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Investment Treaty Arbitration Caught in The Public-Private Law Divide

Catharine Titi
French National Centre for Scientific Research (CNRS); CERSA research centre of the University Paris-Panthéon-Assas

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INVESTMENT TREATY ARBITRATION CAUGHT IN THE PUBLIC-PRIVATE LAW DIVIDE

Catharine Titi[*]

ABSTRACT

The ongoing reform of investor-state dispute settlement ("ISDS") underlines the pertinence of an old question that has received various and conflicting answers: Is investment arbitration a public or private method of dispute settlement? A key criticism leveled at investment treaty arbitration is that public interest disputes are decided by a system of private justice. This article critically reviews the dominant interpretations of investment treaty arbitration as public, private, or hybrid. It argues that the subjective nature of each interpretation means that none of them can be definitively adopted. Rather, the real arguments in favor of or against arbitration lie beyond the traditional debate. The article shows that investment arbitration displays important commonalities with international court systems, with its presumed unique features—including party autonomy—appearing a little less unique on closer inspection. Ultimately, a system is what states make it, irrespective of whether its particular features are described as public or private.

I. INTRODUCTION

The ongoing efforts for reform of investor-state dispute settlement ("ISDS")[1] underline the pertinence of an old question that has received various

* Catharine Titi, Dr iur., FCIArb, is a tenured Research Associate Professor at the French National Centre for Scientific Research (CNRS) and at the CERSA research centre of the University Paris-Panthéon-Assas. The author would like to thank Julian Arato, Katia Fach Gómez, and Anastasios Gourgourinis for useful comments on earlier versions of this article.

1. Both substantive investment standards and ISDS have been the subject of continuing reforms since the system's conception. States regularly amend their model negotiating texts and update their stock of investment treaties. Arbitration rules too tend to be reviewed and updated. In recent years, efforts to reform ISDS have intensified. Two initiatives of the United Nations Commission on International Trade Law ("UNCITRAL") aimed to introduce more transparency in ISDS. The first initiative was the adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which became effective in 2014. U.N. Comm'n on Int'l Tr. L. [UNCITRAL], Rep. on the Work of its Forty-Sixth Session, 81–86, U.N. Doc. A /68/17 (July 8–26, 2013); *see also* UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, http://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency (last visited May 15, 2024). The second initiative was the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency"), *opened for signature* Mar. 17, 2015, 3208 U.N.T.S., 54 I.L.M. 4 (entered into force Oct. 18, 2017), http://uncitral.un.org/en/texts/arbitration/conventions/transparency. The United Nations Conference on Trade and Development ("UNCTAD") has been a vocal

and conflicting answers: Is investment arbitration a public or a private method of dispute settlement? Arbitration has been used to resolve both interstate and private disputes.[2] With the advent of investor-state dispute settlement, it gained currency as a means of settling mixed disputes; that is, disputes between private entities and sovereign states in public international law.[3] Early investment treaties maintained the public international law default method of dispute settlement, interstate dispute resolution. However, starting in 1969, bilateral investment treaties ("BITs") incorporated investor-state arbitration options.[4]

The apparent innocuousness of the "public" or "private" dilemma must not mislead: One of the main criticisms leveled at investment treaty arbitration is that public interest disputes are decided by a system of private justice.[5] For

advocate of the need for reform. *See*, *e.g.*, U.N. CONF. ON TR. & DEV. [UNCTAD], WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE, U.N. Sales No. E.15.II.D.5 (2015). Arbitral institutions too are engaged in the reform effort and constantly amend their procedural rules. In 2022, the International Centre for Settlement of Investment Disputes ("ICSID") adopted its amended ICSID Rules and Regulations, which are the fourth and most extensive revision to date. *See* Int'l Ctr. for Settlement of Inv. Disps. [ICSID], *ICSID Rules and Regulations Amendment*, https://icsid.worldbank.org/resources/rules-amendments (last visited May 15, 2024). Yet the most notable initiative that targets a holistic, multilateral reform of ISDS is the work done in UNCITRAL Working Group III since 2017. *See* UNCITRAL, *Working Group III: Investor-State Dispute Settlement Reform*, http://uncitral.un.org/en/working_groups/3/investor-state (last visited May 15, 2024) [hereinafter UNCITRAL, *Working Group III: ISDS Reform*].

2. *See generally* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION (Thomas Schultz & Frederico Ortino eds., 2020).

3. This is not to forget that investors can also be public entities.

4. JÜRGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS 46–47 (2016).

5. JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 351 (2011) ("[The Argentine cases] are frequently cited to demonstrate that private commercial arbitral mechanisms are inappropriate for resolving 'public policy' disputes that, in the view of some, require adjudication by national judges, or at least permanent judges, whose independence and neutrality [are] assured by lengthy tenure."); Stephan W. Schill, *Editorial: The Mauritius Convention on Transparency*, 16 J. WORLD INV. & TRADE 201, 203 (2015); Julien Chaisse & Yves Renouf, *Investor-State Dispute Settlement*, *in* POTENTIAL BENEFITS OF AN AUSTRALIA-EU FREE TRADE AGREEMENT 281, 288–89 (Jane Drake-Brockman & Patrick Messerlin eds., 2018) (citing Cecilia Malmström, *Proposing an Investment Court System*, EU MONITOR (Sept. 16, 2015), http://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjxdm6kcngzo?ctx=vhyzn0ozwmz1&start_tab0=50); U.N. Secretary-General, *Promotion of a Democratic and Equitable International Order*, ¶¶ 9, 13, 21, 23, 52, U.N. Doc. A/70/285 (Aug. 5, 2015); Alfred-Maurice de Zayas, *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order*, ¶ 67, U.N. Doc. A/HRC/30/44 (July 14, 2015); *see* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4–6 (2008); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1538 (2005) ("[The transition towards investment arbitration has] created a private cause of action against Sovereigns, which permits investors to act like 'private attorney generals,' and places the enforcement of public international law rights in the hands of private individuals and corporations."); *cf.* Andrea Bjorklund, Marc Bungenberg, Manjiao Chi, & Catharine Titi, *Selection and Appointment of International Adjudicators: Structural Options*

some investment law critics, the premise that investment arbitration is a private method of dispute settlement constitutes a fundamental flaw; it allows privately-appointed arbitrators to sit in judgment on the legislative, executive, and judicial branches of government and overrule "well-established, respected and independent judiciaries."[6] Worse still, it points to a dearth of democratic legitimacy in the resolution of what, in effect, are public law disputes.[7] The latter criticism is typically coupled with related accusations: that of the purported secrecy of proceedings and the concern that the system operates at a remove from national institutions and public scrutiny.[8] The assumed private law nature of investment treaty arbitration has been invoked in parliamentary debates as an argument to resist investment treaties and ISDS,[9] and although it did not emerge as a formally identified concern in the reform negotiations in Working Group III of the United Nations Commission on International Trade Law ("UNCITRAL"),[10] it has underlain part of the civil society debate

for ISDS Reform 8 (Sept. 17, 2019) (concept paper, *Academic Forum on ISDS*); Yarik Kryvoi, *Private or Public Adjudication? Procedure, Substance and Legitimacy*, 34 LEIDEN J. INT'L L. 681, 700 (2021). *See generally* Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55 INT'L ORG. 919 (2001).

6. ROBERT FRENCH, C.J., INVESTOR-STATE DISPUTE SETTLEMENT — A CUT ABOVE THE COURTS? 9 (2014), http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf; U.N. Secretary-General, *supra* note 5, at ¶ 52 ("The most fundamental argument against investor-State dispute settlement is that it subverts the rule of law so laboriously constructed over the past two hundred years by attempting to privatize justice."); *see also id.* ¶¶ 9, 13, 21, 23.

7. The term "public law" as used here is agnostic about whether these are "public *international* law" or "public *domestic* law" disputes. For a description of this criticism, see ALVAREZ, *supra* note 5, at 76; VAN HARTEN, *supra* note 5, *passim*; M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 43 (5th ed. 2021).

8. *See* Marc Bungenberg, *Democracy and International Investment Law*, *in* 1 CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 186, 186, 204 (Stefan Kröll, Andrea K. Bjorklund, & Franco Ferrari eds., 2023); Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761, 763 (2015); *see also* Anthony Depalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html; *cf.* Thomas Schultz, *The Concept of Law in Transnational Arbitral Orders and Some of Its Consequences*, 2 J. INT'L DISP. SETTLEMENT 59, 59–60 (2011) (discussing the liberalization of national arbitration laws that leads to a decrease in scrutiny over arbitral proceedings and awards).

9. *See* Don Davies, Member, House of Commons, Debate at House of Commons, Parliament of Canada, 41st Parliament, 1st Session, *in* 146 HANSARD 235, 15564–67 (Apr. 18, 2013) (Can.), http://www.ourcommons.ca/documentviewer/en/41-1/house/sitting-235/hansard; Melissa Parks, Member, House of Representatives, Debate at Treaties Committee, Parliament of Australia (Sept. 22, 2014), http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/cf028b00-427a-488c-8c92-2792de44c147/0370/hansard_frag.pdf.

10. For the identified concerns, see UNCITRAL, Rep. of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Sixth Session, U.N. Doc. A/CN.9/964 (Nov. 6, 2018).

that triggered the reform effort in the first place.[11] In the UNCITRAL context, states have split into two major camps (albeit with a number of intermediary positions): those favoring a judicialization of investment dispute settlement and those favoring incremental reforms to investment arbitration while opposing a departure from arbitration as a method of dispute settlement.[12] Part of the argument supporting judicialization relies on this perception of arbitration as a private law system, such that the European Union, a proponent of judicialization, stressed that its proposal is for the establishment of a "public" dispute settlement system.[13]

This article is premised on the assumption that investment treaty arbitration has a public international law *function*, since it resolves public international law disputes,[14] but what is contested is the *nature* of its procedural framework: Is it

11. Ironically, part of the debate has repeated ad nauseam a statement by Arbitrator Juan Fernández-Armesto, who is quoted as saying: "When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all. . . . Three *private* individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament" (emphasis added). *See* PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM 34 (Helen Burley ed., 2012), http://www.tni.org/files/download/profitingfrominjustice.pdf; GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION 8 (2013); NATACHA CINGOTTI, FRIENDS OF THE EARTH EUR., THE TTIP OF THE ANTI-DEMOCRACY ICEBERG: THE RISKS OF INCLUDING INVESTOR-TO-DISPUTE SETTLEMENT IN TRANSATLANTIC TRADE TALKS 1 (Ronnie Hall & Francesca Gater eds., 2013); George Monbiot, *This Transatlantic Trade Deal is a Full-Frontal Assault on Democracy*, THE GUARDIAN (Nov. 4, 2013), http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy; *Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, April 2014*, AUSTL. FAIR TRADE & INV. NETWORK 8 (2014), http://aftinet.org.au/cms/sites/default/files/AFTINET%20submission%20ISDS%200404.pdf; Melissa Parke, *Why Support the TPP When It Will Let Foreign Corporations Take Our Democracies to Court?*, THE GUARDIAN (Oct. 29, 2014), http://www.theguardian.com/commentisfree/2014/oct/29/why-support-the-tpp-when-it-will-let-foreign-corporations-take-our-democracies-to-court; de Zayas, *supra* note 5, ¶ 17; SUSAN GEORGE, SHADOW SOVEREIGNS: HOW GLOBAL CORPORATIONS ARE SEIZING POWER 78 (2015); Stephen McBride, *The New Constitutionalism and Austerity*, *in* THE AUSTERITY STATE 169, 173 (Stephen McBride & Bryan M. Evans eds., 2017).

12. *See generally* UNCITRAL, *Working Group III: ISDS Reform*, *supra* note 1.

13. Press Release, European Commission, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015).

14. *See* ALVAREZ, *supra* note 5, at 406–56 (explaining why investment arbitration "merits inclusion within the 'public' side of the Hague Academy of International Law"); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 45 (2013) ("Investment treaties are clearly creatures of public international law: they are entered into by two or more states and are substantively governed by public international law."); Attila Tanzi, *Conclusions: Testing General Principles of Law in International Law: Between Principles and Rules of International Law*, *in* GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 297, 303 (Mads Andenas, Malgosia Fitzmaurice, Attila Tanzi, & Jan Wouters eds., 2019); Schill, *supra* note 5, at 203. However, this view is not

one of public or private law? The distinction between the *function* and the *nature* of investment treaty arbitration is not generally drawn in the literature, yet it matters nonetheless.

For example, if the nature of investment arbitration is one of private international law,[15] then arbitrators do not need to contribute to the development of international investment law. Rather, they must focus on resolving the dispute at hand; by the same token, there is no need for transparency.[16] This can lead to the conclusion that if investment treaty arbitration is a private method of settling disputes, it is inappropriate for the settlement of public international law disputes, such as disputes between states and investors. Professor Joost Pauwelyn, who described investment arbitration as a private adjudication model—in other words, as of a private nature—has argued that it "needs rethinking, in terms of transparency and openness to the public . . . and also in terms of adjudicator appointments (although eliminating party-appointed arbitrators remains a taboo)."[17]

Contrariwise, if investment arbitration is a public method of settling disputes, and it takes into account concerns such as the harmonious development of international law and the need for transparency,[18] its public law nature is apposite to its function: the resolution of public international law disputes. By the same token, the consideration that investment arbitration *functions* as a system of global administrative review implies a need for transparency, reasoned decisions, the possibility of a review of decisions, and exceptions, such as on grounds of national security.[19]

The question of the public or private law nature of investment treaty arbitration is not new. As early as 1964, during the drafting of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"),[20] investment arbitration's most utilized procedural rules,[21] Aron Broches suggested that the parallel between the

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uncontested. *See* Julian Arato, *The Private Law Critique of International Investment Law*, 113 AM. J. INT'L L. 1, 9–10 (2019); *cf.* José E. Alvarez, *Is Investor-State Arbitration 'Public'?*, 7 J. INT'L DISP. SETTLEMENT 534, 535 (2016) ("ISDS, and the regime of which it is a part, should best be seen as a hybrid between public and private.").

15. The term "private international law," as used in this article, does not refer to the system that governs conflict of laws but rather to international law administered in cross-border disputes between individuals or private entities.

16. ALVAREZ, *supra* note 5, at 434 ("Whether investor-State arbitration belongs to the private or public side of the aisle . . . has real world political implications.").

17. Pauwelyn, *supra* note 8, at 803.

18. ALVAREZ, *supra* note 5, at 434.

19. Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 37–42 (2005).

20. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

21. The number of ICSID Convention cases is higher than that under all other arbitration rules (including the ICSID Additional Facility) combined. According to UNCTAD data, 718 out of a total of 1,332 cases have been brought under the ICSID Convention. UNCTAD, *ISDS*

ICSID Convention and "commercial arbitration should not be drawn too closely because the Convention sought to establish a new jurisdiction. *The parallel if any lay with the International Court of Justice rather than with commercial arbitration*."[22] This statement invites two observations. First, the quandary in which contemporary international investment lawyers find themselves about whether investment arbitration is a public or private method of dispute settlement has a long pedigree. It dates from the system's inception. Second, the "principal architect" of the ICSID Convention thought of it as a *sui generis* system modeled on the Statute of the International Court of Justice ("ICJ").[23]

In this article, I argue that the gargantuan task of persuasively deciding whether investment treaty arbitration is a public or a private law means of settling disputes is not only unfinished but also unlikely to yield a definitive answer. There are burgeoning studies of the nature of investment treaty arbitration as public or private, published by investment treaty arbitration's apologists and detractors alike, but there is little agreement. The various theories that have been proposed are not only irreconcilable, but they tend to disprove one another. Since it therefore seems impossible to convincingly attribute a public or private law nature to investment treaty arbitration, I suggest that the public and private law divide cannot serve as an argument in favor of or against arbitration. For this reason, it is necessary to move away from the original inquiry into the public or private law nature of investment treaty arbitration.

