

UNCITRAL and the Possibility of Returning to the Multilateral Regulation of Foreign Investments.

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In the historical development of the international investment framework, there have been some multilateral attempts to regulate foreign investments. From the 1950s to the 1970s the United Nations (UN), was the first multilateral forum used to regulate foreign investments. It was a platform for countries to reach decisions about the rules by consensus. As a result, there were numerous UN General Assembly resolutions concerning rules of foreign investment. UN General Assembly resolutions have the legal value of being *de lege ferenda*, meaning that states should strive to practice in accordance with what the resolutions recommend, they are, however, not binding. In matters pertaining to the establishment of an international investment framework, countries instead engaged in bilateral negotiations, in attempts to agree on different rules. Most countries signed Bilateral Investment Treaties (BITs), which contained different provisions than the ones contained in the UN resolutions. Most of these treaties were signed in the 1990s, though the signings did not end then. On the other hand, the World Trade Organization (WTO), once established, was also used as a multilateral forum to bring about regulation of investment rules. Investment regulations were proposed at the 1996, 1999, 2001 and the 2003 WTO Ministerial conferences. In a similar vein to what had occurred at the UN, however, the agreements were not reached at the multilateral level and more investment treaties continued to be signed at a bilateral level.¹ As a result, the current framework was formed, for the most part, bilaterally. However, some current developments, in which the work of UNCITRAL played a crucial role, suggest yet again a return to the multilateral level to amend the current international framework. The question is, then, why are countries returning to the multilateral forum to amend or improve the existing rules?

In this paper, I will argue that criticisms against the bilaterally established international investment framework have once again prompted actors to return to a discussion of foreign investment rules at the multilateral level. This results in a forum shifting that can be explained by international relations theories relating to modified structural approaches and contested multilateralism.

Since the criticism arise mainly from the enforcement of investor-state dispute settlement clauses in investment treaties, in the first section, I shall discuss the different arbitration institutions and rules in investor-state dispute settlement clauses. In the second section, I shall discuss how the inclusion of transparency provisions in investor-state disputes settlement has opened up the possibility for returning to a multilateral forum for

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¹ Gwynn, M.A. *Power in the International Investment Framework* Palgrave Macmillan. 2016. Chapter 3 and 6.

amending or improving the foreign investment rules. In the third and last section, I shall explain this phenomenon of forum shifting, from the bilateral to the multilateral, by using the theoretical lenses of modified structural approaches and contested multilateralism.

1. International Arbitration Rules in Investor-State Disputes.

For settling investor-state disputes, most International Investment Agreements (IIAs) feature international arbitration as a mechanism to settle such disputes. One of the main international arbitration institutions for settling investor-state disputes has been the International Centre for the Settlement of Investment Disputes (ICSID). ICSID was established in 1965 with the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (the ICSID Convention), and it is one of the five agencies of the World Bank. ICSID is a specialized institution created for the sole purpose of settling investment disputes.²

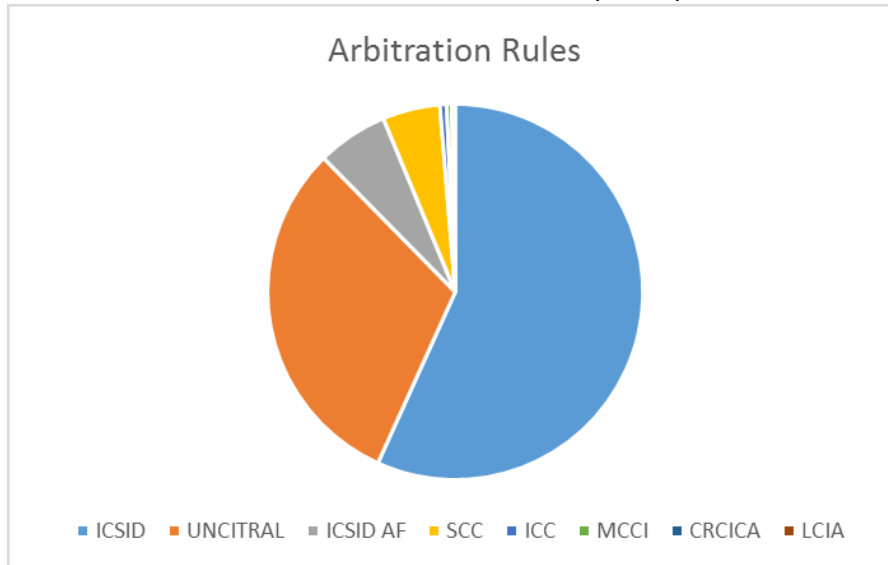
As of January 2017, the investor-state dispute settlement mechanism of IIAs has been used in 756 cases.³ The disputes have been mainly submitted to ICSID, and thus the ICSID rules for arbitration were used. However, the data also shows that ICSID is followed by a great number of investor-state disputes that have been submitted for international arbitration in which the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules are used.⁴ (See Table 1)

