

TOO MANY BUTTERFLIES?

THE MICRO-DRIVERS OF THE INTERNATIONAL INVESTMENT LAW SYSTEM

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Abstract

This article argues that the legal analysis of international investment law and arbitration should focus not on treaties, rules or cases, but on certain conceptual positions on specific questions that act as 'micro-drivers' of the dynamics of the entire system. The main contention is that the very same investment law architecture may operate very differently as a result of such micro-drivers or, more specifically, of the accretion and alignment of a range of conceptual positions adopted by tribunals and, to a lesser extent, argued by counsel or in academic writings. Such conceptual positions arise in some relatively undefined yet critical areas in the topography of international investment law and arbitration (e.g. the definition of investment, the assessment of the legality of investments, reliance on the economic reality of an investment scheme, the connections between treaty and custom in investment regulation, among many others). Such conceptual variation with respect to relatively undetermined issues is an ordinary occurrence in any body of law. What is, however, noteworthy in international investment law and arbitration is the magnitude of the impact of such minor variations when some of them are aligned. To borrow the suggestive image of the so-called 'butterfly effect', it is not just the flapping of a butterfly's wings that is shaping the system, it is the fact that too many butterflies are flapping their wings in the same direction.

I. INTRODUCTION

The dynamics of international investment law and arbitration has featured prominently in the literature on international law in the last two decades. This is likely a result of the surge in investment arbitration since the 1990 decision in *AAPL v. Sri Lanka*,¹ which admitted the proposition that a treaty clause may serve as a sufficient basis for a State to consent to arbitration with a foreign investor, despite the absence of privity of contract between the two.² Much has been written regarding the nature of investment arbitration, which relies heavily but not entirely on the techniques of international

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¹ *Asian Agricultural Products LTD (AAPL) v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Final Award (27 June 1990).

² This point was emphasised by J. Paulsson, 'Arbitration Without Privity' (1995) 10 *ICSID Review-Foreign Investment Law Journal* 232.

commercial arbitration,³ as well as regarding its legitimacy, to the extent that it bestows on one or, more frequently, three private individuals the power to decide disputes with potentially important public dimensions.⁴ Those discussions, however significant, are not the primary target of the analysis conducted in this article. Nor are the debates over the role of precedent in investment arbitration⁵ or the – alas frequent – contradictory positions taken by investment tribunals on similar issues.⁶

Instead, this article makes the case for a change of approach in the way we – as academics and practitioners – analyse international investment law. *Specifically, it is submitted that legal analysis should focus not on treaties, rules or cases, but on certain conceptual positions that are important – perhaps the most important – ‘micro-drivers’ of the dynamics of the entire investment law system.* In order to explain this argument and its implications, it is necessary to set the right scale between a range of scholarly contributions analysing, in great detail, some specific treaties,⁷ rules⁸ or cases,⁹ and some others addressing more systemic considerations¹⁰ but paying relatively less attention to technical questions. This article seeks to explore a middle scale which connects, very specifically, what may appear to be narrow technicalities to the broad operation of the entire investment law system and beyond. Such scale and the connections it attempts to unveil and/or emphasise is more easily understood if one recalls that the very same architecture on which international investment law and arbitration are based could operate in very different ways. In this context, the scale this article proposes is intended to capture what ‘drives’ such variations within the same overall architecture and, more fundamentally, the drivers whose combined effect can result in an overall dynamics that has come under much criticism in the last several

³ The ambiguous foundations of the investment arbitration were analysed, in particular, by Z. Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2004) 74 *British Yearbook of International Law* 151.

⁴ The first author to have fully articulated this point was G. van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).

⁵ For two overviews of the debate see G. Kaufmann Kohler, ‘Arbitral Precedent: Dream, Necessity or Excuse?’ (2007) 23 *Arbitration International* 357; G. Guillaume, ‘The Use of Precedent by International Judges and Arbitrators’ (2011) 2 *Journal of International Dispute Settlement* 5.

⁶ For two overviews of the debate see F. Spoorenberg and J. E. Viñuales, ‘Conflicting Decisions in International Arbitration’ (2009) 8 *The Law and Practice of International Courts and Tribunals* 91; P. Mayer, ‘Conflicting Decisions in International Commercial Arbitration’ (2013) 4 *Journal of International Dispute Settlement* 407.

⁷ See e.g. C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013); K. Vanvelde, *US International Investment Agreements* (Oxford University Press, 2009).