Building on traditional interpretations of investment treaty arbitration as private, hybrid, or public, I suggest in the alternative that the system is best conceptualized as a continuum along which one can find varying public and private law elements, more or less so depending on the beholder's viewpoint.

Navigator, http://investmentpolicy.unctad.org/investment-dispute-settlement (last visited May 15, 2024) [hereinafter *ISDS Navigator*]; ICSID, ICSID Additional Facility Rules and Regulations, ICSID Doc. ICSID//11/Rev. 3 (July 2022) [hereinafter ICSID Additional Facility]. For a comparison of the numbers of cases brought under ICSID and other investment treaty arbitrations from 1987 to 2019, see UNCTAD, WORLD INVESTMENT REPORT 2020: INTERNATIONAL PRODUCTION BEYOND THE PANDEMIC, U.N. Sales No. E.20.II.D.23 at 110 fig.III.7 (2020). The fact that ICSID cases may be brought under either the ICSID Convention or the ICSID Additional Facility does not affect the general conclusion of the popularity of the ICSID Convention. The majority of ICSID cases are ICSID Convention cases. For example, in 2020, only three out of forty ICSID cases were ICSID Additional Facility cases, which corresponds to about 8%. ICSID, *2020 Annual Report*, at 21 (Sept. 21, 2020), http://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf.

22. *Summary Record of Proceedings, Consultative Meetings of Legal Experts, 19 February 1964*, *in* [II-1] ICSID, HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 423 (1968) (emphasis added).

23. *See* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 256 (1995) ("[T]his is not a subgenre of an existing discipline. It is dramatically different from anything previously known in the international sphere."); Bernando M. Cremades & David J. Cairns, *The Brave New World of Global Arbitration*, 3 J. WORLD INV. 173, 183 (2002); SCHREUER'S COMMENTARY ON THE ICSID CONVENTION 2 (Stephan W. Schill, Loretta Malintoppi, August Reinisch, Christoph H. Schreuer, & Anthony Sinclair eds., 3d ed. 2022).

In addition, while some have claimed that the European Union's project of judicialization is in effect arbitration in disguise,[24] investment arbitration displays important commonalities with an international court system. Its presumed unique features—including consent and control over the appointment of adjudicators as aspects of party autonomy—appear a little less unique when surveyed up close. The emergence of hybrid adjudicative bodies, combining features traditionally associated with arbitration and courts, further blurs the line between international courts and arbitration.[25] This is not to deny the differences between judicial settlement and arbitration; it is to put them in perspective. In turn, this means that the legitimization of investment arbitration cannot depend on our understanding of it as a private or public method of dispute settlement, because the distinction has become moot. Rather, the crux of the matter is the appropriateness and legitimacy of particular features of the dispute settlement system, such as those concerning selection and appointment of adjudicators. Ultimately, what matters are the system design choices that states make. This has important repercussions for our assessment of investment treaty arbitration as a dispute settlement mechanism and has the potential to frame its continuing reform.

In contrast with existing legal scholarship, which aims to attribute a public or private law nature to investment arbitration, this article argues that alternative benchmarks are necessary to appraise the desirability of arbitration or, alternatively, of a court system for the resolution of investment disputes. That said, it is not the purpose of this article to weigh arbitration against a court system.[26] Rather, it centers on offering the necessary tools to appreciate one important question in the reform debate.

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24. *See*, *e.g.*, GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, GENEVA CENT. FOR INT'L DISP. SETTLEMENT, 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? 34–41 (June 2016), http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf; *cf*. Opinion 1/17, Comprehensive Economic and Trade Agreement between Canada and the European Union, ECLI:EU:C:2019:341, ¶ 193 (Apr. 30, 2019) (describing the bilateral investment court in the Comprehensive Economic and Trade Agreement between Canada and the European Union ("CETA") as "'hybrid' in nature, in that it contains, in addition to characteristics of judicial bodies, a number of elements that continue to be based on traditional arbitration mechanisms in relation to investments."). *Contra* Catharine Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, 14 TRANSNAT'L DISP. MGMT. 1 (2017) (first published online 2016). However, the Court of Justice of the European Union added that "without there being any need to ascertain whether the Parties will formally classify those tribunals as 'judicial bodies' or whether their Members . . . will be called 'judges,' . . . those tribunals will, in essence, exercise judicial functions." *Id.* ¶ 197; *see also infra* text accompanying note 301.

25. An example is the Iran-U.S. Claims Tribunal, created by the Algiers Accords, which has already caused a lot of ink to be spilled. *See infra* note 121. However, given space constraints, these bodies are not discussed in this article.

26. The article remains agnostic about this issue. This is certainly not a reflection of the significance of this debate, but rather a matter of focus.

The article makes two contributions. The first of these is conceptual: It critically assesses the existing theories on the nature of investment treaty arbitration, reveals their weaknesses, and points to the need for an alternative approach. The article's second contribution is normative: While not claiming to propose a definitive solution to an ongoing debate, the article presents theoretical frameworks that can help reconcile the conflict between states' respective choices and firmly establish them on a robust legal basis.

Following this introduction, the remainder of the article is organized as follows. In Part II, I review the different doctrinal interpretations of investment treaty arbitration as private, public, or hybrid. In this context, I identify six conflicting readings that dominate the field. In Part III, I consider some important overlaps between investment arbitration and procedures before public international law courts. In Part IV, I conclude the article.

II. SIX READINGS OF INVESTMENT TREATY ARBITRATION BETWEEN PUBLIC AND PRIVATE LAW

A. *Investment Arbitration as a Private Method of Dispute Settlement*

When Professor José E. Alvarez gave his lectures on *The Public International Law Regime Governing International Investment* at the Hague Academy of International Law, there was some resistance within the Academy to the idea that he would teach international investment law as part of the Academy's courses on *public* international law.[27] He acknowledged that, indeed, "if one focuses only on certain features of the investment regime, *particularly the procedural rules,*" a description of the law on foreign investment as private international law "remains plausible."[28] That investment treaty arbitration uses the procedural framework set in place for commercial arbitration is the main argument used in support of the private law nature of investment treaty arbitration.[29] It is not the only one. In this section, I discuss some of the arguments that underlie this first reading of investment treaty arbitration as a private law method of dispute settlement.

To some extent, investment treaty arbitration integrates the procedural rules and enforcement machinery of international commercial arbitration.[30] The

27. ALVAREZ, *supra* note 5, at 259.

28. *Id.* (emphasis added).

29. *See* text accompanying notes 30–41.

30. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 125 (2006); Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 73 BRIT. Y.B. INT'L L. 151, 224 (2003); Stephan W. Schill, *Derecho Internacional de Inversiones y Derecho Público Comparado en una Perspectiva Latino-Americana*, *in* INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA/ DERECHO INTERNACIONAL DE LAS INVERSIONES EN AMERICA LATINA 21, 36–37 (Attila Tanzi, Alessandra Asteriti, Rodrigo Polanco Lazo, & Paolo Turrini eds., 2016); Stephan W. Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty*

International Centre for Settlement of Investment Disputes ("ICSID") framework was developed for contractual claims.[31] The UNCITRAL Arbitration Rules, the Arbitration Rules of the Stockholm Chamber of Commerce ("SCC"), and the Arbitration Rules of the International Chamber of Commerce ("ICC"), among others, offer a common operative framework for commercial and investment arbitration.[32] The core of the UNCITRAL Arbitration Rules is designed for commercial arbitration. According to the description offered on UNCITRAL's website, the Rules "provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings *arising out of their commercial relationship*."[33] Commercial disputes are also the focus of the SCC and of the ICC Arbitration Rules.[34]

The UNCITRAL Model Law on International Commercial Arbitration presents a broad interpretation of the term "international *commercial* arbitration" to encompass "matters arising from all relationships of a commercial nature, whether contractual or not," including notably "investment."[35] The argument has been advanced that the term "commercial" as used in international arbitration instruments "is intended to have a purely economic meaning, not a restrictive meaning, so that it does not prevent recourse to arbitration in respect of relationships that would not be defined as 'commercial' under the commercial law or statutes of a given country."[36]

Arbitration and Its Significance for the Role of the Arbitrator, 23 LEIDEN J. INT'L L. 401, 410 (2010); *see also* Roberts, *supra* note 14, at 45 ("[T]he vast majority of [investment treaties] permit investors to bring arbitral claims directly against host states based on procedural rules and enforcement mechanisms developed largely in the context of international commercial arbitration and investor-state contracts. Accordingly, the system grafts private international law dispute resolution mechanisms onto public international law treaties."); *cf*. KURTZ, *supra* note 4, at 47 (referring to "a range of private systems of dispute settlement"). *Contra* ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW (2016).

31. Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (Or the Tale of the Dolphin and the Shark)*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 217, 220 (Julian D. Lew & Loukas A. Mistelis eds., 2006).

32. These arbitration rules contain no provision equivalent to Article 25 of the ICSID Convention, *supra* note 20, which specifically stipulates that the jurisdiction of an ICSID tribunal extends to legal disputes "arising directly out of an *investment*" (emphasis added).

33. UNCITRAL, *UNCITRAL Arbitration Rules*, http://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration (last visited May 15, 2024) (emphasis added).

34. *See* Stockholm Chamber of Comm. [SCC], *SCC Arbitration Institute*, http://sccarbitrationinstitute.se/en (last visited May 15, 2024); ICC ARBITRATION RULES (2021), http://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf.

35. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 1(1) n.2, U.N. Docs. A/40/17 & A/61/17, http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

36. Giorgio Sacerdoti, *Arbitration of Investment Disputes Under the Rules of UNCITRAL and ICSID: Prerequisites, Applicable Law and Review of Awards*, 19 ICSID REV. 1, 12 (2004). The debate is not without significance and the scope of the term "commercial" is disputed. For example, the term "commercial" in the UNCITRAL Arbitration Rules is understood to encompass "investment," and the UNCITRAL Arbitration Rules clearly cover investor-state disputes.

To challenge non-ICSID Convention awards, a party must resort to set-aside proceedings established by municipal law in the seat of the arbitration, as in the case of commercial arbitration.[37] Similarly, for the enforcement of non-ICSID investment arbitral awards, a number of treaties make reference to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[38] The United States-Mexico-Canada Agreement ("USMCA") provides that a claim submitted to investor-state arbitration under Annex 14-D on Mexico-United States Investment Disputes "shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of the New York Convention and article I of the InterAmerican Convention."[39] The same provision existed in its predecessor, the North American Free Trade Agreement ("NAFTA").[40] Somewhat astonishingly, the Comprehensive Economic and Trade Agreement between Canada and the European Union ("CETA") contains a similar provision in relation to enforcement of decisions rendered by CETA's investment *court*.[41]

Remarkably, as a result of recent revisions, some traditional commercial arbitration rules reserve a handful of provisions for investment treaty

See UNCITRAL ARBITRATION RULES (2021) art. 1(4), http://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf (explicitly mentioning investor-state arbitration). However, questions have been raised about the scope of the term "commercial" in another UNCITRAL instrument, the Convention on International Settlement Agreements Resulting from Mediation [hereinafter Singapore Convention on Mediation], *opened for signature* Aug. 7, 2019, 3369 U.N.T.S., U.N. Doc. A/73/17. Article 1 of the Singapore Convention on Meditation states that the Convention applies to an international "agreement resulting from mediation and concluded in writing by parties to resolve a *commercial* dispute" (emphasis added). The Convention does not mention investment disputes, raising the question of whether it does cover this type of dispute. It is worth recalling that, like the UNCITRAL Model Law on International Commercial Arbitration, the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (G.A. Res. 73/199 (Dec. 20, 2018)) requires a broad interpretation of the term "commercial," "so as to cover matters arising from all relationships of a commercial nature, whether contractual or not," including "investment." This allows the assumption that the UNCITRAL Mediation Rules may also apply to investment settlement agreements. On the Singapore Convention on Mediation, see Hal Abramson, *New Singapore Convention on Cross-Border Mediated Settlements: Key Choices*, *in* MEDIATION IN INTERNATIONAL COMMERCIAL AND INVESTMENT DISPUTES 389 (Catharine Titi & Katia Fach Gómez eds., 2019).

37. *See* Steffen Hindelang & Julia Nassl, *Annulment and Set-aside*, *in* THE AWARD IN INTERNATIONAL INVESTMENT ARBITRATION (Katia Fach Gómez & Catharine Titi eds., forthcoming 2024).

38. *See*, *e.g.*, Trans-Pacific Partnership ("TPP") art. 9.29(13), as incorporated in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), Mar. 8, 2018, 3346 U.N.T.S., and U.S. Model BIT (2012) art. 34(10), http://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

39. United States-Mexico-Canada Agreement [USMCA] Annex 14-D art. 14.D.13, Nov. 30, 2018, 134 Stat. 11.

40. North American Free Trade Agreement [NAFTA] art. 1136(7), Dec. 17, 1992, 32 I.L.M. 289.

41. Comprehensive Economic and Trade Agreement between Canada and the European Union [CETA] art. 8.41(5), Jan. 14, 2017, O.J. (L 11) 23.

arbitration. Since 2013, the UNCITRAL Arbitration Rules include provisions on transparency for ISDS, notably UNCITRAL's Rules on Transparency in Treaty-based Investor-State Arbitration for arbitrations initiated on the basis of an investment treaty.[42] The 2023 SCC Arbitration Rules contain an appendix applicable to investment treaty disputes, making provision, *inter alia*, for transparency (in particular, participation by third parties, including non-disputing treaty parties).[43] In *UPS v. Canada*, the tribunal recalled "the emphasis placed on the value of greater transparency" in investment arbitration and reasoned that "[s]uch proceedings are not now, if they ever were, to be equated to the standard run of international commercial arbitration between private parties."[44] The 2021 ICC Arbitration Rules also comprise two provisions specific to *treaty*-based disputes, possibly investment disputes.[45]

Another assumed point of convergence between investment and commercial arbitration is that investment tribunals perceive their mandate as akin to that of commercial tribunals. Investment tribunals sometimes consider that "arbitration as a general class is appropriately limited to efficient and particularistic resolution of disputes, with the reasoning having no value at all for other stakeholders and future claims."[46] This is, properly speaking, the approach in commercial arbitration. The *Glamis Gold* tribunal decided that its mandate under Chapter 11 of NAFTA was similar to the "mandate ordinarily found in international commercial arbitration."[47] In *Romak*, the tribunal held that it had not been entrusted:

> with a mission to ensure the coherence or development of "arbitral jurisprudence." The Arbitral Tribunal's mission is more mundane . . . : to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general.[48]

This approach has come under fire for being "simplistic" and ignoring the distinction between commercial and investment treaty arbitration.[49] It is not universally followed; other tribunals have taken the opposite stance. In

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42. UNCITRAL ARBITRATION RULES (2021), *supra* note 36, art. 1(4).

43. SCC ARBITRATION RULES (2023) app. III, http://sccarbitrationinstitute.se/sites/default/files/2023-01/scc_arbitration_rules_2023_eng.pdf.

44. United Parcel Serv. of America Inc. v. Canada, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, ¶ 70 (Oct. 17, 2001), 7 ICSID Rep. 285 (2005).

