MEASURING' THE SOCIAL LEGITIMACY OF INTERNATIONAL INVESTOR STATE DISPUTE SETTLEMENT: A NEW RESEARCH AGENDA

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Abstract: *The international investment law regime (IIL) has been criticised in recent times, where various stakeholders have claimed that the regime's dispute resolution system lacks 'legitimacy'. Simultaneously, the regime has encountered a backlash from states, interest groups, and the wider public. The convergence of these two elements has led to serious concern about the regime's future.*

Since global initiatives are currently underway to 'repair' the legitimacy of IIL's dispute resolution system, including under the aegis of the United Nations Commission on International Trade Law (UNCITRAL) and pursuant to European Union (EU)-led proposals, the question of assessing such legitimacy has assumed added importance. Although stakeholders have sought to explain why reforms are necessary in light of the underlying 'legitimacy crisis', little systematic attempt has been made to design an analytical framework that can evaluate the conflictingly articulated assessments of legitimacy in this regard.

On the other hand, while scholars have written at length about the so-called global backlash, they appear to have assumed that such backlash arises because of an objective legitimacy deficit. However, I argue that we need to design an analytical framework that can measure the relationship between backlash and legitimacy – including the possibility of omitted and/or intervening variables. Further, we must base such measurement upon a revised and more sophisticated conceptualization of legitimacy itself. Among other elements, this revised theorization, as well as the appurtenant framework of analysis, should include a dynamic assessment of ongoing socio-political contestations among relevant stakeholders, including a critical evaluation of the power dynamics between them.

Keywords: ISDS; international judicial legitimacy; international investment law; arbitration; regime; social legitimacy; backlash; perceptions

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I. INTRODUCTION

In this paper, I argue for the creation of an analytical framework to understand and 'measure' legitimacy with regard to international regimes. In particular, this framework can be used to analyse globally prominent legitimacy contestations, including those related to investor-state dispute settlement (**'ISDS'**), as presently being witnessed under the auspices of the United Nations Commission on International Trade Law (**'UNCITRAL'**). It is important to construct this framework because world opinion appears to be divided on how best to improve the legitimacy of ISDS, but without properly addressing whether it is actually illegitimate, and if not, why not.

The main research question stems from the so-called 'legitimacy crisis' involving the international investment law (**'IIL'**) regime, with particular reference to its dispute resolution system (ISDS)—along with the global backlash against it. Various stakeholders and commentators appear to be talking past each other on this issue, to the extent that it is now necessary to understand what we mean when we talk about legitimacy, and what we mean by a 'crisis' in such legitimacy.

Other than suggesting a framework which can be used to evaluate the legitimacy of ISDS more systematically than has been attempted so far, this paper makes two important contributions to general theories on legitimacy.

Firstly, it goes beyond existing analytical templates that look at legitimacy and illegitimacy in static and/or binary terms—or as discrete configurations that exist within insulated silos. Instead, I look at legitimacy through the lens of a dynamic conceptualisation, including by accounting for the interpretative flexibility that deliberate and intersubjective understandings of legitimacy typically involve (especially among motivated stakeholders) – such that the very concept has to be constantly negotiated, failing which it may be subject to attack from equally motivated, but opposing, stakeholders. In effect, I argue that legitimacy is an idea that exists on a politicised spectrum, which can be, and indeed *is*, constructed and re-constructed within a fluid, albeit contested, setting, and thereby remains susceptible to change.

Secondly, within this environment of contestation, I recommend a critical examination of the role of power with respect to those entities that remain engaged in maintaining or attacking an

institution's legitimacy. Past and current thinking appear to suggest that debates about normative change, if and when they do occur, involve questions of framing new norms in a particular way, and allegedly rely on the intrinsic nature of such norms and/or the substantive content of the change suggested. However, it is less clear from the literature whether the structural dynamics of power itself, by virtue of its propensity to create unequal circumstances, also creates conditions where certain norm entrepreneurs (but not others) are able to influence, or demand imitative behaviour from, target audiences. Such influence includes ways through which the normativity of a regime can be recalibrated in light of a stakeholder's own preferences – rather than on the basis of the regime's innate value. In other words, before the question arises about whether there is a need to (1) reconstruct legitimacy, or (2) analyse the relative strength of legitimacy arguments, or (3) examine if socioeconomic changes affect audiences and their perceptions, what matters most is *who* is doing the legitimacy reconstruction, and *why*.

Further, in terms of timing and trajectory, certain critical junctures may create a unique fissure in the existing balance of power, especially when equally motivated and/or powerful coalitions are involved in opposite camps, including on account of a break in prior alliances. This fissure may then escalate contestations to a new intensity, thereby promoting a particular understanding of the regime's (il)legitimacy in a manner more pronounced than in prior times, such as when negotiations for a vaunted transatlantic treaty (**'TTIP'**) between two IIL hegemons (the US and the EU) broke down mainly on account of ISDS, leading the EU to champion an alternative regime in lieu of ISDS.

Accordingly, my suggested framework can be used to analyse various possible outcomes of legitimacy contestation, including by critically examining power relations among key stakeholders using International Relations (**'IR'**) theory. In this regard, given that deliberations are ongoing at UNCITRAL with respect to reforming ISDS on account of its perceived illegitimacy, this framework can be further used to: (i) evaluate the likelihood of success in connection with reform proposals based on alliance-building, and (ii) predict the possible endpoint of such alliance-building exercises, along with subsequent effects on regime stability.

Furthermore, this framework aims to be an improvement upon erstwhile models because it involves an assessment of power at multiple levels of interaction, comprising different categories of stakeholders. Since such interactions occur among opposing coalitions, they

involve conflicting perspectives and motivations. However, my framework remains useful in such situations, including where legitimacy concerns have been sufficiently escalated, and where powerful but opposing coalitions seek to assert the supremacy of their own preferred alternatives at the exclusion of others'. Ultimately, the framework adopts a realist approach towards assessing legitimacy, thereby aiming to make better, and qualitatively richer, predictions for the future.

The paper proceeds as follows: Part II provides a general background to the 'problem'; Part III discusses the key ideas contained in this paper; Part IV introduces and explains a revised research agenda, based on my analysis from the preceding two parts; Part V talks about the main elements of the proposed analytical framework, building on existing templates and refining their underlying components further; Part VI cursorily applies the framework to ISDS to check for fit and utility; Part VII builds on such framework with additional elements, including with respect to power and alliance-building; Part VIII suggests certain methodological considerations for future researchers; and Part IX concludes.

II. BACKGROUND

IIL is largely built on a network of international investment agreements (**'IIAs'**),[2] through which foreign investors are granted broad beneficiary rights aimed at the protection and promotion of foreign investment. While each IIA is a stand-alone treaty, IIAs contain similar legal standards, including with respect to ISDS. Under ISDS provisions, an aggrieved national from one country has the right to directly sue the other (country) for investment-related damages.[3] This mechanism of granting a private party the right to bring legal action against a sovereign state before an *ad hoc*[4] international arbitral tribunal was once considered a ground-

[2] IIAs comprise both Bilateral Investment Treaties ('**BITs**') and other agreements with investment provisions, such as those on free trade (Free Trade Agreements or '**FTAs**'). See UNCTAD, 'International Investment Agreements Navigator' (Investment Policy Hub 2022) <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 19 December 2022. As of 19 December 2022, there were 2850 BITS and 432 treaties with investment provisions, making a total of 3282 IIAs.

[3] To date, 120 countries and one regional grouping are known to have been respondents to at least one ISDS claim. As of December 31, 2019, the total number of known treaty-based ISDS arbitrations had reached 1,023. Since some arbitrations can be kept fully confidential, the actual number of disputes filed is likely to be higher.

[4] In the sense that such tribunals are temporarily constituted and do not exist before the dispute arises. Further, such tribunals are dissolved once the final award is issued. Such *ad hoc* tribunals may be contrasted with permanent court.

breaking development. No other category of individual entities under international law bears legal rights as expansive as foreign investors do under IIL.[5]

Over the past few years, however, IIL has witnessed significant scholarly criticism, as well as public and state action clamouring for reform. More recently, the regime has encountered global efforts towards a complete overhaul, stemming largely from dispersed allegations of illegitimacy.[6] Essentially, such initiatives seek to improve, withdraw from, or altogether change the regime's adjudicatory mechanism, comprising consent-based *ad hoc* arbitral tribunals that issue binding awards.

Further, stemming from the worldwide proliferation of IIAs and enhanced flows of foreign direct investment ('**FDI**') since the 1990s, investors have increasingly exercised their treaty rights under ISDS.[7] This 'litigation boom' has exacerbated state and civil society responses, which commentators have described as a 'backlash'[8] against an ongoing 'legitimacy crisis'[9] – allegedly punctuated by private judicial encroachment upon state sovereignty.[10]

Although critical views with respect to international tribunals[11] in general have existed for a long-time involving issues related to sovereignty, such concerns have been more palpably

[5] Beth A Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 World Politics 12-46.

[6] See Frank J Garcia, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 Journal of International Economic Law; Anthea Roberts and Taylor St John, 'Complex Designers and Emergent Design: Reforming the Investment Treaty System' (2021) 116 American Journal of International Law; Tuuli-Anna Huikuri, 'Constraints and incentives in the investment regime: How bargaining power shapes BIT reform' (2022) The Review of International Organizations; and Naimeh Masumy, 'ISDS Reform: The Dimming Yet Discerning Voices of the Global South States' (*OpinioJuris*, 1 September 2021) <http://opiniojuris.org/2021/09/01/isds-reform-the-dimming-yet-discerning-voices-of-the-global-south-states/> accessed 20 December 2022.

[7] ISDS was virtually non-existent prior to 1990. However, as of today, there are over 1,000 cases.

[8] Asha Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 Harvard International Law Journal; Malcom Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 European Journal of International Law; and Thomas Gammeltoft-Hansen and Tanja Aalberts, *The Changing Practices of International Law* (Cambridge University Press 2018).

[9] M Sornarajah, 'A coming crisis: expansionary trends in investment treaty arbitration' (2008) Appeals Mechanism in International Investment Disputes' in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International investment Disputes* (OUP 2008) ; and Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521.

[10] R Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations* (Springer 2008).

[11] See KJ Alter, *The New Terrain of international Law: Courts, Politics, Rights* (Princeton University Press 2014); and S Spelliscy, 'The proliferation of international tribunals: A chink in the armor' (2001) 40 Columbia Journal of Transactional Law 143.

articulated with respect to ISDS in recent years.[12] Among other things, critics allege that foreign investors are able to secure high financial awards against sovereign states even when such states act in public interest.[13]

More recently, ISDS became the main stumbling block during negotiations between the EU and the US with respect to TTIP.[14] In response to mounting criticism, the EU Commissioner on Trade outlined a 'fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model.'[15] Under such circumstances, the EU proposed a new standing court system that seeks to overhaul the existing *ad hoc* tribunal regime,[16] and ultimately aims to produce a permanent and multilateral dispute-settlement body.

Subsequently, in 2017, UNCITRAL mandated its Working Group III to work on ISDS reform options, which include the possibility of completely overhauling the regime in lieu of an alternative structure.[17] In addition, several new IIAs such as those involving the EU and Canada (CETA), as well as the US-Mexico-Canada Agreement (USMCA, which replaced the North American Free Trade Agreement or NAFTA) eliminates ISDS in large part. Such developments have led to hectic global discussions about a changed dispute resolution framework,[18] but without first performing a systematic analysis of *conflicting* legitimacy assessments in this regard.

III. KEY IDEAS

[12] Ari Afilalo, 'Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis' (2004) 17 Georgetown International Environmental Law Review 51.
[13] Carlos G Garcia, 'All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration' (2004) 16 Florida Journal of International Law 304.
[14] Simon Lester, 'One Year into the TTIP Negotiations: Getting to Yes' (*CATO Institute*, 29 September 2014) <https://www.cato.org/free-trade-bulletin/one-year-ttip-negotiations-getting-yes> accessed 20 December 2022.
[15] Cecilia Malmström, 'Proposing an Investment Court System' (*European Commission*, 16 September 2015) <https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom_en> accessed 20 December 2022.
[16] *See* European Commission Press Release, 'Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations' (*Europa.eu*, 16 September 2015) <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5651> accessed 20 December 2022.
[17] *See* UNCITRAL, Report of Working Group III on the work of its 37th session (United Nations General Assembly 2019) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/024/04/PDF/V1902404.pdf?OpenElement> [74].
[18] SW Schill, 'The European Commission's Proposal of an 'Investment Court System' for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?' (*ASIL Insights* 22 April 2016) <www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping> accessed 11 September 2023.

A. Legitimacy

On the question of what 'legitimacy' is, the Oxford dictionary defines the first sense of the word as "conformity to the law or to rules".[19] Similarly, the Cambridge dictionary defines 'legitimacy' as "the quality of being legal," or "the fact of being allowed by law or done according to the rules of an organization or activity".[20] These may be considered the 'legal' definitions of legitimacy. Furthermore, the Merriam-Webster dictionary mentions 'lawfulness' and 'legality' as synonyms.[21] Unsurprisingly, a large body of legal scholarship on legitimacy has focused almost exclusively on legality.

In the second sense of the dictionary meaning of the term 'legitimacy', Oxford defines it as the "ability to be defended with logic or justification" or "validity,"[22] while according to Cambridge, it is "the quality of being reasonable and acceptable" or "the state of being fair".[23] Similarly, Merriam-Webster defines 'legitimate' as "conforming to recognized principles or accepted rules and standards".

As such, it is the second sense of the word that has given rise to several conflicting discussions about the legitimacy of ISDS.

