Trends and challenges in the legal harmonisation of ISDS

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With the emerging wave of new-generation free trade agreements (both bilateral BITs and multilateral IIAs), investment arbitration has become one of the central issues of the contemporary discourse on international economic relations.
Critics argue that investment disputes are settled in the frame of intransparent arbitral proceedings devoid of any democratic legitimacy, giving ad-hoc private bodies and "judges" the competence to adjudicate public law questions of great significance - and potentially great cost - to host countries. So far, the main actors in investor-state arbitration have been slow to respond to this criticism. As a result, several countries have refused to honor awards against them and a couple have even withdrawn from investment arbitration altogether.
The present volume addresses five central issues in the scholarly debate on investment arbitration and national interest:

1. Challenges to the legitimacy of the current system, in particular based on cases of abuse, lack of access and transparency, insufficient public participation, and difficulties with balancing of investor rights and host state (public) interests;
2. Strengths and weaknesses of participating institutions;
3. Increasing issues with the enforcement of awards and what can be done about it;
4. Some regional efforts and perspectives; as well as
5. The global debate about reforms and their successes and failures to date.

Contributors include many experts with experience as arbitrators, legal counsel to investors and/or governments, as well as public interest organizations.

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Investment Arbitration and National Interest

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TRENDS AND CHALLENGES IN THE LEGAL HARMONISATION OF ISDS

Abstract

The creation of international law has moved from the traditional state-centred model to a multilateral process where states, judiciary, private tribunals, international organizations and other non-state actors all jointly contribute to the development of international law across a range of fora. The combined roles of government and non-state actors and their interaction within the legislative development process become especially apparent in the growing area of international investment law and investment disputes.

The current landscape of international investment law consists of thousands of different international trade and investment agreements with differing provisions, resulting in a fragmented legal framework that hinders the development of uniform principles in the field and leads to the criticism the system faces today. As a result, the UNCITRAL has been given a broad mandate to identify and address concerns regarding ISDS. The different stakeholders directly or indirectly affected by the system create a tension in the harmonised regulation of the field, the current work on the ISD reform nicely reflecting the correlation between the top-down approach and a bottom-up influence over legal harmonisation, which today appears to have taken a rather multidimensional shape.

I. Introduction

International law has traditionally been just that: international. It mainly consists of a set of legal rules and institutions and it governs relationships among states.[1] According

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[1] Joseph Gabriel Starke, *Monism and Dualism in the Theory of International Law*, 17 British Yearbook of International Law 66 (1936).

to the traditional rules of international law, only when a state exercised diplomatic protection and implemented the claims of its subjects in an international arena could the claims of individuals or entities reach the international level. [2]

The traditional model of international law as distinct from the domestic domain represents the domestic issues the international legal system sought to address, specifically the enabling of state-to-state cooperation and the treatment of one state's nationals by another state.[3]

Nowadays, international law is made in a large number of fora, including multilateral processes, tribunals and the bodies of international organizations.[4] Although countries continue to be the main producers of international law, they are joined by other participants such as international organizations and legal bodies which are significant in the making of international law, including non-state actors as well as non-governmental organizations (NGOs).[5] These activities are increasingly disparate, with different rules and practices being developed in different areas, by a number of entities, with little by way of coordination and this reflects the decentralized approach to the making of international law.[6]

Contemporary international law is often the product of a subtle and evolving interplay of law-making instruments and it is made through a wide variety of processes and by a growing number of entities and individuals.[7] The deficiency of a unified approach to the creation of international law has meant that law-makers have increasingly felt less controlled by standing practices and procedures. This has allowed larger room for novelty, as states and other entities involved in law-making, pursue to set rules for definite problems or aspects of international existence.[8] International organisations and institutions have become a vital aspect in international law-making processes due to a few features, such as the knowledge gained in their spheres of activities, the proliferation of international institutions and the interconnection between various spheres of international law.[9] Transnational corporations, different legal bodies and institutions in contemporary international law are no longer considered as simply consultants and spectators to international law-making but they have become dynamic actors by playing a vital role in almost every field of international law and regulation.[10]

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[2] Harold Hongju Koh, *Is International Law Really State Law*, 111 Harvard Law Review 1824 (1997).

[3] Louis B. Sohn, *The New International Law: Protection of The Rights of Individuals Rather than State*s, 32 American University Law Review 1 (1982).

[4] Eyal Benvenisti, & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60(2) Stanford Law Review 595 (2007).

[5] Non-state Actors in International Relations (Bas Arts, Math Noortmann & Bob Reinalda eds., Ashgate Publishing, 2001); A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 Chicago-Kent Law Review 61 (1992).