45. ICC ARBITRATION RULES (2021), *supra* note 34, arts. 13(6) and 29(6).

46. KURTZ, *supra* note 4, at 246; *cf.* ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 284 (Jonathan Huston trans., 2016).

47. Glamis Gold, Ltd. v. United States, UNCITRAL, Final Award, ¶ 3 (June 8, 2009).

48. Romak S.A. (Switzerland) v. Uzbekistan, PCA Case No. AA280, Award, ¶ 171 (Perm. Ct. Arb. 2009).

49. KURTZ, *supra* note 4, at 247.

Saipem, the tribunal reasoned that "subject to compelling contrary grounds, [the tribunal] . . . has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."[50]

The consistency that may result from the "harmonious development of investment law" is not a theoretical conundrum for law professors to debate. Rather, it is a pragmatic consideration crucial to the legitimacy of international investment law. In 2008, Professor Charles H. Brower II raised the issue of the "puzzling reluctance of states to embrace judicial settlement in the context of investment treaty disputes,"[51] puzzling "in light of history and foolish in light of the lost opportunity for development of coherent jurisprudence in a field that craves certainty."[52] The lack of consistency of investment awards is also one of the concerns identified by states in UNCITRAL Working Group III in the reform negotiations.[53]

But lack of consistency is not of itself a concern related to a private law means of dispute settlement. This preoccupation was also noted with respect to the resolution of interstate disputes by the Permanent Court of Arbitration ("PCA"), and it was used to explain why arbitration lost popularity for public international law disputes. According to Hersch Lauterpacht:

> [T]here was absent in the awards of the tribunals of the Permanent Court of Arbitration the necessary tradition of continuity, with all the advantages of a resulting relative certainty of the law. There was no assurance that the decisions of the arbitrators chosen from the panel of the Court of Arbitration would serve a purpose other than that of disposing of the dispute between the parties. They could not invariably be relied upon to develop and clarify international law. This was one of the principal reasons militating in favor of the establishment of an Arbitral Court of Justice (and, subsequently, of the Permanent Court of International Justice) as distinguished from the Permanent Court of Arbitration.[54]

Commercial arbitration is sometimes used as inspiration when allocating costs between the disputing parties.[55] In his dissenting opinion in *UAB E*

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50. Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 67 (Mar. 21, 2007).

51. Charles H. Brower II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 DUKE J. COMP. & INT'L L. 259, 298 (2008).

52. *Id.* at 304.

53. UNCITRAL, Rep. of Working Group III, *supra* note 10, ¶¶ 25–63.

54. HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 6 (1958).

55. *See*, *e.g.*, ADC Affiliate Ltd. v. Hungary, ICSID Case No. ARB/03/16, Award, ¶¶ 532–533 (Oct. 2, 2006) (citing Matthew Weiniger and Matthew Page, according to whom some tribunals have adopted "the principle that the successful party should have its costs paid by the unsuccessful party, as adopted in commercial arbitration"); EDF (Servs.) Ltd. v. Romania,

Energija v. Latvia, Arbitrator August Reinisch contrasted the broad discretion that the ICSID Convention confers on investment tribunals to allocate costs with "the general rule in international commercial arbitration exemplified [by the UNCITRAL Arbitration Rules] according to which the costs of the arbitration shall 'in principle' be borne by the unsuccessful party,"[56] thus apparently equating investment arbitration under the UNCITRAL Arbitration Rules with "international commercial arbitration."

Although the tradition for ICSID Convention tribunals has been to split the costs evenly between the disputing parties,[57] more recently the "loser pays" or "costs follow the event" principle has started to gain traction even in ICSID Convention arbitrations.[58] In *EDF v. Romania*, the tribunal reasoned that:

ICSID Case No. ARB/05/13, Award, ¶ 327 (Oct. 8, 2009); *cf.* Alasdair Ross Anderson et al. v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, ¶ 62 (May 19, 2010) ("[I]n reference to the allocation of costs, the practice of ICSID investment arbitration differs from commercial arbitration, which tends to award costs to the successful party. . . . In a few recent investment arbitration cases the principle that 'costs follow the event' has been followed by tribunals, which have determined that the losing party should bear all or part of the costs of the proceeding and counsel fees"); Int'l Thunderbird Gaming Corp. v. United Mexican States, UNCITRAL, Award, ¶ 141 (Dec. 1, 2005) (separate opinion by Wälde, Arb.) (stressing the differences between investment arbitration and commercial arbitration, among others the fact that in contrast with commercial arbitration "states have to defray their own legal representation expenditures, even if they prevail").

56. UAB E. Energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, ¶ 8 (Dec. 22, 2017) (dissenting opinion on costs by Reinisch, Arb.) [hereinafter UAB v. Latvia (dissent Renisch)]; *cf.* Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Excerpts of Award, ¶ 733 (July 2, 2018); *see also* UNCITRAL ARBITRATION RULES (2021), *supra* note 36, art. 42(1); ICSID Convention, *supra* note 20, art. 61(2).

57. Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, ¶ 109 (Feb. 17, 2000); Alasdair v. Costa Rica, ICSID Case No. ARB(AF)/07/3, ¶ 62 (May 19, 2010); UAB v. Latvia (dissent Renisch), ¶ 9.

58. Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, ¶ 380 (Mar. 28, 2011) ("The Arbitral Tribunal, however, welcomes the newly established and growing trend, that there should be an allocation of costs that reflects in some measure the principle that the losing party should contribute in a significant, if not necessarily exhaustive, fashion to the fees, costs and expenses of the arbitration of the prevailing party."); Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24, Award, ¶ 599 (Dec. 17, 2015) (referencing public international law jurisprudence in stating that "the prevailing trend in investment treaty arbitration is that the successful party recover some or all of its costs. This costs principle aligns with the more general damages principles found in the *Chorzów Factory* case that the injured party be restored to the position in which it would have been had the breach not occurred."); Bernhard von Pezold et al. v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶ 1002 (July 28, 2015); Vladislav Kim et al. v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 619 (Mar. 8, 2017); UAB v. Latvia (dissent Renisch), ¶ 10; Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award, ¶ 1316 (July 26, 2018). Interestingly, this has also been the case in arbitrations under the ICSID Additional Facility Rules. *See*, *e.g.*, Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, ¶ 860 (Sept. 22, 2014); Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1, Award, ¶¶ 557–560 (Jan. 18, 2019); Vento Motorcycles, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/17/3, Award, ¶ 338 (July 6, 2020). The 2022 ICSID Arbitration Rules and ICSID Additional Facility Arbitration Rules establish that in allocating the costs, the tribunal shall take

> [T]he traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party. Rather, the practice has been to split the costs evenly, whether the claimant or the respondent prevails.[59]

> In the instant case, and generally, the Tribunal's preferred approach to costs is that of international commercial arbitration and its growing application to investment arbitration. That is, there should be an allocation of costs that reflects in some measure the principle that the losing party pays, but not necessarily all of the costs of the arbitration or of the prevailing party.[60]

In the process of reform of ISDS, the "loser pays" or "costs follow the event" principle has emerged as a possible reform option in relation to both investment arbitration and a multilateral court system.[61]

A final point of purported convergence between commercial and investment arbitration is that practitioners are often drawn from the same pool of individuals, and many investment arbitrators have a background in private international law, often commercial law and commercial arbitration.[62] However, this statement conveniently forgets those arbitrators who not only are versed in public international law, but have also been judges at the ICJ.[63] In fact, the revolving door between the ICJ and investment treaty arbitration has been so common that it gave reason for concern, in light of the ICJ's

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into account "all relevant circumstances," including the outcome of the proceeding. *See* ICSID ARBITRATION RULES r. 52, http://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf; ICSID ADDITIONAL FACILITY ARBITRATION RULES r. 62, http://icsid.worldbank.org/sites/default/files/Additional_Facility_Arbitration_Rules.pdf.

59. EDF (Servs.) Ltd. v. Rom., ICSID Case No. ARB/05/13, ¶ 322.

60. *Id.* ¶ 327; *cf.* EDF (Servs.) Ltd. v. Rom., ICSID Case No. ARB/05/13 (dissent regarding costs by Rovine, Arb.).

61. Gabriel Bottini, Catharine Titi, Facundo Pérez Aznar, Julien Chaisse, Marko Jovanovic, & Olga Puigdemont Sola, *Excessive Costs and Recoverability of Cost Awards in Investment Arbitration*, 21 J. WORLD INV. & TRADE 251, 259 (2020).

62. Sacerdoti, *supra* note 36, at 47 ("Public international lawyers are not so dominant among the arbitrators in these cases as one would expect; should the 'art of arbitration' prevail over subject matter expertise?"); ALVAREZ, *supra* note 5, at 434 n.825 (remarking that "many [investment] arbitrators are commercially trained lawyers"); James Allsop, Chief Justice of the Federal Court of Australia, Commercial and Investor-State Arbitration: The Importance of Recognising their Differences, ICCA Congress 2018 Opening Keynote Address ¶ 3 (Apr. 16, 2018); *cf.* Pauwelyn, *supra* note 8, at 773, 781; Kryvoi, *supra* note 5, at 701.

63. Arbitrators who have also been ICJ judges include (in alphabetical order) Mohammed Bedjaoui, Thomas Buergenthal, James Crawford, Joan E. Donoghue, Christopher Greenwood, Gilbert Guillaume, Francisco Rezek, Bernardo Sepúlveda-Amor, Bruno Simma, Peter Tomka, Antônio Augusto Cançado Trindade, and Abdulqawi Ahmed Yusuf. Compare I.C.J., *All Members*, http://www.icj-cij.org/en/all-members (last visited May 15, 2024), with *ISDS Navigator*, *supra* note 21. To these must be added arbitrators who have also been ad hoc ICJ judges, see *infra* text accompanying note 269.

"ever-increasing workload," and in 2018, Abdulqawi Ahmed Yusuf, the court's former President, announced the decision of the "Members of the Court":

> Members of the Court . . . will not normally accept to participate in international arbitration. In particular, they will not participate in investor-State arbitration or in commercial arbitration. However, in the event that they are called upon, exceptionally, by one or more States that would prefer to resort to arbitration, instead of judicial settlement, the Court has decided that, in order to render service to those States, it will, if the circumstances so warrant, authorize its Members to participate in inter-State arbitration cases. Even in such exceptional cases, a Member of the Court will only participate, if authorized, in one arbitration procedure at a time. Prior authorization must have been granted, for that purpose, in accordance with the mechanism put in place by the Court.[64]

By way of a final remark, Professors Gus Van Harten and Martin Loughlin have observed that international investment law "transplants this private adjudicative model from the commercial sphere into the realm of government" and that "the procedural framework and enforcement structure of international commercial arbitration that provided the basis for the use of a private model of adjudication was extended to resolve regulatory disputes between individuals and the state."[65] However, as we will see later, the same authors draw a different conclusion from this argument, which is that investment treaty arbitration is dispute settlement in public law because investment disputes are public law disputes.[66]

B. *Investment Arbitration as a Private Method of Dispute Settlement with a Public Law Function—and Some Gray Areas of Overlap*

Even if one were to accept that investor-state arbitration is to some extent coterminous with commercial arbitration (this assumption still needs to be tested), there is little doubt that the two are distinct. This is, at least in part, because the legal discipline and the nature of the disputes are different. International commercial arbitration takes place in the context of private international law and concerns commercial disputes; investment treaty arbitration takes place on the basis of investment treaties, creatures of public international law,[67] and concerns, in principle, disputes arising out of regulatory changes.[68]

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64. Abdulqawi Ahmed Yusuf, President of the I.C.J., Address on the Occasion of the Seventy-Third Session of the U.N. General Assembly (Oct. 25, 2018), http://www.icj-cij.org/public/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf.

65. Van Harten & Loughlin, *supra* note 30, at 126.

66. *See infra* notes 154–63.

67. Roberts, *supra* note 14, at 45; VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 3, 225 (2016).

68. *See ISDS Navigator*, *supra* note 21.

Investment arbitration consistently engages a state as respondent and is profoundly political.[69] In contradistinction to commercial tribunals, investment treaty tribunals regularly adjudicate acts taken in the state's sovereign capacity. This is all too evident, for example, in the claims initiated against Argentina in relation to its economic and financial crisis of 2001,[70] as well as its sovereign debt restructuring;[71] cases concerning state measures relating to the protection of the environment, such as the two *Vattenfall* cases against Germany for alleged violations of the Energy Charter Treaty by measures respectively relating to the cleanness of water and the state's decision to phase out nuclear energy production;[72] cases arising out of measures adopted for the protection of public health;[73] and measures aimed to redress discrimination relating to the apartheid regime in South Africa.[74]

It is sometimes argued that the prospect of an investment claim can affect government policies by discouraging regulations in the public interest and in this manner create regulatory chill.[75] When the *Philip Morris v. Uruguay* and *Philip Morris v. Australia* cases were still pending,[76] a number of states reportedly hesitated to adopt anti-tobacco legislation similar to the legislation challenged by the tobacco multinational in Uruguay and Australia.[77]

The fact that investment treaty claims often challenge general legislative measures means that they are in principle more far-reaching than commercial arbitration claims. While commercial arbitration decisions affect principally or exclusively the parties to the dispute, investment treaty arbitration

69. Catharine Titi, *Are Investment Tribunals Adjudicating Political Disputes?*, 32 J. INT'L ARB. 261, 267 (2015).

70. *See*, *e.g.*, CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); Enron Creditors Recovery Corp. and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007); LG&E Energy Corp., LG&E Cap. Corp. & LG&E Int'l Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006).

71. *See*, *e.g.*, Abaclat (formerly Giovanna a Beccara) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

72. Vattenfall AB, Vattenfall Eur. AG, Vattenfall Eur. Generation AG v. Germany, ICSID Case No. ARB/09/6; Vattenfall et al. v. Germany, ICSID Case No. ARB/12/12. Both cases have been settled.

73. Philip Morris Asia Ltd. v. Australia, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

74. Piero Foresti et al. v. South Africa, ICSID Case No. ARB(AF)/07/1, Award (Aug. 4, 2010).

75. John Ruggie (Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises), *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, ¶ 30, U.N. Doc. A/HRC/11/13 (2009).

76. Philip Morris v. Uruguay, ICSID Case No. ARB/10/7; Philip Morris v. Australia, PCA Case No. 2012-12.

77. Titi, *supra* note 69, at 279–80.

decisions tend to have an important impact beyond the disputing parties.[78] This rule is not without exceptions. It has been observed, for instance, that it is questionable "whether the *Feldman* tribunal's award under NAFTA Chapter 11 of $US 1.7 million in damages against Mexico . . . is more significant for Mexicans than the resolution of a contractual dispute worth hundreds of millions of dollars between Mexico's state oil company and a major foreign buyer."[79] It is also true that if the public law nature of a dispute hinges on whether a public interest is affected, "a government's core regulatory concerns may be challenged when an investor seeks to enforce even a standard form contract used by a government," such as when the contract contains broad stabilization clauses.[80] But the exceptions confirm the rule.