B. Normative and Sociological Legitimacy

To be sure, there are different types of, and different ways of understanding, legitimacy. Most scholars distinguish between normative (or objective) legitimacy and sociological/social (or subjective) legitimacy.[24]

In its normative understanding, legitimacy means a *right to rule*, justified according to a set of prescribed standards. Sociological legitimacy, on the other hand, is the empirical study of

[19] *See* Google's English Dictionary, 'Oxford Languages and Google' <'https://languages.oup.com/google-dictionary-en/> accessed 11 September 2023. Google's English dictionary is provided by Oxford Languages.
[20] *See* Cambridge English Dictionary 'Legitimacy' <https://dictionary.cambridge.org/dictionary/english/legitimacy> accessed 11 September 2023.
[21] *See* Merriam-Webster Dictionary, 'Legitimacy' <https://www.merriam-webster.com/dictionary/legitimacy>.
[22] (n 19).
[23] (n 20).
[24] D. Bodansky, 'Legitimacy in international law and international relations: The state of the art. in Dunoff' in M. A Pollack (ed.) *Interdisciplinary perspectives on international law and international relations* (CUP 2013) 321–342.

beliefs in respect of the rightness to rule.[25] According to the latter, legitimacy is not an objective quality, but rests on the perceptions of relevant stakeholders.

The boundary between normative and social legitimacy often gets blurred. On the one hand, the social is conceptually dependent on the normative. On the other hand, normative considerations have an intrinsically social quality, ultimately dependent on public belief. In other words, an institution can only be legitimate if relevant actors *think so*. Thus, normative legitimacy focuses on qualities of the ruler that justify its authority (democratic pedigree, transparency, expertise, etc.), while social legitimacy focuses on the attitudes and beliefs of stakeholders.[26]

Thus, while examining the social legitimacy of an institution, the key challenge is to ascertain to what extent, and why, different actors (*e.g.*, citizens, civil society groups, NGOs, states, investors, etc.) *believe* that such institution ought to be obeyed – and on the basis of what *they* themselves identify as appropriate standards. In other words, social legitimacy is a subjective quality defined by perceptions of normative legitimacy.

If societal beliefs in the legitimacy of an institution are influenced by its conformity to normative standards, then normative and sociological legitimacy can be causally related. However, conformity to normative standards is not a prerequisite for sociological legitimacy. An institution may fare poorly when evaluated against a specific normative standard, such as representativeness or diversity, but may still be broadly regarded as legitimate. For instance, a regime such as ISDS may conform well to a specific normative standard, such as the rule of law, but still be regarded as illegitimate among some audiences.

C. Legitimacy Concerns

While there are several interconnected areas of criticism with respect to the legitimacy of ISDS, it is possible to group such existing critiques into two broad categories, as below:

[25] ibid 327.
[26] Ian Clark, *Legitimacy in International Society* (Oxford University Press 2005) 18.

a) Those related to the *decision-makers* themselves, *i.e.*, the arbitrators under the ISDS structure; and

b) Those related to the *arbitral process* more broadly, including its structural features as well as its design and outcomes.

D. Critiques Related to Decisionmakers

Here, the criticism has mainly focused on the arbitrators' alleged lack of independence and impartiality.[27] Critics allege that since ISDS arbitrators are remunerated directly for their services by the parties that appoint them, arbitrators might have a vested interest in perpetuating the regime. Also, since investment arbitrations can only be initiated by investors,[28] arbitrators depend on such investors for future appointments. Thus, arbitrators might be inclined to cater particularly to investor interests.[29]

The latter criticism is slightly lopsided since it does not explicitly account for the fact that arbitrators are also appointed by states, where the principle of party autonomy applies equally for both sides to a dispute. However, taking the critique at face value, one might conclude that even those arbitrators who are appointed by states may be inclined to favour the appointing parties in order to secure future appointments by similar states.

More generally, critics claim that the system of party-appointment itself negatively impacts the impartiality of arbitral tribunals.[30] Also purportedly problematic is the fact that some practitioners act both as counsel and arbitrator in different proceedings, with the possibility of conflicts of interest.

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[27] Pia Eberhardt and Cecilia Olivet, *Profiting From Injustice* (Corporate Europe Observatory 2012); Noah Rubins and Bernhard Lauterburg, 'Independence, Impartiality and Duty of Disclosure in Investment Arbitration' in Christina Knahr, Christian Koller, Walter Rechberger, and others (eds), *Investment and Commercial Arbitration – Similarities and Divergences* (Eleven International Publishing 2009) 153–180, 171-175. *See also* UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' (2013) 2 International Investment Agreement Issues Note 4.

[28] Claims by host States are extremely rare and the possibility for counterclaims is fairly limited. I Gustavo Laborde, The Case For Host State Claims In Investment Arbitration' (2010) 1(1) Journal Of International Dispute Settlement 97-122.

[29] Carlos G Garcia (n 12); Gus van Harten, 'Perceived Bias in Investment Treaty Arbitration' in Claire Balchin, Liz Kyo-Hwa Chung, Asha Kaushal and others (eds), *The Backlash Against Investment Arbitration: Perceptions And Reality* (Kluwer Law International, 2010) 433–454; 'Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges' (*Public Citizen's Global Trade Watch* 2015) <https://www.citizen.org/wp-content/uploads/ustr-isds-response.pdf> accessed 20 Feb 2024.

[30] Jan Paulsson, 'Moral Hazard In International Dispute Resolution' (2010) 25(2) *ICSID Review* 339-355.

For some commentators, it is unacceptable that private individuals rule on the legality of decisions taken by democratically elected officials.[31] For example, questions have been raised about whether three individuals, appointed as arbitrators on an *ad hoc* basis, have sufficient legitimacy to assess the validity of state regulations enacted through sovereign prerogative, particularly if the dispute involves sensitive public policy issues. In addition, even though the transparency of the system has improved over time,[32] ISDS proceedings can be kept fully confidential — if both parties so wish — even in cases where the dispute involves matters of public interest.[33]

Furthermore, an increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or predisposed to a particular outcome, despite the fact that arbitrators are subject to ethical rules requiring independence and impartiality. Arbitrators' own interest in being re-appointed in future cases and their frequent "changing of hats" amplify these concerns. This, together with the fact that such arbitrators are appointed from a relatively small pool, creates a real risk of conflict of interest, according to critics. Moreover, some arbitral practitioners appoint each other as a matter of routine, which heightens that risk.[34]

E. Critiques Related to the Arbitral Process

In this respect, the following concerns have been voiced:

1. Lack of Consistency

[31] *See for example*: Mary Bottari and Lori Wallach, *Nafta's Threat To Sovereignty And Democracy* (Public Citizen Publication 2005)

[32]*See for example*, the 2006 amendments to the ICSID Arbitration Rules and the 2013 rules on transparency in ISDS proceedings adopted by UNCITRAL. In the case of UNCITRAL, the new rules have a limited effect in that they are designed to apply not to all future arbitrations but only to arbitrations under future IIAs. At the same time, UNCITRAL instructed the relevant working group to consider the possibility of an international convention that would extend the new UNCITRAL transparency rules to ISDS proceedings under existing IIAs — in respect of those States who join the convention.

[33] This applies to cases brought under arbitration rules other than ICSID (only ICSID keeps a public registry of arbitrations) and that do not involve Canada or the United States, each of which makes publicly available detailed information about all cases brought against it. It is indicative that of the 85 cases under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration (PCA), only 18 were public (as of end 2012).

[34] UNICTRAL, 'Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS, Note by the Secretariat' (United Nations General Assembly 2018) 25 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V18/057/64/PDF/V1805764.pdf?OpenElement> accessed 11 September 2023. (The UNCITRAL Secretariat warns that "a counsel may agree to appoint a particular arbitrator in one case, and this arbitrator, when acting as counsel in another case, agrees to appoint the appointing counsel as arbitrator in that second case.").

According to critics, awards issued by investment tribunals are inconsistent or sometimes even contradictory, and there exist no appropriate mechanisms to remedy or limit such inconsistencies.[35] This is allegedly the consequence of indeterminate formulations of investor rights, the absence of a formal rule of precedent, and the lack of a real control or appellate mechanism.[36] Critics claim that the resulting inconsistency could negatively affect the reliability, effectiveness, and predictability of the investment arbitration regime and, in the long run, its credibility overall.[37]

2. Length and Cost

Critics allege that monetary awards issued by arbitral tribunals, as well as the legal fees and related costs incurred by parties in ISDS proceedings, are often very high. As a result, governments are forced to spend large sums of money to defend even legitimate public policies. This burden is especially significant when imposed upon low-income countries, which are unable to defend themselves against wealthy transnational corporations.

Further, ISDS proceedings tend to be lengthy. This, according to critics, has put to doubt the idea that arbitration represents a speedy and low-cost method of dispute resolution.

[35] Tai-Heng Cheng, 'Power, Authority And International Investment Law' (2005) 20(3) American University International Law Review 465; Jorge Viñuales and Frank Spoorenberg, 'Conflicting Decisions In International Arbitration' (2009) 8(1)The Law & Practice Of International Courts And Tribunals 91-113.

[36] Gabrielle Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there differences?' in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards: The Foundation of a New Investment Protection Regime in Treaty Arbitration, IAI Series* (JurisNet, 2004) 189–221, 220; Mara Valenti, 'Restricting the Scope of International Investment Agreements as a Means to Set Limits to the Extent of Arbitral Jurisdiction' (2014) 11(1) *Transnational Dispute Management*.

[37] Andreas Bucher, 'Is There a Need to Establish a Permanent Reviewing Body' in Emmanuel Gaillardm (ed), *The Review of International Arbitral Awards, IAI Series No. 6* (JurisNet 2010) 285–296; Jeffery P Commission, 'Precedent In Investment Treaty Arbitration—A Citation Analysis Of A Developing Jurisprudence' (2007) 24(2) Journal Of International Arbitration 129 – 158; Rudolf Dolzer, 'Perspectives for Investment Arbitration: Consistency as a Policy Goal?' (2012) 9(3) Transnational Dispute Management 5; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity Or Excuse?: The 2006 Freshfields Lecture' (2007) 23(3) Arbitration International.

3. Lack of public access/transparency

Finally, critics allege that the investor-State arbitration regime lacks transparency because it offers insufficient possibilities for third parties to participate in proceedings.[38] Indeed, concerns over excessive confidentiality and, in particular, of justice administered "behind closed doors" in matters of public interest, has been one of the first main criticisms raised against the system.

F. Backlash

While references to a 'backlash' have become increasingly common in IIL scholarship, few scholars have sought to define or unpack its complexities. Generally, a backlash implies actions taken in opposition to the system itself. Sunstein, for instance, defines it as 'intense and sustained public disapproval of a system accompanied by aggressive steps to resist the system and to remove its legal force.[39] Thus, its manifestation is characterized by an aggressive call for the abandonment of a system or for the adoption of a radically alternative structure. A backlash might therefore be a complex phenomenon. However, in the particular context of ISDS, it could be argued that the backlash reflects broader concerns about globalization in general. At any rate, this backlash may emanate from a variety of sources. These sources include civil society, international organizations, academics, the media, and states themselves.[40]

Any one source or manifestation of a backlash may interact with, and inform, the other sources through which the omnibus phenomenon is expressed. The "public consultation on modalities for investment protection and ISDS in TTIP" provides an indicative example, albeit in the European context specifically.[41] This 2014 consultation process garnered almost 150,000 responses. While 148,830 of such responses allegedly came from citizens, approximately 145,000 of those were submitted through non-government organizations (NGOs) which had

[38] Lucas Bastin, 'The Amicus Curiae in Investor-State Arbitration' (2012) 1(3) Cambridge Journal Of International And Comparative Law 208-234; Luke Eric Peterson, 'Challenges Under Bilateral Investment Treaties Give Weight To Calls For Multilateral Rules' (2001) 29 World Trade Agenda 12-14.

[39] Cass R Sunstein, 'Backlash's Travels' (2007) 42 Harvard Civil Rights - Civil Liberties Law Review 435, 435. Sunstein focusses on backlash against particular cases in domestic law, defining backlash as 'intense and sustained public disapproval of a judicial ruling, accompanied by aggressive steps to resist that ruling and to remove its legal force'.

[40] Chen Huiping, 'The Expansion of Jurisdiction by ICSID Tribunals: Approaches, Reasons and Damages' (2011) 12 Journal of World Investment and Trade 671, 671.

[41] The consultation process was open from 27 March-13 July 2014: European Commission, 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (2015) 3 Commission Staff Working Document—Report SWD.

provided respondents with 'pre-defined' answers.[42] In this kind of a situation, a mixed source of backlash exists, comprising a range of actors including individuals, academics, and NGOs. This example also illustrates the fact that 'expert' and public opinion reinforce and shape one another in a more generalized way.[43]

The various sources and manifestations with respect to a backlash also means that there exists a range of motivations and concerns. Once we parse through this aggregation and identify the individual components of this backlash, it becomes apparent that such actions are specific to their situation and source. Thus, apart from the question of what it means to claim the existence of a backlash, there is also an important, albeit more complicated, question of ascertaining what exactly the backlash is *against*. For instance, is it against a particular kind of tribunal and its decision-making, or against investment arbitration generally, or against a new trend in foreign investment and its corresponding treaties, or is it against something else entirely? The point of significance is that the backlash may focus upon ISDS only because it provides a focal point that is easily understood by the public. On the other hand, it may actually be motivated by a more diffuse target – over and above ISDS itself. Thus, these critiques may not be relevant for investment tribunals at all. Rather, these tribunals may form a convenient focal point for expressing more existential concerns about a wider phenomenon.

For example, the linkage of ISDS with broader concerns about globalization has resulted in a "strong ideological and functional opposition" to investment arbitration.[44] Many see it as the embodiment of broader forces with which primary concerns lie, including the "upward transfer of wealth, constraint of government, and liberalization of markets".[45] At the same time, many stakeholders share a concern about the alleged harm done to public welfare by international economic regimes as currently structured, especially in the way they purportedly hamper the ability of governments to act for their people in response to issues of human development and environmental sustainability.[46] Thus, the specific concern about the legitimacy of ISDS could

[42] ibid 10.
[43] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45, 84.
[44] LE Trakman, 'Resolving Investor-State Disputes under a Transpacific Partnership Agreement—What Lies Ahead?' (2012) Transnational Dispute Management 9.
[45] Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2(1) Trade, Law and Development 19, 24.
[46] *See* Public Statement on the International Investment Regime – 31 August 2010', available at: <https://www.bilaterals.org/IMG/pdf/Public_Statement.pdf> accessed 11 September 2023.

stem from wider concerns about the consequences of globalization – including economic dislocation, social interests, jobs, and livelihoods.