² See the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Introduction; Parra, A. *The History of ICSID* Oxford University Press. 2012; Schreuer, C., Malintoppi, L., Reinisch A, Sinclair, A. ‘The ICSID Convention: A Commentary’ 2nd Ed. Cambridge University Press. 2009

³ UNCTAD World Investment Report 2016 reported 696 cases as of January 2016. This number has increased to 756 in 2017 for known cases that have used arbitral rules. The number is higher if the cases with no data available are considered. UNCTAD Investment Policy Hub.

⁴ In the total of investor-state disputes cases, 390 are ICSID cases, 212 UNCITRAL, 85 other rules, 9 unknown. The other rules include those of CRCICA (Cairo Regional Center for International Commercial Arbitration), ICC (International Chamber of Commerce), ICSID (International Centre for Settlement of Investment Disputes), ICSID AF (ICSID Additional Facility), LCIA (London Court of International Arbitration), MCCI (Moscow Chamber of Commerce and Industry), PCA (Permanent Court of Arbitration), SCC (Stockholm Chamber of Commerce). See UNCTAD Investment Dispute Settlement database.

Table 1. Arbitration rules in investor-state disputes pursuant to a IIAs



Source: UNCTAD, Applicable Arbitration Rules.

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 by United Nations Resolution No. 2205. Its mandate was “to further the progressive harmonization and unification of the law of international trade”.⁵ The Commission was charged to do this by, *inter alia*, “establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development.”⁶ The resolution also stated that the Commission shall “bear in mind the interests of all peoples, and particularly those of developing countries, in the extensive development of international trade.”⁷ The UNCITRAL Arbitration Rules were adopted in 1976, but these rules were mainly created for commercial arbitration.

In IIAs, once a dispute arises, the dispute settlement clause will establish the dispute settlement mechanism to be followed. In some treaties the parties are given a choice of which arbitration rules to use. States that have ratified the ICSID Convention automatically give consent to its jurisdiction; but if the treaties allow, the parties can consent to submit the dispute to international arbitration using the UNCITRAL rules

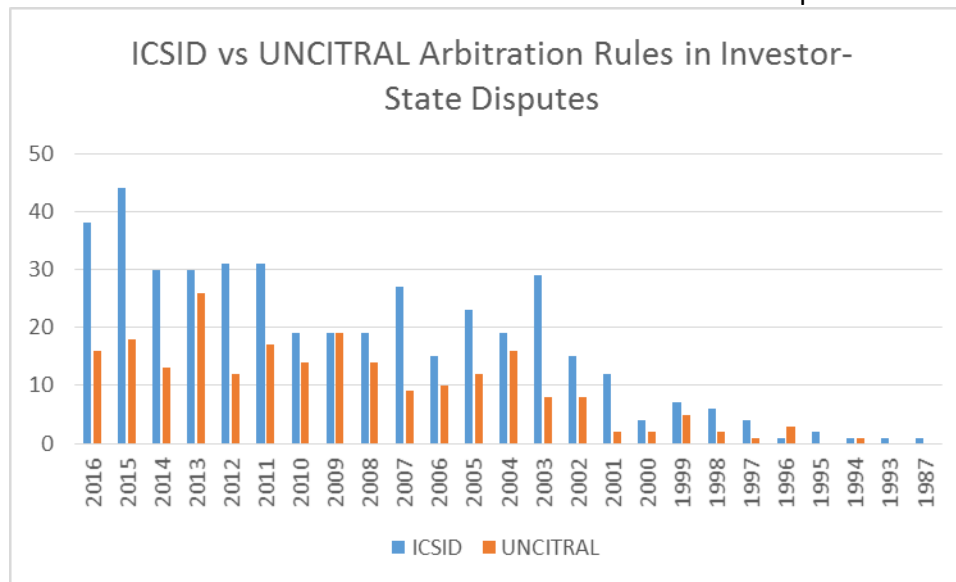
⁵ UN Resolution 2205(XXI) of 17 December 1966; See also “Origin, Mandate and Composition of UNCITRAL”, available at http://www.uncitral.org/uncitral/en/about_us.html.

