against the host state in the written submissions and hearings, while in later exchanges it withdrew those allegations relating to corruption.[579] As a result, the tribunal concludes that, "once the Parties abandoned their reliance on these allegations, there ceased to be

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[575] Domitille Baizeau & Tessa Hayes, "The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte" in Andrea Menaker, ed, *International Arbitration and the Rule of Law: Contribution and Conformity* ICCA Congress Series (Kluwer Law International: Kluwer Law International, 2017) 225 at 243.Giuditta Cordero Moss, "Tribunal's Powers versus Party Autonomy" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 1209 at 1220.
As Kolb explains, the principle means that "the object of the dispute on which the judge can award executory rights is limited by the submissions of the applicant (maximum) and of the respondent (minimum)" and "[t]he applicant can demand less than he or she would be entitled to". Robert Kolb, "Competence of the Court, General Principles of Procedural Law" in Andreas Zimmermann et al, eds, *The Statute of the International Court of Justice: A Commentary* Oxford commentaries on international law, 3rd ed (Oxford, United Kingdom: Oxford University Press, 2019) 963 at 987.
[576] Attila Tanzi, "Ultra Petita" in *Oxford Public International Law*, Max Planck Encyclopedias of International Law (2019) at para 2.
[577] Baizeau & Hayes, *supra* note 575 at 234.
[578] Joe Tirado, Matthew Page & Daniel Meagher, "Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship" (2014) 29:2 ICSID Rev 493 at 499.
[579] *F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award (3 March 2006), paras 50-53.

any reason for the Tribunal to make findings upon them", although it acknowledges that "if allegations of corruption had been made and had proved to be well founded, it would have had a most substantial effect on the view of the case taken by the Tribunal".[580]

Moreover, investigating allegations not raised by the parties may cause challenges to the validity and enforceability of the award. For example, the UNCITRAL Model Law (which represents a broad range of domestic legislations worldwide[581]) provides that the court of the seat may set aside an award if, *inter alia*, "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".[582] A similar provision appears in the New York Convention as a ground to refuse the recognition and enforcement of awards.[583] As Section IV below will discuss, these potential post-award challenges may discourage an investment tribunal from extensively using the inherent power.

B. Going Beyond Applicable Laws

Analysis in this sub-section is more related to the aforementioned scenario (ii) where "the issues in dispute as argued by the parties are polycentric but there are no applicable laws or the applicable laws are not designed to resolve the disputed polycentric issues". In practice, a tribunal is likely to decide on grounds that were not initially expected by the parties.[584] The likelihood goes higher if the applicable law encompasses a high degree of ambiguity which impels the adjudicator to make a novel interpretation. Or, if the tribunal finds the law inappropriate to be applied, hypothetically, it may refer to rules and principles that were not argued by either party (for example, applying

[580] *Ibid*, 211-12.
[581] UNCITRAL, *supra* note 518 ("Legislation based on the Model Law has been adopted in 83 States in a total of 116 jurisdictions").
[582] UNCITRAL Model Law on International Commercial Arbitration, art. 34 (2)(a)(3).
[583] New York Convention, art. V(1)(c).
[584] Fuller, *supra* note 312 at 388.

general principles of law).[585] A doctrine that is of particular relevance here is the ancient public international principle *ex aequo et bono*, which states that a judge or arbitrator may, with the explicit consent of the parties, go beyond the applicable law or contractual agreements and make decisions according to what is fair and good.[586] Party consent as an essential precondition for the application of the principle has been recognized and codified in multiple procedural rules, to name a few, the ICJ Statute,[587] the UNCITRAL Modal Law,[588] the UNCITRAL Arbitration Rules,[589] the ICSID Convention,[590] etc. It thus imposes a critical precondition for a tribunal to invoke the principle.

Apart from party consent, in commercial arbitration, a tribunal's discretion to engage in *ex aequo et bono* decision-making can also be limited by the practice of parties relating to the transaction.[591] As Article 35.3 of the UNCITRAL Arbitration Rules affirms, "[i]n all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction".[592] In the transnational context, trade usages not only serve as factual matters that assist tribunals in ascertaining the intent of the parties, but also embody rules and principles governing the parties' practice and contractual relationship.[593] As such, in cases where the parties fail to designate the applicable law, trade usages are a vital

[585] In some circumstances, as discussed in Section II.3, the tribunal may simply refuse to decide upon the issue on the ground of judicial economy.
[586] Markus Kotzur, *Ex Aequo et Bono* (2009) Max Planck Encyclopedia of Public International Law, available online at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1402>.
[587] ICJ Statute, art. 38.2 ("This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto").
[588] UNCITRAL Model Law on International Commercial Arbitration, art. 28.3 ("The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so").
[589] UNCITRAL Arbitration Rules, art. 35.2 ("The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so").
[590] ICSID Convention, art. 42 ("The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree".
[591] Leon Trakman, "Ex Aequo et Bono: Demystifying an Ancient Concept" (2007) 8:2 Chi J Int'l L 621 at 637.
[592] UNCITRAL Arbitration Rules, art. 35.3. This provision appears right after the *ex aequo et bono* provision.
[593] See Gélinas, *supra* note 390.

factor that an arbitrator must consider as a part of the normative framework. It means that a tribunal must avoid interpreting "fairness and good" embedded in *ex aequo et bono* to be a tacit and universal concept without taking due account of the practice of the parties.[594]

In the context of investment arbitration, tribunals seem to be particularly cautious about deciding *ex aequo et bono*. Indeed, the principle has been explicitly applied in a limited number of cases and scenarios – mainly those relating to the assessment of damages.[595] In some cases, the investment tribunal would explicitly distinguish the grounds for its decision-making from *ex aequo et bono.* The tribunal in *Gold Reserve v. Venezuela* emphasizes that, although it considers equity as a principle to guide the evaluation of damages, its reasoning is an exercise of discretion (or a "margin of appreciation") in accordance with the principles of international law, rather than a decision *ex aequo et bono*.[596] The *Gemplus v. Mexico* tribunal, in affirming the investor's right to seek compensation for the loss of opportunity, holds that "the concept of damages for the loss of a chance (opportunity) is recognised in many national systems of law … and it does not depend upon the tribunal or court acting *ex aequo et bono*".[597] These tribunals have abundant reasons to be cautious about going beyond the applicable law – as will be discussed in Section IV below, it may well expose them to the risk of violating procedural rules and consequently of the award being annulled. As the annulment committee in *Occidental v. Ecuador* notes,

> Powers vested on arbitrators are not unlimited, but restricted. Arbitrators are authorized by the parties to make their adjudication of the merits only in accordance with applicable law, not on the basis of a law different from that

[594] Trakman, "Ex Aequo et Bono", *supra* note 591 at 637.
[595] For example, *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980 [English Translation], para 4.98.
[596] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014), para 686.
[597] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award (English) (16 June 2010), para 13-88.

> agreed by the parties or *ex aequo et bono*. If arbitrators do otherwise, they exceed the authority received from the parties and their decision merits annulment.[598]

On the other hand, however, the foregoing discussion does not mean that investment tribunals must strictly adhere to the disputing parties' arguments of law in their analysis. The general international law principle of *jura novit curia*, which means that the court knows the law and must apply the law *ex offcio*,[599] grants the tribunals the discretion as to the determination of applicable laws. The implication of the principle is that "the contents of the applicable law need not be proven by the parties as factual elements need to be proven".[600] In arbitral practice, a number of investment tribunals have invoked the principle to justify their reasoning.[601] A recent example would be the case *PV Investors v. Spain*, where the tribunal emphasizes that:

> When applying the law governing the substance of the dispute, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim *jura novit curia* – or, better, *jura novit arbiter* – the Tribunal is required to apply the law of its own motion, provided it seeks the Parties' views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.[602]

Nevertheless, a tribunal's power to decide *jura novit curia* is clearly not unfettered.[603] The Annulment Committee in *Klöckner v. Cameroon* recognizes that tribunals enjoy the power

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[598] Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (English) (2 November 2015), para 53.
[599] Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge: Cambridge University Press, 2014) at 101.
[600] *Ibid*. While it is generally recognized that municipal law is excluded from the scope of this principle (see page 102).
[601] Frédéric Gilles Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Leiden, the Netherlands; Boston: Brill Nijhoff, 2015) at 93 (in footnote 2, the author reviews several cases invoking the principle).
[602] *The PV Investors v. Spain*, PCA Case No. 2012-14, Final Award (28 Feb 2020), para 519. In applying the principle, the tribunal "reviewed all of the decisions or awards rendered in investment treaty arbitrations that concern Spanish renewable energies" (para 552).
[603] See general Gabrielle Kaufmann-Kohler, "The governing law: Law or fact ?" in *Best practices in international arbitration : ASA Swiss arbitration Association Conference of January 27, 2006 in Zürich* (Association Suisse de l'Arbitrage, 2006) 79.

to formulate its own theory and argument "even if those arguments were not developed by the parties (although they could have been)", but the prerequisite is that it is done within the dispute's "legal framework".[604] Going beyond the legal framework established by the claimant and respondent, especially if the tribunal fails to allow proper opportunities for the parties to express themselves before reaching decisions on its own basis, may infringe the parties' right to be heard.[605] Consequently, it may violate due process of law, which is a ground to annul the award under Article 52 (1)(d) of the ICSID Convention.[606]

C. Investigating Facts sua sponte

Compared to going beyond the parties' allegation or the applicable law, normally an adjudicator enjoys more freedom to investigate relevant facts. Generally, procedural rules relating to investment arbitration grant tribunals the power to request additional information on their own initiative. The ICSID Arbitration Rules provide that the tribunal may "call upon the parties to produce documents, witnesses and experts" at any stage of the proceeding it deems necessary.[607] Similar provisions appear in the UNCITRAL Arbitration Rules and the ICC Rules of Arbitration.[608] By contrast, the SCC Arbitration Rules, which have been applied to around 5% of

[604] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee (Unofficial English Translation) (3 May 1985), para 91. [*Klöckner v. Cameroon*] The Annulment Committee in several later cases also followed this "within the legal framework" approach. See Sourgens, *supra* note 601 at 106. See also Gabrielle Kaufmann-Kohler, "Iura novit arbiter - est-ce bien raisonnable ? : réflexions sur le statut du droit de fond devant l'arbitre international" in De lege ferenda : Réflexions sur le droit désirable en l'honneur du professeur Alain Hirsch (Slatkine, 2004) 71 at 78.
[605] Sourgens, *supra* note 601 at 106–07; Kaufmann-Kohler, *supra* note 604.
[606] ICSID Convention, art.52(1)(d): "that there has been a serious departure from a fundamental rule of procedure".
[607] ICSID Arbitration Rules, Rule 34 (2)(a). See also, ICSID Convention, art. 43(a).
[608] UNCITRAL Arbitration Rules, art. 27.3 ("At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine"); the International Chamber of Commerce (ICC) Rules of Arbitration, art. 25.5 ("At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence"). In addition, both sets of rules allow the arbitrator to appoint experts after consulting with the parties.

treaty-based ISDS cases,[609] prescribes that the tribunal may "exceptionally", on its own motion, order a party to provide additional documents and evidence.[610] For investment arbitrations not conducted under the ICSID Convention, additional conditions on the exercise of the investigative power may also arise from the law of the seat.[611]

In practice, after hearings, tribunals do often request additional submissions from the parties asking for further elaboration or clarification of issues raised during hearings.[612] Such requests, therefore, are closely related to the arguments forwarded by the parties in previous submissions or hearings. Another scenario where tribunals are widely deemed to enjoy the power of *sua sponte* investigation is that one party fails to participate in arbitral proceedings (i.e., default proceedings).[613] In some legal systems, where one party presents evidence while the other party does not contest as a result of its absence in the proceedings, the tribunal may still request additional evidence to evaluate relevant arguments.[614] This practice has been codified in relevant arbitration rules, for example, the ICSID Arbitration Rules which state that "[f]ailure of the defaulting party to appear or to present its case shall not be deemed an admission of the assertions

[609] UNCTAD Investment Policy Hub, "Investment Dispute Settlement Navigator" available online at https://investmentpolicy.unctad.org/investment-dispute-settlement. According to the statistics, 48 cases are under the SCC Arbitration Rules.
[610] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017) ("At the request of a party, or exceptionally on its own motion, the Arbitral Tribunal may order a party to produce any documents or other evidence that may be relevant to the case and material to its outcome") [SCC Arbitration Rules].
[611] Rahim Moloo, "10 Evidentiary Issues Arising in an Investment Arbitration" in Loretta Malintoppi & N. Jansen Calamita, eds, *Litigating International Investment Disputes* International Litigation in Practice (Leiden, The Netherlands: Brill | Nijhoff, 2014) 287 at 290 publisher: Brill Nijhoff.
[612] Legum Barton, "Part II Guide to Key Preliminary and Procedural Issues, 5 An Overview of Procedure in an Investment Treaty Arbitration" in Katia Yannaca-Small, ed, *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2d ed (Oxford: Oxford University Press, 2018) 103 at 111–12.
[613] Seung Wha Chang, "Inherent Power of the Arbitral Tribunal to Investigate Its Own Jurisdiction" (2012) 29:2 Journal of International Arbitration 171–182 at 179; Moss, *supra* note 575 at 1231–32.
[614] Moss, *ibid* at 1232.

made by the other party" and the tribunal may "at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations".[615]

In these scenarios, requesting additional submissions and evidence mainly serves the purpose of fully evaluating the underlying arguments forwarded by the parties, and such requirements seem to be less contested among disputing parties and commentators. Therefore, it is safe to conclude that, within the scope of the dispute, unless the applicable rules stipulate otherwise, a tribunal does not need to confine its reasoning to facts originally submitted by the parties and can investigate deeper by requesting more information. This can mitigate the limits of adjudication in terms of solving polycentric problems.

To sum up, this part has discussed three circumstances where a tribunal may be tempted to step out of the limits set by party consent and play a more active role in addressing certain polycentric issues. It first discussed the possibility for the adjudicator to decide on claims that were not alleged by the parties and concluded that the chance is little as doing so will violate fundamental principles of procedure. It then discussed the circumstance of applying laws not designated by the parties and finds that the adjudicator's discretion in this regard is still greatly constrained by party consent and key principles of procedural law. Lastly, it examined the adjudicator's inherent power to investigate factual issues *sua sponte* and found that the major arbitration rules explicitly grant this power to tribunals.