G. Legitimacy Crisis

What do we mean when we speak of a 'crisis' – and what does it imply in the context of 'legitimacy'? When scholars highlight concerns about ISDS, they ultimately attribute those to legitimacy concerns. Most critics identify certain *a priori* criteria which, according to them, are what make a legal system *legitimate*. Accordingly, at a given point of time, having found an absence, or low levels, of such essential criteria, they proceed to classify the regime as one in 'crisis'.

Ever since its original invocation in the early 2000s, when the phrase 'legitimacy crisis' first entered mainstream scholarly discourse, it has been oft-repeated and almost unquestioningly reproduced, but without a useful explanation in terms of what it signifies. As a result, it is still unclear whether the term 'crisis' denotes a certain normative quality, or some socially recognized standard of egregiousness, or even a level of functional degradation that the regime has purportedly reached – or whether it signifies that public perceptions of illegitimacy have crossed a critical threshold of diffusion.

In effect, analysts of illegitimacy either fail – or are unwilling – to engage with a critical assessment of the underlying *gravity* or *scale* of the problem. Thus, the question of whether the alleged legitimacy gaps are minor or major – and if major, *how* major – is left largely unaddressed. Without the employment of a proper framework to evaluate the *magnitude* and/or *pervasiveness* of such legitimacy concerns, denoting the aggregate status of the regime as one of 'crisis' appears to be arbitrary, if not premature.

Further, scholarship and rising consensus appear to uncritically assume that the global backlash against ISDS has arisen *because* of the so-called legitimacy 'crisis' (and *not* for any other reason). Accordingly, what must be investigated is whether some hitherto unexplored or under-emphasised factor is separately causing *both* backlash and the perception of a 'crisis'.

H. Narratives

There exist two main narratives with respect to the backlash and the legitimacy crisis.

The first ("**Narrative 1**") suggests that the backlash arose *because* of a pre-existing legitimacy crisis. Narrative 1 relies on normative legitimacy, where the objective standards of ISDS had purportedly grown so compromised on account of major legitimacy gaps that: (i) a crisis, and then, (ii) a corresponding backlash, inevitably followed (in that order).

On the other hand, the second narrative ("**Narrative 2**") suggests as follows:

- There are major legitimacy defects in the way ISDS is structured and in the way it operates;
- On account of such identified legitimacy defects, there has been a global backlash;
- Now that the backlash has reached a critical mass, there exists a legitimacy crisis in the ISDS regime.

This is a different narrative from the one described earlier. Narrative 2 relies more on social legitimacy. In this formulation, the legitimacy gaps in the ISDS regime first led to a backlash, which, upon reaching a certain level of scale and/or diffusion, has now brought a legitimacy crisis in its wake. It is this Narrative 2 that my proposed analytical framework aims to analyze.

I. Legitimation and Delegitimation

Certain actors may deliberately seek to make an institution appear legitimate, *e.g.*, by spreading awareness about, or bolstering favourable opinions related to, a contested reality about whether an institution's rule is being exercised appropriately: I call this legitimation. Conversely, where actors seek to undermine the legitimacy of an institution by challenging the appropriateness of its exercise of authority, I call it delegitimation.

An important implication of the social embeddedness of legitimacy is the possibility for motivated actors to affect others' legitimacy beliefs. From this perspective, social construction opens up spaces for strategic actors to exploit prevailing norms in attempts to shape or change legitimacy beliefs. While authority holders often seek to strengthen the legitimacy of their own exercise of power by invoking common understandings, contestants challenge the same exercise of authority by uncovering unfair practices and outcomes or by pointing to alternative social norms.[47]

[47] John W. Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) American Journal of Sociology 340-363; Blake E. Ashforth and Barrie W. Gibbs, 'The double-edge of Organizational Legitimation' (1990) 1(2) Organization Science 177-194.

Thus, proponents of ISDS may engage in practices that serve to cultivate beliefs in the institution's legitimacy. For instance, supporters of ISDS maintain that IIAs contributed to the creation of global governance regimes ('**GGRs**'), as constituted through legal rules and institutions to enhance compliance therewith,[48] or in other words, towards the strengthening of the rule of law at the international level.[49] Importantly, they also maintain that ISDS led to the 'de-politicization' of disputes and reduced the risk that foreign investment inherently brings with it.[50] While a large number of empirical analyses, conducted with a view to assessing the impact of IIAs on FDI flows, have come to diverging conclusions,[51] the majority of those have indicated that there is indeed a positive correlation between IIAs and foreign investment.[52] Regime defenders further emphasize that ISDS has not just contributed to the functioning of global markets, but enabled economic growth and human development as well, including across developing countries.[53]

Meanwhile, opponents of ISDS engage in delegitimation practices that aim at undermining perceptions about whether the authority of ISDS is being appropriately exercised. On the one hand, such legitimacy concerns are articulated in the language of scholarly discourse, which tends to be normative in nature. On the other hand, concerns have also been expressed in light of empirical claims which suggest that a critical mass of stakeholders have withdrawn their

[48] Thomas W Wälde, 'The Specific Nature of Investment Arbitration' in Philippe Kahn and Thomas W Wälde (eds), *New Aspects of International Investment Law / Les aspects nouveaux du droit des investissements internationaux* (Brill Online Reference Works 2007) 43, 70; Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law' in Albert Jan van den Berg (ed), *50 Years of the New York Convention, ICCA Congress Series 14* (Kluwer Law International 2010) 5–68.

[49] Thomas W Wälde, Investment Arbitration and Sustainable Development: Good Intentions - or Effective Results?' (2006) 3(5) Transnational Dispute Management 2.

[50] Ibrahim FI Shihata (1986) Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, ICSID Review – Foreign Investment Law Journal 1-25.

[51] UNCTAD (2014), *The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014* (International Investment Agreement Issues Note 2014) <https://investmentpolicy.unctad.org/uploaded-files/document/unctad-web-diae-pcb-2014-Sep%2024.pdf> accessed 11 September 2023.

[52] *See for instance:* Peter Egger & Michael Pfaffermayr, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment' (2004) 32(4) Journal of Comparative Economics 788–804; Arjan Lejour and Maria Salfi, 'The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment' CPB Netherlands Bureau for Economic Policy Analysis Discussion Paper No 298, 2015; Eric Neumayer and Laura Spess, 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33(10) World Development 1567–1585.

[53] See Stephan W Schill, 'Enhancing the Legitimacy of International Investment Law: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52(1) Virginia Journal of International Law 57–102.

support for the regime. It was in this context that Wellhausen[54] took up the task of measuring whether ISDS leads to exit by the claimant investor (*i.e.*, ceasing its investment-related business and/or operations in the host state). Contrary to what is widely believed to be true, she found that at least 31% of claimant investors "reinvest," *i.e.*, the claimant investor retains investment in the host state during and after the ISDS process, or exits briefly but later returns to the host state. This 31% reinvestment record[55] comprises 222 instances among an aggregate of 729 ISDS arbitrations (filed from 1990 to 2014, assessed as of December 2015).[56] This evidence seeks to demonstrate that IIL more or less operates in ways consistent with standard expectations from a legal regime. For instance, reinvestment provides proof that, rather than precluding a further relationship, formal adjudication under ISDS allows the parties to coordinate on adjusting their relationship in the wake of the host state's (perceived) adverse action.

Nevertheless, critics[57] challenge the justifications put forth by supporters of the IIL regime – where the latter suggest that ISDS is legitimate because politically independent and democratically organized nations gave their consent to the underlying IIAs in their respective sovereign capacities.[58] According to regime supporters, this not only makes the underlying treaties valid instruments of international law, but it also affirms the sovereignty, political capacity, and bargaining strategies of signatory states. However, critics claim that neither did governments test the anticipated benefits of investment treaties before they signed them, nor did they fully appreciate the risks of ISDS by carrying out cost-benefit analyses prior to committing themselves to the system. Thus, these critics attack the foundations of sovereign consent-giving practices by qualifying such acts of consent with stringent knowledge and due diligence qualifiers.

[54] Rachel L Wellhausen, 'International investment law and foreign direct reinvestment' (2019) 73(4) International Organization 839-858.

[55] Reinvestment occurs if there is definitive evidence that the claimant investor exits but returns to the host state by December 2015; stays in the host state during and for at least one year after the ISDS arbitration; or the claimant investor is operating in the host state as of December 2015 (whether or not what happens in the interim is known). Reinvestment also occurs if there is evidence that a subsidiary of the claimant fits these criteria because continuing operations through a differently named subsidiary might be a political risk-mitigation strategy that enables the one-time claimant to reinvest without highlighting its contentious history.

[56] Of the 729 ISDS arbitrations in the data, 592 were complete by December 2015 and the outcome was public for 574. Of these, settlement occurred in 35 percent, the investor won in 30 percent, and the state won in 35 percent.

[57] *See for example*: Van Harten (n 45).

[58] This is a kind of *input* legitimacy: *i.e.*, the regime is perceived to be legitimate because the *process* by which it was created, and continues to operate, is based on consent among independent states.

Further, while scholars such as Salacuse and Sullivan talk about the 'grand' bargain[59] between developing and developed states in terms of a promise to protect investments in return for the prospect of more capital, critics speak of the same bargain in terms of being an 'unconscionable' one. Thus, both legitimation and delegitimation practices are of interest because of their effects on corresponding legitimacy beliefs among relevant audiences.

Legitimation and delegitimation practices could also be viewed through the lens of intent. Such practices are always communicative, in the sense of conveying information about a regime through a relatable narrative, which is ultimately intended for public consumption with desired outcomes. More specifically, legitimation and delegitimation practices may be discursive or behavioural, directed at constituencies or observers, and sincere or manipulative in their intent.[60] Often, discursive and behavioural practices related to legitimation or delegitimation go together. An example would be the introduction of a particular set of institutional reforms intended to boost the institution's legitimacy, such as in respect of transparency, panel selection and appointment, arbitral codes of conduct, etc., which, in addition to being implemented, are aggressively publicized with all available means among relevant audiences. On the other hand, governments, scholars, and large sections of civil society have challenged the legitimacy of ISDS on the ground[61] that it does not account for disparities in economic conditions among member states.[62] For apparently such reasons, Bolivia in 2007, Ecuador in 2010, and Venezuela in 2012, formally withdrew from the main institutional framework under ISDS, while several states have terminated treaties and/or renegotiated new IIAs with the purported

[59] Jeswald W Salacuse and Nicholas P Sullivan, 'Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain' (2005) 46 *Harvard International Law Journal* 67.
[60] Jens Steffek, 'The legitimation of international governance: A discourse approach' (2003) 9(2) European Journal of International Relations 249-275.
[61] ISDS proceedings can be kept fully confidential — if both parties so wish — even in cases where the dispute involves matters of public interest. This applies to cases brought under arbitration rules other than ICSID (only ICSID keeps a public registry of arbitrations), and that do not involve either Canada or the United States, each of which makes publicly available detailed information about all cases brought against them. It is indicative that of the 85 cases under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration (PCA), only 18 were public (as of end 2012). However, the transparency of the system has improved substantially in recent times pursuant to several efforts in this regard. *See, for example*, the 2006 amendments to the ICSID Arbitration Rules and the 2013 rules on transparency in ISDS proceedings adopted by UNCITRAL. In the case of UNCITRAL, the new rules have a limited effect in that they are designed to apply not to all future arbitrations but only to arbitrations under future IIAs. At the same time, UNCITRAL instructed the relevant working group to consider the possibility of an international convention that would extend the new UNCITRAL transparency rules to ISDS proceedings under *existing* IIAs — in respect of those States who join the convention.
[62] *See for example*: BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 European Journal of International Law 1, 7 (arguing that the subjection of national law to international standards is an attempt to remove local barriers to capital accumulation); BS Chimni, 'Marxism and International Law' (1999) 337 Economic and Political Weekly.

aim of reducing exposure to ISDS.[63] Other states have revised their model agreements or sought to reform ISDS provisions in new treaties,[64] while some have altogether dispensed with the inclusion of ISDS in new IIAs.[65]

J. Withdrawal of Support (Lack of Social Legitimacy)

A range of state initiatives to reform, address, or recalibrate their engagement with the ISDS regime have been cited as evidence of a backlash. However, such state actions may have primarily been taken in response to shifting circumstances in the global economic order. Further, the successful implementation of several ISDS reforms reinforces the argument that the backlash may not be about ISDS at all, but about globalization generally. If the backlash was, in fact, stemming only from ISDS, it would be reasonable to expect that it would decrease as the regime adopted transparency measures and other reforms. Instead, the opposite has happened: the backlash has only *increased* along with reform efforts.[66] Accordingly, state responses to ISDS may not represent indications of a backlash, but instead may involve deliberate strategies in response to shifting circumstances. In this regard, states have been pursuing a process of modification, recalibration, and limitation in respect of ISDS in response to arbitral jurisprudence and their own changing risk profiles.[67]

In addition, there are very few systematic empirical surveys[68] that ascertain, on a case-by-case basis (*i.e.*, checking for discrete state actions at an individual state-level), the likelihood of a

[63] Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues: Unsettled Issues* (Kluwer Law International BV 2017).

[64] Consistent with past trends, reforming ISDS remained a priority in IIAs signed and/or negotiated during 2020-21. Also following the trend from previous years, the preservation of states' regulatory space was the most frequent area of IIA reform. Thus, the most significant developments related to IIAs in 2020 and 2021 included several continued efforts to reform old IIAs with the aim of minimizing the risk of ISDS proceedings, especially in light of certain obvious national policy responses taken in the context of the COVID-19 pandemic. Most IIAs contained at least one type of limitation in respect of ISDS, and some chose to omit ISDS altogether. Various ways of limiting access to ISDS commonly observed in IIAs concluded in 2020 involved limiting treaty provisions subject to ISDS, excluding certain broader policy areas from the scope of ISDS, restricting the time-period to submit claims, as well as omitting the ISDS mechanism altogether.

[65] *See for instance:* United States-Australia Free Trade Agreement (United States of America-Australia) (18 May 2004), Article 11.16.

[66] Daniel S Meyers, 'In Defense of the International Treaty Arbitration System' (2008) 31 Houston Journal of International Law 47, 80.