⁶ UN Resolution 2205(XXI) of 17 December 1966; See also “Origin, Mandate and Composition of UNCITRAL”, available at http://www.uncitral.org/uncitral/en/about_us.html; The first attempt to regulate investment at a multilateral level was at the UN. Developing countries were questioning the Bretton Woods system because they claimed it benefited only those who created them. Due to such an uprising of developing countries’ demands, the United Nations Commission for Trade and Development (UNCTAD) was created in 1964 to support developing countries. See Gwynn, M.A. *Power in the International Investment Framework* Chapter 2. Palgrave Macmillan. 2016.

⁷ UN Resolution 2205(XXI) of 17 December 1966; See also “Origin, Mandate and Composition of UNCITRAL”, available at http://www.uncitral.org/uncitral/en/about_us.html.

instead.⁸ ICSID is still used more, but it is interesting to note that although UNCITRAL Arbitration Rules were not created for the sole purpose of settling investment disputes, and yet over the years, their general use in *investor-state* disputes substantially increased. (See Table 2)

Table 2. Use of Arbitration Rules in Investor-State Disputes



One explanation for the use of UNCITRAL arbitration rules in investor-state disputes is the attractive flexibility that the rules give to the parties for conducting arbitration.⁹ The UNCITRAL Arbitration rules are like guidelines for the parties, who, for example, can freely choose the place of arbitration and can even modify the rules if both parties agree. In contrast, ICSID arbitration rules, being institutional rules, are more rigid in those regards.

However, although the latter might be the colloquial explanation for the increased use of UNCITRAL rules in investor-state disputes, there is room for considering another view. I

⁸ In investor-states disputes, the United States, for example, has had 16 investment disputes up to February 2017 and the UNCITRAL Arbitration Rules have been used in 11 of these disputes. In South America, Bolivia, Ecuador and Venezuela have terminated the ICSID Convention, so since 2010, disputes against Bolivia and Ecuador have used the UNCITRAL Arbitration Rules, but against Venezuela the ICSID rules continued to be used. Though it might seem that this situation is due to the termination of the ICSID Convention and some of their BITs, the sunset clauses mean that the provisions will stay in force for many years after the termination of the treaty. As the Venezuela case shows, even after it terminated the ICSID Convention, cases are still submitted there. In general, the data show the percentage increase of the use of UNCITRAL rules in certain years. See also UNCTAD Press Release ‘Number of international investment disputes mushroomed in 2012’. Figure 2. UNCTAD/PRESS/PR/2013/007 Geneva, Switzerland, (10 April 2013). Available at <http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=120> Accessed July 24 2016.

⁹ See Franchini, J. ‘International Arbitration Under UNCITRAL Arbitration Rules: A Contractual Provision for Improvement’ *Fordham Law Review*. Vol 62. 1994; Caron, D and Caplan, L *The UNCITRAL Arbitration Rules: A Commentary* Oxford University Press. 2013

shall argue that the increase of the use of UNCITRAL rules in investor-state disputes might be connected to the institutional response to the criticisms regarding the enforcement of the IIAs rules. Parties' perception on how effective the institutional response to such criticism is affects their preference over the use of the particular institutions' rules. To illustrate this point, I will discuss the response regarding demands for transparency in investor-state disputes.

2. Increased Transparency Rules in Investor-State Disputes and the Role of UNCITRAL

Some disputes submitted by foreign investors against a host state to international arbitration were due to the regulations of the host state. In some cases, arbitral awards settling those cases had the consequence of restricting the host state's ability to regulate. For this reason, respondent states started to criticize the international investment framework for allowing this.¹⁰ As the awareness of the public interest in these disputes grew, many NGOs likewise complained, alongside some bodies of the European Union. These actors also became aware of their alienation from such controversies.¹¹

Arbitrations conducted at ICSID used to only allow for public notices of the disputes and permitted the parties to publish the awards upon their initiative. As a consequence of the criticism, ICSID addressed the concerns about lack of transparency and modified its arbitration rules in 2006. Since then, it made its hearings public and allowed for the possibility of submitting amicus curiae reports.¹² Every other stage of the process, however, remained confidential. The limited scope of these amendments may have been the reason that actors within the framework began to seek actions from the other relevant forum in investor-state disputes.