[615] ICSID Arbitration Rules, Rule 42 (3) & (4). Similarly, Article 30 1(b) of the UNCITRAL Arbitration Rules states that, if the respondent failed to "communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations".

IV. THE *EX-POST* CONTROLLING MECHANISMS: REVIEW OF AWARDS

The discussion above shows that, in some circumstances, although the relevant rules and practices open up the possibility for an investment tribunal to exercise its inherent power and to decide on legal or factual issues on its own accord, the tribunal tends to refrain from doing so. One plausible explanation for this cautious attitude is the pressure arising from the post-award reviewing mechanisms: as will be explained below, a tribunal's deviating from party consent may be deemed to act in "excess of power", which is an often-cited ground to challenge the validity or enforceability of awards after they are issued. Those post-award reviewing mechanisms impose a critical institutional constraint on the types of problems a tribunal can deal with as well as the manners in which the problems can be solved.

A. Excess of Power

In the context of investment arbitration, review of awards may happen in three circumstances: for ICSID awards, annulment proceedings by the ICSID annulment committee; for non-ICSID awards set aside of awards at the place of arbitration, and recognition and enforcement of awards according to the New York Convention. Article 52 of the ICSID Convention provides five grounds to annul an award and the second one, which states that "the Tribunal has manifestly exceeded its powers", is particularly relevant here.[616] Tribunals' excess of power may occur in various circumstances. The annulment committee in *Hussein Nuaman Soufraki v. United Arab Emirates* draws up a list of activities that can be deemed to exceed power: (1) a tribunal goes beyond its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis*; (2) a tribunal fails to exercise a jurisdiction which it possesses; (3) a tribunal fails to apply the applicable law.[617]

[616] ICSID Convention, art. 52(1)(b).
[617] *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki (5 June 2007), paras 41-46.

For non-ICSID arbitrations, similarly, if a tribunal decides on issues beyond the scope of the arbitration agreement or beyond what is submitted by the parties in the arbitral process, it may well be found to have exceeded authority.[618] Consequently, the court of the seat can set aside the award according to local laws, or the competent court to which enforcement of the award is sought can refuse to recognize and enforce the award according to the New York Convention.[619]

As to the investigation of factual matters, as discussed in Section III.3 above, it is generally acknowledged that a tribunal enjoys the inherent power to investigate facts and evaluate evidence. As the annulment committee in *Caratube v. Kazakhstan* states,

> Factual findings and weighing of evidence made by a tribunal are outside the powers of review of an annulment committee, except if the applicant can prove that the errors of fact are so egregious, or the weighing of evidence so irrational, as to constitute an independent cause for annulment. The respect for tribunals' factual findings is normally justified because it is the tribunal who controlled the marshalling of evidence, and had the opportunity of directly examining witnesses and experts.[620]

Therefore, it is unlikely for a tribunal to be found to have manifestly exceeded its power because of her *sua sponte* investigation of facts, unless the investigation is evidently not related to any issues raised by the parties. Nonetheless, if the tribunal seriously violates fundamental rules of procedure (for example, impartiality and equality of treatment[621]) in exercising the power of investigation, the award deriving from it might still be annulled according to Article 52(d) of the ICSID Convention.[622]

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[618] Gary B Born, *International Commercial Arbitration*, 2d ed (Alphen aan den Rijn, The Netherlands: Kluwer Law Intl, 2014) at 3287.
[619] See e.g. UNCITRAL Model Law, Article 34(2)(a)(iii); New York Convention, Article 1(c). Both articles deal with the circumstance where the arbitrator decided on issues not alleged by the parties.
[620] *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (21 Feb 2014), para 158. Christoph H Schreuer et al, *supra* note 20 at 983.
[622] According Article 52(d), an award may be annulled if "there has been a serious departure from a fundamental rule of procedure".

B. Excess of Power in Scenarios (ii) and (iii)

The foregoing examples of excess-of-power activities clearly preclude the possibility for an investment tribunal to address polycentric problems in scenario (iii) (i.e., where "the issues in dispute as argued by the parties are not polycentric while the factual background against which the dispute arises is polycentric"), as doing so would compel the tribunal to exceed authority or violating due process of law by deciding on claims that were not submitted or discussed by the parties and consequently render the award susceptible to being annulled.

With regards to scenario (ii) (i.e., where the issues in dispute as argued by the parties are polycentric but there are no applicable laws or the applicable laws are not designed to resolve the disputing polycentric issues), it can be risky for the tribunal to refer to laws not argued by the parties: in arbitral practice, investment tribunals have been accused of *de facto* deciding *ex aequo et bono* without party consent, as a result of which the award should allegedly be annulled, set aside or refused enforcement.[623] In the famous contract-based arbitration case *Klöckner v. Cameroon*, the tribunal allegedly did not take due account of the domestic laws of the contracting state but relied on the "universal requirements of frankness and loyalty in dealings between partners" in its reasoning, which was found by the annulment committee to have violated Article 42 (1) of the ICSID Convention.[624] The committee further criticized that the tribunal "refers to general principles or 'universal requirements,' postulated rather than demonstrated"[625] and "the

[623] For example, *Klöckner v. Cameroon; Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7; Adam Dogan v. Turkmenistan, ICSID Case No. ARB/09/9.
[624] *Klöckner v. Cameroon*, Decision of the Ad Hoc Committee (Unofficial English Translation) (3 May 1985), at 48. Article 42 of the ICSID Convention stipulates that, "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".
[625] *Ibid* at 51.

Award's reasoning and the legal grounds … seem very much like a simple reference to equity".[626] As such, the annulment committee concluded that the tribunal had exceeded its power and annulled the award. This decision triggered a great deal of criticism,[627] while it does show that the line between exercising discretion and exceeding power in terms of the application of law can be quite blurry. This can cause uncertainty at the annulment stage and impose considerable pressure on investment tribunals to avoid going beyond the laws designated by treaties or party consent.

For non-ICSID awards, the practice of local courts can be varied with regards to whether to set aside or refuse to recognize and enforce an award based on a tribunal's failure to apply the proper laws. Neither the New York Convention nor the UNCITRAL Model Law explicitly refers to the failure to apply the proper law as an instance of excess of power. In some domestic legal systems, it may be deemed to be excess of power;[628] however, in practice, "[c]ourts generally have been unwilling to set aside awards based on the arbitral panel's choice of law".[629] A possible explanation is that reviewing the choice of law entails the risk of reviewing the merits of the award – given that in practice the distinction between the two can be quite blurred.

By contrast, in the same scenario, it would be much safer for tribunals to simply interpret and apply the laws argued by the parties – even if the interpretation or application is flawed. Under the ICSID, "failure to apply the proper law" is clearly distinguished from "errors in the application

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[626] *Ibid* at 53.
[627] See C Schreuer, "Decisions Ex Aequo et Bono Under the ICSID Convention" (1996) 11:1 ICSID Rev 37 at 57–58.
[628] For example, in in *AWG v. Argentine*, Argentina applied for the vacatur of award from the United States District Court of Columbia, claiming that, *inter alia*, "the Tribunal exceeded its powers by failing to apply applicable law in its computation of damages and its evaluation of the necessity defense". The court quoted the decision of previous courts that, to succeed in vacating an award, "a party must demonstrate that the 'arbitrator stray[ed] from interpretation and application of the agreement and effectively "dispense[d] his own brand of industrial justice"'". *AWG Group Ltd. v. The Argentine Republic, UNCITRAL*, Decision of the US District Court of Colombia on Argentina's Petition to Vacate the Arbitral Award (30 September 2016), para 46.
[629] Nicola Christine Port, Scott Ethan Bowers & Bethany Davis Noll, "Article V(1)(c)" in Herbert Kronke, Patricia Nacimiento & Dirk Otto, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V., 2010) at 272.

of the law": the former is a ground to annul the award (i.e., excess of power) while the latter is not.[630] As the annulment committee in *Amco Asia v. Indonesia* highlights, the committee examines the laws applied by the tribunal not for the purpose of "scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied"; instead, it merely determines "whether the Tribunal did in fact apply the law it was bound to apply to the dispute".[631] For non-ICSID arbitration, similarly, local courts generally draw a clear line between appellate review and the vacatur, setting aside or annulment of awards, thus avoiding examining tribunals' interpretation of treaties. As the U.S. Court for the District of Columbia puts, "[t]he [investment] tribunal might have been wrong, but '[t]he potential for those mistakes is the price of agreeing to arbitration'".[632]

To briefly sum up, this part has shown the grounds on which an award loses enforceability as a result of the arbitrator's excess of power. This clearly imposes another layer of constraint on the tribunal's ability to decide on issues or apply laws that were not argued by the parties. Although investment tribunals still enjoy the discretion to interpret relevant laws as well as to investigate and evaluate facts, this discretion must be conducted within the framework of party consent and the applicable laws.

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[630] Piero Bernardini, "Annulment of Awards" (2018) General Principles of Law and International Investment Arbitration 168 at 180–81.
[631] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment (16 May 1986), para 23.
[632] *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Decision of the US Court for District of Columbia Denying Mesa Power's Petition to Vacate the Award (15 June 2017), 14.

V. CONCLUSION

This chapter attempted to delineate adjudicators' zone of power – bounded by the context of the ongoing dispute – in terms of resolving polycentric issues. Section I explained the notion of polycentricity in the context of international adjudication and pointed out three scenarios where an international adjudicator may encounter polycentric problems. Section II demonstrated how adjudication, especially international adjudication, is inherently unsuitable for dealing with the "real" polycentric problems. To be more specific, it discussed three prominent features of adjudication that lead to this limit: (1) the limited parties involved in the adjudicative process, (2) justification of legal reasoning with arguments of principles as opposed to arguments of policy, and (3) time-efficiency. Section III then explored whether it is possible for investment tribunals to overcome the limits by going beyond the disputing parties' arguments or the applicable laws. It found that, given the constraints from relevant procedural rules, principles and jurisprudence, tribunals are unlikely and ought not to significantly exceed the power granted by applicable laws and party consent. This conclusion was reinforced by the observation in Section IV, which showed that a tribunal's excess of power can cause the award to be annulled, set aside, or refused enforcement.

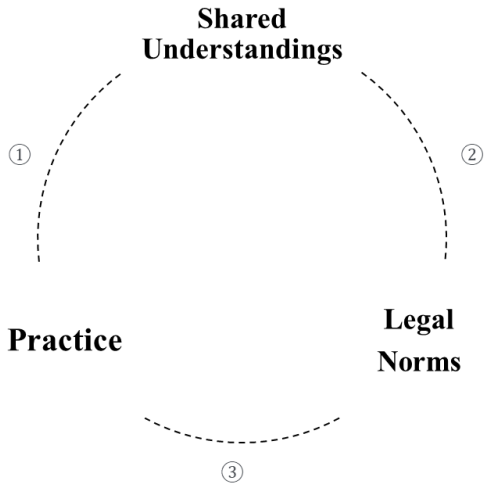
CHAPTER 5. LEGALIZING INTERNATIONAL INVESTMENT LAW

The preceding chapters have explained that the legalization of international investment law via the specific avenue of ISDS is subject to both external constraints and internal constraints; this Chapter then moves on to discuss how the legalization of the legal regime could be realized. Following the constructivist approach, it argues that, given the low level of shared understandings underpinning international investment law, the primary principle guiding the regime's reform agenda should be the facilitation of shared understandings. To be more specific, it explores the possible aspects for reform in light of the three processes of interactional law-making, namely practice, the institutionalization of norms and the application of norms. The main idea is that, at the current stage, the international community should create more opportunities for practice and interaction and allow for sufficient flexibility in the institutional design of the legal regime. To be clear, this chapter does not intend to provide a comprehensive set of reform options; it is rather devoted to examining the fundamental *principles* for the reform, i.e., to promote shared understandings and to ensure flexibility. Therefore, although this chapter does not cover all the potential reform options, it presents useful standards to evaluate whether a particular institutional design is desirable for the purpose of legalization.

I. A CONSTRUCTIVIST APPROACH TO THE LEGALIZATION OF INTERNATIONAL INVESTMENT LAW

Before talking specifically about the reform of international investment law, it is helpful to first summarize the discussion in the preceding chapters with the graph below to demonstrate how an interactional law-making process can achieve legalization in a sustainable manner:

Graph 1: Practice, Shared Understandings, and Legal Norms



The main argument is that the process of legalization should be underpinned by an increase of shared understandings within the community of practice. According to this graph, ideally, shared understandings are generated and accumulated through the practice of both substantive and procedural laws (process ①) and are sometimes, implicitly or explicitly, conceived to constitute new legal norms (process ②);[633] those new legal norms will in turn guide the practice of law (process ③) and facilitate the formation of new shared understandings. It is important to note that, in practice, the relationships between the three elements are not always positive, for example, the inconsistent practice of some key actors can pose challenges to the existing shared understandings; new shared understandings may delegitimize some previously formed legal norms; and sometimes positive laws can constrain or disrupt the necessary practice of law. To reform a legal regime in a sustainable manner, therefore, is to ensure and facilitate the positive circulation of the processes.

[633] An "explicit" recognition would be the recognition of norms as conceived by legal positivists; an "implicit" recognition, for example, the notion of "trade usages", is embedded in the practice of law.

Besides, the relationship between the three elements is not always unidirectional as explained above. For example, shared understandings can directly influence practice even though they are not conceived as legal norms;[634] acts such as codifying norms can reinforce the underlying shared understandings within the community of practice; and the practice of law can test the legitimacy of legal norms. This chapter opts to focus one direction, i.e. practice – shared understandings – norms – practice …, merely for the purpose of providing a clearer illustration of the process of legalization.

The three processes in Graph 1 designate three key aspects for the reform of international investment law: the creation of sufficient opportunities for the practice of law, the institutionalization of norms, and the application of norms. ISDS involves all three aspects: as discussed in Chapter 3, investment dispute settlement serves as an important platform for various actors to practice law and reinforce shared understandings, and the *jurisprudence constante* formed thereby significantly affects legal practice within the community. However, since the contribution of ISDS to the process of legalization is subject to both internal and external constraints, other avenues must also be exploited in the reform agenda to enhance shared understandings of international investment law.