[6] John Boli, & George M. Thomas, *World Culture in the World Polity: A Century of International Non-Governmental Organization*, 62(2) American Sociological Review 171–190 (1997).

[7] Alan Boyle & Christine Chinkin. The Making of International Law (OUP 2007).

[8] *Id*.

[9] Arnold N. Pronto, *Some Thoughts on the Making of International Law*, 19(3) European Journal of International Law 601 (2008).

[10] Alan Boyle & Christine Chinkin. The Making of International Law (OUP 2007).

II. The Role of Different Actors in Creating International Law

There is increasing discussion within the discipline of international law about the trends and the legal and political challenges in the legal harmonization of international law. The relations between the concepts of globalization, harmonization, implementation and international law raise complex issues about the primary structures of international law that need further exploration.[11]

Discourses of globalization demonstrate that the impact of non-state actors and different legal institutions on the international legal arena is progressively moving out of its borders, in the direction of broader involvement in the formation of international norms and in the functioning of international law. The number of legal bodies and non-state actors is visible in the international arena, especially in United Nations (UN) agencies and processes, and continues to develop as frameworks of international law are gradually adapting to accept this phenomenon.[12] The different potentials for legal bodies to get involved in the governance processes of international law across the world exemplify the strains that exist about the degree, value and merits of the involvement of these actors in the international arena and the insufficiencies of present structures and processes of international law.[13]

The participation of legal bodies and non-state actors in the international arena creates a more multifaceted, multidimensional image of international law than that of the traditional state-centered archetype.[14] Old-style state-centric models of international law continue to express and limit the boundaries of the international legal agenda but no longer efficiently and successfully mirror the level of international institutions and non-state actors' participation in the international arena. In contemporary international law, however, the active role of non-state actors, such as international organizations, different non-governmental bodies, entities or transnational corporations has altered the way international law is being created, developed, implemented and applied.[15] Non-state actors have become a constant factor in modern international relations and they play a vital role in almost every field of international law and regulation, albeit not always in a clearly visible role.

In any legal system the subjects of law are the persons, national and juridical, upon whom the law awards rights and imposes duties. In international law, these persons are normally states. The terms legal bodies/entities or non-state actors include all those actors in international relations that are not states and include different entities

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[11] Anne-Marie Slaughter Burley, *International Law and International Relations Theory: a Dual Agenda, in* The Nature of International Law 11–46 (Gerry Simpson ed., Routledge, 2017).

[12] Alan Boyle & Christine Chinkin. The Making of International Law (OUP 2007).

[13] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54(3) International Organization 421–456 (2000); *see also* Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60(2) Stanford Law Review 595 (2007).

[14] José E. Alvarez, *International Organizations as Law-Makers* (OUP, 2005); *see also* Duncan B. Hollis, *Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley Journal of International Law 137 (2005).

[15] Kenneth N. Waltz, Theory of International Politics (Waveland Press 2010).

such as international organizations, corporations, non-governmental organizations ('NGOs'), trade associations and transnational corporations.[16] Non-state actors do not possess official or government authorities and powers and do not have institutional and financial relationships with states.[17] They are considered as potentially new subjects of international law even though they have not been recognized as traditional objects of it.[18] According to one definition, "the concept of non-state actors is generally understood as including any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups or corporations".[19]

Organizations having a different juridical nature from the states composing them, may and have become subjects of international law. It is today largely standard in a variety of treaties and otherwise, that international public bodies composed of states hold an international character or nature and as such are subjects of international law.[20] Individuals, on the other hand, possess international legal personality only in a limited scope given to them expressly or by implication and not always accompanied by corresponding procedural capacity. Nevertheless, different legal bodies and institutions are progressively functioning as participants in the direct formation, application and administration of international law. Changes in domestic business values and dogma consistent with the elimination of barriers to trade activity are enhancing commercial authority.[21] Corporations are receiving rights through new practices of domestic legal documents[22] as governments are also actively engaging in the expansion of corporate rights and powers. With states playing "an indispensable enabling role in the globalization of capital ... governments have facilitated global firms' operations and profits with suitably constructed property guarantees, currency regulations, tax regimes, labour laws and police protection".[23]

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[16] Richard Higgott, Geoffrey RD Underhill & Andreas Bieler, *Introduction: Globalisation and Non-State Actors, in* Non-state Actors and Authority in the Global System (Richard Higgott, Geoffrey RD Underhill & Andreas Bieler eds., Routledge, 2000). *See also* Andrew Clapham, Human Rights Obligations of Non-State Actors 211 (OUP, 2006): "The concept of non-state actors is generally understood as including any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups or corporations".