In 2007, UNCITRAL's Working Group on Arbitration and Conciliation noted that further work on the UNCITRAL Arbitration Rules should take into account investor-state

¹⁰ For example, Argentina complained strongly after the cases regarding their financial regulation during the financial crisis of 2001. In 2008, Brazil gave a statement saying that it would not ratify BITs because of the cost to their sovereignty. Around the same time, Bolivia started terminating its BITs, and it also terminated the ICSID Convention in 2007. So did Ecuador; it terminated some of its BITs and the ICSID Convention in 2009. In 2012, Venezuela also terminated the ICSID Convention. In the same year, Argentina submitted a draft of law to the Congress to terminate the ICSID Convention. Both Australia, in 2011, and Uruguay, in 2014, made public statements complaining about the settlement mechanism of BITs after being sued for regulations in the area of public health; Gwynn, M.A. *Power in the International Investment Framework*. Chapter 6; See also Australia's Response to the Notice of Arbitration. 2011. Available at

<https://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Australias%20Response%20to%20the%20Notice%20of%20Arbitration%2021%20December%202011.pdf> Last accessed July 26, 2016.

¹¹ See for example the International Institute for Sustainable Development (IISD), <http://www.iisd.org/topic/investment> ; and Greenpeace Netherlands, <https://www.ttip-leaks.org/> . For statements of the European Parliament see European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI))

¹² ICSID Arbitration Rules. Chapter IV. Rule 32 (2) and Rule 37 (2).

arbitration.¹³ Urging for the need to enhance transparency in investor arbitrations, in April 2008 the Office of the United Nations High Commissioner for Human Rights issued a statement, declaring that ‘where human rights and other public interests are concerned, transparency should be a governing principle...’.¹⁴ Only two months later, in June 2008, Canada requested UNCITRAL to give the Working Group a mandate to improve the institution’s functionality in that area. It was mentioned in the request that “failing to promptly include, at the earliest possible opportunity, provisions allowing for enhanced transparency will give the impression that the United Nations approves of a lack of transparency in investor-state arbitration. Such an effective endorsement of secrecy in investor-state arbitration would be contrary to the fundamental principles of good governance and human rights upon which the United Nations is founded.”¹⁵ In this timeframe, 2007-2009, the use of UNCITRAL rules in investor-state disputes increased considerably (See Table 2). The fact that after those years it decreased again can be explained by the many cases against Venezuela whose BITs do not include UNCITRAL as a choice in the dispute settlement clause,¹⁶ or for the number of cases deriving from the Energy Charter, in which, although UNCITRAL rules are a choice for the parties, it has the restriction of using them only with a sole arbitrator and not in an arbitration tribunal.¹⁷

The need for transparency in investor-state arbitrations continued to be pledged by other actors. In 2010, the European Union also contemplated transparency provisions as part of their international investment policy.¹⁸

The consensus on transparency in matters that concern public interest is almost universal; transparency in investor-state arbitrations has been no exception.¹⁹ This is why the adoption of the UNCITRAL Rules on Transparency by the majority of countries was straightforward. In 2013, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration were adopted by the UN General Assembly Resolution 68/109 and came into force on April 1, 2014. As compared to what ICSID had done to accommodate

¹³ Report of the United Nations Commission on International Trade Law on the work of its fortieth session, U.N. Doc. A/62/17 (Part I), at ¶ 175 (23 July 2007)

¹⁴ Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights: Advance Edited Version, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, U.N. Doc. A/HRC/8/5, at ¶ 37 (7 April 2008) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8-5.doc>.

¹⁵ United Nations Commission on International Trade Law forty first session, U.N. Doc. A/CN.9/662 (12 June 2008) p7

¹⁶ Gwynn, M.A. *Power in the International Investment Framework*. Chapter 4.

¹⁷ UNCTAD Investment Policy Hub. Investment disputes.