[67] Jurgen Kurtz, 'Building Legitimacy Through Interpretation: Investor-State Arbitration: On Consistency, Coherence and the Identification of Applicable Law' in Zachary Douglas, Joost Pauwelyn, and Jorge Vinuales (eds), *The Foundations of International Investment Law: Bridging Theory into Practice* (Oxford University Press 2014).

[68] But see some recent work in this regard, for example: Alexander Thompson, Tomer Broude, and Yoram Z Haftel, 'Once bitten, twice shy? Investment disputes, state sovereignty, and change in treaty design' (2019) 73(4) International Organization 859-880. (Using new data on the degree to which IIA provisions restrict state regulatory space (SRS), the authors claim to provide the 'first' systematic investigation into the effect of ISDS

particular ISDS claim against a state leading it to relibrate its terms of engagement with the regime. Of course, the aggregate phenomenon of several states terminating treaties within a brief timespan may be attributable to a contagion effect, including the possibility that states learn from the adverse experiences of each other, *i.e.*, they pre-emptively re-balance their treaty commitments without waiting for potential 'adversities' to befall them directly.

Among the few studies that do explore this question, some scholars have argued that states renegotiate when they 'learn' new information about the legal and political consequences of their treaty commitments, and such learning is most likely to take place when states are involved in ISDS cases. Employing an original data set on renegotiated BITs, these scholars find robust empirical support for the 'learning' argument.[69]

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experiences on state decisions to adjust their treaties. According to them, the empirical analysis indicates that exposure to investment claims leads either to the renegotiation of IIAs in the direction of greater SRS or to their termination. This effect varies, however, with the nature of involvement in ISDS and with respect to different treaty provisions.); For discrete, anecdotal accounts of certain states, *see:* Tania Voon and Andrew D Mitchell, 'Denunciation, termination and survival: the interplay of treaty law and international investment law' (2016) 31(2) ICSID Review-Foreign Investment Law Journal 413-433

> "*Three contracting States have denounced the ICSID Convention by giving six months' notice (…): Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012. These countries have all faced ICSID claims and have also unilaterally terminated BITs." Similarly, "Italy withdrew from the Energy Charter Treaty by notice given on 31 December 2014, with effect from 1 January 2016 (…) Italy is facing claims under the Energy Charter Treaty (including two brought during the notice period and one before the notice was issued), although it cited membership fees as its reason for withdrawing.*"

Further,

> "*India's development of a new model BIT stems from a period of critical review of its BIT program. The government commenced this period of review in 2013, in large part due to the increased number of challenges it has faced under investor-State dispute settlement (ISDS), including for example in the successful claim White Industries v India. India may also have been influenced to adopt a new approach to BITs by the conduct of other States, such as South Africa and Indonesia*."

In that regard,

> "*In mid-2009, the South African Department of Trade and Industry issued a draft 'policy review document' containing sharp critiques of both the content of the country's BITs and the omission of risk assessments prior to concluding them, and indicating the conduct of a review of the overarching BIT program, particularly in view of ISDS claims.*"

Similarly, "*Indonesia announced in 2014 its intention to terminate its more than 60 BITs including ISDS mechanisms. This decision, similarly to that of India, followed on from continuing ISDS claims against Indonesia, including twin disputes brought by a UK mining company and its Australian subsidiary."* In sum*, "These developments in South Africa and Indonesia in particular provide examples of significant host State dissatisfaction with the investment treaty system and, more specifically, ISDS. They show a growing willingness of some States to dissociate from the investment regime in response to unwelcome ISDS claims and awards.*".

[69] Yoram Z Haftel and Alexander Thompson, 'When do states renegotiate investment agreements? The impact of arbitration' (2018) 13(1) The Review of International Organizations 25-48.

In general, a look at these results suggests three important conclusions. *First*, states are especially responsive to their experience as respondents to investment claims. As their exposure to such claims increases, they appear more likely to seek greater regulatory space — that is, they seek to reassert their sovereignty through the renegotiation or recalibration of IIAs.

Second, the models that include terminated IIAs suggest that in the aftermath of an ISDS claim, states often prefer to terminate entire treaties rather adjust their content. It is possible that once sued, terminating IIAs with ISDS provisions appears to be the most appropriate response for states in the short run to ward off future claims and appease domestic constituents. It is also possible that such states eventually 'learn' to sign new IIAs with modified provisions, including with respect to ISDS. Hence, the incidence of treaty terminations should not be construed as a final step with respect to a state's response to ISDS claims, but rather, as an immediate, intermediate, and perhaps ill-informed, step in the right direction – whether it involves achieving a balance between attracting FDI and protecting sovereign regulatory space, or otherwise.

Third, the models that exclude terminated IIAs indicate that even in the aftermath of ISDS, parties to treaty renegotiations appear relatively content with ISDS procedures but pursue greater regulatory space in the substantive rules instead.

Accordingly, these findings provide a more nuanced perspective. They show that the regime provides enough discretionary space for states to recalibrate a variety of aspects with respect to ISDS that address their respective sovereignty concerns. In addition, the results indicate that when states renegotiate IIAs, they focus more on the substantive rules than on changing ISDS provisions. This suggests that governments are less concerned about the institutional arrangements for settling disputes than with recalibrating the protections they guarantee.

These findings are consistent with the few rare observations[70] in recent literature which suggest that states have been reluctant to abandon investor-state arbitration – despite widespread complaints about its legitimacy. This reluctance arguably stems from the justified desire of states to attract FDI, coupled with their belief that unless foreign investors are provided enough

[70] Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press 2018) Ch 8.

protection upfront – including the availability of international dispute-settlement – foreign capital will move to other states instead. Similarly, such findings corroborate the occasional works in recent literature which suggest that, rather than being fundamentally flawed, ISDS requires modest reform to enhance its effectiveness further.[71]

K. Analytical Framework

Given that legitimation and delegitimation strategies are actively involved, I suggest that a framework of analysis must be designed to 'measure' legitimacy in the context of such contestation. This framework should go beyond the limitations of existing analytical templates, where legitimacy and illegitimacy are theorized only as static, binary configurations. Instead, the framework I recommend may be used to 'measure' legitimacy in a dynamic, politicized, and fluid setting, where a regime's legitimacy can be explored along a spectrum, including by critically examining power relations among relevant stakeholders using IR theory. Thus, the framework should factor in the global dynamics of delegitimation practices which collectively produce the final outcome – or more correctly – which combine to make legitimacy audiences perceive a regime to be more or less legitimate at a given point of time.

Through this exercise, I reformulate existing understandings of legitimacy in a way that accounts for my argument that the idea of legitimacy is not just an intersubjective phenomenon, but which, in addition, is itself in constant flux and often under contest. This is because legitimacy is ultimately determined by influential stakeholders using standards that keep changing over time, especially where such stakeholders remain susceptible to outside influences, new experiences and learning, as well as individual priors which are often unique to certain cultural, physical, and circumstantial settings. In addition, since the underlying legitimating/delegitimating forces may be diverse and conflicting, my proposed framework needs to be applied in a manner that accounts for the relative power of states, as well as their respective strategies and motivations.

IV. A New Research Agenda

On account of legitimacy contestations with respect to ISDS, the overarching task is to ascertain whether ISDS is *really* suffering from a legitimacy crisis (or not). In this regard, I approach legitimacy and legitimation/delegitimation strategies as observable phenomena. My

[71] Wellhausen (n 54).

interest primarily lies with legitimacy in the sociological sense rather than the purely normative. The *perception* of legitimacy matters because, in a democratic era, international frameworks can be successful only if they are viewed as legitimate by democratic publics.[72]

While legitimacy contestations are common in global governance, they have been insufficiently recognized in the literature. In this paper, legitimation and delegitimation are conceptualized as processes of justification which are intended to shape beliefs about whether an international institution's authority is appropriately exercised.

Accordingly, it is important to understand the subjective implications of legitimacy, as variously perceived and evaluated by a diverse set of stakeholders. The significance of a subjective analysis of ISDS at the level of stakeholder perceptions stems from the fact that certain legitimacy deficits may appear to arise on account of reasons which are not capable of being reflected through the use of frameworks based on purely normative or objective considerations.

A. Significance of the Research Agenda

The unique challenges of international economic regimes have led scholars to examine the legitimacy of these regimes in particular, including with respect to investor-state arbitral tribunals.[73] Not since the Second World War has globalisation faced such existential questions as it does today. Crises and recessions have prompted drastic state measures in response. As a result, important multilateral frameworks[74] and mega-regional economic arrangements have collapsed,[75] bringing the continued legitimacy of such regimes into public focus.

As international economic regimes have increasingly gained authority over subjects (including states and their respective citizenries), the procedural and performance standards which they

[72] A Buchanan and R O Keohane, 'The legitimacy of global governance institutions' (2006) 20(4) Ethics & International Affairs 405–437.
[73] Charles N Brower, Charles H. Brower II, and Jeremy K. Sharpe, 'The coming crisis in the global adjudication system' (2003) 19(4) Arbitration International.
[74] *E.g.*, Brexit and NAFTA. *See* David Parkins, 'The rules-based system is in grave danger' (*The Economist*, 8 March 2018) <www.economist.com/leaders/2018/03/08/the-rules-based-system-is-in-grave-danger> accessed 20 December 2022. *Also, see generally*: Robin Niblett, 'Liberalism in Retreat' (*Foreign Affairs*, 12 December 2016) <www.foreignaffairs.com/world/liberalism-retreat> accessed 20 December 2022.
[75] Such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and the Investment Partnership (TTIP). *See* Larry Elliot, 'Coronavirus putting world on track for new Great Depression, says WTO' (*The Guardian*, 8 April 2020) <www.theguardian.com/world/2020/apr/08/coronavirus-putting-world-on-track-for-new-great-depression-says-who> accessed 20 December.

now have to meet in order to remain socially legitimate have increased. Accordingly, efforts to legitimize or delegitimize such regimes invoke these standards to affect audiences' legitimacy beliefs either positively or negatively, depending upon the motivations and aims of the respective mobilizers of opinion. Thus, what needs to be examined is the relationship between a regime's features, the legitimation/delegitimation processes involved, and the corresponding flux in the legitimacy beliefs of their respective audiences.

Broadly, the intended contribution of my work is three-fold. *First*, I suggest a revised framework for studying legitimacy and legitimation/delegitimation in respect of global governance. The framework conceptualizes legitimacy as a dependent variable and legitimation/delegitimation as a mediating variable, where both variables are affected by the *perceived* or *projected* properties of a given regime. *Second*, I consider public opinion, political behaviour, and strategic communication to analyze both legitimacy and (de)legitimation. *Third*, I look at legitimacy issues and (de)legitimation processes in a global context using IR theory, noting variations in power among and between states – as well as in respect of alliances/coalitions within them.

B. Why Must We Care About '*Legitimacy*'?

In national contexts, judicial legitimacy is typically linked to the legal authority of a state. However, in the absence of a world government, international judicial forums require something else to establish support. Accordingly, the power of legitimacy is defined by a tribunal's ability to command acceptance from the wider community of publics and states so as to render force unnecessary.[76]

An institution's legitimacy becomes especially salient when relevant stakeholders *disapprove* of its actions. In other words, institutions do not need to rely on legitimacy when stakeholders are content with their specific decisions. Legitimacy becomes crucial, however, in the context of dissatisfaction, when actors object to something the institution has or has not done.[77] In the context of judicial legitimacy, this builds on the notion that tribunals rely on 'diffuse support'—

[76] Stefan Mandelbaum, 'The Legitimacy of Arbitral Reasoning: On Authority and Authorisation in International Investment Dispute Settlement' (2020) Czech and Central European Yearbook of Arbitration.
[77] J L Sullivan, J Piereson and G E Marcus, *Political Tolerance and American Democracy* (University of Chicago Press 1993).

i.e., public trust or loyalty,[78] as opposed to case-specific assessments of discrete decisions, based on self-interest or utility-maximization.[79]

In the international sphere, when adjudication is preferable to other modes of dispute-settlement, the question of *what* makes a tribunal legitimate becomes additionally important. The increased delegation of international disputes to specialised adjudicative bodies seems to indicate a preference for resolving disputes legally rather than through interstate conflict or negotiations.[80]

Although various authors have discussed the legitimacy of non-adjudicative global institutions (as well as that of domestic courts),[81] the literature lacks any meaningful attempt to unpack the same in respect of international judicial bodies.[82] Attempting to define, identify, and analyse legitimacy challenges that international tribunals face is useful for the purpose of remedying extant flaws, and further, could inform novel ways of understanding the specific factors which make an international adjudicatory institution socially acceptable.

Since certain global governance institutions,[83] such as ISDS, are similar to governments when they issue decisions and impose consequences for (non)compliance, determining whether such institutions are *perceived* as legitimate remains an urgent matter. If such institutions lack legitimacy, their claims to authority may be compromised, and in turn, public support may wane over time, which may ultimately render them ineffectual. While most recent scholarship

[78] JL Gibson, GA Caldeira and VA Baird, 'On The Legitimacy of National High Courts' (1998) 92 American Political Science Review 343.
[79] D Easton, *A Systems Analysis of Political Life* (Jon Wiley and Sons Inc 1979).
[80] CP Romano, 'The shift from the consensual to the compulsory paradigm in international adjudication: elements for a theory of consent' (2006) 39 New York University Journal of International Law 797-798.
[81] *See for example:* A Hyde, 'The concept of legitimation in the sociology of law' (1983) Wisconsin Law Review 379; HR Fallon Jr, 'Legitimacy and the Constitution' (2004) 118 Harvard Law Review 1787. (Pointing out that, even in the context of U.S. constitutional debate, '*[t]hose who appeal to legitimacy frequently fail to explain what they mean or the criteria that they employ*'); JL Gibson, 'Understandings of justice: Institutional legitimacy, procedural justice, and political tolerance' (1989) Law and Society Review 469-496. (Noting the existence of 'scholarly folklore' in the United States domestic context that the 'special ability' of the United States Supreme Court to legitimise government policies and actions is crucial to the political system because legitimacy engenders voluntary compliance with law by citizens).
[82] *See* D Bodansky, 'The legitimacy of international governance: a coming challenge for international environmental law?' (1993) 93(3) American Journal of International Law 600. (Noting that "*[w]ork on the emerging problem of international legitimacy is only just beginning"* and that there are relatively few discussions of legitimacy by international lawyers).
[83] A large and growing literature exists on global governance. *See for example:* Nye & Donahue (2000); McGrew & Held (2002); Hart & Prakash (2003).

on legitimacy discusses its theoretical implications,[84] including those applicable to international institutions generally,[85] very little is known about the factors that *actually* affect the making of legitimacy assessments by relevant stakeholders, as well as in respect of *who* these stakeholders are, *which* standards they use, and whether such standards make any difference in terms of the way a regime functions. Most studies assume that stakeholders use certain foundational parameters to make legitimacy assessments. Accordingly, these studies posit that improving such broad standards will help legitimise an international institution. However, more critical work is needed on the *perceptions* about legitimacy, as well as the causes and effects of such perceptions. Accordingly, social assessments of legitimacy based on perceptions need to be studied through a uniform and internally-consistent paradigm, rather than relying on pre-identified and/or objective elements. Also, an appropriate framework of assessment must consider whether legitimacy perceptions are uniform across time, or if they vary depending *inter alia* on (1) an institution's sphere of influence; (2) the kind of authority it exercises; (3) changing social dynamics and norms; as well as (4) changing power relations and interests. For instance, the probability of contestation may increase when an institution's decisions have a more public impact, affecting a wider set of stakeholders. Thus, once certain groups start experiencing an increase in the level of influence of ISDS decisions, they may begin to question its standards of appropriateness afresh. Based on how powerful these groups are, the quality of legitimacy contestation may undergo significant changes.