II. PRACTICE

To efficiently increase shared understandings relating to international investment law, the international community needs not only to increase the "quantity" of practice (to the extent necessary) but also to ensure the "quality" of practice in order to improve the legitimacy of the legal regime. Below four important avenues of practice in the context of international investment

[634] As discussed in Chapter 3, shared understandings are not limited to "shared norms" but can also be based on the logic of consequence.

law are singled out, namely multilateral conversations, domestic practice, ISDS and legal assistance.

A. Multilateral Conversations

In the international arena, an effective way to facilitate shared understandings is multilateral conversations,[635] especially those under the auspices of international organizations such as the United Nations and the World Bank.[636] These organizations normally have the necessary expertise in the specific area of discussion and can facilitate communication by setting agenda, collecting information, conducting legal or empirical research, issuing reports and assisting in administrative matters.[637] In such conversations, the process of deliberation, where the actors present reasonable arguments – either principle-based or policy-based – and reflect upon new ideas, can contribute to the achievement of agreements.[638] In some circumstances, even if the actors find it difficult to reach substantive agreements, they may well develop a considerable level of shared understandings on procedural matters – if they are bound by strong common aims to do so.[639]

In this regard, both the UNCITRAL and the ICSID have taken an important step by setting the stage for multilateral discussions of the concerns and expectations relating to ISDS. The UNCITRAL WGIII, which is composed of all state members of the Commission, meets regularly

[635] For the purpose of enhancing shared understandings, multilateral conversations might be more efficient than bilateral or regional ones. As discussed in Chapter 3, a salient characteristic of a legal regime underpinned by thin shared understandings is that the rules within the regime are stipulated in bilateral instruments, which is a convenient avenue for states to reach reciprocal arrangements. In such circumstances, using exchange of interests to fix disagreements on norms can be a handy strategy to reach consensus temporarily; therefore, states might have less motivations to reach multilateral consensus on substantive obligations.
[636] See Finnemore & Sikkink, "International Norm Dynamics and Political Change", *supra* note 135 at 899–900.
[637] See e.g. *Ibid* at 899.
[638] See e.g. Vivien A Schmidt, "Taking ideas and discourse seriously: explaining change through discursive institutionalism as the fourth 'new institutionalism'" (2010) 2:1 European Political Science Review 1 at 17.
[639] A typical example is the interactional law-making process relating to international environmental law as discussed by Brunnée and Toope: the countries cannot agree upon key substantive obligations but they have developed considerable procedural understandings to work further on environmental protection. See Brunnée & Toope, *supra* note 126.

to discuss the problems relating to ISDS and the possible solutions.[640] Since its first formal session in 2017, the work of WGIII has attracted broad attention from a wide range of actors, including states, intergovernmental organizations, arbitration institutions, research centers and other NGOs.[641] It has also issued reports on a broad range of topics relating to the reform. In the meantime, the ICSID Secretariat has embarked on the amendment of its rules and regulations and has published four versions of reform proposals since 2016.[642] The ongoing conversation in the two organizations serves as an important platform for state and non-state actors to practice, interact and enhance shared understandings.

A notable feature of these discussions lies in inclusiveness and transparency: both the UNCITRAL WGIII and the ICSID invite opinions from the public and publish the reports and comments on their websites. This creates ample opportunities for interactions within and beyond the two organizations. Adhering to the principle of public participation and transparency further ensures the legitimacy of the interactional law-making process. Another merit of the discussions is the respect for diversity. While the UNCITRAL WGIII is committed to establishing a multilateral framework of reform, instead of seeking an outright multilateralization, it acknowledges the fact that the states are holding different or even conflicting approaches to certain key issues of reform and accordingly allows for sufficient flexibility in framework design. Thus, it is considering a multilateral instrument that "could allow States to opt for the reform options of their choice".[643]

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[640] UNCITRAL Secretariat, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-fourth Session (Vienna, 27 November - 1 December 2017) Part I", A/CN.9/930/Rev.1 (UNCITRAL, 2017) at 3. The 39th session was disrupted by COVID-19.
[641] *Ibid.*
[642] ICSID, "About ICSID Amendments", online: <https://icsid.worldbank.org/en/amendments/Pages/About/about.aspx>.
[643] See e.g. UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS): Multilateral Instrument on ISDS Reform" A/CN.9/WG.III/WP.194 (UNCITRAL WGIII, 2020) at 11.

The two institutions have achieved progress by gaining general support for developing a binding arbitration Code of Conduct. There have long been concerns regarding the lack of independence and impartiality of tribunal members in investment arbitration; thus, this Code of Conduct apparently reflects a shared understanding about the need and means to address these concerns.[644] Notably, the Code is not drafted from scratch but is "based on a comparative review of the standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and codes of conduct of international courts".[645] In other words, the understandings as reflected by the draft text are not generated from the multilateral conversations alone but to a great extent benefit from previous practices of international investment and commercial arbitration.[646] This fact, nevertheless, by no means diminishes the significance of the attempt to draft this Code – it affirms the *shared* expectations – as it is prepared under a *multilateral* framework – regarding the regulation of arbitration behaviors for the specific purpose of investment arbitration,[647] and it sets the stage for the formation of more detailed shared understandings concerning the issue.

It is inevitable that, in the meantime, power plays a role in the discourses, which may distort the legitimacy of the outcome of the conversations.[648] Power may not only influence the effect of persuasion in a coercive manner but can also be embedded in the "discursive construction of

[644] UNCITRAL Secretariat, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019)", A/CN.9/1004* (UNCITRAL, 2019) at paras 51–52.
[645] UNCITRAL and ICSID, "Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement", para 7, available online at <https://uncitral.un.org/en/codeofconduct>.
[646] For example, CETA, Annex 29-B – Code of conduct for arbitrators and mediators; American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (entered into force 1 March 2004).
[647] Previous code of conduct or code of ethics are prepared either for commercial arbitration or under bilateral investment treaties (i.e. CETA, EU-Singapore FTA, etc.)
[648] On the other hand, it is argued that "[b[iased or self-interested communicators are far less persuasive than those who are perceived to be neutral or motivated by moral values", thus questioning the actual influence of power on the outcome of conversations. Thomas Risse, "'Let's Argue!': Communicative Action in World Politics" (2000) 54:1 International Organization 1 at 17.

meaning" by "enabling and legitimating the arguments of individual persuaders".[649] In other words, power relations may define "who has legitimate access to a discourse" as well as which arguments can be deemed to be "good arguments".[650] To minimize this risk, it is necessary to adopt a pluralist approach to international law that respects the divergence, distances and oppositions in the discourses.[651] In the practice of ISDS reform negotiations, it requires the UNCITRAL WGIII and the ICSID to at least show equal consideration for different actors' appeals and interpretations of law in line with their social and historical backgrounds.

B. Domestic Practice

Practice and interactions at the domestic level – legislative, judicial or administrative – are of particular importance for international investment law because states' legal commitments are directly owed to foreign investors and are principally executed by local authorities.[652] Moreover, domestic legislation plays a critical role in tribunals' evaluation of compliance with key standards relating to foreign investment.[653] For example, a great number of investment treaties and tribunal interpretations have explicitly or implicitly referred to compliance with domestic laws as a standard to assess whether there is a violation of the "due process" requirements in expropriations.[654] Another issue that has a close nexus to local laws is the legality of investments,

[649] Jeffrey T Checkel, "Constructivism and EU Politics" in Knud Jørgensen, Mark Pollack & Ben Rosamond, eds, *Handbook of European Union Politics* (London, United Kingdom: SAGE Publications Ltd, 2006) 57 at 67.
[650] Risse, "'Let's Argue!'", *supra* note 648 at 16. See also Seumas Miller, "Foucault on Discourse and Power" (1990) 76 Theoria: A Journal of Social and Political Theory 115 at 122.
[651] See Michel Foucault, "Politics and the Study of Discourse" in Graham Burchell, Colin Gordon & Peter Miller, eds, *The Foucault Effect: Studies in Governmentality: with Two Lectures by and An Interview with Michel Foucault* (Chicago: The University of Chicago Press, 1991) 53 at 53–55.
[652] See Brunnée & Toope, *supra* note 126 at 114–15.
[653] See general Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford: Oxford University Press, 2017).
[654] *Ibid* at 58.

where an investment tribunal has to decide whether an investment is still eligible to the protection of the investment treaty if it was made in violation of domestic laws.[655]

Active interactions between domestic laws and international laws may result in the "harmonization" of laws, meaning the process by which states' national laws converge on a particular issue. Such interactions can take place through various avenues, for example, the top-down implementation of international treaties or the spontaneous reference to model laws.[656] The outcome of harmonization, however, is unlikely to be realized in the context of international investment law, not only because the investment protection standards are not designed for harmonization but more importantly, the diversification of foreign investment laws and practice is closely associated with the economic position of each state in international capital flows. Currently, the international community is still at the early stage of sorting out what the shared understandings are regarding foreign investment protection; this thus requires each state to first have a "sound assessment of domestic understandings".[657] To this end, it is necessary to ensure that key actors (e.g., investors, affected communities, experts, etc.) are provided with adequate opportunities to participate in relevant domestic processes,[658] thus ensuring that the understandings of states are sufficiently representative of domestic actors. In the meantime, measures can be taken to educate local authorities about the regulation of foreign investments – getting familiar with relevant rules

[655] Some investment agreements make compliance with local laws an explicit requirement (e.g. Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference. Art. 9), while others are silent on the issue. In practice, some investment tribunals hold that an investment must be made consistent with local laws even if the treaty is silent on the issue (e.g. *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012), 307-10.
[656] Examples of the latter include the UNCITRAL Model Law on International Commercial Arbitration and UNIDROIT Principles of International Commercial Contracts. See Martin Gebauer, *Unification and Harmonization of Laws*, Max Planck Encyclopedias of International Law (Oxford University Press, 2009). See also Fabien Gélinas, "Peeking Through the Form of Uniform Law: International Arbitration Practice and Legal Harmonization" (2010) 27:3 Journal of International Arbitration 317–330.
[657] Brunnée & Toope, *supra* note 126 at 119.
[658] *Ibid.*

may lower their risk of being sued by foreign investors and reshape domestic (mis)understandings about international investment law.[659]

C. ISDS

Although this section emphasizes the creation of opportunities for practice and interactions, it does not necessarily arrive at the conclusion that having more ISDS cases is desirable for the purpose of enhancing shared understandings (given the costs and time length of investment arbitration). Rather, the focus should be on improving the "quality" of interactions within each case. Chapter 2 has analyzed several aspects of ISDS that may influence the legalization of international investment law including, *inter alia*, access to dispute settlement, procedural impartiality, the quality of awards, transparency and public participation.[660] These aspects are critical to improving interactions within ISDS: increasing transparency and granting impacted actors' access to arbitral proceedings (e.g., as *amicus curiae*) not only creates opportunities for necessary interactions but also ensures the conception of legitimacy of the arbitral procedure; decisions which are rendered impartially and stated clearly in arbitral awards tend to be more persuasive and thus facilitate the formation of shared understandings. These aspects are traditionally conceived as core tenets of legitimacy and the rule of law in adjudication, and the discussion here has just highlighted their importance from a constructivist perspective. Since there already is a general understanding to address these issues internationally (for example, the conclusion of the UNCITRAL Rules on Transparency and the draft of the arbitration Code of Conduct), I will not elaborate on them here.

[659] For example, it is argued that domestic regulators are very likely to be unaware of potential investment treaty violations when conducting regulatory activities. See Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606 at 610–11.
[660] See Chapter 2.III.

D. Legal Assistance

Apart from the aforementioned avenues, legal assistance mechanisms are also important in terms of facilitating interactions: they can contribute to the legal capacity-building of less advantaged actors such as least developed countries, small companies and local communities,[661] thus helping them better understand the prevalent rules and to accurately identify the more desirable ones for their conditions. It may mitigate the adverse effects brought by the phenomenon of "bounded rationality" in investment treaty design, meaning some developing countries' over-estimation of the potential economic benefit of signing BITs and under-estimation of the legal risk of those treaty rules.[662] The issue of legal assistance has been thoroughly discussed by the UNCITRAL WGIII. The key idea is to establish an advisory center that provides legal assistance on dispute settlement and offers advice on domestic laws.[663] On the other hand, one may worry that the decentralized international investment legal regime as well as the complexity of investment cases would pose considerable challenges to the establishment of a multilateral advisory center like the Advisory Centre on WTO Law.[664] In light of this concern, one possible option is to assist developing and least developed countries in building their local think tanks or research centers. These decentralized centers can provide more customized legal advice to local authorities or companies, and they can frequently communicate and share information with each other to facilitate mutual understandings world-wide.[665]