¹⁸ Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions ‘Towards a comprehensive European international investment policy’ Brussels, 7 July 2010

¹⁹ See a contrary opinion in European Federation for Investment Law and Arbitration ‘A response to the criticism against ISDS’ May 2015. Accessible at http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the_criticism_of_ISDS_final_draft.pdf

transparency provisions, the UNCITRAL Rules on Transparency are of a much broader scope because the rules allow for the whole arbitration process to be made public from the moment that the respondent state gets notified of the dispute.²⁰

Since its adoption, every arbitration conducted henceforth under UNCITRAL Rules must observe the transparency regulations. The transparency rules also establish the creation of a repository, creating a registry of the disputes, all of which becomes available to the public. This information includes the names of the disputing parties, the economic sector involved, the treaty under which the claim is being made, the notice of arbitration, the response to the notice of arbitration, the statement of claim of defence and every other statement or written submission, the exhibits, expert and witness reports, non disputing party submissions (*amicus curiae*), transcripts of hearings, orders, decisions and awards.²¹

However, the UNCITRAL rules on transparency contain an exception to the rules of transparency. This exception pertains to confidential or protected information, such as confidential business information, information that is protected from being made available to the public under the treaty or under the law of the respondent state or any law or rules determined by the arbitration tribunal, or when the disclosure is considered to be contrary to essential security interests of the state.²² This exception will continue to please those who see the attractiveness of these rules in their flexibility because the parties can decide how to conduct the process and what to leave out as confidential.

The relevance of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration is that they are a key stone for the amendment of the framework rules. Their establishment was pursued by actors facing the challenge to overcome some of the criticism against the enforcement mechanism of the international investment framework.

Due to this, other developments at the multilateral level unfolded. The UNCITRAL Rules on Transparency entered into force in 2014, but most of the existing investment treaties are dated much earlier. Finding a way for the new UNCITRAL rules to have a retroactive effect was the next challenge. The problem was solved by using international law. The Vienna Convention on the Law of Treaties states that a later treaty can modify previous treaties if states agree to it.²³

In December 2014, only 8 months after the UNCITRAL Rules on Transparency entered into force, the Mauritius Convention or United Nations Convention on Transparency in Treaty-based Investor-State Arbitration was adopted by UN General Assembly Resolution 69/116. The Mauritius convention provides for the transparency rules to be applied retroactively to all existing BITs. It will come into force when countries ratify it. So far, the

²⁰ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

²¹ UNCITRAL Rules on Transparency, Article 2 and 3.

²² UNCITRAL Rules on Transparency, Article 7.

²³ Vienna Convention on the Law of Treaties, Article 30: a successive treaty creating new obligations.

convention has been signed by 17 countries; the first country to ratify it was Mauritius.²⁴ The United States Trade Representative Office has stated that “The United States is committed to ensuring the highest levels of transparency in all investor-state proceedings.”²⁵ The European Commission has also approved ‘pushing’ for transparency in investor state disputes by recommending the signing of the Mauritius Convention to the European Council.²⁶

Although some scepticism might remain on whether the latter approach will work, as the toll for such a convention to come into force is each state’s ratification of the convention, the path pursued by the convention is relevant to the scholarship on the continuing development of the international investment framework. The Mauritius Convention was used as a meta-treaty to modify all previously-existing investment treaties so as to include transparency rules. This is the first step towards returning to multilateralism in the area of international investments.

The leap towards a consensual discussion of improving foreign investment rules at the multilateral level would be much greater if other criticized rules that exist in IIAs could also be amended in a way similar to the inclusion of the transparency rules in the framework.

And indeed, in May 2016, this exactly was proposed. The UNCITRAL Secretariat submitted to the Commission a proposition for further research to amend the topic of investor-state dispute settlement in a similar way as the transparency rules were adopted through the Mauritius Convention, i.e. to use the Mauritius Convention as a model for other conventions or as a complement to modify other rules. The proposition considers the establishment of a permanent dispute-settlement body to replace or complement investor-state provisions in existing and future treaties as well as the possibility of considering an appeal mechanism.²⁷

Although the proposition limits itself to revising the investor-state dispute settlement, if accepted, this would nevertheless be a huge stepping stone towards the return to the multilateralization of investment rules. The Vienna Convention of the Law of Treaties

²⁴ Status United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014). http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html Accessed November 25, 2016.