[17] Richard Higgott, Geoffrey RD Underhill & Andreas Bieler, *Introduction: Globalisation and Non-State Actors, in* Non-state Actors and Authority in the Global System (Richard Higgott, Geoffrey RD Underhill & Andreas Bieler eds., Routledge, 2000).

[18] Janne E. Nijman, *Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory'of International Legal Personality 1., in* Non-State Actor Dynamics in International Law 91–124 (Cedric Ryngaert & Math Noortmann eds., Routledge, 2016) ("[N]on-state actors are subject or persons of international law. The conception of non-state actors as an object of international law does, however, not sufficiently explain its present-day position in the international law… In the other words, power and influence of non-state actors in many cases goes far beyond that of entities to which international law has traditionally accorded to object states.").

[19] Andrew Clapham, Human Rights Obligations of Non-State Actors 211 (OUP 2006).

[20] Kenneth N. Waltz, Theory of International Politics (Waveland Press 2010).

[21] Jan Aart Scholte, *Global Capitalism and the State*, 73(3) International Affairs 427–452 (1997).

[22] Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights, 41* Hastings Law Journal 577 (1989); *see also* Chris Tollefson, *Corporate Constitutional Rights and the Supreme Court of Canada*, 19 Queen's Law Journal 309 (1993).

[23] Jan Aart Scholte, *Global Capitalism and the State*, 73(3) International Affairs (1997).

Even though there seems to be a great deal of acknowledgement of the greater power of transnational corporations, it is unaccompanied by effective efforts to control them. In many aspects, international law is silent.[24] There is no binding, compulsory and universal international commercial code regulating the practices of transnational corporations. Most issues are dealt with under domestic structures of commercial and private international law principles.[25] The hard work of international organizations and private business as well as business associations have formed several mechanisms that try to adjust corporate behaviour but they have a tendency to have a 'soft law' nature,[26] leaving a disparity between the governing power corporations have and the principles they are subjected to transnationally.

It is important to highlight the non-state actors, which hold some form of legal capacity under international law and hence it is certainly possible that non-state actors may also be granted the status of right-holders and of duty-holders. This feature differentiates non-state actors from states which as a rule own full legal capacity. To the extent non-state actors are concerned, this legal capacity may take on manifold levels, depending on and restricted by the purpose of a non-state actor in the international legal order.[27] The participation of non-state actors may not be seen as being still limited to a quite insignificant role or to the status of bystander: non-state actors are increasingly partaking, directly or indirectly, in international discussions and in the systematization of international law, in international litigation. The most explicit example is the distinctive role played by NGOs in the institutional process of international law-making in three particular circumstances:

1) the UN 1992 Rio Conference on Environment and Development;[28]
2) the negotiations of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction;[29]
3) the Rome Statute of the International Criminal Court.[30]

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[24] Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94(3) American Journal of International Law 478–504 (2000).

[25] Notes of Cases, *The Multinational and the Antiquities of Company Law*. 47 The Modern Law Review 87–92 (1984).

[26] Fleur Johns, *The Invisibility of the Transnational Corporation: an Analysis of International Law and Legal Theory*, 19 *Melbourne University Law Review* 893 (1993).

[27] Klaus Dieter Wolf, *11 Private Actors and the Legitimacy of Governance Beyond the State, in* Governance and Democracy: Comparing National, European and International Experiences 200 (Arthur Benz & Yannis Papadopoulos eds., Routledge, 2006).

[28] United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992; *see also* Bertram Irwin Spector, Gunnar Sjöstedt & I. William Zartman, Negotiating International Regimes: Lessons Learned from the United Nations Conference on Environment and Development (UNCED) (Graham & Trotman/Martinus Nijhoff 1994).

[29] Convention on The Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997; *See also* Shawn Roberts, *No Exceptions, No Reservations, No Loopholes: The Campaign for the 1997 Convention on the Prohibition of the Development, Production, Stockpiling, Transfer, and Use of Anti-Personnel Mines and on Their Destruction*, 9 Colorado Journal of International Environmental Law & Policy 371 (1998).

[30] Rome Statute of the International Criminal Court, 17 July 1998.