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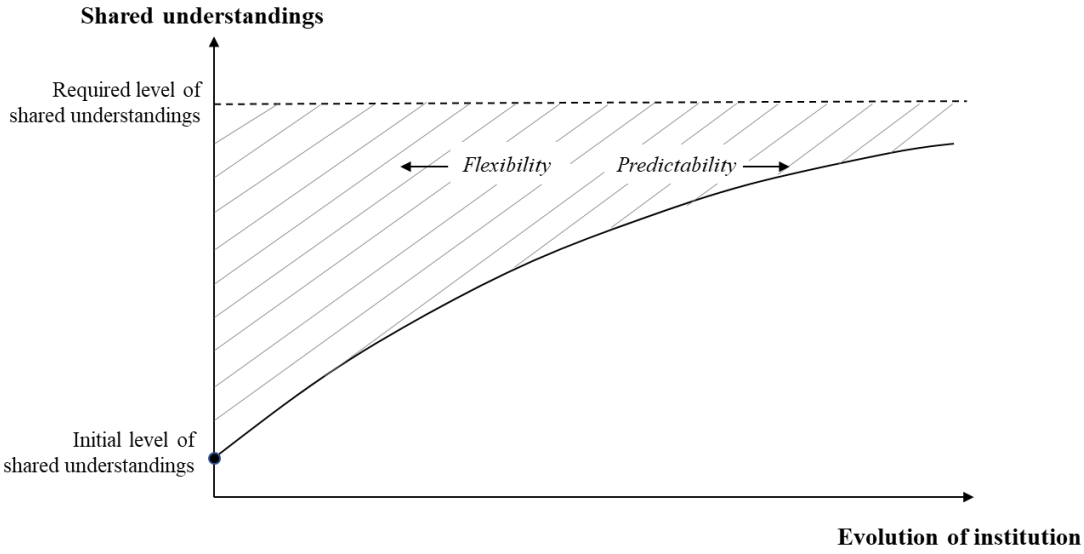
[661] See Stephan W Schill & Geraldo Vidigal, "Designing Investment Dispute Settlement à la Carte: Insights from Comparative Institutional Design Analysis" (2020) 18:3 The Law & Practice of International Courts and Tribunals 314–344 at 340–41.
[662] See Poulsen, *supra* note 384.
[663] UNCITRAL Secretariat, *"*Possible reform of investor-State dispute settlement (ISDS): Advisory Centre*"*, A/CN.9/WG.III/WP.168 (2019).
[664] *Ibid* at 7–8.
[665] An example would be China's practice relating to WTO laws. After joining the WTO, to improve relevant legal capacity, China's local governments established several think tanks known as "WTO centers". These centers are believed to have "fill[ed] the information and communication gaps for those in academia, industries and the

III. THE INSTITUTIONALIZATION OF RULES

It can be seen from the discussion above that, in terms of facilitating interactions (process ①), although the constructivist approach has not been explicitly referred to in the discourse of ISDS's reform, the international community is generally following a path that is consistent with the spirit of the theory which highlights the fertilization of shared understandings. By contrast, reform opinions relating to process ② – whether there should be radical institutionalization of legal norms through the creation of investment courts – are greatly diversified. The controversies can largely be attributed to the competing demands between predictability and flexibility in institutional design. Following the constructivist approach, I would like to use the graph below to describe the relationship between the level of shared understandings and reform options:

Graph 2: Shared Understandings and Reform Options



government". Pasha L Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building" (2010) 13:4 J Int Econ L 997 at 1014.

The vertical axis denotes the level of shared understandings within an institution and the horizontal axis denotes the evolution of the institution with time. The solid curve demonstrates the actual level of shared understandings and the dashed line demonstrates the required level of shared understandings. The shaded area demonstrates the gap between the Actual and the Required levels of shared understandings.

A. The Gap Between the Actual and the Required Level of Shared Understandings

Ideally, shared understandings should gradually increase with the accumulation of practice and the internalization of norms by the actors within the institution. Nevertheless, as reflected in the curve, generally the evolution of shared understandings is subject to the marginal diminishing effect where the evolutive process slows down with measures of institutionalization.[666] For example, as the content of shared understandings may not be fully reflected in the codified rules, the process of codification, by recognizing the "validity" of some norms over others, may fossilize the community's expectations of law, thus slowing down the evolution of shared understandings. As to the initial level of shared understandings, it may vary among institutions: as discussed in Chapter 3, for institutions initially triggered by common aims (for example, those relating to human rights protection), there is generally a higher level of initial shared understandings; by contrast, for institutions initially triggered by reciprocity (for example, the GATT system), there is generally a lower level of initial shared understandings.

Another important factor in the graph is the Required level of shared understandings, which is determined by the goal to be pursued and the nature of the obligations to be fulfilled in the

[666] To be sure, the shape of the curve is not necessarily an *accurate* reflection of the development of shared understandings within an institution – it is simply drawn to demonstrate the gap between the Actual and Required levels of shared understandings; in practice, there may well be different trend of development at different stages of the institution.

institution.[667] To use the GATT as an example again – the system was created as a provisional arrangement that facilitates global trade by reducing tariffs, and the obligations for the contracting parties are economically reciprocal.[668] As such, it poses less challenge to the sovereignty of states.[669] Moreover, during the Geneva Round, the tariff commitments were negotiated bilaterally between pairs of trade partners and were extended to the multilateral level via the application of the MFN clause, which provides ample opportunities for bargaining.[670] In a word, the formation of the GATT system does not require a high level of shared understandings among the contracting parties.[671] By contrast, the obligations under the current international investment legal regime require states to relinquish more rights of regulation and in some circumstances, to provide super-national treatment to foreign investors. In bilateral or regional relationships, states may be willing to make compromises out of reciprocal economic or political concerns; while in the multilateral setting, having shared understandings of the desirable level of treatment becomes the prerequisite for the formation of institutions. Therefore, the Required level of shared understandings of international investment law is significantly higher than that of the GATT.

This graph suggests an important principle for institutional reform as well as the institutionalization of rules: when the Actual level of shared understandings is significantly lower than the Required level, the rules and rule-making procedures might allow more flexibility for

[667] To be sure, the shape of the line of the required shared understanding (i.e. a line with fixed value), like that of the ASU, is just for illustrative purposes. In practice, RSU may fluctuate, increase or decrease with the change of the actors' shared normative expectations.
[668] "WTO | Understanding the WTO - The GATT years: from Havana to Marrakesh", online: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm>.
[669] Thomas W Zeiler, "The Expanding Mandate Of The Gatt: The First Seven Rounds" in Martin Daunton, Amrita Narlikar & Robert M Stern, eds, *The Oxford Handbook on the World Trade Organization* (New York: Oxford University Press, 2012) 102 at 104 ("[t]he modified multilateral order that evolved in the post-war period under the GATT was less an assault on national sovereignty—for recovery and reconstruction demands required countries to protect their economies—than a general thrust towards opening markets").
[670] *Ibid* at 105.
[671] In comparison, the formation of the WTO requires a higher level of shared understandings. This will be discussed in detail in the case study below.

actors to practice law and enhance shared understandings; by contrast, when the Actual level of shared understandings is converging with the Required level, the norms and practice can be further institutionalized to provide more predictability for individual behaviors. Such an understanding is also consistent with the finding of Chapter 4 that a higher level of flexibility increases a tribunal's ability to tackle polycentric issues.[672] The case study below will demonstrate how the evolution of the WTO and the ECHR implies this principle.

1. Case 1: the ITO, GATT and WTO

The relatively successful experience of the WTO has been frequently referred to as an ideal model for the reform of international investment law. The Required level of shared understandings of the GATT, as discussed above, is lower than that of the international investment law; nevertheless, the international community still struggled for several decades to eventually legalize the system. The negotiation process for the multilateral trade regime, like that of the international investment law, has been charged with the arduous task of reconciling the divergent opinions between developing countries and developed countries for decades.[673] To give an example, during the Havana Conference in 1947, the parties could not agree upon the issue of whether the use of quantitative import restrictions should get the prior approval of the proposed International Trade Organization (ITO, which never came into existence).[674] For developing states, this rule would greatly circumscribe their right to regulate imports, thus threatening their economic development;

[672] See Chapter 4.II.B.2.
[673] See general Richard Toye, "The International Trade Organization" in Martin Daunton, Amrita Narlikar & Robert M Stern, eds, *The Oxford Handbook on The World Trade Organization* (Oxford: Oxford University Press, 2012) 85.
[674] *Ibid* at 93–94.

while for industrialized countries like the UK, the primary concern apparently was their own exports.[675]

Fortunately, the flexible legal framework of the GATT leaves adequate opportunities for the states to discuss and make compromises on many controversial issues. After the unsuccessful attempt to establish the legally comprehensive and institutionalized ITO (which was largely caused by the US's failure to ratify the charter domestically[676]), the GATT system survived as a "provisional" "tariff-bargain forum" for more than four decades until the creation of the WTO.[677] Compared with the ITO charter, the GATT initially had a much narrower focus, that is, reducing tariffs.[678] After several rounds of negotiations, the final text of the GATT that covers other trade-related issues was concluded in 1947 in Geneva.[679] Interestingly, Part II of the GATT, which includes key provisions relating to non-tariff issues such as national treatment, quantitative restrictions, anti-dumping, subsidies, balance of payment and exchange arrangements, was enforced differently from the tariff concession provisions.[680] According to the *Protocol of Provisional Application*, Part II shall be applied "to the fullest extent not inconsistent with existing legislation".[681] In other words, it allows a contracting party to maintain pre-existing laws even if they are inconsistent with the provisions in Part II of the GATT, which is known as the

[675] *Ibid* (in the end, they reached a compromise, which allows the use of quantitative import restrictions under certain conditions; however, the UK was quite unsatisfied with this solution).
[676] See *ibid* at 96; William Diebold, "Reflections on the International Trade Organization International Trade Conference: International Trade after the Cold War: Revisiting the Allies' Idealistic Vision of the Post-World War II International Economic Order" (1993) 14:2 N Ill U L Rev 335–346.
[677] Zeiler, *supra* note 669 at 102.
[678] Indeed, the negotiation of the GATT was undertaken by one of the several ITO committees in 1946 that specialized in commercial policy; other committees tackled with other issues such as employment. Douglas A Irwin, Petros C Mavroidis & Alan O Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008) at 99.
[679] *Ibid* at 101.
[680] For detailed contents of the two Parts, see GATT 1947.
[681] *Protocol of Provisional Application of the General Agreement on Tariffs and Trade* (30 October 1947) 61 Stat. A2051, TIAS No. 1700, 55 UNTS 308 (entered into force 1 January 1948), art 1(b). By contrast, other Parts were applied definitively.

"grandfather clause".[682] Because the negotiators were expecting the GATT to be superseded by the ITO Charter in the near future, they envisaged the grandfather clause to be a temporary measure that would allow the prompt application of those tariff concessions first and at the same time avoid changing domestic legislations or prejudicing later ITO negotiations.[683] When it became clear that the ITO would not come into existence, the negotiators established working parties and groups to continue the negotiation of non-tariff barriers and other issues.[684]

Notably, during the 1970s Tokyo Round negotiation where 102 parties participated in the negotiations, consensus was finally reached to allow preferential treatment to developing countries in terms of both tariff and non-tariff measures, which is known as the "derogation to the MFN obligation".[685] The success of the developing countries in this regard is not only a result of their continuous endeavor to argue for preferential treatment since the ITO era but also a result of the international community's increasing recognition of the principle of preferential and non-reciprocal treatment.[686] In this process, numerous scholarly studies, by showing the importance of the principle in terms of addressing economic inequality problems and revealing the *de facto* "legal and quasi-legal recognition" of the principle in actual GATT practice, played an irreplaceable role to legitimize the principle.[687]

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[682] Marc Hansen & Edwin Vermulst, "The GATT Protocol of Provisional Application: A Dying Grandfather" (1988) 27:2 Colum J Transnat'l L 263 at 264.
[683] WTO, Analytical Index of the GATT, Provisional Application of the General Agreement, 1072-73, available online at <https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/prov_appl_gen_agree_e.pdf>. The Protocol was terminated on 8 December 1994.
[684] Irwin, Mavroidis & Sykes, *supra* note 678 at 124–25.
[685] WTO, Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979 (L/4903).
[686] Robert E Hudec & Joseph Michael Finger, *Developing Countries in the GATT Legal System* (Cambridge: Cambridge University Press, 2010) at 101–02.
[687] *Ibid*.

Eventually, in the Uruguay Round, topics relating to trade in service, subsidies, safeguards, and intellectual properties, which were either not covered or not elaborated in the GATT 1947, got fully discussed by the negotiating parties.[688] It is also during this Round that the idea of institutionalizing the regime with more efficient administrative, reviewing and dispute settlement mechanisms was raised.[689] In the end, the Uruguay Round "brought about the biggest reform of the world's trading system since GATT was created" – the creation of the WTO.[690] In this process, through decades of practice, the contracting parties eventually accumulated a sufficient level of shared understandings to initiate a fundamental institutional change towards a regime that has a significantly higher Required level of shared understandings.

In addition to substantive rules, in the meantime, the system was witnessing a spontaneous evolution of the procedure for dispute settlement. The initial method of dispute settlement provided by the GATT 1947 is in essence diplomatic, i.e., through bilateral consultation or multilateral consultation (if bilateral consultation failed).[691] Later, in around 1955, there was a "major shift" to dispute resolution by independent panels of experts.[692] The function of the dispute settlement system as carried out by the panels had also evolved from settlement-facilitation focused to obligation-enforcement focused.[693] The practice of the parties and panels in this process was recognized as the "customary practice of the GATT in the field of dispute settlement" and was progressively codified in a series of decisions and understandings as the practice developed.[694]

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[688] Ernest H Preeg, "The Uruguay Round Negotiations and the Creation of the WTO" in Martin Daunton, Amrita Narlikar & Robert M Stern, eds, *The Oxford Handbook on The World Trade Organization* (Oxford: Oxford University Press, 2012) 122 at 127.
[689] *Ibid* at 131.
[690] "WTO | Understanding the WTO - The Uruguay Round", online: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm>.
[691] GATT 1947, arts XXII and XXIII.
[692] John H Jackson, "The Case of the World Trade Organization" (2008) 84:3 International Affairs 437 at 442.
[693] *Ibid* at 442–43.
[694] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, L/4907, adopted 28 November 1979.