²⁵ The Facts on Investor-State Dispute Settlement. Official Blog of the United States Trade Representative. March. 2014. Available at <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> Accessed July 25, 2016.

²⁶ European Commission (EC) Press Release ‘European Commission pushes for full transparency for ISDS in current investment treaties’ Brussels, 29 January 2015

²⁷ Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-state dispute settlement. Submitted by the Secretariat on 24 May 2016 for the Commission on International Trade Law Forty-ninth session New York, 27 June-15 July 2016. A/CN.9/890

allows for amending the existing investment treaties by successive treaties, as it was with the Mauritius Convention²⁸, but the Vienna Convention also allows for the modification of existing treaties.²⁹ Either way, the final course of action to agree and to implement these conventions, will remain in the hands of each state. So the awareness of these developments is important, as well as the theoretical explanations of them that are discussed in the next section.

3. Theoretical background for the Forum Shifting

The efforts to include transparency provisions in the international investment framework at the multilateral level, the Mauritius Convention, and the proposition to further research other provisions of the investment framework, suggest a return to the multilateral level to amend the current international investment framework. These developments show a phenomenon of forum shifting from the bilateral yet again to the multilateral.

The discipline of international relations provides theories that describe why actors in the international system behave in particular ways. When states and actors of the international system interact with each other, they do so through relationships with one another. Although these particular relationships are important, one must also consider the structural contexts in which these relationships take place. Institutions are structures that are part of these contexts, and their role can be evidenced in the ways that such institutions can constrain but also enable actors' behaviour. This is a modified approach to concepts of structural power in international relations.³⁰ By a similar token, there is also the conception of contested multilateralism put forward by Morse and Keohane (2014) that states that "contemporary multilateralism is characterized by competing coalitions and shifting institutional arrangements, informal as well as formal."³¹ They claim that "[f]requently, multilateral institutions are challenged through the use of other multilateral institutions, either without resort to unilateralism or bilateralism or in conjunction with those strategies."³² The value of these theories as lenses for the international investment framework lies in their usefulness to understand the latest

²⁸ Art 30 Vienna Convention.

²⁹ Chapter IV Vienna Convention.

³⁰ Power analysed herein keeps the parsimony of structural realism. Susan Strange spelled out a concept of structural power where structures are sources of power, but she dismissed institutions and international regimes. Thus, this is a modified approach that considers institutions and international law as structures as well, understanding a concept of power that includes relationships and structures within the concept. For further reading see Strange, S. *States and Markets* Pinter Publishers Limited. London. 1988; Krasner, S 'Structural causes and regime consequences: regimes as intervening variables' in *International Regimes* Edited Stephen Krasner Cornell University Press 1983; Keohane, R 'Theory of World Politics: Structural Realism and Beyond' in *Neorealism and its critics*. Edited by Robert O. Keohane New York: Columbia University Press 1986; Gwynn, M.A. "Structural Power in International Relations and International Law" GLF Working Paper-forthcoming.

³¹ Morse, J. and Keohane, R. "Contested multilateralism" *Rev Int Organ* 9:385-412. 2014

³² Morse, J. and Keohane, R. "Contested multilateralism" *Rev Int Organ* 9:385-412. 2014. p.386

developments indicating forum shifting, in this case, the state's recourse to discuss amendments of foreign investment rules at the multilateral level.

As discussed in section 1, there are two main arbitral rules involved in the enforcement of the international investment framework, the institutions from which derive, therefore, deserve some consideration. ICSID, one of the five agencies of the World Bank, and the UN, through its bodies like UNCTAD and UNCITRAL. ICSID was created by a multilateral convention as a specialized institution for settling investor-state disputes. As Table 1 shows, ICSID has been the key enforcer of the rules of the international investment framework and has issued many arbitral awards. But, as pointed out by Shihata (1986): "Similarly to the World Bank, to which it is tightly connected....ICSID should be considered as an instrument of international policy to promote investments and economic development."³³ On the other hand, the UN bodies, UNCITRAL, and also UNCTAD, were created to aid developing countries. Just this formal veil might influence the preference of the majority of actors in the framework, the developing states, towards sympathizing with one institution rather than the other.