Nevertheless, the input of private actors in the advance of international standards of commercial conduct (*lex mercatoria*) might also be considered as an example of involvement of non-state actors in the process of formation of international law.[31] Of course, at the international level the significant influence of non-state actors on normative results does not make them the formal law-maker but it shows their significance in this process. Besides law-making power, non-state actors also participate in adjudication processes. This means that non-state actors may be a party to international judicial proceedings by having direct access to a number of international tribunals and may directly enforce their claims[32] and submit *amicus curiae* briefs before international courts.[33]

It has been some decades since the idea of non-state actors made its entrance into the sphere of international law. Shifting the fora of treaty negotiations from ad hoc conferences to international institutions increased the influence of various non-state actors such as NGOs, international civil servants and experts in the treaty-making process.[34] Non-state actors do not hold authorized or government powers and controls, besides they do not have official and economic relations with states.[35] Intrinsically, they have not commonly been recognized as customary objects of international law but, as an alternative, have become potentially new subjects of it. "… Non-state actors are subject or persons of international law. The concept of non-state actors as an object of international law does, however, not sufficiently explain its present-day position in the international law… In other words, power and influence of non-state actors in many cases goes far beyond that of entities to which international law has traditionally accorded to object states".[36]

To have legal character, a legal body is required to have rights in consort with obligations within a legal system. There are international mechanisms which have enumerated several rights and obligations for non-state actors, depending on the content and intent of the mechanism.[37] There are disputes and doubts about the consequences of the recognition of non-state actors' legal personality. "There is a fear that one 'legitimizes' actors by giving them human rights obligations and implies a power which they may themselves erode, rather than enhancing, human freedom and autonomy".[38] One of the substantial causes for not awarding 'legal personality' to non-state actors is the outdated

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[31] Bhupinder S Chimni, *International Institutions Today: an Imperial Global State in the Making*, 15(1) European Journal of International Law 1–37 (2004).

[32] Antarctic Resources Policy: Scientific, Legal and Political Issues (Francisco Orrego-Vicuna ed., Cambridge University Press 1983).

[33] Thomas Buergenthal, Dinah L. Shelton & David Stewart, International Human Rights in a Nutshell (West 2009).

[34] Jose E Alvarez, *The new treaty makers*, 25 Boston College International and Comparative Law Review 213 (2002).

[35] Roderick Arthur William Rhodes, *The New Governance: Governing Without Government*, 44(4) Political Studies 652–667 (1996).

[36] Janne E. Nijman, *Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality 1., in* Non-State Actor Dynamics in International Law 91–124 (Cedric Ryngaert & Math Noortmann eds., Routledge, 2016).

[37] Duncan B. Hollis, *Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley Journal of International Law 137 (2005).

[38] Andrew Clapham, Human Rights Obligations of Non-State Actors 46 (OUP, 2006).

state-centred or state-focused ideology of international law and consequently, the unwillingness of the states to share their powers and authorities with non-state actors.[39]

The adoption of two main treaties, the Rome Statute of the International Criminal Court[40] and the Ottawa Convention on the ban of landmines[41], showed the role of non-state actors and NGOs and their participation in the international law-making process. These are prominent examples of this tendency for the obvious and important role that non-state actors have played in their formation.[42]

Another notable role of non-state actors is their involvement in international law adjudication processes. This refers to the opportunity that non-state actors be involved in international judicial proceedings. For example, until recently an entity's lack of standing before international tribunals has been used as a reason to deny the entity's subjectivity under international law.[43]

Law-making and adjudication process are not the only power they have as non-state actors may also effectively participate in law enforcement processes. For example, non-state actors, particularly NGOs can ensure the compliance with agreements such as multilateral environmental[44] or human rights agreements in which non-state actors may control or inspect the implementation of international law standards. They can directly or indirectly participate in monitoring activities and may activate instruments of compliance or implementation. Their power to collect data and deliver expertise makes non-state actors authoritative players in the implementation of international law. This is especially evident in contemporary international investment law.[45]

The combined roles of government and non-state actors and their interaction within the legislative development process is relevant to assess the correlation between the formal top-down legal harmonisation of international law and the reality of bottom-up development initiatives impacting on the same. These influences become especially apparent in the growing area of international investment law and investment disputes.

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[39] *Id*.

[40] United Nations, *Rome Statute of the International Criminal Court*, 26 Social Justice 125–143 (1999).

[41] Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11(1) European Journal of International Law 91–120 (2000).

[42] Thomas Risse-Kappen, *Bringing Transnational Relations Back In: Introduction, in* Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions 3 (Thomas Risse-Kappen ed., Cambridge University Press 1995).

[43] Antarctic Resources Policy: Scientific, Legal and Political Issues (Francisco Orrego-Vicuna ed., Cambridge University Press 1983).

[44] Astrid Epiney, *The Role of NGOs in the Process of Ensuring Compliance with MEAs, in* Ensuring Compliance with Multilateral Environmental Agreements 319–352 (U. Beyerlin, Peter-Tobias Stoll & Rüdiger Wolfrum eds., Brill, 2006).