C. Why Must We Focus on '*Social*' Legitimacy?

Since meanings of legitimacy often tend to be subjective, attempts to define legitimacy are highly susceptible to logical fallacies. Further, a situation has now arisen where critics and defenders of ISDS talk past each other. More specifically, they do so because each group addresses a different facet of legitimacy and thereby assesses ISDS exclusively through the prism of their particular concerns. However, conclusions based on normative legitimacy alone may suggest no *prima facie* evidence of a legitimacy crisis.

[84] J Steffek, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9 European Journal of International Relations 249–75; and AI Applbaum, 'Legitimacy without the Duty to Obey' (2010) 38(3) Philosophy and Public Affairs 215-239.

[85] See S Bernstein, 'Legitimacy in Global Environmental Governance' (2005) 1 Journal of International Law and International Relations 139–66; Buchanan and Keohane (n 72); and EC Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115(7) Yale Law Journal 1490–1562.

With the rise of global governance, interest in legitimacy has broadened. Yet, most research has remained normative in orientation. Drawing on political theory, however, scholars are increasingly challenging the narrowly-constructed normative standards which are typically employed while evaluating the legitimacy of international regimes, and have offered alternative social parameters instead.[86] Accordingly, analyzing the social legitimacy of global regimes has emerged as a distinct topic of research, including with respect to situations where scholars address questions about how such regimes are legitimized or delegitimized through practices aimed at boosting or undermining their legitimacy.[87]

V. WHAT ELEMENTS DOES THE PROPOSED FRAMEWORK INVOLVE?

The idea of legitimacy is both constructed and politicised. Such politicisation can take different forms, including state responses, civil society campaigns, public protests, academic criticism, populist and epistemic mobilisations, or even critical media coverage, and may involve different actors at the same time. Therefore, it is important to identify the wider legitimation community,[88] composed of groups that pressurise the state to act on its behalf. These actors, whose perceptions matter, may either raise concerns or defend the institutional *status quo*.[89] Within this complex, certain actors may emerge especially relevant, and their level of influence may increase over time.

Accordingly, using central constructs around normative and sociological legitimacy, and building on existing templates that analyse trajectories of legitimacy crises, I provide a modified framework, as presented below.

A. Elements and Stages of a 'Legitimacy Crisis'

A legitimacy *crisis* may emerge when certain conditions are met, such as (in chronological order): (i) the existence of a legitimacy gap which has, or is perceived to have, a broad social impact; (ii) politicisation of this gap through a relevant group of actors beyond a tolerance

[86] *See for example:* Dahl 1999; Zürn 2000; Held and Koenig-Archibugi 2005; Buchanan and Keohane (n 72).
[87] Steffek 2003; Bernstein 2011; Brassett and Tsingou 2011; Zaum 2013; Binder and Heupel 2015.
[88] '*Legitimation*' is a sociological concept – the idea that an institution builds legitimacy over time, through its practice and the discourse surrounding that practice; Ian Johnstone, *The Power Of Deliberation: International Law, Politics and Organizations*. (Oxford University Press 2011).
[89] J Symons, 'The legitimation of international organisations: Examining The Identity of the Communities that Grant Legitimacy' (2011) 37(5) Review of International Studies 2557–2583; D Zaum, *Legitimating International Organisations* (Oxford University Press 2013); D Zaum, 'Legitimacy' In JK Cogan, I Hurd, and I Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016) 1107–1025.

threshold; (iii) a 'critical juncture', represented through a spectacular or discontinuous event, like a war, recession, economic crisis, public health emergency, changing power and economic relations, etc.; and finally (iv) espousal of the politicized position by a powerful state, lobby, group, or coalition – or by a critical mass of the same, whether for principled or motivated reasons. Under such circumstances, governments that participate in the regime may find themselves under pressure to respond. Since a total 'exit' is costly, states usually exercise 'voice' options and take steps towards reform.[90] If such reforms respond positively to altered legitimacy demands, the reformed institution may re-establish its authority. If, however, the reforms fail or are merely symbolic, the problem remains unresolved.

In this regard, Suchman[91] suggests that institutional legitimacy demands a level of congruence between the purpose, procedures, and performance of an institution. Pursuant to this logic, there are two ways in which legitimacy gaps may open:[92] *firstly*, an institution may change to such an extent that it no longer meets social standards. This may occur when the institution uses its discretion to expand authority in a way not originally intended by actors that bestowed such authority in the first place. *Secondly*, an institution may fail to keep up with changing standards of appropriateness shared by relevant actors.[93]

However, the mere existence of legitimacy gaps may not amount to a perceived deficit overall. A well-established institution may continue to operate with considerable legitimacy gaps as long as such gaps are not critically articulated and/or politicized by powerful actors. In other words, any regime or institutional mechanism is bound to have design or performance flaws. However, such flaws need not necessarily be fatal. Thus, a regime can exist and continue to successfully exercise authority despite having minor defects or face negative reviews by audiences from time to time, and no legitimacy issues may come up – unless: (i) the regime issues a critical mass of unpopular decisions and/or does so with greater frequency than in a previous reference period; (ii) these unpopular decisions produce a major public impact; (iii)

[90] Shuping Li and Shen Wei, 'Legitimacy Crisis and the ISDS Reform in a Political Economy Context' (2022) 15 Journal of East Asia and International Law 31-60.
[91] A thorough review of the sociological literature on organisational legitimacy can be found in MC Suchman, Managing legitimacy: Strategic and institutional approaches (1995) 20(3) Academy of Management Review71.
[92] T Lenz and LA Viola, 'Legitimacy and Institutional Change in International Organisations: A Cognitive Approach' (2017) 43(5) Review of International Studies 939-961; MD Stephen 'Legitimacy deficits of International Organizations: Design, Drift, and Decoupling at the UN Security Council' (2018) 31(1)Cambridge Review of International Affairs 96–121.
[93] M Zürn, *A Theory of Global Governance: Authority, Legitimacy, And Contestation* (Oxford University Press 2018) 77–84.

further, such unpopular decisions and their corresponding impacts are publicized to a sufficient degree; and most importantly, (iv) this contestation is then supported by a relevant power centre – often in the wake of a watershed moment, where a key actor (or a coalition comprising, or led by, key actors) is typically connected with the regime in a significant way.

A backlash itself may lead to updated legitimacy assessments.[94] Under such circumstances, an ongoing toleration or denial of legitimacy gaps could prove costly, threatening a government's own legitimacy. Suchman suggests that the risk of negative contagion may drive states to disassociate themselves from a troubled regime and engage in ritualistic withdrawals. A mass of such negative responses, when critical in terms of volume and/or influence, may consolidate a backlash further. This situation may finally usher in a 'legitimacy crisis', defined by Reus-Smit[95] as a critical turning point when the decline in an institution's legitimacy culminates in complete disempowerment or replacement.

Pursuant to this modified framework, the trajectory of legitimacy concerns related to ISDS can be examined.

VI. APPLYING THE FRAMEWORK TO ISDS

Some of the first serious academic invocations of a 'crisis' came from insiders of the ISDS regime: in June 2002, Judge Brower[96] pre-empted a 'coming crisis' stating,[97] *inter alia*, that "[A] crisis clearly is upon us to a significant degree. Whether it will sink the system, however, is debatable." Brower concluded that certain key characteristics of adjudication, as well as its allied perceptions of legitimacy, were "too often spectacularly absent" in the regime. Similarly, Susan Franck first wrote about a 'looming legitimacy crisis' in 2004-05,[98] focusing on the mismatch between private and public law, as well as the legacy of inconsistent jurisprudence that later came to permeate much of the critical ISDS literature. Both commentators, however, modified their respective stances in response to the public backlash that followed. Writing with Schill in 2009, Brower noted:

[94] Lenz and Viola (n 63).
[95] C Reus-Smit, 'International crises of legitimacy' (2007) 44(2-3) International Politics 172.
[96] Judge of the Iran-United States Claims Tribunal.
[97] CN Brower, 'A crisis of legitimacy' (2002) 7 National Law Journal 1-3; Brower and others (n 24).
[98] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73(4) Fordham Law Review 1521-1626; Afilalo (n 14).

> "*[O]verall, states seem to accept that international investment treaties and investment-treaty arbitration are legitimate, even if they occasionally disagree with some of the decisions…They sometimes react negatively to such decisions...Such reactions by states should, however, not be read as casting doubt on the legitimacy of the entire system…The more drastic reactions…are a phenomenon that seems to be limited to a minority of states and can often be explained more by the countries' internal political situation rather than a more widespread view of a lack of legitimacy...Consequently, there is no reason to view the isolated opposition of some states…as an indicator of a more universal discontent or a firm basis upon which to question the legitimacy of this field of international law…*"[99]

Similarly, Franck later argued that unexplained variances in judicial outcomes in IIL do *not* result from distortions in the ISDS framework itself, but in wider economic transitions globally.[100]

However, with ISDS claims increasing manifold in the last 20 years, much of recent scholarship has focused on judicial outcomes and stakeholder responses to such outcomes.[101] This shift in scholarship indicates a transition from earlier legitimacy discourses to an analysis of the backlash itself[102] (or a conflation of the two).

[99] CN Brower and SW Schill 'Is Arbitration a Threat or Boon to the Legitimacy of International Investment Law' (2009) 9(2) Chicago Journal of International Law 471-498.
[100] SD Franck 'Conflating Politics and Development: Examining Investment Treaty Arbitration Outcomes'(2014) 55 Virginia Journal of International Law 13.
[101] T Samples, 'Winning and Losing in Investor–State Dispute Settlement' (2019) 56(1) American Business Law Journal, 115-175; K Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?' (2017) 71(3) International Organization 559-583; Y Haftel and A Thompson, 'When do States Renegotiate Investment Agreements? The Impact of Arbitration' (2018) 13(1) Review of International Organisations 25-48.
[102] G Dimitropoulos 'The Conditions for Reform: a Typology of "Backlash" and Lessons for Reform in International Investment Law and Arbitration' (2020) 18(3) The Law and Practice of International Courts and Tribunals, 416-435.

Further, the post-2010 period saw a marked increase in publications mentioning 'legitimacy crisis,' as well as globally prominent (and controversial) cases against Australia,[103] Uruguay,[104] Germany,[105] as well as an $18 billion case against Ecuador,[106] some of which triggered partial exit strategies.[107] In 2014-2015, the discourse on ISDS legitimacy moved into the public sphere, while a number of high profile awards were rendered against Venezuela, [108] Zimbabwe,[109] Canada[110] and Russia.[111] The number of new cases grew, including more than 45 claims (2013–2016) against EU member states.[112] Certain states continued to terminate and/or renegotiate their IIAs as a response to major ISDS claims, including the Czech Republic, Romania, Indonesia, India, and Poland.[113]

In the last few years, this trend has continued. The US withdrew its signature from The Trans-Pacific Partnership ("**TPP**") in January 2017.[114] The Australia-US Free Trade Agreement (FTA) did not include access to ISDS (at Australia's insistence).[115] Similarly, most modern IIAs regulate ISDS in bespoke ways, *e.g.,* by (i) excluding policy areas from ISDS; and/or (ii) restricting the period within which ISDS claims can be submitted. In addition, certain IIAs *omit* ISDS altogether.

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[103] *Philip Morris Asia Limited v The Commonwealth of Australia*, Award, PCA Case No 2012-12, 8 July 2017, Permanent Court of Arbitration (PCA).
[104] *Philip Morris Brands and Others v Oriental Republic of Uruguay*, Award, ICSID Case No. ARB/10/7,8 July 2016, International Centre for Settlement of Investment Disputes (ICSID).
[105] *Vattenfall AB & Others v Germany*, ICSID Case No. ARB/12/12, 31 August 2018, International Centre for Settlement of Investment Disputes (ICSID).
[106] *Chevron and Texaco Petroleum v. Ecuador*, PCA Case No. 2009-23, Permanent Court of Arbitration (PCA) .
[107] In the wake of the *Philip Morris* litigation, the government under Julia Gillard in Australia announced that no future IIA with Australia would include ISDS provisions. Similarly, after being subject to a wave of cases, the Czech Republic initiated an internal policy review, mutually terminated some IIAs, and renegotiated many others.
[108] *ConocoPhillips v Venezuela*, ICSID Case No. ARB/07/30; *Gold Reserve v Venezuela*, ICSID Case No. ARB(AF)/09/1; *Venezuela Holdings v Venezuela*, ICSID Case No. ARB/07/27.
[109] *Bernhard von Pezold v Zimbabwe*, ICSID Case No. ARB/10/15; *Border Timber v Zimbabwe*, ICSID Case No. ARB/10/25.
[110] *Clayton v Canada*, PCA Case No. 2009-04.
[111] The three landmark cases collectively granting US $50 billion to Yukos shareholders are: *Yukos v Russia*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, Permanent Court of Arbitration (PCA); *Hulley Enterprises v Russia*, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, Permanent Court of Arbitration (PCA); *Veteran Petroleum v Russia*, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014, Permanent Court of Arbitration (PCA).
[112] D Behn and OK Fauchald, 'Governments under Cross-Fire: Renewable Energy and International Economic Tribunals'(2015) 12 Manchester Journal of International Economic Law 117.
[113] T Jones, 'Poland Threatens to Cancel BITs' (*Global Arbitration Review* 26 February 2016) < https://globalarbitrationreview.com/article/poland-threatens-cancel-bits> accessed 11 September 2023.
[114] The TPP was replaced by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership after the US withdrawal, entering into force on 30 December 2018.
[115] A Capling and KR Nossal, 'Blowback: Investor-State Dispute Mechanisms in International Trade Agreements'(2006) 19 Governance 151, 160.