However, the institutional response to the criticisms of the framework provides an explanation for why a forum shift developed. The criticisms regarding the lack of transparency forced ICSID to change its rules in 2006, but the changes were minimal and so the criticisms remained. Furthermore, even though ICSID settles disputes between states and investors, nationals of other states, the members of the ICSID Convention are only states. This poses a difficulty for other actors that became relevant to the international investment framework, such as the European Union. The European Union, since the Treaty of Lisbon, signed in 2009, gained more "actorness" in the international investment framework. Since then agreements on foreign direct investments are under the supervision of the European Commission.³⁴ The difficulty for a supranational organization as the EU is that ICSID only accepts states and considers what the parties agreed upon in the treaty. This difficulty has been reflected in practice with cases in which the participation of the EU was limited.³⁵

The lack of a broader scope of the transparency rules implemented by ICSID rules was not enough to mitigate the criticism towards the enforcement of investment treaties. An

³³ Shihata, I. *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, ICSID Review—Foreign Investment Law Journal, Vol. 1, No. 1, pp. 1-15. 1986. p 6. Author's translation of the Spanish original.

³⁴ Lisbon Treaty on the Functioning of the European Union, Article 3. See also European Union (EU) Regulation No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between member states and third countries.

³⁵ In cases between two European countries, request to apply EU legislation was denied (*Eastern Sugar BV (Netherlands) v. The Czech Republic* (SCC no. 088/2004), and participation of the EU was only allowed through third party amicus curiae submissions (*Electrabel SA v. Republic of Hungary* (ICSID Case No. ARB/07/19)).

example can be seen in the reaction of some South American countries which started terminating their convention with ICSID because they blamed the institution for unintended sovereignty costs in the form of restriction to regulate.³⁶ Coupled to this was the discontent of relevant actors with their limited participation in the disputes submitted to ICSID. In 2013, the European Commission stated: “We also have the possibility to influence the multilateral context, for example through the United Nations Commission on International Trade Law (UNCITRAL) – where we have created new rules on transparency that will apply beyond the EU's own investment agreements.”³⁷ Furthermore, the European Commission, in a draft text for the Transatlantic Trade and Investment Partnership (TTIP) which was under negotiation with the United States, proposed the creation of a new Investment Court system.³⁸

The new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are very broad in scope so as to make the whole arbitration process transparent. UNCITRAL also prepared a draft so that the transparency rules may be applied retroactively; this was later approved at the UN General Assembly as the Mauritius Convention. These actions overcome some of the criticism of the different actors involved in the international investment framework, and using these rules in investment disputes does not limit the participation of actors like the EU, either as a party or in the application of their legislation.

A modified structural approach describes that institutions may enable actors to change the rules peacefully but the choice of states on a particular forum, or in this case to choose another forum to contest the existing rules or to further amendments, might be connected to the actors’ dissatisfaction with the partial amendments to the rules or limited access to use the main institutional facilities. This is how the institutional contestation arises. As described by the theoretical background, “the phenomenon of contested multilateralism occurs when states and/or non-state actors either *shift their focus from one existing institution to another* or create an alternative multilateral institution to compete with existing ones.”³⁹ Actors that faced difficulties with not being accommodated at one of the institutions in the investment framework shifted their efforts to another relevant institution. Institutions, when considered as structures that

³⁶ Although the enforcement problem was connected to the rules and not the institution, some of these countries blamed ICSID for the sovereignty costs in the form of restriction to regulate. See Brazil’s position in Peterson, L. and Simoes e Silva, A. *Investment Arbitration Reporter* 1 (9) 2008; Ecuador’s allegation of sovereignty costs in Interview by Mena Erazo, Paul. BBC News report. September 16, 2010; Venezuela’s statement in Digital news reported by Agencia Venezolana de Noticias (AVN) on January 15, 2012; Argentina’s request of termination of the ICSID Convention in Argentina’s Draft of Law. File No. 1311-D-2012. H. Camara de Diputados de la Nacion. March 21, 2012; See also Vandeveld, K. “A Brief History of International Investment Agreements” *University of California at Davis Journal of International Law and Policy* .Vol.12. 2005–2006.