Investment arbitration's public function also helps explain why it has received attention from civil society, while commercial arbitration has remained discreetly in the background, apparently immune to criticism.[81] By the same token, while confidentiality has proven suitable for commercial disputes, it sits uncomfortably with public interest investment treaty arbitration.[82] Writing in 1992, Professors Christine Gray and Benedict Kingsbury suggested that states decide to arbitrate, among other reasons, to take advantage of confidentiality and avoid the intervention in the proceedings by a third state.[83] Yet this statement no longer accurately reflects ISDS. Transparency, including participation of *amici curiae*, is becoming the rule.[84] Despite their slow start, the UNCITRAL Transparency Rules and the Mauritius Convention on Transparency bear witness to changing attitudes in this respect, as do numerous new investment treaties and revised arbitration rules, such as the 2022 ICSID Arbitration Rules.[85] The new transparency applies not only to access to documents and hearings, but also to the intervention of third parties as *amici curiae*, and even to third-party funding.[86] It is transparency that has led to a view of investment treaty arbitrators as "de facto common law judges . . . expected to produce and rely on public *jurisprudence constante*."[87] Transparency allows for a consistent application of investment treaty standards;

78. Van Harten & Loughlin, *supra* note 30, at 145.

79. *Id*.

80. Alvarez, *supra* note 14, at 544.

81. Commercial arbitration has not faced the equivalent of the "backlash" against ISDS. *See generally* THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung, & Claire Balchin eds., 2010).

82. VADI, *supra* note 67, at 58.

83. Christine Gray & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 63 BRIT. Y.B. INT'L L. 97, 109 (1992).

84. Blackaby, *supra* note 31, at 225.

85. *See*, *e.g.*, ICSID ARBITRATION RULES, *supra* note 58, r. 62–68.

86. *See*, *e.g.*, *id.* r. 14; ICSID ADDITIONAL FACILITY ARBITRATION RULES, *supra* note 58, r. 23.

87. Alvarez, *supra* note 14, at 549.

however, whether it also creates a related responsibility for arbitrators to decide in a manner that ensures consistency is an altogether different matter.[88]

The line distinguishing between commercial and investment arbitration becomes more difficult to draw when both involve a state as the respondent in light of whether a challenged measure is a private (*iure gestionis*) or a sovereign (*iure imperii*) measure. When a state becomes party to a commercial contract, such as a contract for the sale of goods, it acts in its private rather than in its sovereign capacity.[89] However, the distinction between a state act *iure gestionis* and an act *iure imperii* is more nuanced than may first appear. For example, in a contractual dispute brought on the basis of a commercial or investment contract, the challenged act can be *legislation* interfering with a contractual relationship, while, in a treaty dispute, investors regularly challenge the non-execution of a contract.[90] Revocation or denial of licenses or permits and cancellations or alleged violations of contracts are some of the most commonly challenged measures in investment arbitrations.[91] The links between investment-treaty and contract-based arbitration are also complex, as is evident when one considers umbrella clauses in investment treaties—which contain a promise that the host state will observe contractual obligations—and the divergent case law that has emerged in that respect.[92] This begs the question of whether an umbrella clause claim denotes a public law dispute simply "because of the form in which the state made its promise to the private party," in other words, because the umbrella clause is included in an investment *treaty*.[93]

Investment treaty arbitration and commercial arbitration also differ with respect to the method of consent. The majority of commercial arbitration cases involve private parties that have consented to arbitration through contract.[94] Therefore, in commercial arbitration (as in contractual investment arbitration), arbitration tends to be based on a compromissory clause specific to the parties' contract or, alternatively, a *compromis*, an agreement to submit a given dispute to arbitration.[95] By contrast, in investment treaty arbitration, consent is usually

88. *Cf.* Blackaby, *supra* note 31, at 228.

89. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 480–82 (9th ed. 2019).

90. SEBASTIEN MANCIAUX, INVESTISSEMENTS ÉTRANGERS ET ARBITRAGE ENTRE ÉTATS ET RESSORTISSANTS D'AUTRES ÉTATS 444 (2004) (citing case law).

91. UNCTAD, WORLD INVESTMENT REPORT 2016: INVESTOR NATIONALITY: POLICY CHANGES, U.N. Sales No. E.16.II.D.4, at 106 (2016).

92. Christoph Schreuer, *Travelling the BIT Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 249–55 (2004); Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements* 15–21 (OECD Working Papers on Int'l Inv., Paper No. 3, 2006); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137 (2006).

93. Alvarez, *supra* note 14, at 543–44.

94. NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 79 (6th ed. 2015).

95. *Id.* at 15–16.

given in an investment treaty or in a national law for an unspecified number of investors.[96] It is probably for this reason that consent in investment arbitration is subject to preconditions, such as limited local remedies clauses and fork-in-the-road provisions,[97] that aim to minimize the number of disputes that reach arbitration.[98] Such preconditions are often absent from commercial contracts.[99]

A further difference between investment arbitration and commercial arbitration concerns the applicable law: In commercial arbitration, the applicable law is a commercial contract and usually municipal law,[100] while in investment arbitration, it is an investment treaty and public international law.[101] However, municipal law is also regularly part of the applicable law in ISDS: Although most investment treaties are silent on the law to be applied to the dispute,[102] several grant access to arbitration rules that identify the host state's domestic law as part of the law to be applied by a tribunal.[103] For instance, the ICSID Convention provides that, should the parties not agree on the applicable law, the tribunal shall apply, *inter alia*, the municipal law of the contracting state party to the dispute, including its rules on conflicts of laws.[104] Other arbitration rules grant arbitral tribunals greater discretion to determine the applicable law in the absence of the parties' agreement.[105] Some investment

96. *See generally* Paulsson, *supra* note 23.

97. *See generally* Schreuer, *supra* note 92 (discussing fork-in-the-road provisions); Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 L. & PRAC. INT'L CTS. & TRIBUNALS 1 (2005) (discussing limited local remedies clauses).

98. Lars Markert & Catharine Titi, *States Strike Back – Old and New Ways for Host States to Defend Against Investment Arbitrations*, *in* Y.B. ON INT'L INVEST. L. & POL'Y 2013-2014, at 401, 406–10 (Andrea Bjorklund ed., 2015).

99. BLACKABY ET AL., *supra* note 94, at 458 *passim* (addressing conditions to access arbitration specifically when discussing ISDS claims, rather than commercial arbitration claims).

100. BLACKABY ET AL., *supra* note 94, at 190–91; Blackaby, *supra* note 31, at 222; *see* Michael Joachim Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, 23 UNIF. L. REV. 15 (2018).

101. Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. DISP. RES. 1, *passim* (2014); Blackaby, *supra* note 31, at 222; ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS ch. 2 (2009).

102. According to the same OECD study, close to 70% of investment treaties examined for the survey were silent on applicable law. Joachim Pohl, Kekeletso Mashigo, & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, ¶ 80 (OECD Working Papers on Int'l Inv. 2012/02, 2012).

103. On municipal law as part of the applicable law in investment treaty disputes, see Schreuer, *supra* note 101, *passim*; Ole Spiermann, *Applicable Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 89, 110–15 (Peter Muchlinksi, Federico Ortino, & Christoph Schreuer eds., 2008); DOUGLAS, *supra* note 101, at ch. 2; *cf.* HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION: THE INTERPLAY BETWEEN NATIONAL AND INTERNATIONAL LAW ch. 5 (2013) (focusing on contractual disputes).

104. ICSID Convention, *supra* note 20, art. 42(1).

105. *See*, *e.g.*, SCC ARBITRATION RULES (2023), *supra* note 43, art. 27(1) (providing that, if the parties have not designated the applicable law, the tribunal shall apply "the law or rules of law that it considers most appropriate."); UNCITRAL ARBITRATION RULES (2021), *supra*

treaties lay down provisions similar to the ICSID Convention's applicable law clause,[106] and the argument has been advanced that "the substantive law governing investment disputes is necessarily a hybrid of international and municipal law."[107] It is worth noting that some recent treaties, notably those signed by the European Union (and which provide for bilateral investment courts rather than arbitration) exclude municipal law from the applicable law.[108] Finally, liability in commercial arbitration essentially means liability for breach of contract; in investment arbitration, a finding of violation of an investment treaty entails the international responsibility of the violating state under public international law.[109]

C. *Investment Treaty Arbitration Is Dispute Settlement in Public International Law Because Arbitration Is a Public International Law Method of Dispute Settlement*

Interstate disputes have historically been resolved by recourse to arbitration, even though arbitration's popularity for this type of dispute has recently declined in favor of judicial settlement.[110] Modern interstate arbitration is typically considered to have originated in the friendship, commerce, and navigation treaty between the United States and Great Britain of 1794, commonly known as the Jay Treaty.[111] The Jay Treaty set in place arbitral commissions, some of which dealt effectively with interstate disputes and some of which constituted claims tribunals established to process claims espoused by British

note 36, art. 35(1); ICC ARBITRATION RULES (2021), *supra* note 34, art. 21(1); OPTIONAL RULES FOR ARBITRATING DISPUTES BETWEEN TWO PARTIES OF WHICH ONLY ONE IS A STATE OF THE PERMANENT COURT OF ARBITRATION (1993) art. 33(1), http://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-Parties-of-Which-Only-One-is-a-State-1993.pdf. The ICSID Additional Facility Arbitration Rules provide that in the absence of the parties' agreement on the law applicable to the dispute, the tribunal shall apply "(a) the law which it determines to be applicable; and (b) the rules of international law it considers applicable." ICSID ADDITIONAL FACILITY ARBITRATION RULES, *supra* note 58, r. 68(1).

106. According to a 2012 OECD study, 23% of investment treaties that contain a provision on applicable law include the domestic law in their applicable law. Pohl, Mashigo, & Nohen, *supra* note 102, ¶ 82. *See*, *e.g.*, U.S. Model BIT (2012), *supra* note 38, art. 30.

107. Douglas, *supra* note 30, at 195.

108. *See infra* text accompanying notes 246–247.

109. *See*, *e.g.*, CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Annulment, *passim* (Sept. 25, 2007); *cf.* Martins Paparinskis, *Investment Treaty Arbitration and the (New) Law of State Responsibility*, 24 EUR. J. INT'L L. 617 (2013).

110. Brower II, *supra* note 51, at 265–66; *see also* Gray & Kingsbury, *supra* note 83.

111. Treaty of Amity, Commerce and Navigation between his Britannick Majesty and the United States of America, Gr. Brit.-U.S., Nov. 19, 1794, T.S. No. 105 [hereinafter Jay Treaty]. *See also* JACKSON HARVEY RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 191 (1929); Gray & Kingsbury, *supra* note 83, at 97; Brower II, *supra* note 51, at 266. A distinction is necessary with arbitration in the Middle Ages with disputes submitted to the Pope, the Holy Roman Emperor, or to other monarchs who typically state no reasons for their decisions. *See* Brower II, *supra* note 51, at 269–70 (with citations).

and U.S. nationals.[112] The first arbitral commission was appointed to identify the "latitude and longitude" of the St. Croix River intended as a boundary of the United States.[113] The second arbitral commission was, in reality, a claims tribunal instituted to ascertain losses incurred by British merchants for legal impediments to the collection of debts contracted before the peace and to determine the compensation to be paid by the United States.[114] The amounts proved larger than had been expected, which led to deadlocks when the U.S. commissioners withdrew.[115] The pending claims were later settled by the United States by treaty.[116] The third commission (also a claims tribunal) was established to adjudicate U.S. claims concerning British capture or condemnation of U.S. "vessels and other property."[117] This commission also encountered problems (on two occasions the British commissioners withdrew), but overall "in the course of eight years, [it] rendered over 530 awards in favor of U.S. claimants."[118]

The function of the Jay Treaty commissions depended on a "combination of legal proceedings and diplomatic negotiations," with a strong reliance on the latter.[119] Arbitral commissions were regularly regarded as "extensions of diplomacy."[120] In many respects, the Jay Treaty commissions differ from modern investor-state tribunals, as do the Iran-U.S. Claims Tribunal and the United Nations Compensation Commission.[121]

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112. Richard B. Lillich, *The Jay Treaty Commissions*, 37 ST. JOHN'S L. REV. 260 (1963); David J. Bederman, *The Glorious Past and Uncertain Future of International Claims Tribunals*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 161, 164 (Mark W. Janis ed., 1992); JOHN G. COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 32 (1999).

113. Jay Treaty, *supra* note 111, art. V.

114. *Id.* art. VI.

115. Bederman, *supra* note 112, at 164; Brower II, *supra* note 51, at 268.

116. Brower II, *supra* note 51, at 268.

117. Jay Treaty, *supra* note 111, art. VII.

118. Brower II, *supra* note 51, at 269.

119. *Id.* at 270–71.

120. COLLIER & LOWE, *supra* note 112, at 32.

121. On the Iran-U.S. Claims Tribunal, see David Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990); Jamal Seifi, *State Responsibility for Failure to Enforce Iran-United States Claims Tribunal Awards by the Respective National Courts-International Character and Non-Reviewability of the Awards Reconfirmed*, 16 J. INT'L ARB. 5, 6 (1999) ("The appearance of individuals before the Tribunal could not undermine the overwhelming public international law character of Tribunal awards."); Jamal Seifi, *Procedural Remedies Against Awards of Iran-United States Claims Tribunal Arbitration International*, 8 ARB. INT'L 41 (1992); Hazel Fox, *States and the Undertaking to Arbitrate*, 37 INT'L & COMP. L.Q. 1, 3 (1988) ("[A] private party may, by means of mixed claims commissions—and the Iran–US Claims Tribunal is the latest version—have its private claims taken up by the State and presented through an inter-State arbitration."); DOUGLAS, *supra* note 101, at 9; Douglas, *supra* note 30, at 160 ("The literature on [the precise legal status of the Tribunal] testifies to a complete lack of consensus."). The United Nations Compensation Commission was established in 1991, as a subsidiary organ of the U.N. Security

The inflection point in interstate arbitration with a move towards "judicial" settlement is said to have taken place with the *Alabama Claims* arbitration, initiated under the Treaty of Washington of May 8, 1871 in relation to losses inflicted by the warship *Alabama*,[122] which had been supplied to the Confederacy in violation of Britain's duty of neutrality during the U.S. Civil War.[123] The *Alabama Claims* arbitration was hailed as a remarkable success and, as a result, recourse to arbitration increased.[124]

The years that followed led to the establishment of the PCA with The Hague Convention of 1899 (amended in 1907).[125] The name "Permanent Court of Arbitration" is a misnomer; the institution "is neither permanent nor a court nor, itself, does it arbitrate."[126] The PCA is an arbitral institution that administers arbitrations, but it relies on parties selecting arbitrators from a pre-established list of designated individuals.[127] The Hague Convention confirms that "[i]n questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle."[128]

Council under S.C. Res. 687 (Apr. 3, 1991), to hear claims in relation to losses and damage suffered as a result of Iraq's invasion of Kuwait in 1990-1991. *See* Security Council Unanimously Adopts Resolution Confirming United Nations Compensation Commission Has Fulfilled Its Iraq-Kuwait Mandate, U.N. Doc. No. SC/14801 (Feb. 22, 2022), https://press.un.org/en/2022/sc14801.doc.htm. It has been described as neither a court nor an arbitral tribunal, but rather as a "a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims," U.N. Secretary General, *Report of the Secretary-General Pursuant to Paragraph 19 of S.C. Resolution 687*, ¶ 20, U.N. Doc. S/22559 (May 2, 1991).

122. Treaty between Her Majesty and the United States of America for the Amicable Settlement of all Causes of Difference Between the Two Countries ("Alabama" Claims; Fisheries; Claims of Corporations, Companies or Private Individuals; Navigation of Rivers and Lakes; San Juan Water Boundary; and Rules Defining Duties of a Neutral Government during War), Gr. Brit.-U.S., May 8, 1871, U.S.T. 133 (Washington Treaty).