A. Politicisation by a Key Actor: The EU

Despite various concerns raised against ISDS in the past – mainly by countries from Latin America, Africa, and Asia (and on limited occasions, by certain groups in North American countries, especially under NAFTA) – such legitimacy concerns received the attention of the EU only recently. Globally prominent cases had further fueled debate within the EU, including the energy utility *Vattenfall* cases against Germany.[116]

B. Critical Juncture and Domestic Escalation: TTIP

TTIP became a hugely controversial agreement for the EU, including on account of ISDS and the the US. In the TTIP debate, initial supporters of the treaty included European firms and the Commission ('**EC**') itself. On the other hand, the 'opposition' coalition was led by civil society organizations which mobilized resources and galvanized public opinion at unprecedented levels, adding to the traditional opposition mounted by anti-trade activists such as labor unions. To convince the public that the implications of the TTIP would be inimical to the interests of Europe, the most controversial issues related to ISDS, among other concerns, were deliberately and strategically chosen by these opponents in order to maximize the perception of threat allegedly posed by TTIP.[117] The level of this perceived threat was, in turn, based on presumptions of, *inter alia*, aggressive and overly litigious American companies, as well as the inherent corporate bias that ISDS purportedly represents. TTIP was thus presented as a trade-off between neo-liberalism (or 'wild-west capitalism') and 'popular sovereignty'.[118]

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[116] ICSID, Vattenfall AB and Others v Federal Republic of Germany, ICSID Case No. ARB/09/6, Award, 11 March 2011, International Centre for Settlement of Investment Disputes (ICSID);Vattenfall AB and Others v Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018, International Centre for Settlement of Investment Disputes (ICSID).

[117] *For example:* European Consumer Organization (BEUC), 'The Micula Case: When ISDS Messes with EU Law' (*BEUC Blog* 27 Oct. 2014), <www.beuc.eu/blog/the-micula-case-when-isds-messes-with-eu-law/> accessed 11 September 2023; BEUC, 'Consumers at the Heart of the Transatlantic Trade and Investment Partnership, Position Paper' (*BEUC* 21 May 2014) <www.beuc.eu/publications/beuc-x-2014-031_mgo_ttip_updated.pdf> accessed 11 September 2023; Public Citizen, 'Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges' (*Citizen* July 2015), <www.citizen.org/documents/ustr-isds-response.pdf> accessed 11 September 2023; Public Citizen, 'Table of Foreign Investor-State Cases and Claims Under NAFTA and Other US 'Trade' Deals' (*Citizen* June 2015), <www.citizen.org/documents/investor-state-chart.pdf> accessed 11 September 2023; European Public Health Alliance, 'EPHA Position on Investment Protection in TTIP and Trade Agreements' (*EPHA* November 2015), <www.epha.org/IMG/pdf/EPHA_Position_Paper_on_Investment_Protection_in_TTIP-3.pdf> accessed 11 September 2023. Leif Johan Eliasson, *The Transatlantic Trade and Investment Partnership: Interest Groups, Public Opinion, and Policy in Different Glances at EU Trade Policy* (Barcelona Centre for International Affairs 2016), etc. discuss how the German group Campact! systematized and professionalized testing of key phrases to aid civil society organizations at opposing TTIP.

[118] *For example:* Chevy Chase, Maryland, 32014; Friends of the Earth Europe, 'How TTIP Undermines Food Safety and Animal Welfare' (*FOEE* 4 February 2015) <www.foeeurope.org/how-TTIP-undermines-food-safety-animal-welfare-040215> accessed 11 September 2023.

Back in 2014, a year after negotiations between the EU and the US had commenced, in response to an already palpable public backlash across western Europe, the EC launched a public consultation on international investment and ISDS.[119] The results of the consultation and the appurtenant parliamentary debates – which considered criticism from academia, human rights bodies, consumer associations, and environmental organizations – eventually gave the EU adequate justification to adopt a revised position on ISDS. This new position held that ISDS was in need of immediate and systemic overhaul. Indeed, it was clear from the consultation that the ISDS system was perceived as illegitimate, partial, and opaque by the European public.[120] Accordingly, the EU concluded that ISDS could not be relied upon to be neutral and consistent any longer.[121]

C. Proposed Replacement: ICS/MIC

Further, to resolve the underlying problems with ISDS, the EU proposed to replace the system with one that could guarantee transparency, consistency, predictability, and the possibility of appeal.[122] Accordingly, in 2015, the EC proposed to include, in all future trade and investment negotiations conducted by the EU, an investment court system ('**ICS**') such as the one eventually negotiated with Canada and Vietnam, respectively.[123] The ICS was thus announced as a blueprint for a proposed multilateral investment court ('**MIC**') in the future.[124] Other than

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[119] European Commission, Commission Staff Working Document on Online Public Consultation on Investment Protection and Investor-To-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), (*EU* 13 January 2015) 2, <https://ec.europa.eu/commission/presscorner/detail/hr/MEMO_15_3202> accessed 11 September 2023 (**'European Commission Staff Report on TTIP'**)

[120] ibid 14 (describing concerns about transparency in the public consultation).

[121] Jean-Claude Juncker, President of the European Commission, 'Wind in Our Sails' (State of the Union Address, Brussels, 13 September 2017) (**'Juncker State of the Union Address'**) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165> accessed 11 September 2023 (noting that the ISDS's "ad hoc nature [could] not sufficiently guarantee impartiality and predictability").

[122] *See* Directorate-General for Trade, 'Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution' 2 (*European Commission* 8 January 2016), <http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf> accessed 9 September 2023 (noting that the EU proposed a system that provided "*transparency, consistency, predictability and the possibility to appeal*").

[123] According to the European Commission, CETA "*is the EU's most comprehensive FTA to date*" and future modernisation of trade agreements with Mexico and Chile "*should be comparable to, and compatible with, our FTA with Canada . . . .*" European Commission, 'Trade for All: Towards A More Responsible Trade and Investment Policy' (*European Commission* 2015) 30, 33 <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 11 September 2023.

[124] In the EU's view, "*a bilateral appellate mechanism should be included not only in TTIP but should become a standard feature in all EU trade and investment agreements with other negotiating partners*." European Commission, 'Investment In TTIP And Beyond—The Path For Reform: Enhancing The Right To Regulate And Moving From Current Ad Hoc Arbitration Towards An Investment Court' (2015) 11, <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 11 September 2023. In the

at UNCITRAL as discussed below, the EU also managed to include its ICS and MIC proposals in the agenda of UNCTAD [125] and the Organization for Economic Co-operation and Development (OECD).[126] In 2017, the EC eventually decided that UNCITRAL would provide the most suitable forum to conduct further negotiations on the MIC.[127] Shortly thereafter, the EU began negotiations on ISDS reform under the auspices of UNCITRAL.[128]

D. The Build-up to the EU's Position on ISDS

The EU's proposal in respect of an MIC is part of its broader agenda to reform the ISDS system, which began in 2014-2015 and gained momentum in March 2018 when the General Secretariat of the EU Council issued negotiating directives to its delegations about a proposed convention establishing a multilateral court for the settlement of investment disputes.[129] These directives stipulated, *inter alia*, that based on a preliminary analysis, future negotiations in respect of establishing a multilateral court for investment disputes should be conducted under the auspices of UNCITRAL. Further, in the event of a vote, the EU member states – which are also members

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discussion paper from the expert meeting between Canada and the European Commission, however, it was stated that "*it is not the intention of the European Commission nor of the Government of Canada to propose it as a model for the current discussions on the establishment of a permanent multilateral investment dispute settlement system*." European Commission, 'Discussion Paper For Expert Meeting: Establishment Of A Multilateral Investment Dispute Settlement System' (2016) 1, <http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf> accessed 11 September 2023 (**'Discussion Paper For Expert Meeting'**).

[125] UNCTAD, 'Improving Investment Dispute Settlement: UNCTAD Policy Tools' (IIA Issues Note November 2017) 4–6, <www.uncitral.org/pdf/english/workinggroups/wg_2/IIA_Issues_November_2017.pdf> accessed 11 September 2023.

[126] *See generally* OECD, 'Freedom of Investment Roundtables: Summary of Discussions' <www.oecd.org/investment/investment-policy/oecdroundtablesonfreedomofinvestment.htm> accessed 11 September 2023 (collecting summary reports of OECD roundtables). For example, under the OECD's meetings, Canada and the EU prepared and chaired a discussion about the MIC in 2016: Commission on International Trade Law, 'Settlement of Commercial Disputes, Investor-State Dispute Settlement Framework, Comments from International Intergovernmental Organizations, Addendum' 3 (UN General Assembly 12 June 2017). The issues of an ICS and the right to regulate were addressed during Roundtables 22, 23, 24, 25, and 26, between 2014 and 2017.

[127] Discussion Paper for Expert Meeting (n 124), at 7–8; Juncker State of the Union Address (n 121).

[128] On 20 March 2018, when the Council of the European Union declassified a document titled Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, the strategy was clear. UN Secretariat, 'Note from the General Secretariat of the Council to Delegations' 4 (UNGA 20 March 2018) <https://perma.cc/RUV8-QUUE> accessed 11 September 2023. The Press Release on March 20, 2018 was clear on this point, confirming that *"[o]n the basis of the mandate provided by the Council, the Commission will start negotiations with its trading and investment partners in the framework of the United Nations Commission on International Trade Law (UNCITRAL)*." Council of the European Union, 'Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations' (*Consilium* 20 March 2018) <www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-courtcouncilgives-mandate-to-the-commission-to-open-negotiations/pdf> accessed 11 September 2023.

[129] *Available at*: <https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf> accessed 11 September 2023.

of UNCITRAL – were required to exercise their voting rights in accordance with such directives – as previously agreed upon in terms of this being the official EU position.

Pursuant to this mandate, the EU is operating on two fronts: (1) on the one hand, it is actively pursuing the goal of creating an MIC as part of the discussions at UNCITRAL, where it maintains that such MIC is the only meaningful alternative to the extant ISDS system; and (2) on the other hand (but at the same time), it continues to advance its template of the investment court system (ICS) in new IIAs, including those negotiated with Canada (the Comprehensive and Economic Trade Agreement, or CETA); Singapore (the EU-Singapore Investment Protection Agreement, or EUSIPA, as part of the wider EU-Singapore Free Trade Agreement, or EUSFTA); and Vietnam (the EU-Vietnam Investment Protection Agreement, or EVIPA, as part of the wider EU-Vietnam Free Trade Agreement, or EVFTA).

E. EU-driven developments at UNCITRAL

In an April 2019 submission on possible reform of ISDS made to the UNCITRAL Working Group III at its thirty-seventh session in New York (the '**2019 EU Submission**'),[130] the EU and its member states set out their views on the establishment of a standing mechanism for settling international investment disputes. This 2019 EU Submission went on to describe a potential structure in respect of such mechanism. Further, it sought to explain how, from among other reform options, this standing mechanism alone, involving systemic structural change, could effectively respond to all identified legitimacy concerns.

While major legitimacy concerns in respect of ISDS were highlighted in the 2019 EU Submission, such concerns were widely accepted by member states during the Working Group deliberations. Earlier still, during deliberations in 2017, the EU had put forth a similar proposal for an MIC replacing the current 'privatized' judicial decision-making model. Further, in a written submission from December 2017,[131] the EU had put forth its legitimacy concerns. This way, the EU has been able to secure widespread acknowledgement of ISDS-related legitimacy gaps at the level of the wider Working Group within UNCITRAL.[132] Moreover, the EU has

[130] UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' (*UNCITRAL*) <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 20 Feb 2024.
[131] ibid.
[132] UNCITRAL, 'Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session' (*UNCITRAL*, 6 November 2018) <https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf > accessed 20 Feb 2024. For a more elaborate discussion of concerns about ISDS, see ibid (At its thirty-fifth session, the Working

been notably and repeatedly active in terms of drawing attention to these legitimacy gaps among all member states.

F. UNCITRAL as a Forum of Contestation

Certain reasons explain why UNCITRAL, in particular, emerged as the forum of choice in respect of comprehensive reform. Among other reasons, the Working Group III was available for a new mandate, and the open membership of UNCITRAL offered the EU a multilateral arena in which to pursue its own preferred structural changes.[133]

G. Opposing Views at UNCITRAL

Other governmental submissions before the Working Group suggest key differences in stance relative to the EU's. For example, the submission from Russia dated December 30, 2019[134] proposed that ISDS reform should be based, *inter alia,* on the principles of: (a) preservation of the advantages of the current ISDS system – such as its decentralized nature, flexibility and neutrality; and (b) the depoliticized nature of the ISDS system. Further, Russia maintained that the right of parties to appoint arbitrators in investment arbitration is one of the key principles of the ISDS system that builds confidence and makes international arbitration more attractive to both states and investors. Accordingly, any reform option should preserve the extant mechanism. In addition, Russia's submission specifically stated that 'radical' options, such as the creation of an international investment court (like the model proposed by the EU), are not only likely to fail in terms of solving the fundamental problems of the current system, but these might also lead to new problems.

On the subject of potentially establishing an international investment court, Russia made a further submission dated December 31, 2019.[135] It maintained that even if the existing ISDS system had some minor shortcomings, those could be easily overcome by addressing specific problems without changing the overall structure. An incremental approach would be far more effective towards addressing legitimacy concerns than adopting radical solutions – which would create the risk of destabilizing the system as a whole.