[45] Thomas Risse-Kappen, *Bringing Transnational Relations Back In: Introduction, in* Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions 3 (Thomas Risse-Kappen ed., Cambridge University Press 1995).

III. ISDS – Where It Came from and Where It Is Heading

As mentioned above and under the traditional rules of international law, claims of individuals could reach the international level only when a state exercised diplomatic protection and adopted the claims of its nationals in an international forum.[46] Historically, there was no right for an individual or a corporation who had been wronged to sue a host state for a breach of customary international law. The aggrieved party would have to petition its government to espouse the claim on its behalf.[47] If a state decided to pursue the claim it meant that it assumed the claim under its own name, thereby granting the aggrieved party diplomatic protection, subject to certain requirements. The investor had to be a national of the state granting diplomatic protection and must have been a national to the state continuously from the time of the injury until the claim is presented to the state, or possibly even until the dispute has been settled. The investor must have also exhausted all local remedies in the host state prior to diplomatic protection being granted.

The investor had no right to diplomatic protection and it was up to the discretion of the investor's home state government to decide whether diplomatic protection would be granted to the investor.[48] As confirmed by the ICJ, "the state must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by consideration of political or other nature, unrelated to the particular case".[49] Considering this, it is quite clear that from the investor's perspective the diplomatic channel is not a desirable system of investment protection and dispute resolution.

From the perspective of the state, there are also some serious disadvantages with granting diplomatic protection. The most important of these is a possible disruption in international relations, which could lead to prolonged disputes and in extreme cases even armed conflict – even though the use of armed force is not a permitted means of protecting the rights of a foreign investor.[50]

Apart from the diplomatic avenue, a foreign investor would usually depend on the host state's courts in case of a dispute regarding its investment, unless there is an international agreement saying otherwise, as conflict of law rules will most often point to the courts in the state in which the investment is made. From the investor's perspective this is quite undesirable as there is a risk that the judiciary might be biased or even controlled by the state. Especially when dealing with states where the legal system is not as well-developed, or the political regime is too authoritarian or unstable, this risk is imminent. In addition, even if the court would decide in favour of the investor, the

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[46] *Mavromatis Palestine Concessions* (*Greece v. Gr. Brit.*), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

[47] Nigel Blackaby & Constantine QC Partasides, Alan Redfern & Martin Hunter, Redfern and Hunter on International Arbitration 441 (OUP, 2015).

[48] Rudolf Dolzer & Christoph Schreuer. Principles of International Investment Law 22–23 (OUP, 2012).

[49] *Barcelona Traction, Light and Power Co Ltd* (*Belgium v. Spain*), Judgement, 5 February 1970, ICJ Reports (1970) para 44.

[50] Rudolf Dolzer & Christoph Schreuer. Principles of International Investment Law 232–233 (OUP, 2012).

executive branch of the host government might ignore the court's decision.[51] The home state of the investor will usually lack jurisdiction over a dispute arising from a foreign investment as the investment is made in another state. Even if a domestic court other than the court of the host state would have jurisdiction, rules of state immunity are a serious obstacle to overcome, rendering most lawsuits arising from investment disputes in another country unsuccessful, unless there is a waiver of immunity from the host state.[52]

Due to these disadvantages and problems both in regard to diplomatic protection and the use of domestic courts, alternative methods were developed to settle disputes, most notably international investment arbitration. This development was made possible by reforms in the dispute settlement provisions of Bilateral Investment Treaties (BITs) and by the conclusion of the ICSID convention.[53] International investment arbitration deals with the issue of biased courts by providing a forum that is more neutral both in a political and a procedural regard.[54] Developed from the concept of commercial arbitration as an alternative dispute resolution system, one prerequisite for investment arbitration is, as with any other form of arbitration, that there is an agreement to arbitrate, with consent being required from both state and investor. Consent by a state can be given through a direct agreement with the investor, by adopting national legislation which gives a general consent to arbitration, or by concluding a BIT or another international trade and investment agreement with an ISDS provision offering ISDS protection to all investors who are nationals of the other contracting state.[55] Since the ICSID convention, states became more open to include ISDS provisions in BITs and regional trade agreements, granting investors the right to seek direct recourse for their claims through investment arbitration.[56]

The increasing number of trade agreements led to a multitude of varying ISDS provisions globally, but the main investor-state dispute resolution method remained either ICSID or *ad hoc* arbitration, keeping both the sovereign state and the private commercial investing entity on equal procedural footing and with balanced rights in seeking resolution to their dispute. The net of relationships became more complicated in Europe after the Lisbon Treaty entered into force in December 2009, when the competence to conclude trade and investment agreements was transferred into concurring competence, giving both the EU Member States and the EU itself authority to enter into such agreements. This tension has further escalated through the recent landmark Achmea decision,[57] in which the Court of Justice of the European Union (CJEU) decided that the arbitration clause contained in an intra-EU BIT is incompatible with

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[51] *Id*. at 235.