123. COLLIER & LOWE, *supra* note 112, at 32; Brower II, *supra* note 51, at 272–74.

124. COLLIER & LOWE, *supra* note 112, at 32–33.

125. Convention for the Pacific Settlement of International Disputes, July 29, 1899, 1 Bevans 230 [hereinafter The Hague Convention (1899)]; Convention for the Pacific Settlement of International Disputes (Convention I), Oct. 18, 1907, 1 Bevans 577 [hereinafter The Hague Convention (1907)]. It is noteworthy, however, that the process that culminated in the creation of the Permanent Court of Arbitration ("PCA") was one that started within a broad movement aiming to create a standing international *court*, as distinct from arbitration. This position was favored *inter alia* by the United States. Brower II, *supra* note 51, at 276, 279; David Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 4 (2000).

126. COLLIER & LOWE, *supra* note 112, at 35; *see also* Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 7–8 (2011).

127. The Hague Convention (1907), *supra* note 125, art. 44.

128. *Id.* art. 38. A quasi-identical provision existed in The Hague Convention (1899), *supra* note 125, art. 16.

The PCA had its heyday in the years before World War I, falling into disuse with the creation of the Permanent Court of International Justice ("PCIJ") in the early 1920s.[129] In 1962, the PCA started to allow mixed arbitrations,[130] and it administers today some investment arbitrations.[131] If one were to argue that investment treaty arbitration is a private mode of dispute settlement because recourse can be had to the UNCITRAL Arbitration Rules, the PCA offers the opposite example of an institution that started by accepting interstate claims and later opened up to investor-state claims. The 2012 PCA Arbitration Rules are a consolidation of four prior sets of procedural rules, the oldest of which are the PCA Optional Rules for Arbitrating Disputes *between Two States*.[132]

The PCIJ was established with the Covenant of the League of Nations. The court functioned in The Hague until 1940, the year in which Germany invaded the Netherlands.[133] The PCIJ was dissolved in 1946 after dealing with twenty-nine contentious interstate cases and delivering twenty-seven advisory opinions.[134] The short-lived PCIJ was replaced by the ICJ. But continuity was sought between the two institutions: The drafters of the ICJ's founding document created a Statute quasi-identical to that of its predecessor; the ICJ moved into the facilities that had been occupied by the PCIJ;[135] and the ICJ exercised jurisdiction over treaties that made reference to the PCIJ.[136] The ICJ has applied interchangeably the decisions of the PCIJ and its own decisions.[137]

In parallel, interstate arbitration gradually declined, as some disputes that would otherwise have been resolved through interstate arbitration were channeled to the ICJ.[138] A study revealed that, while in the years 1900 to 1945 there were 178 arbitrations, only forty-three arbitrations were recorded in the same number of years after World War II.[139] But some interstate arbitrations,

129. COLLIER & LOWE, *supra* note 112, at 36.

130. *Id.* at 37.

131. *See* Permanent Ct. of Arb. [PCA], *Cases*, http://pca-cpa.org/cases (last visited May 15, 2024).

132. The other prior rules incorporated in the 2012 PCA Arbitration Rules are the Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State, the Optional Rules for Arbitration Between International Organizations and States, and the Optional Rules for Arbitration Between International Organizations and Private Parties. *See* PCA, *PCA Arbitration Rules*, http://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012.

133. *See* I.C.J., *Permanent Court of International Justice*, http://www.icj-cij.org/pcij (last visited May 15, 2024). *See also* Brower II, *supra* note 51, at 287.

134. *See Permanent Court of International Justice*, *supra* note 133.

135. Brower II, *supra* note 51, at 288.

136. Statute of the International Court of Justice art. 37, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter I.C.J. Statute].

137. Brower II, *supra* note 51, at 288; LAUTERPACHT, *supra* note 54, at 11.

138. *See* COLLIER & LOWE, *supra* note 112, at 38.

139. Gray & Kingsbury, *supra* note 83, at 99–100.

from territorial and maritime boundary disputes to the occasional interstate investment arbitration, do take place.[140]

In short, arbitration has been used extensively to resolve traditional public international law disputes, that is, interstate disputes. Remarkably, new investment treaties that establish bilateral investment courts for investor-state disputes, such as CETA, still opt for arbitration if disputes should arise between the contracting parties regarding the treaty's interpretation.[141] If arbitration is appropriate for disputes between sovereign subjects, is there a reason why it should be inappropriate for mixed disputes? In addition, if arbitration for mixed disputes had not been used in public international law before investor-state disputes, contrariwise, judicial settlement had not become generalized for disputes between states and individuals before the advent of international human rights' courts.[142] Interestingly, a larger number of states have consented to investment arbitration than to the jurisdiction of human rights courts, which remain "regional."[143]

D. *Investment Treaty Arbitration Is Dispute Settlement in Public (International) Law Because Investment Disputes Are Public Law Disputes*

This interpretation brings together a few nuanced approaches that treat investment treaty arbitration as a public method of dispute settlement, drawing on the nature of investment disputes. First, it groups together claims that investment dispute settlement is based on either a "public law" model or a "public international law" model. The two are different because the legal relationships

140. For territorial and maritime boundary disputes, see for example Argentine-Chile Frontier Case, 16 R.I.A.A. 109 (1966); Dispute between Argentina and Chile concerning the Beagle Channel, 21 R.I.A.A. 53 (1977); Delimitation of the Continental Shelf (U.K. v. France), 28 R.I.A.A. 3 (Ct. Arb. 1977); Barbados v. Trinidad and Tobago, PCA Case No. 2004-02, Award (Apr. 11, 2006), PCA Case Repository (2006); Guyana v. Suriname, PCA Case No. 2004-04, Award (Sept. 17, 2007), PCA Case Repository (2007); Bay of Bengal Maritime Boundary (Bangl. v. India), PCA Case No. 2010-16, Award (July 7, 2014), PCA Case Repository (2014); Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), PCA Case No. 2011-03, Award (Mar. 18, 2015), PCA Case Repository (2015); Croatia/Slovenia, PCA Case No. 2012-04, Final Award (June 29, 2017), PCA Case Repository (2017). For interstate investment arbitration, see for example Italy v. Cuba, ad hoc arb., Final Award (Jan. 1, 2008).

141. CETA, *supra* note 41, at ch. 29.

142. On the status of the individual in international law, see generally PETERS, *supra* note 46.

143. As of June 2023, the time of writing this article, about 75 states in total have accepted the jurisdiction of the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights. *See, respectively*, *46 Member States*, COUNCIL OF EUROPE http://www.coe.int/en/web/portal/46-members-states, (last visited May 15, 2024); *What is the I/A Court H.R.?*, INTER-AMERICA COURT OF HUMAN RIGHTS, http://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en (last visited May 15, 2024); AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS, http://www.african-court.org/wpafc (last visited May 15, 2024). By contrast, more than two hundred states include ISDS provisions in their investment treaties. *See* UNCTAD, *IIA Navigator*, http://investmentpolicy.unctad.org/international-investment-agreements/by-economy (last visited May 15, 2024) [hereinafter *IIA Navigator*].

within each model are different.[144] However, for the purposes of the present discussion, this section will not draw the distinction between the *domestic* and *international* public law nature of investment treaty arbitration. Rather, the focus will be on the distinction between the administrative review model and the public international law model. Second, this interpretation groups together approaches relying on the administrative review *analogy* or *resemblance* theories and those relying on the *fact* that investment arbitration *is* used to resolve public international law disputes, in other words, disputes arising out of states' "sovereign activities and application of public international law."[145] This section does not examine related arguments that partly acknowledge investment arbitration's public law nature by identifying elements of diplomatic protection in it.[146] The ensuing paragraphs commence with a critical review of the administrative review model before moving to the less controversial arguments based on the public international law model.

In a 2005 article, Professors Benedict Kingsbury, Nico Krischn, and Richard Stewart documented *The Emergence of Global Administrative Law*.[147] For them, global administrative law comprises mechanisms that enhance the accountability of "global administrative bodies."[148] Accordingly, "global administrative action" comprises "rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties."[149] Thus understood, global administrative law may require

144. Roberts, *supra* note 14, at 63–64 ("[T]he public law paradigm differs from the public international law paradigm because it focuses on vertical relationships between unequal parties (a state acting in its public capacity and a private actor subject to that state's regulatory power) instead of horizontal relationships between equal parties.").

145. Brower II, *supra* note 51, at 299.

146. It has been debated whether investment treaties grant investors direct or derivative rights; in other words, whether investors when instituting proceedings against their host state are enforcing their own rights in a "direct legal relationship" with the host state, or whether investment treaty rights and obligations exist solely between sovereign states and investors do not vindicate autonomous rights but "procedurally step into the shoes of their [host state] without by doing so becoming privy to their [interstate] legal relationship." Douglas, *supra* note 30, at 163. The persuasiveness of the derivative theory is decreasing in contemporary international law. As Anne Peters has stated, "[T]he power of the investor to institute proceedings before an ICSID or other investment tribunal is a procedural right of the investor under international law." PETERS, *supra* note 46, at 291. Therefore, Peters concluded that:

> [The] view of investor-State investment arbitration as a *reinforcement* of the traditional system of diplomatic protection seems erroneous. It . . . switches the roles of the individual and the State. . . . Not the State sues on behalf of the individual but the individual on behalf of the State. The traditional legal fiction would be replaced by a new one, and would, if consistently pulled through, require that the investor would have to turn the reparation awarded to him to his home State.

Id. at 306. For additional discussion, see *id.* ch. 10; Douglas, *supra* note 30, at 282; and Alvarez, *supra* note 14, at 20.

147. Kingsbury et al., *supra* note 19.

148. *Id*. at 17.

149. *Id*. at 17, 36.

changes in domestic administrative procedures.[150] For these authors, this is also how investment arbitration works.[151] Professor Thomas Wälde suggested that investment arbitration should develop as a form of "quasi-judicial review of governmental conduct" to ensure it operates at a remove from commercial dispute settlement.[152] For example, fair and equitable treatment "has emerged as a singularly effective test for contesting the legality of governmental action, comparable in scope to demanding that States adhere to the rule of law itself."[153]

In his 2007 monograph, *Investment Treaty Arbitration and Public Law*, as well as in other writings, Van Harten maintained that investment dispute settlement is a "mechanism of adjudicative review in public law" for regulatory disputes between states and investors.[154] In a joint paper with Loughlin, he claimed that "by obliging states to arbitrate disputes arising from sovereign acts, investment treaties establish investment arbitration as a mechanism to control the exercise of public authority. For this reason, in particular, investment arbitration is best analogized to domestic administrative law."[155] In the same paper, the authors considered that although investment awards are compensatory and do not generally impose punitive damages, the award of damages is a form of retrospective sanction with a deterrent effect on the state; this, they concluded, means that investment treaties authorize tribunals to award damages as a public law remedy.[156] They asserted that "investment arbitration based on the general consent is analogous not to commercial arbitration but to domestic judicial review of state conduct."[157] A similar argument has been advanced by legal practitioner Daniel Kalderimis, who suggested that neither commercial arbitration nor public international law are appropriate paradigms to understand investment arbitration, that the closest parallel to investment dispute settlement

150. *Id*. at 36.

151. *Id. See also* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, 1 (N.Y.U. Pub. L. & Legal Theory Working Papers, Working Paper No. 09-46, 2009).

152. Thomas W. Wälde, *Introduction: International Investment Law Emerging from the Dynamics of Direct Investor-State Arbitration*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 87 (Philippe Kahn & Thomas W. Wälde eds., 2007).

153. ALVAREZ, *supra* note 5, at 442 (citing Campbell McLachlan, *The Principle of Systematic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279 (2005)).

154. VAN HARTEN, *supra* note 5, at 45. *See also* Gus van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L.Q. 371 (2007).

155. Van Harten & Loughlin, *supra* note 30, at 146.

156. *Id.* at 131.

157. *Id.* at 144; *see also id.* at 143 (remarking that this "general consent transforms investment arbitration from a sub-category of commercial arbitration, based on a reciprocal legal relationship between private parties, into an adjudicative mechanism to control the exercise of public authority.").

is national administrative law, and that investment dispute settlement *is* global administrative law.[158]

Some of these arguments originate in the character of the disputes that are being adjudicated and the need to follow public (international) law rules, given that international investment agreements are public international law instruments. For example, Professor Stephan Schill described ISDS as "more akin to administrative or constitutional judicial review than to commercial arbitration, even though investment law makes use of the arbitral process to settle disputes."[159] The arguments of Van Harten and Loughlin were also revealing. They stated that "investment treaties adopt an essentially private mode of adjudicating disputes."[160] The two further explained that:

> [F]rom the perspective of administrative law, what is especially remarkable about investment treaties is that they transplant the procedural framework and enforcement structure of commercial arbitration into the public realm. . . . By using a private model of adjudication to resolve what are quite clearly regulatory disputes, investment treaties have radically transformed how adjudication is used to review and control public authorities.[161]

Then, Van Harten and Loughlin tried to reconcile the purported private origin of investment arbitration with the nature of the disputes it resolves. They argued that instead of viewing investment arbitration as a branch of commercial arbitration, the latter should be understood as:

> a unique, internationally-organized strand of the administrative law systems of states. Not only is the regime of investment arbitration established by a sovereign act of the state; it is also designed to resolve disputes arising from the exercise of public authority. The subject matter of investment arbitration is a regulatory dispute arising between the state (acting in a public capacity) and an individual who is subject to the exercise of public authority by the state.[162]

> [T]he general consent authorizes the adjudication of regulatory disputes by an international tribunal. Whether resolved by resort to domestic or international law, this is intrinsically a matter of public law. The regime is therefore to be distinguished from reciprocally consensual adjudication, as conventionally used to resolve international

158. Daniel Kalderimis, *Investment Treaty Arbitration as Global Administrative Law: What This Might Mean in Practice*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 145, 149–55 *passim* (Chester Brown & Kate Miles eds., 2011).

159. Stephan W. Schill, *International Investment Law and Comparative Public Law – An Introduction*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 4 (Stephan W. Schill ed., 2010).

160. Van Harten & Loughlin, *supra* note 30, at 139.

161. *Id.* at 147.

162. *Id.* at 148.

> disputes between states or commercial disputes between private parties; it is not based on a reciprocal relationship between juridical equals, but engages a regulatory relationship between the state and an individual.[163]

While one is tempted to agree with the authors on many points, this approach appears to equate resemblance or analogy with equivalence.[164] That ISDS may resemble administrative or constitutional review "does not mean that it *is* constitutional review."[165] In fact, it most certainly is not. In addition, the above descriptions do not draw a clear distinction between the *function* and the *nature* of investment arbitration. To claim that that investment treaty arbitration is or resembles global administrative review in its *function* is not the same as to say that the *nature* of investment treaty arbitration is one of global administrative review and public international law—does it truly share the procedural framework of administrative law review, and, in this respect, is it a public law means of settling disputes? And what is the method of settling "global administrative law" disputes anyway? In this sense, the above arguments sometimes leave the reader at a loss as to what type of dispute settlement investment treaty arbitration actually is.

Alvarez has suggested that some of the proposed reforms to investment dispute settlement have been inspired by the perception that international investment law is a form of global administrative law.[166] He added that "[i]f investor-State arbitration is a form of governance, this is all the more reason to distinguish its procedures from those governing ordinary, commercial arbitration."[167] In other words, if the *function* of investment treaty arbitration is that of global administrative review, then it makes sense that its *nature* should be differentiated from that of commercial arbitration.