And then, in the Uruguay Round, in line with the legalization of the whole regime, a more judicialized WTO dispute settlement body with a standing appellate body, compulsory jurisdiction and binding decisions was established.[695]

It is clear that, in the case of the GATT and its dispute settlement mechanism, institutionalization is not the means but rather the end of the development towards a rule-based system. The fundamental driving force behind the development is the shift – or convergence – of shared understandings about the international economic order, with both the developing countries and developed countries recognizing the value of a relatively liberal trade regime.[696] John Jackson provided a succinct summary of the life of GATT:

> With very meagre treaty language as a start, plus divergent alternative views about the policy goals of the system, the GATT, like so many human institutions, took on a life of its own. In respect of both the dispute-handling procedures (a shift from working parties to panels) and the substantive focus of the system (a shift from general ambiguous ideas about 'nullification or impairment' to more analytical or legalistic approaches to interpreting rules of treaty obligation), the GATT panel procedure evolved towards more rule orientation.[697]

To sum up, the evolution of the international trade regime is a telling example of how a flexible legal framework facilitates the formation of shared understandings. The flexibility of the GATT is embedded in both the treaty law-making and dispute settlement processes. From start to finish, the GATT was conceived as a provisional arrangement where the legal obligations might be subject to further negotiations and modifications. In the whole process, consensus went before the codification or elaboration of rules. As to dispute settlement, the form of consultation and *ad hoc* panels grant adequate party autonomy to the disputants. Notably, the panel decisions are not

[695] See generally, DSU.
[696] Preeg, *supra* note 688 at 127. Particularly, as highlighted by the author, at the time of the Uruguay Round, there was a movement towards liberalization of economies in traditionally communist countries like China.
[697] Jackson, *supra* note 692 at 444.

binding *per se* but need to be approved by the positive consensus of the GATT Council (including the representative of the responding party) before taking effect.[698] This means that the respondent state, presumably, could easily block the adoption of the panel reports – although in practice they generally refrained from doing so.[699] Under such a loose dispute settlement framework, the majority of concessions made by the responding parties were based on pre-ruling settlements (even the panels had been established) rather than panel rulings.[700]

It is true that, on the other hand, such a degree of flexibility entails various problems. To use the grandfather clause as an example – there had been inconsistent understandings among practitioners and commentators as to, *inter alia*, which kinds of domestic legislation should be deemed to be grandfathered and to what extent a contracting party can amend those pieces of grandfathered legislations.[701] This had apparently given rise to significant uncertainties. Another problem caused by the ambiguous standard, as raised by the European Community during the negotiations, was the imbalance of obligations among GATT contracting parties, given that the clause may apply differently in different countries.[702] Despite these problems, it is undeniable that the adoption of the grandfather clause enabled the immediate birth of the GATT system. It is thus a question of balancing the legal and political pros and cons. As far as I see, it is worth the compromise – flexibility provides more possibilities for the parties to test and promote their understandings via negotiations and dispute settlement, which drives the formation of shared

[698] "WTO | Disputes - Dispute Settlement CBT - Historic development of the WTO dispute settlement system - The system under GATT 1947 and its evolution over the years - Page 1", online: <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm>.
[699] *Ibid* ("[t]hey did so because they had a long-term systemic interest and knew that excessive use of the veto right would result in a response in kind by the others").
[700] Marc L Busch & Eric Reinhardt, "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes" (2000) 24:1 & 2 Fordham Int'l LJ 158 at 162.
[701] Hansen & Vermulst, "The GATT Protocol of Provisional Application", *supra* note 682 at 273–83.
[702] John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (Geneva: World Trade Organization, 1995) at 104.

understandings and eventually the establishment of the WTO. On the other hand, the ongoing WTO crisis might be a signal that the regime has been over institutionalized – as discussed in Chapter 3, blocking the appointment of appellate body members is not simply the result of the Trump administration's anti-multilateralism approach but also reflects the concern that the dispute settlement body has been delegated law-making powers that have exceeded the shared understandings of the member states.[703]

2. Case 2: the ECHR

The legal regime of the European Convention on Human Rights (ECHR) is a typical example of a highly legalized institution where the gap between the Required level of shared understandings and the Actual level of shared understandings is relatively small and hence embraces a higher level of predictability. Currently, the ECHR has 47 Contracting Parties.[704] It sets out obligations of the contracting parties in terms of the protection of the rights and freedoms of "everyone within their jurisdiction".[705] The obligations include the protection of fundamental human rights such as the right to life, freedom of speech and assembly, liberty, equality, right to a fair trial, etc., as well as the prohibition of activities infringing such rights such as torture and discrimination.[706] A prominent feature of the ECHR – compared to other international human rights treaties – is its strong enforcement mechanism.[707] The European Court of Human Rights (ECtHR), whose jurisdiction "extend[s] to all matters concerning the interpretation and application of the

[703] See Chapter 3.IV.B.
[704] European Court of Human Rights, "Accession of the European Union", online: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/accessioneu&c=>.
[705] *ECHR*, art 1.
[706] See "European Convention on Human Rights - How it works", online: *Impact of the European Convention on Human Rights* <https://www.coe.int/en/web/impact-convention-human-rights/how-it-works>.
[707] David John Harris et al, *Law of the European Convention on Human Rights* (Oxford: Oxford University Press, 2014) at 5.

Convention and the Protocols thereto",[708] may admit both the application of a state against another state's violation of the ECHR or the application of an individual (or a group of individuals) who is the victim of a state's violation of the ECHR.[709] The judgments of the ECtHR are binding upon the contracting parties and are executed under the supervision of the Committee of Ministers.[710] In addition to resolving disputes, if requested by the Committee of Ministers, the ECtHR may also issue advisory opinions on certain issues relating to the interpretation of the ECHR.[711]

Like the GATT, the ECHR was an endeavor to restore and redesign the post-WWII legal order;[712] on the other hand, unlike the GATT, the journey towards the conclusion of the ECHR appeared to be much less tortuous – it took only around a year for the Convention to be signed by the Committee of Ministers.[713] Notably, to form an international human rights legal regime like the ECHR requires a much higher level of shared understandings because – unlike international economic law regimes that are built upon transnational practices and thus inherently demand transnational legal framework – human rights issues are conventionally conceived to fall into states' domestic jurisdiction (unless transnational factors are involved).[714] In other words, to join a legal regime that allows a state to be sued by its own nationals in an international court would require the state to relinquish its sovereignty to a great extent. This was eventually realized thanks to the

[708] ECHR, art. 32.
[709] ECHR, arts 33-34.
[710] ECHR, art. 46.
[711] ECHR, art. 47.
[712] Clare Ovey & Robin White, *Jacobs and White: the European Convention on Human Rights*, 4th ed (Oxford, New York: Oxford University Press, 2006) at 2.
[713] The idea of having a human rights convention in Europe was first formally discussed by the Council of Europe in fall 1949; the ECHR was concluded and open for signature on 4 November 1950 and entered into force on 3 September 1953 with 10 ratifications. See Steven Greer, Laurence W Gormley & Jo Shaw, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge, United Kingdom: Cambridge University Press, 2006) at 18–20; Council of Europea, "Details of Treaty No.005: Convention for the Protection of Human Rights and Fundamental Freedoms", online: *Treaty Office* <https://www.coe.int/en/web/conventions/full-list>.
[714] See Ovey & White, *supra* note 712 at 4.

strong common aims binding the European countries at that time. One of the aims, apparently, was the protection of fundamental human rights.[715] This value has been particularly cherished by the international community after the end of WWII, which led to the conclusion of the Universal Declaration of Human Rights in the United Nations.[716] Against this backdrop, the ECHR can be said to be an endeavor to further address the issue among the European countries in line with the broader goal of building a more integrated Europe.[717] The second common aim – against the Cold War backdrop – is a rather ideological one: a convention protecting human rights and political freedom could "re-inforce a sense of common identity" among the European countries and consequently combat the dissemination of communism.[718] In a word, the initial level of shared understandings of the human rights legal regime based on the ECHR is rather high.

The strong common aims are embodied in the countries' willingness to delegate the legislative and judicial functions relating to human rights issues to independent institutions. In May 1949, they established the Council of Europe, the aim of which is to "achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress".[719] The Council of Europe consists of two organs, namely the Committee of Ministers and the Consultative Assembly (which was called "Parliamentary Assembly" after 1994).[720] The former is more of a political body, consisting of government representatives (normally the Minister of Foreign Affairs) and deciding

[715] ECHR, Preamble ("this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared").
[716] *Universal Declaration of Human Rights*, Adopted 10 December 1948, 217 A (III); United Nations, "History of the Document", (6 October 2015), online: <https://www.un.org/en/sections/universal-declaration/history-document/index.html>.
[717] See ECHR, Preamble ("Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948").
[718] Greer, Gormley & Shaw, *supra* note 38 at 20; Ovey & White, *supra* note 37 at 2 ("[the concern was] to protest states from Communist subversion").
[719] *Statute of the Council of Europe*, ETS No.001 (signed 5 May 1949, entered into force 3 August 1949), art 1.
[720] *Ibid*, art. 10.

on issues such as the conclusion of conventions and the organization and arrangements of the Council of Europe;[721] the latter serves as the "deliberative organ", where a number of individual representatives (who are different from those of the Committee of Ministers) discuss matters within the aim and scope of the Council of Europe and make recommendations to the Committee of Ministers.[722]

The existence of the Consultative Assembly means that the Council of Europe is not a purely political body but is significantly legalized, as the Assembly is relatively independent of the governments and directly serves the goal of protecting and promoting fundamental principles relating to human rights, democracy, and the rule of law.[723] Indeed, during the preparation of the human rights rules, it was not unusual for the Assembly to disagree with the texts prepared by the Ministers (which generally reflected the compromises among the countries) and insisted on its own standards.[724] In addition to the deliberative role, the Assembly is entrusted with the power to elect the judges of the ECtHR, which is quite different from the common practice in domestic legal systems where judges are usually elected via political procedures.[725] Moreover, although the Assembly is not granted by the ECHR the authority to supervise the implementation of the Court's judgments (as it is the authority of the Commission of Ministers), it has "*de facto* and even *de jure*

[721] *Ibid*, arts 14-18.
[722] *Ibid*, art 23.
[723] See A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford; New York: Oxford University Press, 2004) at 645–46 (the author quoted a statement which indicates that the Consultative Assembly was meant to reflect the public opinion of the European peoples).
[724] For example, during the preparation of the Protocol which stipulates rules concerning the protection of property, the right to education and the right to free elections, the Assembly disagreed with the loose standards presented by the chairman of ministers and resulting in the redesigning of some parts of the articles. For details about this history, see *Ibid* at 801–02.
[725] ECHR, art 22; Elisabeth Lambert-Abdelgawad, "The Court as a part of the Council of Europe: the Parliamentary Assembly and the Committee of Ministers" in Andreas Follesdal, Birgit Peters & Geir Ulfstein, eds, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013) 263 at 264.

imposed an increasingly institutionalised right of inspection" on the Committee of Minister's execution of the judgments.[726]

Unsurprisingly, despite the strong common aims, there was still significant divergence among the countries on a range of issues during the preparation of the ECHR. Some disagreements can be resolved by making compromises. For example, the civil law countries and the common law countries were adopting distinct approaches regarding, *inter alia*, the extent to which the obligations should be precisely specified and the role of the court,[727] but eventually, the states were willing and able to make compromises between the two approaches.[728] For disagreements that were harder to be reconciled, techniques that allow for flexibility were used to facilitate the achievement of consensus. For example, like the practice during the GATT negotiation, the contracting parties decided to leave some issues to be negotiated later as Protocols after the conclusion of the ECHR.[729] As a result, since 1952, there have been sixteen Protocols amending or supplementing the Convention.[730] Another technique was to make controversial arrangements like the acceptance of the court's jurisdiction and the right of individual petitions temporarily optional.[731] The later-concluded Protocols that stipulate additional rights to the ECHR are also made optional for acceptance.[732]

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[726] *Ibid* at 276.
[727] Simpson, *supra* note 723 at 713. According to the author, "[t]he civilian approach was to specify the rights and the limitations to them in very general terms … and to police the system of protection through the elaboration by the court of a jurisprudence of right", while "[t]he common law approach was distrustful of bills of rights expressed in broad general terms".
[728] *Ibid*.
[729] *Ibid* at 753.
[730] For details about the Protocols, see Council of Europe, "Search on Treaties", online: *Treaty Office* <https://www.coe.int/en/web/conventions/search-on-treaties>.
[731] Simpson, *supra* note 723 at 711.
[732] For updates on each country's signatory status, see Council of Europe, "Search on Treaties: Simplified Chart of signatures and ratifications", online: *Treaty Office* <https://www.coe.int/en/web/conventions/search-on-treaties>.

Notwithstanding the flexibilities, it can be clearly seen from the brief historical review above that the norms within the legal regime – both the primary norms and secondary norms – are highly institutionalized to provide greater predictability. The Committee of Ministers and the Parliamentary Assembly follow standardized sets of procedures to amend or create laws; with regards to case laws, the ECtHR, a permanent court with full-time judges, interprets and applies the ECHR and has developed the *de facto* doctrine of precedent by relying heavily on its decisions in previous cases.[733]

To briefly sum up, this section has discussed the relationship between the level of shared understandings and the strategies for institutional reform. It argues that, for institutions where the Actual level of shared understandings is far from the Required level of shared understandings, a high degree of flexibility must be preserved (or tolerated) to allow the actors to practice law and reinforce shared understandings; predictability is more desirable when the Actual level of shared understandings is converging with the Required level of shared understandings. To further explain the argument, it uses the examples of the GATT and the ECHR. The former exemplifies the type of institution where there was a significant gap between the Actual and Required level of shared understandings at the beginning while the flexible law-making and dispute settlement mechanisms fertilize a considerable level of shared understandings after decades of practice. By contrast, the latter exemplifies the type of institution where, driven by firm common aims, the level of shared understandings was high during the creation of the institution and predictability was embedded in the institutional design from the very beginning. These two institutions can be useful benchmarks for us to assess where the current international investment law is and how far it can go.

[733] Yonatan Lupu & Erik Voeten, "Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights" (2012) 42:2 Brit J Polit Sci 413 at 416.

B. Thin Shared Understandings of International Investment Law: An Observation from the UNCITRAL Negotiation

While Chapter I has discussed the debates among commentators regarding the desirable reform of international investment law, this section will focus on the opinions of states as reflected in their UNCITRAL WGIII submissions. The UNCITRAL process is principally "government-led", with experts playing supplementary roles as observers and advisors.[734] Up to now, the degree of agreement among states is rather modest, being limited to issues such as drafting a Code of Conduct for arbitrators. Although the initiative to reform ISDS is broadly supported by the international community, a review of states' submissions shows that they have rather divergent expectations of the outcome of the reform. Generally, developing states tend to argue for greater control by host states throughout the dispute settlement process via mechanisms such as mandatory dispute prevention, counter-claims, and joint interpretation of treaties by treaty parties.[735] Some of their proposals appear to conflict with the EU's intention to further judicialize ISDS. Therefore, it remains doubtful whether WGIII negotiation will achieve substantial progress that satisfies the divergent demand of various actors.