[52] *Id*. at 232–33.

[53] Nigel Blackaby & Constantine QC Partasides, Alan Redfern & Martin Hunter, Redfern and Hunter on International Arbitration 443 (OUP, 2015).

[54] William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings Law Journal 251, 327 (2006).

[55] Rudolf Dolzer & Christoph Schreuer. Principles of International Investment Law 254–258 (OUP, 2012).

[56] Nigel Blackaby & Constantine QC Partasides, Alan Redfern & Martin Hunter, Redfern and Hunter on International Arbitration 444 (OUP, 2015).

[57] Case C-284/16 *Slovak Republic v. Achmea* B.V.

EU law. While the CJEU decision is not binding upon investment treaty tribunals, it is likely to have serious consequences on the inclusion and application of ISDS in BITS concluded within the EU and consequently on ISDS in any trade relationships including EU Member States.

The changing landscape of intra-EU investment disputes is reinforced by the EU Commission's view that intra-EU BITs are anyway unnecessary as there are EU remedies available to resolve investment disputes between Member States. This may both disrupt or lead to a harmonised legal approach for investment from and into the EU and ultimately impact investment treaties and disputes globally. A harmonised approach would benefit foreign investors as the standardisation of legal rules would provide one single and simplified route into the whole EU market. At the same time, even in international investment there is no one size fits all (procedural) solution to all disputes and this dichotomy is at the core of the current review of ISDS.

The current landscape of international investment law consists of thousands of different international trade and investment agreements with differing provisions. This fragmented legal framework creates legal uncertainty for investors, which then leads to inconsistent arbitral awards and complicates the development of uniform principles in the area of international investment law. It is not surprising, therefore, that ISDS is considered to "lack many of the basic protections and procedures of the justice system normally available in a court of law. There is no appeals process. There is no oversight or accountability of the private lawyers who serve as arbitrators, many of whom rotate between being arbitrators and bringing cases for corporations against governments".[58] While some of these claims are true, insofar as there is usually no appeals process in arbitration, other criticisms such as the statement that investment arbitration lacks basic procedural protections, is incorrect. Arbitration is a highly structured and formal process which operates through specific rules and procedures, although these might vary depending on what arbitration rules govern the proceedings. Some of the formalities and procedural technicalities common in domestic legal systems and court proceedings might not exist in arbitration, but arbitration must always conform with a minimal standard of justice and due process that is common to all developed legal systems in the world.[59] Both the ICSID and the UNCITRAL Arbitration Rules governing *ad hoc* investment arbitrations contain multiple control mechanisms to ensure the procedural fairness of any awards, including a possibility to dismiss arbitrators which are perceived to be biased.[60]

ISDS has proved to be a very effective way of settling dispute in international investment law and as a result, the amount of ISDS claims has increased sharply over the past decades. With this increase of claims there have also been other developments. Litigants have started to engage in strategic considerations about where and how to bring their cases, 'forum shopping' and trying to pursue their claims in multiple fora with different courts and tribunals.[61] Multiple and parallel proceedings, however, come with

[58] Alliance for Justice, Letter Opposing ISDS.

[59] Jeswald W. Salacuse, The Law of Investment Treaties 369–370 (OUP, 2010).

[60] Article 56–58, ICSID Convention, Article 12, UNCITRAL Procedural Rules.

[61] Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61(4) International Organization 735–761 (2007).

a number of drawbacks, multiplying costs and resources and potentially straining states financially. The availability of various fora may also lead to investors utilising harassing and oppressive litigation tactics, forcing the state to defend itself. The greatest risk, however, is the risk of inconsistent outcomes across the field of investment relations and disputes overall.