⁸ See e.g. J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005); I. Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford University Press, 2008); M. Paparinskis, *The International Minimum Standard of Treatment and Fair and Equitable Treatment* (Oxford University Press, 2013); A. de Nanteuil, *L'expropriation indirecte en droit international de l'investissement* (Paris: Pedone, 2014); A. Mitchell, D. Heaton and C. Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Cheltenham: Edward Elgar, 2016).

⁹ See e.g. T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005).

¹⁰ See van Harten, above n. 4; S. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’ (2011) 52 *Virginia Journal of International Law* 57; A. Roberts, ‘Clash of paradigms: actors and analogies shaping the investment treaty system’ (2013) 107 *American Journal of International Law* 45; J. Pauwelyn, ‘At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System. How it Emerged and How it Can Be Reformed’ (2014) 29 *ICSID Review* 372.

years.¹¹ From this perspective, this article adopts a vantage point from which the operation of these drivers is unveiled and/or emphasised, particularly as regards their combined effect on the how the same underlying architecture is fleshed out and turned into a practice, leading to its current – rather peculiar – dynamics.

These drivers, which may include certain conceptual positions on questions such as the definition of investment, the assessment of the legality of investments, reliance on the economic reality of an investment scheme, the connections between treaty and custom in investment regulation, and many others, are normally found in areas of the investment law topography which are relatively unsettled or that admit different principled stances or conceptual positions. It is an ordinary feature of any body of a law to leave a range of questions rather open or to require further specification when a rule is applied to specific factual circumstances. To further clarify the object of this article, I should add that my purpose is not merely to emphasise the importance of analysing the above questions as such or the interpretation of investment treaties. Some of these questions have received significant attention already.¹² It is the systemic effect that these apparently minor variations can have when they are aligned. In other words, this article seeks to unveil their role in driving the entire operation of the investment law system and, even beyond, their impact on the broader context of investment law (e.g. on the protection of human rights and the environment or the fight against corruption). This is in my view useful not only to highlight the need for a return to the conceptual foundations of international investment law but also to put some (sometimes radical) reform proposals into a broader perspective. Indeed, if as argued in this article, the investment law system is highly sensitive to the conceptual positions adopted in a range of open but critical questions, then, in order to be effective in practice, any reform proposal must address these micro-drivers. And it may be possible to achieve some fundamental change without an overhaul of the entire investment law architecture. It seems prudent at this stage not pursue what may appear as an utterly theoretical discussion, which would put off the appetite of busy practitioners. To put it simply, let me borrow the suggestive image of the so-called 'butterfly effect' to say that it is not just the flapping of a butterfly's wings that is shaping the system, it is the fact that too many of them are flapping in the same direction.

The analysis begins with a brief characterisation both of conceptual positions that operate as micro-drivers of the investment law system (II) and of the wider context of this system (III). These two sections discuss why such conceptual positions, when aligned, can be seen as micro-drivers of the investment law system, and why the

¹¹ See e.g. P.-M. Dupuy, F. Francioni, E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, 2009); C. Balchin, L. Kyo-Hwa Chung, A. Kaushal and M. Waibel (eds.), *The Backlash Against Investment Arbitration* (Boston: Kluwer, 2010); J. E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012); M. Sornarajah, *Resistance and Change in the International Law of Foreign Investment* (Cambridge University Press, 2015); S. Hindelang and M. Krajewski, *Shifting Paradigms in International Investment Law* (Oxford University Press, 2016).

¹² See e.g. J. Ho, 'The Meaning of 'Investment' in ICSID Arbitrations' (2010) 26 *Arbitration International* 633 ; Z. Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29 *ICSID Review* 155 ; R. Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press, 2012) ; J. E. Viñuales, 'Customary Law in Investment Regulation (2014) 23 *Italian Yearbook of International Law* 23.

bilateral relations between foreign investors and host States must be seen as just one aspect of a wider context. The article then turns to a range of specific examples of conceptual positions that have acted as micro-drivers with systemic effects for investment law. The examples provided are but a selection of a broader range of micro-drivers, which cannot be addressed within the limited bounds set for this article. To facilitate the presentation, these examples are organised in what could be seen as an order of appearance in investment proceedings, starting with jurisdictional matters (IV), then moving to admissibility matters (V) and then to the merits of a dispute (V). This organisation is for presentation purposes only, as in practice such stages may or may not be separated. But my hope is that it will help to locate more easily where the valves of the system have been loosened, whether inadvertently or purposefully. The article concludes with some theoretical and practical observations on the implications of this thesis for legal scholarship, teaching and practice (VII).