1. The Substantive Concerns

The reform agenda proposed by WGIII is primarily directed at the procedural aspects of ISDS. Nevertheless, as noted by some states, it will be difficult to separate the reform of substantive rules from that of procedural rules.[736] For some developing states, the fundamental flaw of the legal regime lies in the imbalance of rights and obligations stipulated in investment treaties, especially

[734] Malcolm Langford et al, "Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction" (2020) 21:2–3 The Journal of World Investment & Trade 167 at 177.
[735] Except for joint interpretation of treaties, other issues are generally not highlighted in submissions by developed states.
[736] UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS): Comments by the Government of Indonesia", A/CN.9/WG.III/WP.156 (UNCITRAL, 2018) [Indonesia Submission].

if one of the treaty parties has relatively weaker negotiation power.[737] As a result, they consider their rights of regulation to be unfairly eroded by such a legal regime;[738] accordingly, they would expect a more comprehensive reform of the system that could address broader issues relating to human rights protections and sustainable development of host states.[739] Notably, up to now, these issues are barely mentioned in submissions by developed countries.

Looking back upon the evolution of the international investment legal regime, the impossibility for states to agree on substantive obligations has always been the key reason for the failure to reach multilateral agreements. As discussed in Chapter I, there have been several attempts in history to establish a multilateral instrument on international investment law, all of which failed. Both drafts on investment protection prepared by the OECD in the 1960s and 1990s were criticized as mainly representing the interests of the capital-exporting countries.[740]

It is important to note that the genesis of the foreign investment protection regime is against an imperialist and colonialist backdrop where Europe and North America dominated international rule-making.[741] Those legal principles relating to foreign investment protection were criticized for being "developed and used by capital-exporting states to legitimise their often repressive actions in acquiring commercial advantages and protecting property".[742] Therefore, it should not be surprising that some investment-protection standards asserted by them have been subject to strong

[737] For example, Mali calls for measures to "prevent developed countries from exerting undue influence over developing countries in respect of the form of international investment treaties and agreements that are proposed, signed and ratified". See also UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa", A/CN.9/WG.III/WP.176 (UNCITRAL, 2019) [South Africa Submission].
[738] See *Ibid* at 5 ("[t]here must be a conscious recognition of the principle of sustainable development through promoting and facilitating investment and ensuring responsible investment").
[739] UNCITRAL Secretariat, *supra* note 737.
[740] Dolzer & Schreuer, *supra* note 15 at 8–10.
[741] Miles, *supra* note 214 at 23.
[742] *Ibid* at 32.

criticism from other parts of the world. A typical example is the emergence of the Calvo Doctrine in the nineteenth century, which contends that foreigners should not be granted super-national treatment and that relevant disputes should be resolved locally.[743] In the twenty-first century, there has been a revival of the Doctrine with the surge of ISDS cases against Latin American states.[744]

The disagreements among the international community not only lay in those concrete standards but more importantly, in whether there exists such a notion of "customary international law" relating to foreign investment protection.[745] Although bilateral and regional investment treaties provide similar provisions, it is hard to say that the states have developed a significant level of *opinio juris*. In the 1960s, acknowledging the lack of shared understandings, the World Bank opted for the creation of a multilateral dispute settlement mechanism, i.e., the ICSID;[746] now, with the ISDS's own legitimacy being challenged and some developing countries' explicit expression of dissatisfaction with relevant legal obligations in WGIII submissions, it is doubtful to what extent WGIII can circumvent the substantive issues again.

2. Dispute Settlement

In UNCITRAL WGIII discussion, the states do not seem to be close to reaching consensus on the desirable procedures for dispute settlement either. A prominent issue is what forms of dispute prevention mechanisms are desirable and whether they should be mandatory. Generally, developing countries, who are more likely to be the respondent party in ISDS, emphasize the value of dispute prevention mechanisms at the pre-arbitration stage. Concerns relating to investor's "frivolous" claims and ISDS's "regulatory chill" effect have caused some of them to doubt the

[743] Shan, "From North-South Divide to Private-Public Debate", *supra* note 353 at 632.
[744] *Ibid* at 635.
[745] Sornarajah, *supra* note 27 at 285.
[746] Parra, *supra* note 29 at 18–20.

necessity of granting investors direct access to investment arbitration. For example, Indonesia proposed to reintroduce the requirement of the exhaustion of local remedies before the investors can bring the dispute to investment tribunals.[747] There are also proposals to include mandatory procedural steps of negotiation and mediation before the investor can bring disputes to arbitration.[748] Notably, the "ombudsman system" – where the ombuds office of the host state serves as the first contact point to tackle the investor's complaints and communicate with the local authority – has been mentioned in several submissions.[749] By contrast, although the EU also recognizes the value of alternative dispute resolution mechanisms,[750] it does not seem likely to agree with making them compulsory. This is manifested by the recent bilateral FTAs between the EU and its trade partners where mediation is not stipulated as a pre-requirement for arbitration.[751] Therefore, it is even more unlikely that developed states such as the EU members will agree to include the requirement of exhaustion of local remedies in the reformed ISDS mechanism.

As to the creation of an investment court mechanism, divergence also pervades among the states. Some states have expressed their interest in exploring more of the EU's proposal to establish an appellate review mechanism for ISDS awards,[752] while others remain skeptical about whether

[747] UNCITRAL Secretariat, "Indonesia Submission", *supra* note 736 at 4; See also UNCITRAL Secretariat, "South Africa Submission", *supra* note 737 at 7–8.
[748] UNCITRAL Secretariat, "Indonesia Submission", *supra* note 736; UNCITRAL Secretariat, "Possible Reform of Investor-state Dispute Settlement (ISDS) Submission from the Government of Brazil" A/CN.9/WG.III/WP.171 (UNCITRAL) at 3; UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of the Russian Federation", A/CN.9/WG.III/WP.188 (UNCITRAL, 2019) at 4.
[749] See e.g. UNCITRAL Secretariat, "South Africa Submission", *supra* note 737 at 8; UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Republic of Korea", A/CN.9/WG.III/WP.179 (UNCITRAL) at 5. According to Korea, "[t]hrough this system, complaints can be addressed and discrepancy of related agencies can be harmonized", thus it can "help prevent a complaint from being escalated into an investment dispute".
[750] UNCITRAL Secretariat, "Possible Reform of Investor-state Dispute Settlement (ISDS) Submission from the European Union and Its Member States" A/CN.9/WG.III/WP.159/Add.1 (UNCITRAL, 2019) at 4.
[751] See EU-Vietnam FTA, Investment Protection Agreement, art. 3.4; CETA, art. 8.20. Particularly, Article 3.4.2 of the EU-Singapore FTA explicitly mentioned that "[r]ecourse to mediation is voluntary".
[752] See e.g. UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Morocco", A/CN.9/WG.III/WP.161 (UNCITRAL, 2019) at 6; UNCITRAL Secretariat,

it will address the legitimacy concerns relating to the consistency and coherence of arbitral decisions.[753] Moreover, even among the states that are optimistic about the appellate review mechanism, there seems to exist different visions of the desirable institutional designs: some states envisage a treaty-specific appellate review mechanism or *ad hoc* appellate tribunals to be the proper method to address concerns relating to the consistency of arbitral awards,[754] while others believe a single multilateral appeal mechanism is more efficient than bilateral ones.[755] Disagreement also arises as to whether and to what extent the disputing parties should retain the right to appoint adjudicators.[756]

The above-discussed issues are only a few examples of the divergent opinions among states.[757] Such a divergence is an inevitable result of the different roles played by the states in global capital flow: states that are more likely to be the respondent parties in ISDS are generally reluctant to delegate further power to adjudicators; instead, they prefer greater state control over investment dispute settlement. With regards to substantive issues, they prefer more regulatory

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"Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Ecuador", A/CN.9/WG.III/WP.175 (UNCITRAL, 2019) at 3.

[753] UNCITRAL Secretariat, *supra* note 5 at 13 ("it is doubtful a court would reduce uncertainty in decision-making and increase predictability and legal certainty for both investors and host governments"). UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Bahrain" A/CN.9/WG.III/WP.180 (UNCITRAL) at 14 ("ISDS reform is preferable to establishing a permanent investment court system").

[754] UNCITRAL Secretariat, "Submission from the Governments of Chile, Israel and Japan" A/CN.9/WG.III/WP.163 (UNCITRAL, 2019) at 8; UNCITRAL Secretariat, *supra* note 748 at 3.

[755] UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of China" A/CN.9/WG.III/WP.177 (UNCITRAL, 2019) at 4; UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Morocco" A/CN.9/WG.III/WP.195 (UNCITRAL, 2020) at 3.

[756] For example, China believes that "[t]he right of parties to appoint arbitrators at the first-instance stage of investment arbitration is a widely accepted institutional arrangement that is an important aid to enhancing the confidence of parties to disputes", while the EU's proposal to establish a standing court with tenured judges can greatly limit this right. UNCITRAL Secretariat, *supra* note 756 at 4; UNCITRAL Secretariat, *supra* note 751 at 4.

[757] For example, states have proposed various solutions to the problems caused by third-party funding: some argue that third-party funding should be entirely banned, while others seek for stricter regulation. UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Third-party Funding – Possible Solutions", A/CN.9/WG.III/WP.172 (UNCITRAL, 2019).

rights of host states. In a word, it is unlikely that a single set of rules would fit the reform demand of all the states.[758] In constructivist terms, the international community is far from having a sufficient level of shared understandings for radical institutionalization. The current status of international investment law is at the very left of the evolution spectrum in Graph 2 where the gap between the Required and Actual levels of shared understandings is so vast that flexibility should be the dominating principle for reform.

C. What Can be Institutionalized

Given the insufficient shared understandings underpinning international investment law, at the current stage, the international community should create more opportunities for practice and interaction in the institutional design of the legal regime. The plural or even competing reform demands of different actors must be respected. States should be allowed to pursue their policy goals and design institutions accordingly,[759] and non-state actors should be offered sufficient opportunities to express opinions in domestic and international rule-making processes. As Wolfgang Alschner succinctly argues, "it is better to wait to get it right than to rush and get it wrong".[760]

The demand for flexibility is increasingly recognized in the discourse of ISDS reform. As Schill and Vidigal highlight in a recent paper, "the way to ensure the widest possible participation of states in a multilateral reform of ISDS is to make flexibility in dispute settlement the cornerstone of any newly established multilateral legal framework".[761] That being said, recognizing the

[758] See Schill & Vidigal, "Designing Investment Dispute Settlement à la Carte", *supra* note 661 at 319 ("it is difficult to imagine that the EU's model for ISDS will be universally accepted").
[759] Wolfgang Alschner, "The Global Laboratory of Investment Law Reform Alternatives" (2018) 112 AJIL 237, at 242.
[760] *Ibid*, at 242. See also Sonia E Rolland & David M Trubek, *Emerging Powers in the International Economic Order: Cooperation, Competition and Transformation* (Cambridge: Cambridge University Press, 2019) at 197.
[761] Schill & Vidigal, "Designing Investment Dispute Settlement à la Carte", *supra* note 661.

diversified understandings does not mean that we should do nothing about the development of the law. Efforts can be made to institutionalize the understandings that have been recognized or are likely to be recognized inter-subjectively, hence relatively improving the predictability of the legal regime.

1. Procedural settings

A feasible option for institutionalization in the context of deep diversity is to start with procedural issues that are generally recognized among the community.[762] It can be procedures about substantive law-making, where the participants "put procedures and institutions in place that can facilitate the gradual development of shared understandings on substantive matters".[763] In this circumstance, there is normally a "shared vision" that binds the parties together to negotiate substantive rules. Or, if there is a lack of a shared vision (or common aim) substantively, the focus can be procedures about procedural law-making, like the current reform work by the UNCITRAL WGIII and the ICSID. Whichever way, the procedures must adhere to basic requirements of legitimacy such as transparency and fairness so that they can facilitate the growth of shared understandings within the community. Indeed, the UNCITRAL has rich experience in this regard given that it has successfully assisted in drafting a wide range of rules relating to international business.[764]

[762] Brunnée & Toope, *supra* note 126 at 130.
[763] *Ibid* at 181. Analyzing the practice relating to international environmental law, the authors conclude that "the existence of procedural interaction law has assisted the growth of broader substantive understandings amongst participants" (at 217).
[764] E.g., the UNCITRAL Rules on Transparency, the UNCITRAL models laws relating to insolvency, the UNCITRAL Arbitration rules, the UNCITRAL Model Law on International Commercial Arbitration, etc.

2. Inconsistency avoidance

To increase the predictability of arbitral decisions does not necessarily mean to impose the doctrine of stare decisis. Many issues affecting the predictability of ISDS can be addressed through procedural instruments that could at the same time avoid hindering sustainable interactions. A typical example is the means to address the problem of parallel proceedings, where several investors of the same investment (e.g., direct shareholders and indirect shareholders) bring claims before different investment tribunals under different BITs against the same measure of the host state.[765] In the much-criticized cases *CME v. Czech Republic* and *Lauder v. Czech Republic*, the individual investor Lauder and the parent company CME brought separate claims against the Czech Republic under the US-Czech BIT and the Netherlands-Czech BIT respectively, while the two investment tribunals reached opposite results on the same facts and legal issues.[766]

A similar scenario that may give rise to inconsistencies is where a certain activity of the host state (e.g., increasing tax, withdrawing subsidies, etc.) has impacted a broad range of foreign investments and thus caused multiple ISDS claims by different investors. A typical example is the massive investment arbitration cases against Argentina at the beginning of the century as a result of the country's implementation of the "Emergency Law" which introduced a series of measures in response to a deep economic crisis.[767] Notably, several claims were brought by US investors under the US-Argentina BIT. In the BIT, there is an exception clause that allows the host state to take necessary measures for the maintenance of public order, while the investment tribunals

[765] Katia Yannaca-Small, "Part III Procedural Issues, Ch.25 Parallel Proceedings" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford ; New York: Oxford University Press, 2008) 1008 at 1011. This phenomenon is partly due to the broad scope of "investors" as defined by investment treaties.
[766] See Charles N Brower & Jeremy K Sharpe, "Multiple and Conflicting International Arbitral Awards" (2003) 4:2 The Journal of World Investment & Trade 211.
[767] See Giovanni Zarra, "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?" (2018) 17:1 Chinese Journal of International Law 137 at 150.