One of the most fundamental values of a system based on the rule of law is predictability. If investment tribunals render conflicting judgments on similar or same issues, then there will be poor predictability in the ISDS system. The issue of inconsistent outcomes is not only an issue when there are parallel proceedings but also when there are separate cases which have a similar background or fact pattern.[62] That the awards of investment tribunals are inconsistent and unpredictable is not very surprising, considering that the awards are based on a framework of public international law that is decentralised and non-hierarchic and consists of thousands of different investment agreements. There is no formally binding principle of *stare decisis* or precedent in public international law or international arbitration. In regular international commercial arbitration, the award is usually kept confidential, which makes inconsistencies and fact discrepancies hard to detect. Awards rendered in investment disputes are, however, to a large extent published which makes it easy to detect inconsistencies and deviations from established rules and principles.[63] Inconsistent outcomes in ISDS mean not only that independent investment tribunals have divergent views on legal issues or on how to assess the facts of the case, but are also impacting on the uniform interpretation of public international law principles, therefore hindering the intended purpose of texts serving legislative harmonisation. This fragmented legal framework produces legal ambiguity for investors, which in turn perplexes the growth of uniform principles in international investment law and leads to the criticism the system faces today. As a result, the UNCITRAL[64] Working Group III (WGIII)[65] has been given a mandate to identify and address concerns regarding ISDS. This mandate and the resulting work beautifully reflect the role of the different actors in developing international law and the correlation between the top-down approach and a bottom-up influence over legal harmonisation.

The UNCITRAL mandate made it clear that discussions within the working group are meant to be government-led, with a broad mandate to review the system before recommending any amendments to it. Due to the transparent nature of WG processes, the reform about the future of ISDS raised interest for the prospect of a more systemic

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[62] Susan D. Franck, *The Nature and Enforcement of Investor Rights Under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 UC Davis Journal of International Law & Policy 47 (2005).

[63] Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, 1(1) Journal of International Dispute Settlement 153–190 (2010).

[64] The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966 "to promote the progressive harmonization and unification of international trade law".

[65] The 35th session of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) took place April 23–27, 2018, in New York to continue discussions on possible reform of investor–state dispute settlement (ISDS). WGIII started its work in the 34th session which took place from 27 November to 1 December 2017. http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html, accessed on June 1, 2018.

reform. Nevertheless, the review is limited to the procedural aspects of dispute settlement, not including substantive issues that affect the overall perception of ISDS effectiveness – issues that are also more politically charged.

WGIII started its work in the 34th session in 2017, with the key points for review being identified as the duration of proceedings, overall costs, allocation of costs, security for costs, third party funding, transparency and early dismissal mechanisms.[66] The overarching issue discussed in this session was the concern over the legitimacy of the system, where some states supported a fact-based analysis of ISDS, while others emphasised the necessity to address wider public perceptions of the system. The 35th session, although bearing the potential to produce a versatile plan for ISDS, did not lead to harmony. It is difficult to identify cohesion at this stage in either the nature of the perceived issues associated with the current system of ad hoc arbitration, or on how those issues might be resolved. While on a global level, states are divided on whether investment claims would be better heard by *ad hoc* arbitral bodies or a permanent investment court, on a domestic level ISDS has evidenced serious tensions within some states, resulting in a firm repulsion towards the system overall. Consequently, in the 35th session, two general issues emerged: whether states should be concerned with facts and perceptions, or just facts, and whether some of the issues identified were systemic in nature and, accordingly called for systemic solutions.

The systemic concerns regarding ISDS derive from the interaction of multiple elements of the current system. The issues identified as needing reform range from the lack of consistency and predictability across decisions, limited systemic checks on correctness and consistency in the absence of an effective appeal mechanism, the nature of the appointment process impacting the outputs of the adjudicative process, significant costs and a lack of transparency[67]. The contemporary investment regime is described by repeat disputes, relative indeterminacy and vertical relationships in a context of public international law and public law situations. The international society and states have preferred to produce permanent standing bodies to adjudicate disputes in the context of such regimes.[68]

At the time of writing this paper, it is likely that there will be at least one more session before the working group makes any recommendations on the reform of ISDS. There is still need for multilateral reform as different responses from different countries to address problems that largely affect all countries, and thus, there is momentum to engage in discussions to multilaterally reform investment dispute settlement and need to work on realizable objectives that have a broad positive impact for all. It is necessary to consider a new framework for investment dispute resolution which is permanent, independent and recognised as legitimate by citizens, not only law-makers.

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[66] http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html, accessed on June 1, 2018.

[67] United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-fifth session New York, 23–27 April 2018. https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/088/32/PDF/V1708832.pdf?OpenElement, accessed on June 1, 2018.

[68] *Id*.

IV. Conclusion – Top-Down or Bottom-Up?

The correlation between the formal top-down legislative process and the often bottom-up role of non-state actors is especially important in the regulation of investment disputes involving public interest in a private process.[69] The different stakeholders directly or indirectly affected by the system create a tension in the harmonised regulation of the field. Several generations of legal theorists[70] traditionally agreed that "law is something handed down to the populace by high officials following professional norms and the citizenry is obligated to follow the rules simply because they are the rules handed down by the duly established mechanisms for handing down rules"[71]. This perception has been radically changed to a currently more accepted view that law "often percolates up from 'the bottom,' from communities of citizens who experience the world or law in a certain way".[72] The communities shaping the development of investment law and investor-state dispute resolution range from directly interested stakeholders composed of corporations to NGOs representing public interests affected by foreign investment and the state regulations impacting those investments.