A different approach is adopted by Professor Eric de Brabandere in his 2016 monograph, *Investment Treaty Arbitration as Public International Law*. He argues that investor-state treaty arbitration is a public international law method of dispute settlement.[168] De Brabandere explains that his interpretation is different from the "public law paradigm" in that it does not rely on analogy but contends instead that "investment treaty arbitration essentially *is* public international law."[169] He observes that investment arbitration has shifted from a private or commercial method of dispute settlement to one of

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163. *Id.* at 149.

164. Caron, *supra* note 121, at 107; Alvarez, *supra* note 14, at 12.

165. Alvarez, *supra* note 14, at 12.

166. ALVAREZ, *supra* note 5, at 443–44 ("The characterization of the investment regime as a form of global *public* administrative law has normative implications. . . . [Like other forms of global administrative law], the investment regime is facing comparable pressures to promote greater transparency and participation.").

167. *Id.* at 506.

168. DE BRABANDERE, *supra* note 30, at 11.

169. *Id.* at 12.

public international law. De Brabandere disavows the perception of ISDS as public-administrative law dispute settlement and the characterization of international investment arbitration as a hybrid machinery to affirm its essentially, if not purely, public international law nature.[170] In support, he argues that (i) investment treaty arbitration is based on international investment treaties, which are public international law instruments; (ii) investment disputes concern the state's international legal obligations and are, therefore, public international law disputes; and (iii) they are settled within public international law.[171] For instance, he draws similarities between, on the one hand, international investment law and investment treaty dispute settlement and, on the other, human rights law and the adjudication of international human rights claims. He remarks that human rights treaties "confer rights on individuals, although the *obligations* derived from the treaty remain interstate obligations."[172] Although individuals are not party to the treaty, they may rely on rights it bestows on them.[173] Similarly, he argues that, through international investment treaties, states assume international legal obligations that remain interstate obligations, and they create rights for foreign investors who are the treaties' beneficiaries.[174] Discussing human rights law in relation to investment law may of course also rely on analogy and resemblance. However, an important difference between the adjudication of international human rights claims and investment claims is that in the former case the system is one of human rights *trial* rather than human rights *arbitration*. In other words, while this comparison tells us that investment treaty arbitration *functions* as a method of settling public international law disputes, it can also lead to the conclusion that, when it comes to the *nature* of the dispute settlement mechanism, only human rights law uses a public law method of dispute settlement.

Pushing beyond this phraseology of the function and the nature of investment treaty arbitration, the better argument underlying the above explanations is that investment treaty arbitration decides public (international) law disputes, and for this reason, it is a public law method of dispute settlement.

E. *Investment Treaty Arbitration as a Hybrid System*

The approach that has probably garnered the greatest support is that investment arbitration is hybrid in nature. In his article, "The Hybrid Foundations of Investment Treaty Arbitration," Professor Zachary Douglas contends that the "investment treaty regime for investor-state disputes cannot be rationalised either as a purely public international law or purely private international law

170. De Brabandere accepts, however, that investment arbitration also has a private law dimension, which is subsidiary to its public international law dimension. *Id.* at 9.

171. *Id.* at 2.

172. *Id.* at 57.

173. *Id.*

174. *Id.* at 58.

form of dispute settlement," since it includes elements of both public and private law.[175]

One argument in favor of the hybrid nature of investor-state arbitration is that investment arbitration is treated as the equivalent of recourse to the host state's local courts.[176] In particular, investment arbitration clauses can contain as a precondition fork-in-the-road provisions, whereby when the investor chooses a forum to bring its case—international arbitration or *municipal* courts of the host state—that choice becomes final and irrevocable.[177] Such preconditions to arbitration appear to make local remedies and international dispute settlement interchangeable. Consequently, they reveal local courts as the equivalent of investment arbitration: The investor can bring the same dispute to either of the two forums.[178] However, it is doubtful whether such interchangeability or equivalence is enough to support the hybrid argument. For example, diplomatic protection claims can typically be brought to the ICJ after local remedies have been exhausted.[179] Is the ICJ hearing a diplomatic protection application the equivalent of a domestic court simply because it can decide the same dispute?

Related arguments in support of the hybridity theory include the fact that *contractual* claims can be brought before investment *treaty* tribunals or that investment treaties contemplate claims that can arise both under international law and municipal law.[180] Douglas refers to the applicable sources of law in investment disputes, noting that "[a]t the heart of the investment dispute [lie] private or commercial interests that owe their existence to municipal law."[181] Some treaties explicitly require that a covered investment be made in accordance with the domestic law of the host state.[182] Where the investor's host state interferes with its property rights, the investor will normally be able to pursue a claim or initiate an administrative procedure in local courts.[183] However, instead of just describing the nature of investment arbitration, this line of argument makes a statement about the nature of the investment dispute: If at

175. Douglas, *supra* note 30, at 282 *passim*. *See also* Alvarez, *supra* note 14, *passim*.

176. Douglas, *supra* note 30, at 274–81.

177. *Id.* On fork-in-the-road provisions, see generally Schreuer, *supra* note 92; Markus A. Petsche, *The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches*, 18 WASH U. GLOBAL STUD. L. REV. 391, 393 (2019).

178. *See*, *e.g.*, GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, INVESTOR-STATE DISPUTE SETTLEMENT AND NATIONAL COURTS 31–43 (2020).

179. MALCOLM N. SHAW, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015, at 1196 (5th ed. 2016)*; see also* John R. Dugard (Special Rapporteur of the Int'l Law Comm'n), *Second Rep. on Diplomatic Protection*, ¶ 5, U.N. Doc A/CN.4/514 (Feb. 28, 2001).

180. Douglas, *supra* note 30, at 281.

181. *Id*. at 237.

182. For a recent example, see Agreement on the Promotion and Protection of Investments, Myan.-Sing., art. 1, Sept. 24, 2019, *IIA Navigator*, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6006/download.

183. Douglas, *supra* note 30, at 236.

the heart of the dispute lie commercial interests, then the dispute itself is hybrid, therefore the mode of dispute settlement (private, hybrid, or public) should give no cause for concern.

In some cases, the investor may also be able to lodge a claim with a regional human rights court, such as the European Court on Human Rights.[184] There is a certain overlap between investment protections and human rights, such as protection in case of expropriation, nondiscrimination, fair and equitable treatment, and prohibition of denial of justice (the latter two coinciding in part with the right to a fair trial and due process).[185] On occasion, such as in case of an expropriation, some protection is also afforded by customary international law,[186] making theoretically possible a claim by means of diplomatic protection.[187] Therefore, that the investor is able to pursue satisfaction for violation of the same right under an investment treaty or under municipal civil law does not by itself alter the character of the rights protected under investment treaties; these same rights can sometimes fall under the scope of regional human rights treaties, and in the same manner, they should be perceived as public law rights, even if the investor can pursue them under a contractual arbitration clause.

While Douglas describes investor-state arbitration as a hybrid method of dispute settlement, he is careful to distinguish it from interstate dispute settlement, "a creation of public international law *stricto sensu*."[188] The distinction between "hybrid" and public law arbitration in one and the same investment treaty (such as when a treaty provides for both mixed and interstate arbitration) seems doubtful. An alternative approach is to consider that all rights and obligations elevated to the treaty level are, for this reason alone, public law rights.

Douglas argues further that the investment arbitration procedure itself, with the exception of proceedings under the ICSID Convention, is governed by the investment treaty, the applicable arbitration rules, and the *municipal arbitration law of the seat*.[189] He contrasts this with "the law applicable to questions of procedure in arbitrations between sovereign states" which is "public international law."[190] He adds that awards rendered in investor-state arbitration outside the ICSID Convention "are not truly international awards and as a result they are subject to challenge and review in accordance with

184. For a critical reading, see Ursula Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 219 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni eds., 2009).

185. *See* VADI, *supra* note 67, at 218.

186. *See, e.g.*, Catherine Yannaca-Small, OECD, INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 44 n.1 (2005).

187. *See*, *e.g.*, RODRIGO POLANCO, THE RETURN OF THE HOME STATE TO INVESTOR-STATE DISPUTES ch. 1 (2019).

188. Douglas, *supra* note 30, at 282.

189. *Id.* at 177–78, 283.

190. *Id.* at 177.

municipal and international legislative instruments dealing with international commercial arbitral awards,"[191] such as the New York Convention.[192] However, as pointed out earlier, even CETA, which provides for a bilateral investment court, aims to rely on the New York Convention for enforcement of its court's decisions.[193] In addition, comments that draw general conclusions for ISDS from non-ICSID Convention proceedings do not take into account the fact that the ICSID Convention (with its own enforcement system and no possibility of review by local courts) *is* investment arbitration's most popular set of arbitration rules.[194]

No matter how appealing, the hybridity argument is not without drawbacks. It is a compromise "solution"; in the words of de Brabandere, it is "the easy way out,"[195] an attempt to classify what is unclassifiable. It is borne out of the inability to ascribe to investment treaty arbitration a cogently private or public law nature. We can agree that the system has both private and public law elements or that the system is unique, *sui generis*, so to speak,[196] but this still leaves us in the quandary of not knowing whether it is appropriate for the resolution of disputes in public international law.

Moreover, not all arguments that point to "hybrid" elements necessarily imply that investment treaty arbitration itself is "hybrid." For instance, Bernando Cremades and David Cairns argue that investment arbitration is a "new type of *commercial* arbitration," although they immediately comment on how different it is from "traditional international commercial arbitration" and describe it as "a hybrid between private arbitration and inter-State arbitration."[197] They conclude that ISDS is "quasi-public" or at least that it has "an inescapably public element"[198] and that the "growth of investor-State arbitrations has confirmed a new importance of public international law to

191. *Id.* at 181; *see also* Sacerdoti, *supra* note 36, at 6 ("[T]he provisions on applicable law do not entail the internationalization of the investment relation.").

192. Douglas, *supra* note 30, at 181; *see also* Sacerdoti, *supra* note 36, at 6 ("[T]he provisions on applicable law do not entail the internationalization of the investment relation"); Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 6 (Aug. 4, 2011) (dissenting opinion by Abi-Saab, Arb.) ("This is technically an international ad hoc arbitral Tribunal. It is 'ad hoc' because specially established to hear one specific case, suit or action. It is 'international' because it is rooted in two layers of international treaties: the ICSID Convention and the Bilateral Investment Treaty between Italy and Argentina. As such it functions under, and is governed by international law, and has to be clearly distinguished from 'international' commercial arbitration tribunals, such as those established within the framework of the International Chamber of Commerce, which function under national law and ultimate national judicial control.").

193. *See supra* text accompanying note 41.

194. *See supra* note 21.

195. DE BRABANDERE, *supra* note 30, at 4.

196. *See supra* text accompanying note 23; *see also* Roberts, *supra* note 14, at 45, 94.

197. Cremades & Cairns, *supra* note 23, at 183 (emphasis added).

198. *Id.* at 184–85.

international commercial arbitration."[199] Giorgio Sacerdoti observes that "investment arbitration does not appear so far apart from international commercial arbitration, notwithstanding [its] public international law features and the national public interest often involved in international investment disputes."[200] In other words, we can agree that investment arbitration may have both public and private law elements, without concluding that for that reason, it is itself a hybrid system. Ultimately, the hybridity theory tells us very little about the appropriateness of arbitration as a means of settling mixed disputes in public international law, and, in this respect, it does not carry the debate forward.

F. *Neither Public nor Private Because the Public-Private Divide Does Not Reflect Reality*

It has been argued that "it is difficult to find a jurisprudentially consistent basis for treating commercial arbitration and ISDS as two distinct 'species' of arbitration in part because the public-private divide itself is a construct in tension with reality."[201] Surely, whether investment arbitration can be explained as a private or a public method of dispute settlement relies on the assumption that there is a distinction between public and private international law. The debate on whether the distinction between public and private international law is, *vel non*, watertight and whether it continues to be relevant,[202] is gaining currency. This discussion is closely related to the argument that we are witnessing a certain privatization of international law, evidenced, for instance, by states' increasing reliance on private law firms for their legal defense in international economic law disputes.[203]

Professors Diego Fernández Arroyo and Makane Moïse Mbengue make this argument in unambiguous terms.[204] The authors point out that both public and private international law emerged from the law of nations and argue that the divide between public and private international law has never genuinely

199. *Id.* at 185.

200. Sacerdoti, *supra* note 36, at 47.

201. Alvarez, *supra* note 14, at 7. It is also said that "for much of recorded history there was no public/private distinction in either national or international law, perhaps because we were at the time more ready to accept that proposition that powerful private enterprises, whether the Dutch East India Company or United Fruit (and their lawyers, including Grotius), could themselves develop the law of nations." *Id.* at 13–14; *see also* William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT'L L. 371 (2008). Note also that the distinction between public and private law has been uncertain in certain legal orders. For example, in Spain, the distinction between public and private international law was not reflected in academia until 1979. *See* José Carlos Fernández Rozas, *Sobre el Contenido del Derecho Internacional Privado*, 38 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 69, 69 n.3 (1986); *cf.* Caron, *supra* note 121, at 105–06 n.6.

202. See Alvarez, *supra* note 14 for a discussion of the public/private distinction.

203. Sacerdoti, *supra* note 36, at 47.

204. Diego P. Fernández Arroyo & Makane Moïse Mbengue, *Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction*, 56 COLUM. J. TRANSNAT'L L. 797 (2018).

"reflected reality."[205] The authors review the interactions between public and private international law in the practice of international courts and tribunals—underlining the emergence of the individual and private entities in human rights law and in international investment law—to challenge the traditional understanding of public international law as only concerned with state interests.[206] For those who argue that the distinction between public and private international law has lost its relevance, the argument of whether investment treaty arbitration is a public or private law means of dispute settlement becomes moot.

III. BEYOND THE PUBLIC-PRIVATE LAW DIVIDE: ARBITRATION AND COURT SYSTEMS—WORLDS APART OR SIDES OF THE SAME COIN?

The main weakness of some of the previous readings is that one may easily come to completely different conclusions depending on the features one chooses as definitive. Although each reading is presented from a position of authority as neutral and objective, in reality, the arguments that support it are value-laden. The multiplicity and subjectivity of the readings reveal that the public-private law divide is unreliable or, at best, inconclusive as a litmus test to determine the appropriateness of resolving investor-state disputes by means of arbitration. While much of the traditional debate on the nature of investment treaty arbitration has inquired into whether investment arbitration is a public or a private method of dispute resolution, two related issues have often been ignored.

For a start, while the nature of investment treaty arbitration as a public or private means of dispute settlement has trickled into the debate of whether arbitration is an appropriate means of settling investment disputes or whether it should be replaced by an investment court system,[207] the rift between investment arbitration and international court systems (generally, creatures of public international law) is not as wide as it may first appear. The presumed gulf between the two tends to be more or less bridged depending on the particular institutional design of each system.

Second, the real benchmark of the appropriateness of a dispute settlement method does not lie in the abstract attribution of a public or private law character to it, especially given that agreement on this character cannot be obtained, but in choices with respect to crucial elements of the functioning of the dispute settlement mechanism. In the following paragraphs, I argue that commonalities between investment arbitration and procedures before international courts deciding traditional interstate disputes to some extent blur the distinction between arbitration and judicial settlement, and I show that what matters is not the purported public or private law nature of the chosen method of dispute settlement but systemic design choices that states make.

205. *Id.* at 799–800.

206. *Id.* at 801–02.

207. *See supra* notes 5–13 and accompanying text.