Group III had requested the UNCITRAL Secretariat to prepare a list of concerns about ISDS as raised during its thirty-fourth and thirty-fifth sessions. See the document prepared pursuant to such request).

[133] According to Malcolm Langford, Daniel Behn, and the authors of the CIDS Report, for example.

[134] UNCITRAL (n 130).

[135] ibid.

Similarly, in its submission dated July 19, 2019 to the Working Group III, China[136] put forth its belief that the ISDS mechanism is one that is generally worth maintaining because it plays an important role in: (a) protecting the rights and interests of foreign investors, (b) promoting transnational investment, (c) building the rule of law into international investment governance, and (d) avoiding economic disputes between investors and host countries from escalating into political conflicts between nations.

On the other hand, during the Working Group's sessions in late-2021, even ISDS critics had raised concerns about reform efforts failing to confront bigger issues that lie at the heart of the legitimacy crisis. In particular, they alleged that major actors such as the EU and the US had proposed various procedural reforms at the cost of more substantive ones. Also, dominant voices like the EU and the US tended to overshadow more critical concerns raised by countries from the Global South, consequently widening the gap between interests and priorities in the reform process.

At present, Working Group deliberations appear to be focused on the question of whether the EU will prevail in its aim of abandoning ISDS and introducing a standing investment court instead. [137] Thus, now that politicization processes have moved away from local/national/regional arenas to an inter-state level, the dynamics and (de)legitimation coalitions at the level of UNCITRAL have become additionally important.

H. Escalation within UNCITRAL

Unique trends associated with politicization and escalation, once legitimacy gaps have been identified and debated among key stakeholders, may be observable within the chosen sites of contestation. For instance, in the context of ISDS, reform debates have experienced a *division within* major western developed nations, according to observers[138] who attended the Working Group meetings conducted at New York in April 2019.

[136] ibid.
[137] Naimeh Masumy, 'ISDS Reform: The Dimming Yet Discerning Voices of the Global South States' (*OpinioJuris* 1 September 2021) <http://opiniojuris.org/2021/09/01/isds-reform-the-dimming-yet-discerning-voices-of-the-global-south-states/> accessed 11 September 23
[138] Anthea Roberts and Taylor St John, 'UNCITRAL and ISDS Reforms: The Divided West and the Battle by and for the Rest' (*EJIL: Talk* 30 April 2019) <ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest/> accessed 11 September 2023.

Since ISDS had already become politically unsavoury in Europe during TTIP negotiations, the EU first contemplated the creation of an MIC through CETA – its IIA with Canada. Around the same time, the EU supported reform debates under UNCITRAL along with Canada. Other significant powers, including the US and Japan, remain opposed to both the creation of a standing court as well as to wider reform debates. While the EU robustly champions multilateral dispute resolution, the US remains skeptical. In addition, the US had objected to pursuing such discussions under UNCITRAL in the first place – because the latter's decisions are almost always reached by consensus. On the other hand, if a reform option is put to vote, only 60 states are eligible to participate. However, since the EU (along with its member states) hold as many as 12 of those 60 votes at present (amounting to a fifth of the total), the countries opposed to the EU's agenda may not be able to stop the proposed court from being created, at least under UNCITRAL.

Further, while the EU wants to continue with its agenda at UNCITRAL, countries like the US, Japan, and Russia have attempted to slow down such debates and instead support the development of alternative reforms that might convince others to accept a reformed version of the existing system (rather than replacing it altogether). According to the latter lobby, some of the problems with ISDS were already being addressed through new IIAs.

In addition, according to the EU, since ISDS allegedly suffers a 'fundamental lack of trust by the public',[139] regaining such trust requires an inclusive, transparent, and legitimate process. Accordingly, the EU, Germany, and Switzerland have contributed significantly towards a travel fund administered by UNCITRAL to enable representatives from various developing states to attend the Working Group meetings on ISDS reform. As a result, the number of states participating in each such meeting has continued to increase, including, in particular, through active participation by developing countries (e.g., Costa Rica, Morocco, several in Africa, etc.).

Strategically, the EU is trying to persuade as many developing countries to support its multilateral reform proposal – especially those states that already harbour concerns about ISDS. In addition, the numerical advantage provided by being in alliance with several developing countries might help the EU counterbalance the potentially hegemonic influence of

[139] In the words of Cecilia Malmström, in context of the public consultation conducted during TTIP negotiations with the US.

the US (along with its traditional allies). While several developing states *did* have serious misgivings about ISDS and its legitimacy in the past, and continue to have at present, whether such states will *actually* join the European coalition (in terms of supporting the creation of an MIC) remains uncertain.

VII. ADDITIONAL ELEMENTS: A 'DYNAMIC FRAMEWORK'

A 'Dynamic Framework' to measure international institutional legitimacy needs to take into account not only the current perceptions of relevant stakeholders, but also the changing standards of appropriateness, changing levels of contest and politicisation, as well as the strategic accommodation of such changes by the institution itself, measured in terms of evolving social acceptability.

A. Multiple Levels of Analysis

Further, the proposed framework needs to accommodate the possibility that all of local, national, regional, or transnational coalitions may initiate and/or engage in socio-political contestations. This suggests a 'two-level game'. If a non-state lobby is not powerful enough to force a state to respond to legitimacy complaints, then such states may adhere to the *status quo* and not adopt politicization strategies at the international and/or inter-state level. On the other hand, if and when states do need to respond to underlying domestic pressures, the arena of contestation shifts to one where the relative power between and among states is salient, including in terms of hegemonic influence, alliance-building, balance-of-power, and 'bandwagoning'. Obviously, powerful states are able to influence regime outcomes better than weaker counterparts.

B. Power

If a hegemonically powerful state holds a certain position in respect of the interplay between legitimation/delegitimation narratives, that position may define the future trajectory of regime legitimacy. Similarly, if a coalition of strong states holds a common position, especially when other states are not able to adequately articulate a contrary preference or are otherwise disinclined to do so, then the legitimacy outcome of the regime may be determined by this common position. However, there might also be a situation where there are two opposing coalitions of equally powerful states on either side of the legitimacy debate.

In such situations, the dynamics of the global balance of power (*e.g.,* developed countries of the 'west', such as those of North America and Europe, balanced by emerging powers, such as China, India, Brazil, etc.), needs to be particularly looked at.

Thus, any evaluation of an international crisis of legitimacy demands a nuanced understanding of power and legitimacy both. The notion that 'Great Powers' have special responsibilities for the maintenance of international order is relevant here. How such special responsibilities are defined and allocated in a social/political system affects the overall distribution of power. Accordingly, such special responsibilities might become key focal points in the politics of legitimacy.

For instance, despite legitimacy concerns raised by countries from other parts of the world in the past, such concerns received special attention from the EU only recently. As earlier discussed, robust opposition against ISDS first emerged in Germany in response to a case brought by energy company *Vattenfall* over a nuclear phase-out. Nuclear energy was already a sensitive topic for the German public. Accordingly, the *Vattenfall* case came to be seen by the German public as an attack on its values, its legal system, and as undermining its democracy. In such a situation, the offending ISDS regime started to receive more attention in Europe than before. Simultaneously, a wider group of European stakeholders politicized the alleged defects of ISDS – and in a more pronounced manner than in earlier periods.

Previously, the *Aguas del Tunari* case against Bolivia, for example, which grew out of the infamous 'water wars of Cochabamba', prompted a global civil society campaign as well. The widespread discontent included pushback even by the US, hitherto one of the regime's most dominant norm-setters. However, despite sufficient controversy and international attention, politicization was limited by the relative power of Bolivia as a stakeholder in the regime. Similarly, the ISDS claim in Philip Morris v. Uruguay[140] underscored crucial tensions between the private rights of foreign investors vis-à-vis sovereign regulatory powers in matters of public interest – such as health and welfare.[141] This tension is central to ISDS legitimacy debates even today.[142] The public health implications involved made Philip Morris v. Uruguay an especially

[140] *Philip Morris Brands Sarl v Oriental Republic of Uruguay* (n 104).
[141] *See* Sergio Puig, 'Tobacco Litigation in International Courts' (2016) 57 Harvard International Law Journal 383, 392–93 (exploring broader issues in international tobacco disputes).
[142] Gus Van Harten and others, 'Investment Provisions in Trade and Investment Treaties: The Need for Reform' (2015) Gegi Exchange 4.

high-profile dispute, attracting global consternation and even third-party funding for Uruguay.[143] Nevertheless, it did not lead to the level of politicization that the EU was able to curate.

From 1999 until 2018, more than 200 claims were brought against EU states, amounting to billions of dollars.[144] Moreover, in 2014 and 2015, the discourse about ISDS legitimacy moved into the European public sphere as a result of TTIP.[145] In addition, the number of new cases grew, including claims against EU member states in relation to subsidization schemes for the promotion of solar energy.[146] Subsequently, the EU's role toward overhauling the extant ISDS regime, including under the auspices of UNCITRAL, has been extraordinary relative to that of other states.

C. Alliance-Building

In general, once contestations related to a regime's legitimacy reach the international sphere in terms of inter-state dynamics, certain age-old questions in the realist IR literature might be useful to predict legitimacy outcomes. For example, realists ask: do states ally more often with the weaker or the stronger side in a 'conflict'? Constructivists, on the other hand, would argue that the answer to this question depends on what and how developing states *perceive* strength and weakness in this regard, and how they identify their respective roles in this ideological clash. More specifically, IR theory also asks: do states tend to balance against, or 'bandwagon' with, a rising state or coalition? The answer to this question is critical, including with respect to strategy formulation among developing states, and the definition of their vital interests through their stance on ISDS.[147] 'Bandwagoning,' in this regard, might be defined as clear

[143] Kate Kelland, 'Gates and Bloomberg Create $4 Million Fund to Fight Big Tobacco' (*Reuters* 18 March 2015) <www.reuters.com/article/us-health-tobacco-fund/gates-andbloomberg-create-4-million-fund-to-fight-big-tobacco-idUSKBN0ME24C20150318> accessed 11 September 23 (reporting on third-party funding for Uruguay's legal battle).

[144] *See generally:* Investment Dispute Settlement Navigator, UNCTAD, available at: <http://investmentpolicyhub.unctad.org/ISDS> accessed 11 September 23

[145] See, e.g., The Econimist, 'The Arbitration Game: Governments Are Souring on Treaties to Protect Foreign Investors' (*The Economist* 11 October 2014); James Surowiecki, 'Trade Agreement Troubles' (*The New Yorker* 22 June 2015); Bernadette Ségol, 'TTIP Will Not be Approved unless ISDS Is Dropped' (*Financial Times* 27 October 2014).

[146] *See* Behn and Fauchald, 'Governments under Cross-Fire: Renewable Energy and International Economic Tribunals' (2015) 12(2) Manchester Journal of International Economic Law 117.

[147] Randall L Schweller, 'Bandwagoning for profit: Bringing the Revisionist State Back In' (1994) 19(1) International Security 72-107.

attempts to curry favour with a state or coalition (as well as a specific ideological orientation) through alliance-building or economic and diplomatic cooperation.[148]

However, alliance choices are often motivated by opportunities for gain as well, *i.e.*, by risk appetite or a desire for *more*. When profit rather than security drives alliance choices, there is no reason to expect that states will be threatened or persuaded to bandwagon; in fact, they might do so willingly. The bandwagon gains momentum through the promise of rewards, not the threat of punishment. Thus, we might find alliance choices made in the expectation of gain (*e.g.*, higher inflows of FDI, or, conversely, greater state control over economic decision-making).

Generally speaking – satisfied states, such as Great Powers that rule and manage the international system, are likely to favour the *status quo*. After all, states that find the *status quo* most agreeable are usually the ones that created the existing order. Thus, as the principal beneficiaries of the *status quo*, they have a vested interest in preserving it.[149] In modern global regimes, all major powers typically hold a common view of what constitutes an acceptable *status quo*.[150] However, when an alternative position becomes stronger than the *status quo*, the system may eventually undergo a change; only the question of when, how, and to whose advantage, may remain undecided.

In terms of legitimacy contestations involving ISDS at UNCITRAL, an ideological divide between the US and the EU represents a major clash between two transatlantic hegemons. Indeed, the history of ISDS, as well as the history of colonization itself, clearly demonstrates the hegemonic influence that these two blocs have enjoyed in respect of creating and

[148] David C Kang, 'Between balancing and bandwagoning: South Korea's response to China' (2009) 9(1) Journal of East Asian Studies 1-28. The term 'bandwagoning' as a description of international alliance behavior first appeared in Kenneth Waltz's 'Theory of International Politics'. *See* Kenneth N Waltz, *Theory of International Politics* (Addison-Wesley 1979) 126. Waltz credits the term to Stephen Van Evera. Arnold Wolfers earlier mentioned the term 'bandwagoning' to mean the opposite of balancing, but only in a passing reference. Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (The Johns Hopkins University Press 1962), Ch 8, p 124. In his structural model of balance-of-power theory, Waltz uses 'bandwagoning' to serve as the opposite of balancing: thus, bandwagoning refers to joining the stronger coalition, balancing means allying with the weaker side.

[149] This argument is consistent with the power-transition model. See AFK Organski and Jacek Kugler, *The War Ledger* (University of Chicago Press 1980) Ch 1, especially pp 19-23; Robert Gilpin, *War and Change in World Politics* (Cambridge University Press 1981).

[150] Charles A Kupchan and Clifford A Kupchan, 'A New Concert for Europe' in Graham Allison and Gregory F Treverton (eds), *Rethinking America's Security: Beyond Cold War to New World Order* (WW Norton 1992), 251. *Also see:* Kupchan and Kupchan, 'Concerts, Collective Security, and the Future of Europe' (1991) 16(1) International Security 114-161.

perpetuating the IIL regime. Accordingly, the current dissonance between the US and the EU means that developing country-alignment will assume additional importance while determining the legitimacy of ISDS. In other words, a lot may depend upon which of the two positions other countries ultimately decide to support – (i) the US position of continuing with the extant ISDS system with incremental adjustments, or (ii) the EU position of replacing the system altogether with a standing court. Some states may bandwagon with the EU if they perceive it as the 'stronger' side in the legitimacy debate, or if they believe that the EU's stance represents the inevitable future.