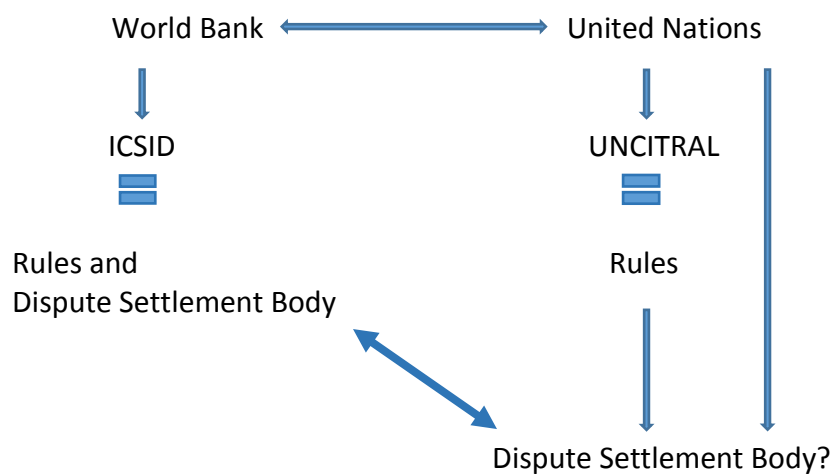
³⁷ EC. Fact Sheet. ‘Investment Protection and Investor-to-State Dispute Settlement in EU agreements’ Executive Summary. November 2013.

³⁸ European Commission draft text for the TTIP, Investment, Chapter II, section 3.

³⁹ Morse, J. and Keohane, R. “Contested multilateralism” *Rev Int Organ* 9:385-412. 2014. p.387. Emphasis added.

enable actors' behaviour, provide power to these actors to affect outcomes. These actions are reflected in scenarios of contested multilateralism which describes the shift from the bilateral establishment of rules to the discussion of improving the foreign investment rules at a multilateral level, as the case of the transparency provisions in the dispute settlement mechanism has shown. Furthermore, it also describes the situation of countries agreeing to modify the rest of the criticized rules of the international investment framework at a multilateral forum like the UN.⁴⁰ The aforementioned developments have indirectly made the UN once again an attractive forum for regulating investment rules.

Figure 1. Institutional Power and Contested Multilateralism in the area of International Investments.



Conclusion

The public interest matters in the area of international investments. Rules should encompass the interests of all actors in the international investment framework. These include states but also some key non-state actors, investors and also NGOs, civil society and regional economic integration organizations. Such an inclusion would likely result in the agreement of provisions or rules that are balanced for all actors, which in turn would allow for more sustainable development.

Different multilateral institutions might provide the platform for this task, but the choice of which institution to use might fall on the one that allows all actors' interests to be considered. UNCITRAL's work on the Transparency Rules and the Mauritius Convention has proven that UNCITRAL is a suitable organization to prepare the work for such a great challenge as the amendment or improvement of existing regulation of foreign

⁴⁰ By agreeing to a convention similar to the Mauritius convention, or using the latter as a complement.

investment.⁴¹ The UNCITRAL Rules on Transparency also give access to the non-state actors affected by the investment treaties.

Therefore, having the United Nations as the forum for the discussions about improving the rules of the current international investment framework by a meta-treaty is a promising step forward towards achieving balanced rules in this area. At the multilateral level, actors' asymmetries get diminished far more than at a bilateral setting. It is not a coincidence that the foreign investment rules developed at the multilateral level (UN) in the 1950s to 1970s favoured the developing countries' interests. This does not mean that it will be a detriment for other countries. Establishing rules that protect the public welfare are the goal and are in the interest of all countries. Furthermore, the inclusiveness provided by a multilateral setting allows countries which are not aware of certain matters to become aware of an issue that might matter to them, just by listening to the different issues that are being raised by other countries at such a forum.

The establishment of rules at such fora might take longer and be more difficult, but the deficiencies of the current international investment framework have proven the problems that can derive from agreeing to something just because it is faster and more convenient. This is comparable to the effect of acquiring a cheap product that turns out to be of bad quality and inevitably does not last long. Further work to improve the current international investment framework lies in states' increase awareness of the advantages of a multilateral forum. It promises more success in overcoming the existing deficiencies, because actors at such a forum can reach an agreement on rules that are balanced because the rules reflect the interests of all parties at stake in the framework.

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⁴¹ See the advantages of the participation in UNCITRAL's work and its decision reached by consensus in Nicholas, C. 'Negotiations and the Development of International Standards in Public Procurement: Let the Best Team Win?' 7(1) *Trade Law and Development* 64. 2015. p.76-79

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