The formal distinction between arbitration and judicial settlement notwithstanding,[208] strict divisions between arbitral tribunals and courts are becoming increasingly difficult to sustain.[209] As Aron Broches explained, the ICSID Convention was inspired by the Statute of the ICJ.[210] Conversely, the permanent international courts developed from interstate arbitration.[211] Jeswald Salacuse reiterated this continuity between arbitration and judicial settlement. He conceptualized four "ideal" types of dispute settlement (negotiation, mediation, arbitration, and judicial settlement) as existing on a continuum.[212] He remarked that as parties move along the continuum from negotiation to judicial settlement, they increasingly lose flexibility and control over their dispute.[213] Such flexibility and control are at the heart of party autonomy, a cornerstone of arbitration with purportedly no equivalent in judicial settlement.[214] Yet, the devil is in the details, and when one takes a look at the granular detail, one discerns important points of convergence between international courts and arbitral tribunals. The myth of party autonomy as the exclusive prerogative of arbitration is put to the test. This is not to deny that there are differences between international courts and arbitral tribunals, but it does mean that these differences must be put in perspective. In the remainder of this section, I focus on aspects of party autonomy in investment arbitration and in the functioning of international courts, examining in turn the consent requirement, choice of law provisions, and the appointment of adjudicators. I argue that when it comes to international dispute settlement, a degree of party autonomy exists in both systems. I also consider some further elements of importance in this context, notably the "interchangeability" of arbitration and judicial settlement.

The assumption that party autonomy is a definitive feature of arbitration that distinguishes it from judicial settlement comes from the context of commercial disputes and municipal law.[215] Recourse to a municipal court against a business partner does not, in principle, require the latter's agreement,

208. *See*, *e.g.*, U.N. Charter art. 33(1) (enumerating arbitration and judicial dispute settlement as distinct means of peaceful settlement); U.N. OFF. OF LEGAL AFF., HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES, ¶¶ 168–229, U.N. Doc. OLA/COD/2394, U.N. Sales No. E.92.V.7 (1992).

209. CRAWFORD, *supra* note 89, at 694 ("In the modern period there is no sharp line between arbitration and judicial settlement.").

210. *See supra* text accompanying note 22.

211. *See supra* text accompanying notes 110–11; CRAWFORD, *supra* note 89, at 694.

212. Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138, 154–55 (2007).

213. *Id.*

214. *See*, *e.g.*, Caron, *supra* note 121, at 109.

215. *See*, *e.g.*, BLACKABY ET AL., *supra* note 94, at 187, 355; GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 81–83 (3d ed. 2020); *cf.* Mia Louise Livingstone, *Party Autonomy in International Commercial Arbitration: Popular Fallacy or Proven Fact?*, 25 J. INT'L ARB. 529 (2008).

although recourse to arbitration against the same partner does.[216] With few exceptions, a proceeding before a municipal court implies application of municipal law, while arbitration means primarily application of the law agreed upon by the parties.[217] When it comes to *international* dispute settlement, these distinctions lose part of their relevance.

Certainly, investment treaty arbitration is only possible with the parties' agreement, arbitration allows the parties to choose the applicable law and shape the procedure, tribunals are constituted ad hoc, and arbitrators are appointed by the parties, each party appointing its own arbitrator.[218] Let us consider these features one by one.

A. *The Requirement of Consent*

Consent, that is, the parties' agreement to submit to dispute settlement, is often seen as the defining feature of arbitration.[219] The requirement of consent is understood to relate to states' ability to "control" the adjudicative body,[220] and this "desire to maximize control" is sometimes assumed to "lead states to prefer arbitration."[221] Yet consent is not only a requirement for submitting a dispute to arbitration, it is also a *sine qua non* of international dispute settlement more generally: No state can be compelled to appear before an international court or tribunal unless it has consented to its jurisdiction.[222]

B. *The Parties' Choice of Law*

The parties' choice of law as a unique feature of international arbitration is also put to the test. In practice, the law applicable to an investment treaty dispute is the investment treaty and any other law identified as applicable in

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216. Typically, the claimant's request alone is enough to initiate civil proceedings in domestic courts, *e.g.*, Fed. R. Civ. P. 3; CPR (Eng. & Wales) 7.2; C.P.C. (Fr.) art. 53.

217. On the law applicable in arbitration, see *infra* text accompanying notes 224–41.

218. RUDOLF DOLZER, URSULA KRIEBAUM, & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 401 (3d ed. 2022).

219. *Cf.* Paulsson, *supra* note 23.

220. Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 419 (2008) ("[W]ithout control there would be no consent, and without consent there would be no adjudication. Thus, when controls are removed (or perceived to be removed), consent is likely to go as well. And when controls are weakened, so too is consent. Effective controls are, therefore, necessary for the existence and success of international dispute resolution.").

221. Brower II, *supra* note 51, at 298.

222. *See*, *e.g.*, HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 3–4 (1933). For a discussion of consent under the I.C.J. Statute, see SHAW, *supra* note 179, at 571. For a discussion of consent under the ICSID Convention, see Stephan W. Schill, Christoph Schreuer, & Anthony Sinclair, *Article 25*, *in* SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *supra* note 23, at 346; *cf.* Caron, *supra* note 121, at 109 ("If consent is the focus, an international court and an ad hoc interstate arbitration can be said to involve the same process.").

the treaty and in the arbitration rules.[223] The state can choose the applicable law to the extent that it can design the treaty, i.e., insert a clause on the applicable law and give investors access to one or another set of arbitration rules. There is no doubt that the state shapes the investment treaty. However, even though recent treaties increasingly identify the applicable law, overall, treaty clauses on governing law continue to be the exception rather than the rule.[224] When it comes to selecting the arbitration forum, the vast majority of investment treaties give access to more than one set of arbitration rules, including both institutional and ad hoc arbitration.[225]

When the state incorporates these arbitration rules into the investment treaty, it also adopts their provisions on applicable law. The default rule in the ICSID Convention is that if the parties have not agreed on the law governing their dispute, the tribunal must apply the domestic law of the host state and "such rules of international law as may be applicable."[226] This reference to applicable rules of international law points, at least in part, to the principle of systemic integration laid down in article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which "any relevant rules of international law applicable in the relations between the parties" must be taken into account together with their context when interpreting an international treaty.[227] The UNCITRAL Arbitration Rules provide that absent the parties' agreement, the arbitral tribunal shall apply "the law which it determines to be appropriate."[228] The Arbitration Rules of the London Court of International Arbitration ("LCIA") stipulate as applicable the law of the seat of the arbitration (while the arbitration rules themselves are to be "interpreted in accordance with the laws of England").[229] Even the state is then limited when it comes to the application of the arbitration rules' default provisions on applicable law in the majority of investment treaty disputes. There is therefore little evidence to support the argument that, in practice, the state actually *chooses* the applicable law—at least, not any more than a state chooses the applicable law when it submits to the compulsory jurisdiction of the ICJ and accepts as applicable the sources of international law laid down in article 38(1) of the Statute of the ICJ.[230]

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223. DOLZER ET AL., *supra* note 218, at 416–24.

224. Dafina Atanasova, *Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?*, 10 J. INT'L DISP. SETTLEMENT 396, 407 (2019).

225. Peter Egger, Alain Pirotte, & Catharine Titi, *International Investment Agreements and Foreign Direct Investment: A Survey*, 46 WORLD ECON. 1524, 1540 tbl.4 (2023).

226. ICSID Convention, *supra* note 20, art. 42(1).

227. *See also* Ursula Kriebaum, *Article 42*, *in* SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, *supra* note 23, at 797, 865. On the principle of systemic integration, see Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54 INT'L & COMPAR. L.Q. 279 (2005).

228. UNCITRAL ARBITRATION RULES (2021), *supra* note 36, art. 35(1). *See also supra* text accompanying note 105.

229. LCIA ARBITRATION RULES (2020) art. 16, http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx.

230. I.C.J. Statute, *supra* note 136, art. 36(1); *see also* SHAW, *supra* note 179, at ch. 12.

When it comes to the investor, the ability to choose the applicable law is even more limited. While the default provisions of the arbitration rules kick in only if the parties have not agreed on the applicable law, in practice, even then, only exceptionally is an arbitration agreement specifically negotiated between them: This is precisely the meaning of arbitration without privity.[231] In investment *treaty* arbitrations, the parties' agreement to arbitrate and their choice of the law to be applied to their dispute are found in the treaty (the state offers to arbitrate future investment disputes by concluding the treaty, and the investor accepts the offer by initiating arbitration on the basis of the treaty).[232] The investor has little choice with respect to the applicable law in a dispute concerning its investment. While in commercial arbitration, or more generally in contract-based arbitration, the parties (including private parties) can choose the law governing their legal relationship,[233] this flexibility does not apply to investment treaty arbitration. By accepting the state's offer to arbitrate the dispute, the investor also accepts the applicable law proposed by the host state.[234] The investor's only source of flexibility arises from treaty or forum shopping, if the investor is protected under different treaties, or if the investment treaty allows the investor to choose between different arbitration rules.[235]

Let us now turn to the applicable law in judicial settlement and take two examples: first, that of the ICJ, which, as a court of general jurisdiction, may decide an investment dispute when a state makes a claim for diplomatic protection; second, that of CETA's investment court system. For disputes submitted to the ICJ, article 38 of the Statute of the ICJ is applicable. Accordingly, the applicable law is first conventional law,[236] as in investment arbitration, where the applicable law is first and foremost the investment treaty and any law identified as applicable within it. In *Elettronica Sicula ("ELSI")*, the ICJ upheld jurisdiction over an application instituted by the United States against Italy on the basis of the Italy-U.S. Friendship, Commerce, and Navigation Treaty of 1948 and an agreement supplementing that treaty, in respect of ELSI, an Italian company that was owned by two U.S. corporations.[237] In contrast with the court's other jurisprudence on shareholder claims where, in the absence of an applicable investment treaty, the ICJ declined jurisdiction with the reasoning that such claims were inadmissible,[238] the court in *ELSI* applied the Friendship, Commerce, and Navigation Treaty and upheld jurisdiction. In addition, like investment tribunals, the ICJ may resort to municipal law if international law does not offer solutions (for instance, this is how the ICJ reasoned in *Barcelona*

231. Paulsson, *supra* note 23.

232. *Id*. at 239–41.

233. *See*, *e.g.*, *id.* at 250.

234. *Id.*

235. *See supra* text accompanying note 226.

236. I.C.J. Statute, *supra* note 136, art. 31(1)(a).

237. Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. 15 (July 20).

238. *See, e.g.*, Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 64 (Feb. 5) (separate opinion by Fitzmaurice, J.).

Traction)[239] or in order to identify customary international law norms or general principles of law.[240] As in the majority of investment treaty arbitrations, where the treaty does not include an applicable law provision,[241] in international courts the law applicable to the dispute is determined by the rules of the forum selected to decide the dispute—in the above examples, the ICJ.[242]

Let us now consider the applicable law in the case of an investment court system, the bilateral court for the European Union and Canada that was established by CETA. Pursuant to article 8.31, CETA's investment court system "shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties."[243] The second part ("other rules and principles of international law applicable between the Parties") resembles the ICSID Convention's reference, considered earlier in this section, to "such rules of international law as may be applicable."[244] This formulation is also familiar to us from investment treaties that give access to traditional investment arbitration.[245] The second paragraph of the same CETA article differs from the default rule in the ICSID Convention and from some investment treaties in that it removes municipal law from the applicable law—instead providing that the parties' domestic law may only be considered as a fact.[246] But, and it is an important "but," this is not due to the fact that CETA establishes an investment court system as opposed to providing for arbitration. Rather, this particularity is explained by the need for European Union negotiators to respect the jurisprudence of the Court of Justice of the European Union, according to which it is necessary to protect the interpretive autonomy of European Union law.[247]

The foregoing leads to the conclusion that recourse to investment treaty arbitration is not that dissimilar from recourse to an international court with respect to the requirement of consent to dispute settlement and the choice of applicable law as aspects of party autonomy.

C. *Adjudicator Appointments*

A more important difference concerns the parties' ability to appoint adjudicators. We tend to think of arbitration as a system where the parties can

239. *Id. passim*. For a criticism, see CATHARINE TITI, THE FUNCTION OF EQUITY IN INTERNATIONAL LAW 55–58 (2021).

240. I.C.J. Statute, *supra* note 136, art. 38.

241. *See supra* notes 224–26 and accompanying text.

242. *See* I.C.J. Statute, *supra* note 136, art. 38.

243. CETA, *supra* note 41, art. 8.31(1).

244. ICSID Convention, *supra* note 20, art. 42(1); *see supra* note 227 and accompanying text.

245. *E.g.* USMCA, *supra* note 39, art. 14.D.9; TPP (CPTPP), *supra* note 38, art. 9.25.

246. CETA, *supra* note 41, art. 8.31(2).

247. *See* Catharine Titi, *Opinion 1/17 and the Future of Investment Dispute Settlement: Implications for the Design of a Multilateral Investment Court*, 2019 Y.B. ON INT'L INVEST. L. & POL'Y 514, 528 (Lisa Sachs, Lise Johnson, & Lise Coleman eds., 2021).

choose their arbitrators, as opposed to permanent international courts, where parties cannot choose judges.[248] But this comment too must be put in perspective, particularly as regards institutional arbitration, notably arbitration under the ICSID Convention. For a start, arbitration under the ICSID Convention limits the presumed free reign that parties have when selecting their arbitrators. ICSID has a roster of arbitrators, its Panel of Arbitrators, established by states.[249] While disputing parties are not under an obligation to select an arbitrator designated to ICSID's Panel of Arbitrators,[250] if the tribunal is not constituted in a timely manner, it is no longer the parties that appoint the arbitrators, but the Chairman of ICSID's Administrative Council.[251] In appointing the arbitrators, the Chairman must choose one of the persons designated to the Panel of Arbitrators.[252] If an award rendered under the ICSID Convention is challenged, the ad hoc committee called upon to decide the petition for annulment is entirely and always constituted by the Chairman of ICSID's Administrative Council.[253] In this case, ICSID functions as the appointing authority and the disputing parties have no say in the constitution of the annulment committee.[254] Overall, the line between arbitration and judicial settlement as regards the parties' freedom to select their adjudicators is blurred in an institutional setting with a pre-established roster of adjudicators. As legal practitioners Gabrielle Kaufmann-Kohler and Michele Potestà have argued, a body of the latter type could be described in effect as either "semi-standing" or "semi-permanent."[255] In the case of ad hoc (as opposed to institutional) arbitration, some provision for arbitrator appointments by an appointing authority is also made.[256] In the latter case, challenges to the award are decided in set-aside proceedings in national courts—these proceedings are judicial in nature, and the parties cannot choose the adjudicators.[257]

The line between international courts and tribunals with respect to appointments is blurred for an additional reason. Ad hoc adjudicators are *not* only the prerogative of arbitral tribunals. The statutes of international courts

248. *Cf.* Andrea Bjorklund et al., *supra* note 5.

249. Each ICSID member state may designate to the Panel four individuals. In addition, the Chairman of ICSID's Administrative Council may designate ten individuals to serve on the Panel. *See* ICSID Convention, *supra* note 20, art. 13.

250. *See id.* art. 12.

251. *Id.* art. 40.

252. *Id.*

253. *Id.* art. 52(3).

254. *See* DAVID GAUKRODGER, OECD, APPOINTING AUTHORITIES AND THE SELECTION OF ARBITRATORS IN INVESTOR-STATE DISPUTE SETTLEMENT: AN OVERVIEW ¶¶ 134–58 (2018).

255. GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, GENEVA CENT. FOR INT'L DISP. SETTLEMENT, THE COMPOSITION OF A MULTILATERAL INVESTMENT COURT AND OF AN APPEAL MECHANISM FOR INVESTMENT AWARDS 10 (Nov. 15, 2017).