II. CONCEPTUAL POSITIONS AS MICRO-DRIVERS

In many ways, this article is an attempt at bringing the analysis closer to the topography of international investment legal practice so as to identify the spectrum of conceptual positions regarding the application of certain major principles and their wider implications. This spectrum is not unlimited. As the article will endeavour to show, whereas it is rare not to find fluctuation and ambiguity in the application of virtually all principles governing investment law, the divergence tends to settle or crystallise around a limited number – two, perhaps three and in some cases four – approaches or ways of applying a principle. Technically, these approaches are presented as interpretations of the applicable rules and, sometimes, they even purport to express common positions widely adopted in the jurisprudence. But, in fairness, they are conceptual positions, broad options within a spectrum of possibilities.

The precise legal nature of these conceptual positions is difficult to characterise. As noted earlier, they are often presented as interpretations of the rules applicable to a dispute but, strictly speaking, the treaties and rules interpreted are in most cases different, although their wording may be to some extent similar. The fact that dozens of different treaties may be at stake and that only a few 'interpretations' may be derived from them raises some doubt as to the 'interpretative' nature of these conceptual positions. There is certainly an element of interpretation involved, but this interpretation is greatly influenced by a distillation of previous cases, particularly a distillation operated by authoritative commentary, that sets bounds to the spectrum of conceptual positions available to tribunals. This is, of course, unless the treaty at stake contains unusual clauses or wording. At the same time, such positions cannot be considered to be, technically, jurisprudential lines. This is not only because there is no doctrine of *stare decisis* in international law (or international investment law) but also because the material from which 'lines' would be derived does not even refer to the same law. Finally, such conceptual positions cannot be taken as rules agreed by the parties as applicable to their dispute. Although this may be the case with respect to

some rules derived from soft-law instruments¹³ or practices,¹⁴ the parties to a dispute have no authority to either create conventional rules applicable to other potential parties or to turn a commonly agreed rule into customary law.¹⁵ The latter point is sometimes forgotten by investment tribunals, who may find it convenient to merely state that both parties agree on the contents of a rule or on the fact that a rule has customary nature. All in all, and in fairness, the converging principles identified in this article are conceptual positions that can rely on some authority, broadly understood, without necessarily enjoying a clear link to a formal source of law.

These are the conceptual positions, the flapping of butterflies' wings, that when sufficiently aligned can lead to important effects at the level of international investment law as a system. It is this ability to shape the system that turns them into 'drivers', and it is their lack of a clear legal basis, somewhere at the intersection of broadly stated rules, interpretations, arbitral accretion, and circumstance-specific compromise, that makes them 'micro'-drivers, by contrast with explicitly chosen architectural features of the system. The driving power of these conceptual positions will be discussed in context, in the light of carefully selected illustrations. And I shall endeavour to show that it is not the mere fact that there is space for different conceptual positions with respect to a given issue that resonates at the level of the entire system but, rather, the fact that some of these conceptual positions are aligned to produce systemic effects.

III. THE BROADER CONTEXT OF INVESTMENT DISPUTES

Investment schemes do not take place in a vacuum and the international legal framework applicable to them should reflect such complexity. When a dispute arises, the aspects of the investment scheme that are most directly addressed by investment law and arbitration are sometimes only one segment, an artificial cut, in a complex social reality with much deeper roots. This is the broader context that must be taken into account in assessing the implications of different conceptual positions within the fabric of investment law, and this context can be characterised by reference to three basic observations.

Firstly, investment disputes concern only one relation, that between a foreign investor and the authorities of a host State, within a wider set of relations potentially involving interactions with populations affected by the investment scheme, different levels of governmental authorities and the authorities of another State (the home State or parties to relevant multilateral instruments). These other relationships are governed primarily by different norms of domestic and international law. It is a truism to note that the relations between the foreign investor and potentially affected individuals or populations are subject to the domestic law of the host State (e.g. tort law) but also,

¹³ See e.g. International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration, adopted by a resolution of the IBA Council of 29 May 2010.

¹⁴ See e.g. the common use of the so-called 'Redfern Schedule' to structure the document production phase in investment procedures.