(including the *ad hoc* annulment tribunal) came down with entirely different interpretations of "necessity", leading to different conclusions on whether Argentina had violated the BIT.[768]

In the two aforementioned circumstances, traditional legal solutions such as the doctrine of *res judicata* and *lis alibi pendens* have quite limited application because the claims are usually brought under different investment agreements or by different investors.[769] An effective solution is the consolidation of claims, meaning "the joinder of two or more proceedings that already are pending before different courts or arbitral tribunals".[770] The idea of consolidation is not new in the context of investment arbitration. For example, NAFTA Article 1126 grants tribunals the discretion to consolidate proceedings if, after hearing the disputing parties, in the interests of "fair and efficient resolution of the claims", the tribunals are satisfied that the claims "have a question of law or fact in common".[771] The idea was also discussed in the history of the ICSID and the failed Multilateral Agreement on Investment by the OECD.[772] Recently, the Singapore International Arbitration Centre (SIAC) Proposal on Cross-Institution Consolidation Protocol has triggered new scholarly discussions on the possibility of consolidating ISDS proceedings under different procedural rules.[773] In a word, the ICSID or the UNCITRAL can consider creating a multilateral and opt-in instrument like the "Consolidation Facility"[774] with clearer guidance on,

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[768] *Ibid* at 154.
[769] Yannaca-Small, *supra* note 765 at 1013–25.
[770] Gabrielle Kaufmann-Kohler et al, "Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently? Final Report on the Geneva Colloquium held on 22 April 2006" (2006) 21:1 ICSID Review 59 at 64. See also Brower & Sharpe, *supra* note 766 at 222; Yannaca-Small, *supra* note 765 at 1032; Christoph Schreuer, "Multiple Proceedings" in *General Principles of Law and International Investment Arbitration* (Leiden, The Netherlands: Brill | Nijhoff, 2018) 152.
There are, of course, other solutions to the problem of parallel proceedings, for example, limiting the right to claim to only one investor in BIT design. Wolfgang Kühn, "How to Avoid Conflict Awards: The Lauder and CME Cases The 10th Geneva Arbitration Forum" (2004) 5:1 J World Investment & Trade 7 at 17.
[771] NAFTA Article 1126.2.
[772] Dina D Prokić, "SIAC Proposal on Cross-Institution Consolidation Protocol: Can It Be Transplanted into Investment Arbitration?" (2019) 36:2 Journal of International Arbitration 171 at 172.
[773] E.g. *ibid*.
[774] Antonio R Parra, "Desirability and Feasibility of Consolidation: Introductory Remarks" (2006) 21:1 ICSID Review 132 at 134.

inter alia, the standards for consolidation, burden of proof, and the treatment of confidential information.[775] A particularly challenging issue might be whether party consent is a necessary condition for consolidation of ISDS proceedings: in *CME v. Czech Republic* and *Lauder v. Czech Republic*, the claimants sought consolidation while the Czech Republic refused.[776] It thus seems that party consent plays a critical role in investment tribunals' consolidation consideration.[777]

In addition to consolidation, another significant issue influencing the coherence of ISDS decisions is treaty interpretation approaches. It is true that the rule of interpretation set out in Article 31 and 32 of the VCLT is broadly recognized as customary international law for treaty interpretation. However, an empirical study of almost 100 ISDS cases from 1998 to 2006 shows that less than half of the studied tribunals referred to the VCLT articles in their analysis and among those who did, the references are "in general very brief and … only as general arguments in support of the tribunals' approaches".[778] It is further observed that "[t]he way in which ICSID tribunals use interpretative arguments in practice is often quite far removed from the structures set out in Articles 31-32 of the VCLT".[779] Frequently-used interpretative instruments beyond the VCLT framework include, *inter alia*, previous awards, the work of international organizations such as the International Law Association, the principle of effective interpretation, scholarly opinions, legal maxims, etc.[780] The diversity of interpretative approaches has both pros and cons: on the one hand, it enriches the body of investment jurisprudence; on the other hand, it may give rise to the

[775] Lucinda A Low & Jeffrey F Pryce, "Ch.5 Consolidation of Proceedings in Investor-State Arbitration: From the Iran-U.S. Claims Tribunal to the NAFTA" in Christopher R Drahozal & Christopher S Gibson, eds, *The Iran-US Claims Tribunal at 25: the cases everyone needs to know for investor-state & international arbitration* (Dobbs Ferry, NY: Oxford University Press, 2007) 135 at 160–63.
[776] *CME v. Czech Republic*, Final Award (14 March 2003), para 428.
[777] By contrast, in leading commercial arbitration rules such as the ICC Arbitration rules, post-dispute party consent is not a necessary condition for consolidation. See ICC Arbitration Rules, art. 10.
[778] Fauchald, *supra* note 60 at 314.
[779] *Ibid* at 358–59.
[780] Weeramantry J Romesh, *Treaty Interpretation in Investment Arbitration* (Oxford: Oxford University Press, 2012) at 115–48.

inconsistency of arbitral decisions – the above-discussed Argentina cases are vivid examples of this hazard. In the controversial case *Continental Casualty v. Argentina*, in determining the content of the concept of "necessity", the tribunal deviated from the *Enron Corporation v. Argentine* tribunal's approach that referred to the customary law standard of necessity[781] but instead based its analysis on the necessity test in the WTO case law.[782] Consequently, it reached the opposite conclusion from that of the *Enron* award.[783] Besides, even within the framework of the VCLT rule of treaty interpretation, investment tribunals appear to have different preferences for interpretative approaches: some tribunals are criticized for having overly relied on the object and purpose to interpret issues such as umbrella clauses, while others attach more importance to textual and contextual analysis.[784]

Therefore, it seems that a more harmonized interpretative approach – for the interpretation by both tribunals and treaty committees – is desirable for the purpose of improving the consistency and predictability of arbitral decisions. It might be realized through instruments like an "interpretative guide" tailored for ISDS, which may incorporate the VCLT rules and other means of treaty interpretation. In addition, Scheuer proposes the introduction of a preliminary ruling

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[781] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), para 334.

[782] *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 Sep 2008), paras 192-95 [*Continental Casualty v. Argentina*]. See also *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award (12 May 2005); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007); National Grid P.L.C. v. Argentina Republic, UNCITRAL, Award (3 November 2008); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011).

[783] *Continental Casualty v. Argentina*, para 233. The tribunal accepted Argentina's necessity defense. Notably, the *Enron* tribunal's findings on necessity was later annulled by the *ad hoc* Annulment Committee on the basis of failing to apply the applicable law and failing to state the reasons on which it is based. Nevertheless, the Committee did not find the *Enron* tribunal's reference to customary international law *per se* problematic. See *Enron v. Argentina*, Decision on the Application for Annulment of the Argentine Republic (English) (30 July 2010), paras 377-405. See also Alvarez, "'Beware", *supra* note 463 at 194.

[784] Michael Waibel, "International Investment Law and Treaty Interpretation" in Rainer Hofmann & Christian J Tams, eds, *International Investment Law and General International law: from Clinical Isolation to Systemic Integration?* (Baden-Baden: Nomos, 2011) 29 at 39–46.

mechanism where "a tribunal would suspend proceedings and request a ruling on a question of law from a body established for that purpose",[785] thus effectively improving the coherence of the jurisprudence. Compared to an appellate court, the preliminary ruling mechanism is more efficient as it would "prevent" inconsistencies rather than "repair" them through a time-consuming and costly appellate procedure.[786] Notably, following the implication of Graph 2, to allow for sufficient flexibility, the preliminary rulings should be case-specific and not conceived as having the effect of binding precedents; otherwise, it will cause over-institutionalization problems similar to those of an appellate court. Moreover, the body to issue the rulings must be diversified to include adjudicators of different ideological and professional backgrounds.[787]

3. Direct Harmonization or Clarification

Indeed, many issues that have been interpreted inconsistently by investment tribunals have the potential for direct harmonization or clarification: they have generated a certain degree of shared understandings through legal practice – although sometimes the practice can be uneven – and they are less politically sensitive compared to other obligations. The transparency rules for investment arbitration by the ICSID and UNCITRAL exemplify this type of development.

Notably, for procedural issues that have close relationship to or direct impact on substantive rules and thus are more controversial – for example, counter-claims and appellate review, the principle of flexibility has two implications. First, rather than seeking universal solutions, states must enjoy the flexibility to choose their preferred procedural rules.[788] Second,

[785] Christoph Schreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden, The Netherlands: Brill, 2010) 129, at 150.
[786] *Ibid* at 151.
[787] Karton, "Reform of Investor-State Dispute Settlement", *supra* note 63 at 31..
[788] See Schill & Vidigal, "Designing Investment Dispute Settlement à la Carte", *supra* note 661.

for *multilateral* rule design, in light of the thin shared understandings regarding substantive rules, this type of procedural rules should not be implemented to expand or reinforce the law-making power of investment tribunals. For example, allowing counter-claims may enable investment tribunals to interpret and apply domestic laws – a function traditionally exercised by local courts. Attempts to impose counter-claim rules universally may trigger legitimacy problems as international tribunals are likely to be unfamiliar with the complex legal and social contexts of the relevant laws.[789] By contrast, at this stage, mechanisms like ombudsmen are more desirable because they offer cheaper and more efficient avenues for host states and their local authorities to practice investment law and reflect upon the consistency of their regulatory framework with treaty obligations.[790]

To sum up, Part III analyzes process ② in the interactional law-making circle – the institutionalization of norms. It mainly argues that, since the gap between the required level of shared understandings and the actual level of shared understandings is considerable in the current context of international investment law, the legal regime should embrace more flexibility in its institutional design. As such, efforts towards institutionalization should primarily focus on issues that do not require a high level of shared understandings or issues that are already underpinned by broad shared understandings.

IV. THE APPLICATION OF NORMS

Process ③ represents the process whereby the norms are applied within the community of practice – either in a binding manner or voluntarily. This process may reinforce and reshape the actors'

[789] See Bjorklund, "The Role of Counterclaims in Rebalancing Investment Law Business Law Forum", *supra* note 553 at 478.
[790] See Jeswald W Salacuse, "Is There a Better Way - Alternative Methods of Treaty-Based, Investor-State Dispute Resolution Eighteenth Annual Philip D. Reed Memorial Issue" (2007) 31 Fordham Intl LJ 138 at 176.

understandings about international investment law; on the other hand, as will be detailed below, it may also give rise to legitimacy challenges to the law. This is also the process through which compliance with the norms can be observed. The preceding section explains why flexibility matters for current international investment law, and this section serves as a caution, by demonstrating the possible repercussion, against imposing legal rules for the purpose of predictability while disregarding the lack of shared understandings.

Since the international community is generally not optimistic about the prospect of a multilateral investment treaty, ISDS naturally becomes the locus of the predictability reform. According to the EU's UNCITRAL WGIII submission, predictability is essentially realized via the exercise of the doctrine of precedent within its proposed two-tiered permanent court system.[791] The risk is that, in such a system, later tribunals may be under higher pressure to avoid deviating from previous findings despite the different contexts of different treaties. From the perspective of the treaty parties, they might conceive that the court is creating and imposing laws that have strayed from their original intent and consequently start to question the legitimacy of the court. This internal dissatisfaction may be externalized via various behaviors: learning from the experiences of international investment law and other international legal regimes, this section discusses two prominent ones, namely (1) non-compliance and other backlashes and (2) reinforced political control.

1. Non-compliance and other backlashes

The issue of backlash has been well-discussed in Chapter 3 to demonstrate the potential repercussions caused by an "unsustainable" law-making process.[792] It was used as an example to

[791] UNCITRAL Secretariat, *supra* note 750 at 9.
[792] See Chapter 3.VI.

show that, when the rules that severely deviate from shared understandings are institutionalized, it may impair the sustainable interaction between shared understandings and law-making; as a result, some actors may take radical actions such as exiting the institution to express their dissatisfaction. Pursuing predictability while disregarding the low level of shared understandings increases such a risk: in this circumstance, any attempt to unify rules and practices by some actors will inevitably trigger the dissatisfaction of other actors. This risk is further magnified by the fact that the task of enhancing predictability is carried out by courts. As discussed in Chapter 4, judicial decision-making tends to follow a different logic from political decision-making: the former is guided by legal principles which are more about the rights asserted by the claimants rather than political compromises or collective social interests.[793] This difference tends to enlarge the potential divergence between shared understandings and the institutionalized rules.

Besides, it is important to note that, under the current arbitration regime, the host states' compliance with ISDS decisions is generally satisfying, as in most cases they opt to implement the arbitral decisions.[794] This stands in clear contrast to the widespread "strong backlash" narrative manifested by some Latin American countries' exit from the ISDS. The reasons for the low non-compliance rate can be multifaceted, for example, host states' reputational concerns,[795] the vigorous enforcement regime set out in the New York Convention and the ICSID Convention, or the fact that the remedies are mainly pecuniary, which require less modification to the host state's

[793] Chapter 4.II.B.
[794] Gaukrodger & Gordon, *supra* note 38 at 30. See also ICSID, "Survey for ICSID Member States on Compliance with ICSID Awards", online: <https://icsid.worldbank.org/en/Documents/about/Report%20on%20ICSID%20Survey.pdf>.
A few states have refused or delayed the enforcement of arbitral awards, for example, Argentina, Thailand, Russia, etc. See Gaukrodger & Gordon, *supra* note 38.
[795] See e.g. Todd Allee & Clint Peinhardt, "Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment" (2011) 65:3 International Organization 401.

domestic legal regime to enforce.[796] Whichever reasons, it shows that the current ISDS mechanism, despite the legitimacy flaws, is by and large effective.[797]

In the context of international adjudication, compliance should not be conceived to be principally driven by the coercive power of the court but by a sense of obligation accumulated via the practice of law.[798] When judge-made laws significantly deviate from the parties' understandings of law, the risk of *de facto* non-compliance arises. Such a risk lurks even in a highly legalized system. A typical example is the above-discussed ECtHR: notwithstanding the ECHR's explicit recognition of the binding force of the court's judgments,[799] in practice, the ratio of states' non-compliance with the judgments remains high (more than a half).[800] This serves as a caution to the reform of ISDS: the risk of non-compliance or insufficient compliance still exists and might grow if, hypothetically, the investment court starts to develop its "coherent" body of case law while disregarding the diversified understandings among the international community.