256. *See*, *e.g.*, UNCITRAL ARBITRATION RULES (2021), *supra* note 36, arts. 8–10.

257. DOLZER ET AL., *supra* note 218, at 434–35.

generally allow for the appointment of judges ad hoc,[258] an institution which has led an observer to comment on the ICJ's "relative 'arbitralisation'"[259] and another to describe judges ad hoc as "national arbitrators."[260] Let us consider the institution of judges ad hoc in the ICJ. According to the Statute of the ICJ, if a party has a judge of its nationality on the bench, any other party may choose a person to sit as judge.[261] Although it is preferable for such a judge to be chosen from among those persons who have been nominated as candidates,[262] no such obligation exists.[263] Similarly, if no judge of the nationality of the parties sits on the bench, each of these parties may select a judge,[264] that is, irrespective of whether the other party has a judge of its nationality on the bench. The institution of judges ad hoc is meant to ensure that in a court system, just like in arbitration, a party may have "its" judge on the bench.[265] The ICJ's ad hoc chambers and judges ad hoc are allowed following statutory changes whose purpose was to encourage recourse to the court, in light of the earlier dearth of cases, and in order to "afford states a voice" in the composition of chambers.[266] The presence of a judge ad hoc is seen as reassuring the appointing party that "the nuances of its pleadings have been understood by at least one member of the Court."[267] Interestingly, a number of investment treaty arbitrators are or have also been ad hoc ICJ judges, thus revealing another revolving door between investment arbitration and the ICJ.[268]

Provision for ad hoc judges is also made in the International Tribunal for the Law of the Sea ("ITLOS") established by Annex VI of the United Nations

258. Catharine Titi, *Nationality and Representation in the Composition of the International Bench* 21 *passim* (CERSA Working Papers on L. & Pol. Science, Working Paper No. 1, 2020).

259. ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 120 (2013). *See also* Pieter Hendrik Kooijmans, *Article 31*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 530, 532 (Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, & Christian J. Tams eds., 2012).

260. TERRY D. GILL, ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 56 (6th revised ed. 2003). The term "national" here makes reference to the widespread if erroneous assumption that, when states appoint judges ad hoc, they always appoint judges who have their nationality. *See* Titi, *supra* note 258, at 40–43; *see also id.* apps. C, D (arguing that states tend to choose as judges ad hoc individuals who are not their nationals).

261. I.C.J. Statute, *supra* note 136, art. 31(2).

262. *See id.* arts. 4 and 5.

263. *See id.* art. 31(2).

264. *Id.* art. 31(3).

265. *Cf.* THE INTERNATIONAL COURT OF JUSTICE HANDBOOK 26–27 (6th ed. 2014).

266. Stephen M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT'L L. 831, 849–50 (1987).

267. COLLIER & LOWE, *supra* note 112, at 131.

268. This is the case for, for example, George Abi-Saab, Charles N. Brower, David Caron, Yves L. Fortier, & Bruno Simma. Compare I.C.J., *All Judges ad hoc*, http://www.icj-cij.org/all-judges-ad-hoc (last visited May 15, 2024), with *ISDS Navigator*, *supra* note 21. *See also supra* text accompanying note 63 for arbitrators who have also been regular ICJ judges.

Convention on the Law of the Sea ("UNCLOS") of 1982.[269] If ITLOS, "when hearing a dispute, does not include upon the bench a member of the nationality of the parties, each of those parties may choose a person to participate as a member of the Tribunal."[270] Similar to the ICJ, ITLOS has ad hoc chambers.[271] The Seabed Disputes Chamber forms three-member ad hoc chambers to deal with specific disputes submitted to it.[272] The composition of these chambers is determined by the Seabed Disputes Chamber *with the approval of the parties*. Failing agreement, each disputing party appoints one member, and the two members thus appointed name in turn a third member.[273] However, members of the ad hoc chamber cannot be nationals—or in the service—of any of the disputing parties.[274] The Seabed Disputes Chamber can also hear contractual disputes between natural or juridical persons and state parties.[275] At the request of any party to the dispute, such cases are submitted to commercial *arbitration*, unless the parties agree otherwise.[276] This is a case of "interchangeable dispute settlement forums," discussed below.[277] The default arbitration rules are the UNCITRAL Arbitration Rules.[278] The drafters of UNCLOS wished to prevent arbitral tribunals from pronouncing on questions of interpretation of the Convention and have designed a preliminary ruling procedure, according to which the Seabed Disputes Chamber can issue a ruling that is binding on the arbitral tribunal.[279]

Judges ad hoc behave much like party-appointed arbitrators. Notably, they tend to vote in favor of their appointing party, and they do so even more frequently than even "permanent" judges vote in favor of the state of their nationality.[280] The presence of judges ad hoc can lead to curious situations when the size of the chamber or division of *regular* judges is small, and especially when judges ad hoc are not supernumerary to, but replace, the regular judges.[281]

Professors Peter Kooijmans and Robert Kolb have commented on the following curious situation. According to article 62 of the Statute of the ICJ,

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269. Statute of the International Tribunal for the Law of the Sea established by United Nations Convention on the Law of the Sea Annex VI art. 36, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter ITLOS Statute]; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

270. ITLOS Statute, *supra* note 269, art. 17(3).

271. *See id.* art. 36.

272. *Id.* art. 36; UNCLOS, *supra* note 269, art. 36(1)

273. ITLOS Statute, *supra* note 269, art. 36.

274. *Id.*

275. UNCLOS, *supra* note 269, art. 187(c).

276. *Id.* art. 188(2).

277. *See infra* text accompanying notes 287–93.

278. UNCLOS, *supra* note 269, art. 188(2).

279. *See id.*

280. *See* Titi, *supra* note 258, at 43.

281. *See id.* at 24.

if a state considers that it has "an interest of a legal nature" that may be affected by a particular decision, the court may allow this state to intervene. If this state is found to be not "in the same interest" with another disputing party, it is allowed to choose a judge ad hoc. In that case, the chamber consists of three regular judges and three judges ad hoc. If there is more than one intervening state, each with a judge ad hoc, the judges ad hoc constitute the majority, making the process resemble an arbitral proceeding.[282]

The nomination, election, and appointment of international adjudicators, notably when repeat appointments are possible, may create incentives for the adjudicators to please their "appointing" party in order to be reappointed.[283] This might be particularly true of investment arbitrators and of international judges with especially short renewable terms.[284] It is for this reason that the European Court of Human Rights does not provide for renewable terms,[285] and the European Union's proposal for a multilateral investment court also stresses the need for nonrenewable terms.[286]

D. *Other Commonalities*

In addition, to some extent, it is possible for courts and arbitration to function as "interchangeable dispute settlement forums." The fact that an investor can turn to the European Court of Human Rights for state conduct that may also constitute a violation of an investment treaty and the possibility of recourse to commercial arbitration under UNCLOS have already been mentioned.[287] Recourse to arbitration is also possible for the settlement of disputes concerning the interpretation or application of UNCLOS as an alternative to ITLOS or the ICJ,[288] as it is possible to arbitrate under the World Trade

282. Kooijmans, *supra* note 259, at 541; KOLB, *supra* note 259, at 127.

283. *See* Jan Paulsson, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law: Moral Hazard in International Dispute Resolution (Apr. 29, 2010). *See generally* Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225 (2017); Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush Arsanjani, Jacob Katz Cogan, Robert Sloane, & Siegfried Wiessner eds., 2011).

284. Dunoff & Pollack, *supra* note 283, at 227; *see also* Paulsson, *supra* note 283.

285. *See* Dunoff & Pollack, *supra* note 283, at 251–52.

286. UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, ¶¶ 19, 47, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019).

287. *See supra* text accompanying notes 185 and 276–79.

288. UNCLOS, *supra* note 269, at art. 287.

Organization ("WTO"),[289] although it is not often used in that context.[290] Furthermore, interstate cases brought before international courts sometimes revolve around private disputes, notably when they correspond—overtly or covertly—to diplomatic protection. Among the earlier examples, one might cite the *Mavromatis* case before the PCIJ and the *Barcelona Traction* case before the ICJ.[291] More recent examples include requests for consultations lodged between March 2012 and September 2013 before the WTO by Cuba, the Dominican Republic, Honduras, Indonesia, and Ukraine, in relation to plain cigarette packaging legislation,[292] with part of the complainants' legal fees reportedly being covered by the tobacco industry;[293] and political pressure exercised in the WTO in relation to the nationalization of Repsol's stake in its Argentine subsidiary, YPF.[294]

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289. *See, e.g.*, Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 22(6) and 25, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401. *See further* CRAWFORD, *supra* note 89, at 694 ("It is now common to see the development of integrated systems of dispute resolution which include international 'courts' of relatively formal jurisdiction and process, whilst reserving certain *sui generis* questions for arbitral tribunals convened under the procedures of the same system, for example, in the procedures of [UNCLOS] and the [WTO].").

290. For the arbitral awards issued in the WTO, see World Tr. Org. [WTO], *Dispute Settlement Reports and Arbitration Awards*, http://www.wto.org/english/res_e/publications_e/ai17_e/tableofcases_e.pdf.

291. Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 P.C.I.J. (ser. B) No. 3 (August 30); *see also* Caron, *supra* note 121, at 151 ("Many arbitrations [*caveat lector*] at the turn of the century, like the *Mavromatis* case, involved claims of individuals based on diplomatic protection. That is, many of the disputes were not truly between the two states named as parties."); Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5).

292. Request for Consultations by Ukraine, *Australia – Certain Measures concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS434/1 (Mar. 13, 2012); Request for Consultations by Honduras, *Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/1 (Apr. 4, 2012); Request for Consultations by the Dominican Republic, *Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS441/1 (July 18, 2012); Request for Consultations by Cuba, *Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS458/1 (May 3, 2013); Request for Consultations by Indonesia, *Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS467/1 (Sept. 20, 2013).

293. *See* Andrew Martin, *Philip Morris Leads Plain Packs Battle in Global Trade Arena*, BLOOMBERG (Aug. 22, 2013); Roger P. Alford, *The Convergence of International Trade and Investment Arbitration*, 12 SANTA CLARA J. INT'L L. 35, 50 (2013); Titi, *supra* note 69, at 279–80.

294. Request for Consultations by the European Union, *Argentina – Measures Affecting the Importation of Goods*, WTO Doc. WT/DS438/1 (May 30, 2012); Request for Consultations by Argentina, *European Union and a Member State – Certain Measures concerning the Importation of Biodiesels*, WTO Doc. WT/DS443/1 (Aug. 17, 2012); *see also* European Commission Press Release MEMO/12/376, Q&As: EU's Challenge to Argentina's Import Restrictions at the

Arbitration and international courts share many further commonalties. The fact that they often draw on the same pool of decision-makers has already been discussed.[295] Typically, both types of adjudicative bodies are the judges of their own competence.[296] They have the power to decide a dispute *ex aequo et bono*, if the parties so agree,[297] and their decisions are binding on the disputing parties although they do not have formal precedential force.[298] Relatedly, although courts are typically seen as having "the power to shape the interpretation of law for other parties in the future,"[299] in fact, so do investment tribunals. Although ad hoc investment tribunals have produced case law that is notoriously inconsistent,[300] case law it is. The two or three strains of interpretation of a particular clause are adhered to religiously by subsequent tribunals that look for guidance in earlier decisions and awards.[301]

The above is not meant to negate the differences between arbitration and judicial dispute settlement, but to put them in perspective. What matters more than any preconceived idea about what arbitration and judicial settlement are, and what they are not, are the strategic system design choices states make, irrespective of whether the resulting dispute settlement body is called a court or tribunal.[302] System design matters. Ultimately, states are more likely to be guided by their preferences with respect to matters such as the manner of

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WTO (May 25, 2012); Titi, *supra* note 69, at 280; Resolution on the Legal Security of European Investments outside the European Union, EUR. PARL. DOC. TA(2012)0143 ¶ 6 (2012).

295. *See supra* notes 63–64 and accompanying text.

296. *See, e.g.*, I.C.J. Statute, *supra* note 136, art. 36(6); ICSID Convention, *supra* note 20, art. 41(1); UNCITRAL ARBITRATION RULES (2021), *supra* note 36, art. 23.

297. *See, e.g.*, I.C.J. Statute, *supra* note 136, art. 38(2); ICSID Convention, *supra* note 20, art. 42(3); UNCITRAL ARBITRATION RULES (2021), *supra* note 36, art. 35(2). On *ex aequo et bono* adjudication, see TITI, *supra* note 239, at 139–60.

298. *See, e.g.*, I.C.J. Statute, *supra* note 136, art. 59; ICSID Convention, *supra* note 20, arts. 53(1) and 54(1); UNCITRAL ARBITRATION RULES (2021), *supra* note 36, art. 34(2).

299. Kryvoi, *supra* note 5, at 683.

300. *See supra* text accompanying note 53. *See also* Julian Arato, Chester Brown, & Federico Ortino, *Parsing and Managing Inconsistency in Investor-State Dispute Settlement*, 21 J. WORLD INV. & TRADE 336, 337–38 (2020).

301. This is for instance the case of the *Mafezzini* and *Plama* interpretations of the applicability of the most-favored-nation clause to the treaty's ISDS provision. *See* Markert & Titi, *supra* note 98, at 14–15.

302. That said, key in determining whether a dispute settlement forum is arbitration or a court system is not the preferred terminology, but particular features of the dispute settlement system. For example, in an apparent attempt to stick to familiar terminology and benefit from investment arbitration's enforcement mechanisms, CETA's "bilateral investment court" is called a "Tribunal," which comprises "Members" (as opposed to "judges"). *See Multilateral Investment Court Project*, European Commission, http://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en; CETA, *supra* note 41, art. 8.27. The CETA "Tribunal" decides disputes on the basis of existing sets of arbitration rules. CETA, *supra* note 41, art. 8.23. It also renders "awards" that are notionally enforceable under the ICSID Convention or the New York Convention. CETA, *supra* note 41 art. 8.41. *See also supra* text accompanying note 24.

appointment of adjudicators and their mandate, rather than by any preconceptions as to what arbitration and judicial dispute settlement are.

IV. CONCLUSION

This article has argued that the traditional debate on the nature of investment treaty-arbitration is an imperfect means by which to gauge the appropriateness of arbitration as a method of settling investment treaty disputes. Rather, the time has come to move beyond the public-private debate and understand that a mechanism is what one makes of it, and if states wish to make investor-state arbitration a *public* mode of dispute settlement, then there is no reason why it should not be perceived as such.

Both arbitration and international court systems have their advantages and disadvantages. Both can probably function as a public method of dispute settlement if that is the intention. As international courts and tribunals continue to proliferate, it is likely that we will increasingly witness a greater overlap and the emergence of hybrid forms of dispute settlement positioned along the continuum between arbitration and judicial settlement. Ultimately, a system is what states make it to be. It is states that choose whether to arbitrate disputes—whether investment disputes or others. What is significant in their choice is not whether arbitration is a public or a private law means of dispute settlement but how states view the particular characteristics of arbitration and judicial dispute settlement. After all, investment dispute settlement is a system made by states, and if states choose arbitration as a means of dispute settlement in public international law, it is this intention that counts. In the words of David Caron: "the issue is not whether an arbitration has this or that character, as if there existed distinct pigeonholes dictating such an approach. Rather, the proper inquiry should focus on what the parties intended the arbitration to be and what principles . . . should be applied in order to ascertain this intent."[303]

303. Caron, *supra* note 121, at 107.