During the Cold War-era, for example, many Third World elites were attracted to communism for rational reasons: they thought that they could profit by it.[151] Similarly, states across the world abandoned communism in favour of the newest wave of the future, *i.e.*, liberal democracy.[152] The same can be said about the proliferation of IIAs in the 1990s. 'Wave-of-the-future' bandwagoning is typically induced by dynamic ideologies, especially when buoyed by massive propaganda campaigns.[153] Thus, such bandwagoning may be the result of states and publics, led by propaganda-based ideas, enjoying the feeling of 'going with the winner'.[154]

Already, a large number of states appears to have reached a consensus that ISDS is due for radical overhaul. In Asia, for example, South Korea and Singapore have both leaned towards embracing systemic change. On the other hand, several Asian countries have sent out mixed signals about their legitimacy perceptions. For example, while Thailand's written submission to the Working Group III urged other states to focus on incremental reforms to ISDS, it maintained that such reforms need not exclude alternative options which could be 'more

[151] This type of bandwagoning most concerned George Kennan in 1947, as he understood that "*a given proportion of the adherents to the [communist] movement are drawn to it…primarily by the belief that it is the coming thing, the movement of the future . . . and that those who hope to survive - let alone to thrive - in the coming days will be those who have the foresight to climb on the bandwagon when it was still the movement of the future*." See Robert Jervis and Jack Snyder, Dominoes and Bandwagons: Strategic Beliefs and Great Power Competition in the Eurasian Rimland (OUP 1991) 33.

[152] Van Evera points out that "*the chain of anti-communist upheavals in Eastern Europe during 1989 is the only widespread domino effect on record.*" Stephen Van Evera, 'Why Europe Matters, Why the Third World Doesn't: American Grand Strategy After the Cold War' (1990) 13(2) The Journal of Strategic Studies 23. On this domino effect, *see:* Harvey Starr, 'Democratic Dominoes: Diffusion Approaches to the Spread of Democracy in the International System' (1991) 35(2) Journal of Conflict Resolution 356-381; Timur Kuran, 'Now Out of Never: The Element of Surprise in the East European Revolution of 1989' (1991) 44(1) World Politics 7-48.

[153] Ralph G Martin, *Ballots and Bandwagons* (Rand McNally 1964) 444.

[154] *See* Larry M Bartels, *Presidential Primaries and the Dynamics of Public Choice* (Princeton University Press, 1988) 111.

comprehensive in nature.'[155] Further, having faced several ISDS proceedings, Indonesia decided in 2014 to review all its existing IIAs. The stated rationale behind such review was to evaluate their impact on Indonesia's right to regulate and pursue public policy objectives. In November 2018,[156] Indonesia's written submission to the Working Group relied on perceived evidence to suggest that the threat of ISDS can lead to a 'regulatory chill'. Accordingly, Indonesia stated that maintaining the conventional approach under ISDS is hardly an option, given the current criticism against it.

Among Latin American countries too, there appears to be a divergence of opinion on ISDS legitimacy. For instance, despite having faced several significant ISDS claims, and despite having spoken of the need for systemic reform before the Working Group, Argentina has remained attached to the regime. Similarly, despite having 21 IIAs in force with ISDS provisions and being a respondent in 9 ISDS cases, Costa Rica submitted documents in March[157] and July 2019,[158] respectively, supporting only targeted reforms of the arbitral model (and therefore, not supporting sweeping changes in the existing regime).

In a joint submission with Israel and Japan in March 2019,[159] Chile put forth the view that for the past two decades, many states had been grappling with different kinds of legitimacy concerns, which had arisen in their own experience with ISDS cases. This joint submission went on to emphasize the need for a flexible approach, taking into account the views of a wide variety of stakeholders in respect of reform – a view that was endorsed by Mexico and Peru, pursuant to a subsequent submission in October 2019. Several African and Middle Eastern states are also emerging as important actors in the ISDS legitimacy debate, although clear regional positions have not yet emerged.

Geopolitical dynamics and shifting power relations further complicate the possibility of credibly assessing globally aggregated perceptions of ISDS. While China has played an engaged role in UNCITRAL debates, it officially supports a greater focus on alternative dispute

[155] UNCITRAL, 'Possible reforms of investor-State dispute settlement (ISDS): Submissions from the Government of Thailand' (*UNCITRAL*, 8 March 2019) < https://documents.un.org/doc/undoc/gen/v19/013/91/pdf/v1901391.pdf?token=uSTOIVIEXXS30RIrPi&fe=true > accessed 20 Feb 2024.
[156] UNCITRAL (n 130)
[157] ibid.
[158] ibid.
[159] ibid.

settlement. Further, going by past equations, China and the EU seem to agree on broad principles related to international economic governance. The same cannot be said about other bilateral equations – for example, with respect to the dynamic between some revisionist and Great Powers, such as that between China and the US; or between Russia and the EU.

VIII. METHODOLOGICAL IMPLICATIONS

In terms of methodology, choosing random examples of legitimacy critiques, without critically examining them for cause or underlying interests, is neither helpful nor adequate. At the very least, such choices need to be justified. Further, 'negative cases' need to be explained – such as those where states have *not* terminated treaties or withdrawn from the ISDS regime. Even if some scattered instances signify a temporary withdrawal of support, they need to be numerically, temporally, and representatively large enough, and *significant* enough, to make illegitimacy claims about the entire regime.

It is possible that discourses on legitimacy are merely strategic, stemming from self-interested or instrumental behaviour to disguise political interests.[160] In this regard, a potential danger with legitimacy analysis, and especially with *measurement*, is circular reasoning.[161] If legitimacy is defined in terms of obedience or support, then the proclivity to comply becomes embedded in the meaning of legitimacy itself, rather than being its outcome. Whether (or not) the normative pedigree of an institution is related to perceptions of legitimacy is an empirical question that cannot be assumed *a priori*. The fact that an institution is objectively legitimate – measured by whatever normative framework necessary – does not imply that it will be socially accepted. Thus, to trace the formulation of legitimacy critiques and related incidences of backlash against ISDS, one needs to rely on empirical data. However, we must anticipate problems of observation and measurement, which need to be accounted for accordingly. In particular, we must address the problems of endogeneity, omitted variable bias, and potential reporting/observation biases.

A. Identifying Signals

[160] A Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?' (2005) 31(1) Review of International Studies 15-32; I Hurd, 'Myths of membership: The Politics of Legitimation in UN Security Council Reform' (2008) 14(2) Global Governance: A Review of Multilateralism and International Organizations 199-217.
[161] Bodansky (n 55).

To measure 'signals' that indicate whether relevant actors *believe* an institution does (or does not) have the right to exercise authority, the researcher has to identify those who communicate such signals, as well as the type of signals they issue, when they do (*i.e.*, under what conditions), and for what purpose. To this end, she might rely on government archives, submissions by international organisations, and media reports of backlash. Being primary subjects in the treaty regime, states obviously remain of interest. State signals include exit actions such as treaty terminations or regime withdrawals, 'voice' actions such as the adoption of sovereignty-sensitive agreements, mixed actions such as moratoriums on the signing of new commitments, increased demands for renegotiating extant structures, or even aggressive tactics in defending ISDS claims. Since the regime has multiple audiences and affects diverse actors, a wide variety of stakeholders may be relevant while determining perceptions of legitimacy. Such non-state stakeholders may signal their displeasure with the regime in various forms: for instance, civil society actors might submit third-party briefs and publicly mobilise, while epistemic commentators may criticise awards or issue generalised critiques.

The delegitimating narrative may reach a point where a government is forced to address a major public reaction, including in the international arena. Such addressing may include narrative-building exercises, like the EU's – after its TTIP negotiations with the US broke down with because of ISDS. In turn, the EU's narrative was built on the premise that ISDS as a model of dispute resolution was unfit for the 21st century.[162]

B. Anticipated Problems of Observation and Measurement

A hypothesised relationship between the factors (independent variables) that lead to international judicial legitimacy (outcome) may be derived from the framework suggested. The problem of verifying this relationship in a sociological sense, however, stems not just from the fact that the independent variable, *i.e.*, *perceptions* about legitimacy, is difficult to *measure*, but also because the underlying *reasons* that lead actors to perceive ISDS negatively, are difficult to *observe*. Errors in measurement may arise because the most interpretable manifestation of actors' cognitive commitments, *i.e.*, their own statements,[163] or reports of such

[162] As summarized by the European Commissioner for Trade, Cecilia Malmström, "*there is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model. This has significantly affected the public's acceptance of ISDS and of companies bringing such cases*". *See:* Cecilia Malmström, 'Proposing an Investment Court System' (Europa Blog Post 16 September 2015) <https://ec.europa.eu/commission/2014- 2019/malmstrom/blog/proposing-investment-court-system_en> accessed 11 September 2023.

[163] For example, press or media statements issued by duly authorised government officials.

beliefs, or specific actions in that connection, will often be a systematically-biased indicator. In other words, even where perceptions can be measured pursuant to the Dynamic Framework, one may face difficulty in assembling evidence of the mechanisms through which such perceptions, measured through voice, exit, discourse, or backlash, are *actually* influenced by beliefs[164] of (il)legitimacy.

Nevertheless, while the underlying motivations may be (strategically) hidden, much of those may be observed because they involve contextual dynamics at higher levels of aggregation,[165] including the co-incidence of adverse arbitral awards, increased investor claims, economic transitions, etc.,; as well as state/constituency concerns, epistemic/elite mobilisations, and public protests. The challenge here is to *connect* independent variable to outcome: thus, even if it is established that actors hold certain beliefs, the *strategic* nature of the causal process makes it difficult to prove that such actors *actually* applied those beliefs.

C. Process-Tracing

Thus, one must consider the ways in which strategic and ideational mechanisms leave behind clues at the systemic level. These could be identified, for example, in terms of cost-benefit analyses that states undertake in respect of continued participation in the regime, as well as certain institutional or realist dynamics in the international sphere. In addition, one must accommodate the possibility that scholarly critiques, as well as state/public backlash, may suffer from reflexivity[166] and/or observer bias.[167] In other words, while stakeholder responses may themselves contribute to perceptions of a legitimacy crisis, those may also be motivated by prior ideological beliefs. Lastly, the persistence and continuity of ISDS, as well as the sustained participation in the network of treaties by most countries (despite having experienced significant setbacks in some cases, *e.g.*, Argentina), may indicate that certain displays of

[164] For example, a government's stated position that it believes ISDS to be lacking legitimacy.
[165] For example, are state *positions* on ISDS legitimacy, as evidenced through government statements, adopted on the back of adverse arbitral awards and/or upon getting sued by investors in high-value claims?
[166] Broadly, reflexivity is considered to occur when the observations of observers in the social system affect the very situations they are observing, or when theory being formulated is disseminated to and affects the behaviour of the individuals or systems the theory is meant to be objectively modelling.
[167] Observer bias is the tendency to see what we expect to see, or what we want to see. In this case, when commentators opine about ISDS legitimacy, they have prior subjective feelings about the phenomenon being studied/observed. In other words, they come to the table with conscious or unconscious prejudices.

backlash emanating from, or affecting, only a small set of states are 'black swan events'[168] – which, in turn, skew perceptions of legitimacy with respect to the wider regime.[169]

D. Endogeneity and Omitted Variable Bias

It may be possible that *reasons other than* legitimacy concerns (omitted variables) lead to both: (1) backlash; *as well as* (2) a critical discourse in respect of the regime. In other words, such omitted variable(s) could be influencing the relationship between the incidence of state/public backlash (on the one hand) and normative legitimacy gaps identified by scholars (on the other), even when factors that provoke either of such responses may have nothing to do with questions of legitimacy. Thus, the presence of omitted variables may render this relationship endogenous. Controlling for such omitted variables (if any) thus becomes critical.

IX. CONCLUDING REMARKS

The research agenda proposed in this paper is aimed towards creating a general framework for measuring international institutional legitimacy, and the legitimacy of ISDS in particular. While the architecture of a refurbished system should be backed by a global standard of appropriateness, norm entrepreneurs[170] may be required to spearhead the necessary social, political, and ideological processes towards securing worldwide consensus. However, the strategic considerations of states and elites; the influence of power dynamics *inter se*; along with *realpolitik* objectives, may determine alternative paradigms.

Pursuant to my suggested framework, for the purpose of determining the presence or absence of a legitimacy crisis with respect to ISDS, the underlying socio-political contestations associated with the regime's legitimacy gaps require critical evaluation. A set of methodologies that could be used by future researchers to conduct such evaluation has also been discussed. Further, the paper illustrates the value of the proposed analytical framework through a cursory examination of the ISDS regime and its appurtenant legitimacy issues.

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[168] NN Taleb, *The Black Swan: The Impact of the Highly Improbable* (Vol 2 Random House 2007). Such events, considered extreme outliers, collectively play vastly larger roles than regular occurrences. A 'Black Swan' event is an outlier, outside the realm of regular expectations; carries an extreme impact; and despite its outlier status, experts concoct explanations for its occurrence after the fact, making it explainable and predictable.

[169] ibid. Taleb suggests that in such situations, expert analysis may be useless, and explains why (even) experts continually see misleading patterns in the data.

[170] M Finnemore, 'Are Legal Norms Distinctive' (1992) 32 New York University Journal of International Law and Politics 699.

To be clear, this is *not* intended to be a full analysis. Nevertheless, through this illustrative application, I have sought to demonstrate: (i) *how* my framework can be employed for legitimacy assessments by future researchers; and (ii) *what* the potential issues, methodological implications, and data points are likely to be while undertaking such assessment. While the application of this framework in respect of ISDS merely indicates the contours of the evaluative toolkit necessary for researchers to conduct a fuller and more comprehensive analysis later, this framework may be applied to other international regimes as well, especially those where legitimacy becomes a salient issue.

Accordingly, rather than the underlying normativity of the regime or the way it actually functions, the answer to the question of whether ISDS faces a legitimacy crisis (or not) may be subject to the dynamics and outcomes of key legitimacy contestations among relevant stakeholders. In this regard, the positions adopted by, and alliances formed among, various actors in the regime – especially key and influential states, along with motivated interest groups within them – may determine how this ideological clash plays out over the long term.