2. Reinforced political controls

In addition to passive actions like non-compliance and exit, states may opt to take positive actions to enhance their controls over the adjudication process and prevent undesirable tribunal rulings. In the context of ISDS, there could be various avenues to do so, for example, requiring an investor to acquire its home state's *ex-ante* permission to submit certain types of disputes (typically those

[796] Fikfak observes that the degree of compliance is associated with the type of remedies: judgements which may "adversely affect important state interests in a significant manner" tend to be less complied by the parties. Veronika Fikfak, "Changing State Behaviour: Damages before the European Court of Human Rights" (2018) 29:4 Eur J Int Law 1091 at 1098.
[797] Compliance is generally considered as a basic standard to evaluate the effectiveness of adjudication. See Laurence Helfer & Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 Yale LJ 273 at 283.
[798] Brunnée & Toope, *supra* note 126 at 97.
[799] ECHR, art. 46.
[800] Fikfak, "Changing State Behaviour", *supra* note 796 at 1092–94.

relating to tax measures) to ISDS tribunals,[801] influencing the work of tribunals via the nomination of arbitrators,[802] or, as will be detailed below, intervening in the interpretation of treaties. Some of these measures help states to ensure that investment tribunals do not deviate significantly from their intent when resolving disputes,[803] while the cost is the impairment of the independence of the dispute settlement mechanism. This might cause more severe legitimacy problems than the problem of dissatisfaction itself.

In the context of ISDS, a controversial measure of this kind could be the establishment of treaty committees that consist of state representatives and enjoy the power to issue binding interpretations on investment tribunals. The idea of allowing treaty parties to issue binding interpretative notes after investment treaties enter into force appears to be quite popular among states.[804] To take CETA as an example, Article 8.31 provides that,

> Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.[805]

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[801] See Robert Wisner & Neil Campbell, "Bringing the Home State Back in: The Case for Home State Control in Investor-State Dispute Settlement" (2018) 19 Business Law International 5,19–20 ("an exchange of letters between the home state and host state authorities under [NAFTA] Article 2103 can immediately bar any claim that a tax measure is tantamount to expropriation"); Wolfgang Alschner, "The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration" in Shaheeza Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (The Netherlands: Brill | Nijhoff 2015) 321.
[802] Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (Cambridge: Cambridge University Press, 2019) at 151–54.
[803] Jack JJr Coe, "Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods" (2003) 36 Vand J Transn'l L 1381, at 1426 ("the NAFTA drafters anticipated unacceptable departures from intended meaning by retaining in themselves the prerogative of conclusively interpreting the text").
[804] UNCITRAL Secretariat, "Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Thailand", A/CN.9/WG.III/WP.162 (UNCITRAL, 2019) at 5; UNCITRAL Secretariat, *supra* note 754 at 8; UNCITRAL Secretariat, *supra* note 752; UNCITRAL Secretariat, "Submission from the Government of Costa Rica", A/CN.9/WG.III/WP.164 (UNCITRAL) at 4; UNCITRAL Secretariat, *supra* note 748 at 3.
[805] CETA, art 8.31 para 3.

According to the CETA *Joint Interpretative Instrument*, the aim of such an arrangement is "to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement".[806] The *Rules for Binding Interpretations* to be adopted by the CETA Joint Committee further specify that the joint interpretations will be binding on both first instance tribunals and appellate tribunals.[807]

Such an interpretative power, if not properly constrained by rules, can create considerable issues of uncertainty in ISDS. First, will the treaty committee's decisions be issued and applied to the case where the "serious concerns" have arisen? The provision grants the committee the discretion to choose the date from which its decision takes effect, which means that application to the current case before it remains possible. This scenario has occurred in the NAFTA regime, where there were several ongoing cases and the Free Trade Commission (FTC) – which has precisely the same function as the treaty committee discussed here – issued a binding interpretation that apparently favored the host states.[808] Second, how could the treaty committee mechanism be compatible with the proposed multilateral court? The rules governing foreign investment protection are fragmented in around three thousand different investment treaties: does this mean that there should be the same number of "treaty committees"? As highlighted by the EU, the primary goal of establishing a multilateral court system is to promote the coherence of arbitral decisions.[809] The rationale behind treaty committees is to avoid situations where the court deviates from the intent of the individual treaties' parties in their attempts to harmonize the laws. Having

[806] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada & the European Union and its Member States, art 6(e), available online at:< https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/jii-iic.aspx?lang=eng>.
[807] "Decision No 002/2021 of the CETA Joint Committee of 29 January 2021 – adopting a procedure for the adoption of interpretations in accordance with Articles 8.31.3 and 8.44.3(A) of CETA as an Annex to its Rules of Procedure", available online at <https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159402.pdf>, art. 5.
[808] For example, *Pope & Talbot Inc. v. The Government of Canada, Methanex Corporation v. United States of America and Waste Management, Inc. v. United Mexican States.*
[809] UNCITRAL Secretariat, "EU Submission", *supra* note 282.

three thousand treaty committees, whose various interpretations can overturn tribunals' findings, by no means serves the goal of consistency. Another option to incorporate the treaty committee mechanism is to establish one multilateral committee that consists of all members of the court. This would draw from the practice of the WTO, where member states adopt an interpretation of a multilateral trade agreement if a three-fourths majority of them support it.[810] However, it lacks feasibility in the context of investment law, as it would amount to asking the parties to a bilateral or regional treaty to relinquish the right to interpret their own rules to some third states.

In addition to the uncertainties, the treaty committee mechanism also entails serious legitimacy problems. The issue of legitimacy had already been well discussed when the NAFTA FTC issued *the Notes of Interpretation of Certain Chapter 11 Provisions* to narrow the source of Article 1105(1) (Minimum Standard of Treatment) from international law to customary international law.[811] There was an intense debate over whether the interpretative notes constitute interpretation[812] or a *de facto* amendment of the treaty.[813] Besides, given that the public, including investors, does not have proper participation in the process, the issue of the Notes may be seen as failing to "adopt procedures that serve the fundamental values of accountability, transparency, and democratic participation".[814] Moreover, these kinds of interpretative activities may infringe core

[810] Marrakesh Agreement, *supra* note 346.
[811] NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions", *supra* note 83.
[812] E.g.Matiation, "Arbitration with Two Twists", *supra* note 419. See also Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104:2 American Journal of International Law 179–225 at 208. Fauchald, *supra* note 60 at 332 ("An example of a subsequent agreement can be found in the Notes of Interpretation issued by the Free Trade Commission [FTC] under the NAFTA).
[813] E.g. *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL(1976), Award in Respect of Damages, para 47 ("were the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter"); Brower, *supra* note 197. Irina Buga, *Modification of Treaties by Subsequent Practice* (Oxford: Oxford University Press, 2018) 283–84. According to this viewpoint, interpretations must be consistent with the customary rules of treaty interpretation set forth in the VCLT and given that none of the text, relevant context, nor drafting history suggest the parties' intent to exclude other sources of international law from the scope of the provision, the Notes does not qualify as an interpretation but is rather an *ultra vires* amendment of the treaty.
[814] Charles H II Brower, "Structure, Legitimacy, and NAFTA's Investment Chapter" (2003) 36 Vand J Transnat'l L 37–94 at 81.

tenets of the rule of law.[815] If a new interpretation, which fundamentally changes the scope of a provision, is applied to previously conducted activities, it may violate the legal principle of non-retroactivity.[816] Further, the fact that states are, at the same time, both respondents in disputes and interpreters of the treaty causes a significant imbalance of power between the two parties to a dispute, which goes against the common perception of fairness and due process.[817]

The establishment of treaty committees is only one example of states' endeavor to exert greater influence on investment tribunals' decision-making.[818] It reveals the dilemma states like the EU are faced with behind the efforts to reform ISDS: on the one hand, they attempt to rely on a judicialized dispute settlement mechanism to achieve the goal of predictability, while on the other hand, they are not willing to delegate more law-making power to adjudicators. The result is a disharmonious regime dominated by both strong political control and judicial law-making, which may create more problems than it solves.

To briefly sum up, by demonstrating the potential undesirable consequences in process ③, this section cautions against the institutionalization of norms for the purpose of predictability while disregarding the lack of shared understandings. It might be questioned – since enforcement mechanisms are normally conceived to be important in the application of norms – why this section did not focus on discussing the reform of enforcement mechanisms such as the recognition and enforcement of arbitral awards. The reason is that, from a constructivist perspective, stronger enforcement requirement does not necessarily lead to better shared understandings, and in a

[815] Kaufmann-Kohler, *supra* note 464.
[816] *Ibid* 191–92.
[817] *Ibid* 192 ("[t]his appears to be contrary to due process, specifically contrary to the principle of independence and impartiality of justice, which includes the principle that no one can be the judge of its own cause").
[818] Another typical example would be the recent rules relating to *amicus curiae* participation which grant prioritized treatment to *amicus* submissions by state parties. For detailed analysis of relevant rules and their potential legitimacy problems, see Yu, *supra* note 93.

sustainable legal regime, compliance should be principally pulled by the actors' conception of legitimacy rather than by coercion. As Brunnée and Toope repeatedly highlight, "enforcement is best viewed as only one element of a practice of legality".[819] Against the backdrop where international investment law is underpinned by rather thin shared understandings, enforcement mechanisms should not be considered as the dominant means to realize legalization.

V. CONCLUSION

This chapter is structured around the three processes of interactional law-making, namely practice, the institutionalization of norms and the application of norms. The three processes constitute a circle of legalization and are firmly connected through the thread of shared understandings – they relate to the generation, stabilization and application of shared understandings. Applying the circle to the reform of international investment law, this Chapter draws three main conclusions: firstly, opportunities must be created to ensure the quantity and quality of interactions; secondly, given the thin shared understandings underpinning international investment law, flexibility and pluralism should be the dominant principles guiding the legal regime's reform; thirdly, pursuing predictability while disregarding the thin shared understandings – especially through the avenue of ISDS – may cause more legitimacy problems than it solves. This Chapter thus impels the international community to adopt a cautious attitude towards the idea of establishing a multilateral investment court.

[819] Brunnée & Toope, *supra* note 126 at 112.

CONCLUDING REMARKS

The primary goal of this thesis is to delineate the boundary of legalization via the specific avenue of adjudication. This has special meaning for international investment law – international collaboration to legalize the regime at the substantive level is quite limited, with the result that much attention has been paid to the reform of dispute settlement procedures. It is clear that many aspects of ISDS procedures can and should be improved for the purpose of enhancing the coherence and predictability of international investment law. That being said, one must recognize that the capacity of adjudicative systems to advance these values is greatly constrained. With a constructivist approach, this thesis has highlighted two layers of such constraints. The outer layer is embodied in the thin shared understandings among the international community regarding the obligations of foreign investment protection: in the past decades, all endeavors to conclude a substantive multilateral investment treaty have failed and state opinions on key issues of ISDS reform in the current UNCITRAL WGIII discussion are significantly diverse. Entrusting adjudicators with enhanced law-making power entails the risk of deviating from shared understandings and causing further backlashes against the legal regime (e.g. non-compliance, legitimacy challenges, etc.).

The inner layer constraint arises from the limits of adjudication as a mode of social ordering to resolve polycentric problems. International investment disputes are frequently intertwined with complex social and legal issues such as human rights and environmental protection, while most investment treaties are narrowly designed for investment promotion. Against this backdrop, investment tribunals have limited authority to go beyond investors' allegations and the applicable laws to address certain public issues. The incapability of investment tribunals to tackle polycentric

problems is further intensified by the fact that only limited actors have legal standing before investment tribunals, the arguments are principle-based, and arbitral proceedings are time-consuming. The inner layer of constraint might be mitigated through more balanced treaty design.

This thesis further argues that to legalize international investment law through ISDS is to recognize these constraints and effectively enhance the function of ISDS as a platform for the practice of law and the formation of shared understandings. This necessitates the adoption of a flexible legal framework where various actors are provided with sufficient opportunities to practice international investment law and to reflect upon the relevant legal norms. The UNCITRAL WGIII has taken a critical first step by creating a formal forum for various actors to exchange reform ideas. At the current stage, the primary task should be to foster shared understandings. This posits the basic requirement that WGIII should adopt a pluralist approach to different understandings of law expressed by different actors.

The constructivist theoretical framework has important implications for the controversial investment court initiative. A key purpose of the court is to increase the consistency of ISDS decisions by *de jure* or *de facto* imposing a doctrine of *stare decisis* and consequently promoting the predictability of the legal regime. Nevertheless, the findings of the court may well deviate from the understandings of many actors as there is a lack of shared understandings on many issues relating to international investment law. Consequently, the chance of divergence between the institutionalized norms and the shared understandings would increase. Therefore, the international community should adopt a cautious attitude towards the establishment of a multilateral investment court to pursue the goal of predictability – it may either increase the level of non-compliance with ISDS decisions or trigger greater dissatisfaction with international investment law.

Another important contribution of this thesis is the valuable framework it provides for the comparative analysis of international institutions, as demonstrated by Graph 2 (Shared Understandings and Reform Options). The lynchpin of the framework is shared understandings, which is by nature a dynamic notion that necessitates the examination of the whole period of institutional evolution. For example, when comparing the investment law regime to the WTO, it does not simply analyze the similarities and differences between the two institutions as reflected in the *status quo* but inquires into the development of shared understandings within the two institutions over time. It thus concludes that, since the current level of shared understandings underpinning international investment law is far from the required level (which is much higher than that of trade law), flexibility rather than predictability should be the dominant principle guiding international investment law reform.

To sum up, this thesis has shown that a nuanced IR constructivist approach has significant implications for the study of international investment law and international adjudication. While the discussion here tends to be theoretical, more empirical work can be conducted in future to visualize the evolution of shared understandings or to explore the dynamic relationship between international investment law and adjudicatory decisions.

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