An easy-to-recognize example of such corroborated net of interests is visible through the Phillip Morris v Australia saga, in which the Australian Tobacco Plain Packaging legislation[73] aimed to protect public health triggered a series of investment claims from Philip Morris, among others[74], through investment arbitration[75]. While the tribunal decided that it does not have jurisdiction to hear the case[76], this being the first investment claim formulated against Australia, the mere existence of the claim had such an initial impact on the public opinion and consequently the government's position towards ISDS, that Australia introduced a flat exclusion policy of ISDS provisions from all its treaties[77]. The policy has since been reversed with the change of government, yet again reflecting how exposed a state's approach to regulating ISDS is to bottom-up pressures and influences.

Whether the current ISDS reform globally will successfully address the underlying reasons triggering the need for reform in the first place, part of which are not procedural but substantive, is yet to be seen. The way this reform is happening, however, is worthy

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[69] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107(1) American Journal of International Law 45–94 (2013), available at https://ssrn.com/abstract=2033167, accessed on June 1, 2018.

[70] Like the formalists, the realists, and the legal process thinkers.

[71] William N. Eskridge Jr., *Public Law from the Bottom Up*, 97 West Virginia Law Review 141, 142 (1994).

[72] *Id*. at 148.

[73] *Tobacco Plain Packaging Act 2011* (NO. 148, 2011).

[74] Two constitutional challenges in 2012: *British American Tobacco Australasia Limited and Ors v. Commonwealth of Australia, and J T International SA v. Commonwealth of Australia*; and WTO panels established at the request of Ukraine (on 28 September 2012), Honduras (on 25 September 2013), Indonesia (on 26 March 2014), Dominican Republic (on 25 April 2014) and Cuba (on 25 April 2014).

[75] *Philip Morris Asia v Australia*, ad hoc arbitration under the UNCITRAL Rules.

[76] Decision of 18 December 2015, available at https://www.cio.org.au/assets/27887028/Decision%2018%20December%202015%20a.pdf, accessed on June 1, 2018.

[77] DFAT, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, April 2011, Canberra 14 (2011).

of its own analysis. The formal structure of legal harmonisation processes through the UNCITRAL involves the UNCITRAL Commission (currently comprising 60 UN member states) identifying topics for work, which are then assigned to a certain working group. The working groups consist of delegates of the member states who are experts in the field but are also representing their governments' position – an aspect that is specifically relevant in the current work of WG III, expressly flagged as government-led. Once assigned a topic, a working group is generally left to complete its substantive task without intervention from the Commission, but only within the Commission's mandate. In this sense, legal development and harmonisation through the UNCITRAL is essentially top-down development: it is formulated at the level of the UN Commission, creating a mandate for the working group experts to work out the technicalities to be approved (or not) by the Commission, so that they can become model laws, conventions, or technical guidelines for states to adopt. Based on the top-down model, individuals and businesses in the adopting countries are then supposed to simply accept and operate under the legislative framework developed under the aegis of international harmonisation.

Nevertheless, the initial source of the mandate reaching the member states sitting on the Trade Commission and the influences reaching the work of the working groups, frequently originate from non-state actors. Practical changes to legal development seem to consistently start from the lowest common denominator i.e., the lowest level at which participants are being involved in the process. The Phillip Morris experience shows that public interest is pushing states to adapt their approach to ISDS overall, due to the political capital and its associated risks attached to policies impacting on public interest. The impact public pressure can have on governments' position with regard to the need for ISDS reform is currently reflected by the differentiation within the WG III review between analysing only the facts of the system or both the factual reality and the perception of that reality. If 'perception' is formally recognised as a relevant factor leading to the level of reform of a system that may, otherwise, be found to be objectively efficient, the regulation of ISDS through an UN-driven legislative development process will, in fact, be officially admitted to be a bottom-up process.

Given that the UN itself is an international organisation established to protect public interest globally,[78] such a process conducted through a non-state actor itself, may not be surprising. Given that the UN and consequently the UNCITRAL, is composed of member states that possess the sovereign power to create legislation regulating ISDS, the correlation between the state and non-state actors becomes more convoluted and the previously perceived top-down or bottom-up vertical processes seem to be of a rather multidimensional shape.

[78] *See* the Preamble and Chapter I on Purposes and Principles of the UN Charter, available at http://www.un.org/en/charter-united-nations/index.html.