¹⁵ This point was clearly and strongly emphasised by the International Court of Justice in one of the most important and influential cases in the ICJ's history: *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits, Judgment*, I.C.J. Reports 1986, p. 14, para 184.

potentially, to that of other States (e.g. if the parent company of the investor is sued before the tribunals of the State where it has its headquarters under the law of that State). It seems also unquestionable that the relations between the authorities of the host State and the investor are subject to domestic law and, perhaps, to contractual arrangements (which may be subject to the domestic law of host State or that of another State, through a choice-of-law clause). The interactions between the host State authorities and the potentially affected populations are governed by both domestic and international law, particularly by human rights instruments. State authorities have a duty to protect individuals within their territory (or jurisdiction) from deprivation of their human rights by a third party, such as an economic operator. Last but not least, there are other international obligations undertaken by the host State which also have a bearing on the way a State organises its legal framework providing protection not only to foreign investors but also to the individuals in its territory, certain groups or the natural environment. Such other obligations may concern *inter alia* the fight against corruption, labour standards, environmental protection or collective rights. Thus, all in all, investment schemes often intervene in the context of a wider State-Investor-Population triangle ('SIP triangle').¹⁶ International investment law targets essentially one aspect of this triangle, i.e. the relationship between the foreign investor and the host State. And, in turn, investment arbitration proceedings only address one sub-component of this partial aspect.

Indeed, investment proceedings are only a segment of the overall relationship between the foreign investor and the host State. When this relationship becomes conflicting, at least three main stages can be distinguished within the process of dispute settlement, moving from the pre-litigation phase (where counsel typically intervenes to prepare the dispute but also to assess its prospects, e.g. when a third party is considering the acquisition of the affected entity or providing finance to pursue the claim), to the litigation phase (itself with several components), to the enforcement phase (whether through judicial means or through alternative means). The litigation phase can be conceptually sub-divided into at least four main components, namely the jurisdictional, admissibility, merits and quantum phases, with some additional incidental proceedings, such as *interim* relief. Moreover, new proceedings can be brought to challenge the award (annulment or set aside) or seek its recognition and enforcement. All these phases are well-known but recalling them is useful to delimitate the scope of the analysis conducted in this article.

The third observation is that the system of international investment law and arbitration as it has functioned over the last two decades is not the only possible expression of the legal architecture upon which it rests. This is important to understand why conceptual positions can operate as micro-drivers shaping how the system effectively works and how the resolution of one aspect – the foreign investor-host State relationship – of a broader context may encroach on other aspects, such as the

¹⁶ On this triangle see J. E. Viñuales, 'International investment law and natural resource governance', in K. Kulovesi, E. Morgera (eds.), *Research Handbook on International Law and Natural Resources* (Cheltenham: Edward Elgar, 2016), pp. 26-45.

protection of the affected population or of the environment. Over time, the system of international investment law has been structured around two main concepts: the law and adjudicator of foreign investment. Historically, the initial forms of foreign investment protection relied on the extraterritorial application of the home State's laws as well as on the extraterritorial jurisdiction of its tribunals over disputes involving nationals from capital-exporting countries. This specific expression of the two components of the system progressively gave way to internationalised or international forms of both the law and the adjudicator through the development of mixed commissions and international minimum standards of treatment of aliens. Today, the still prevailing understanding emphasises a combination of investment treaties and *ad hoc* investment arbitration tribunals. But even such an understanding leaves significant room for different manifestations of the system or ways in which the system as a whole can operate. This is where certain alignments of conceptual positions, which would otherwise appear as context-specific, have in fact critical systemic implications.

By way of illustration, the division of labour between, on the one hand, investment treaty arbitration and, on the other hand, arbitration based on contractual clauses or dispute settlement before domestic courts, has been fundamentally affected by the alignment of certain conceptual positions, including (among several others): the distinction between 'treaty' and 'contract' claims (which may lead to disregard the forum selection clause in the contract); the ability to disregard preliminary procedural requirements through the use of the most-favoured-nation clause (which has greatly limited the need for investors to exhaust local remedies, which is still a formal condition for an application before an international human rights adjudicatory or quasi-adjudicatory body to be admissible); as well as on the broad interpretation of arbitration clauses in so-called 'Chinese treaties' (which normally limit resort to arbitration to disputes of the 'amount' of compensation but have been interpreted in such a way as to extend consent to arbitration to whether there has been an expropriation or not). The wings of these and several other¹⁷ 'butterflies' all flap in the same direction, namely the expansion of investment arbitration to the detriment of other forms of investor-State dispute settlement. Similarly, the important role of investment treaties does not necessarily mean that they should be presumed to exclude other applicable norms of either domestic law (e.g. domestic environmental or tort law, which may ground a State counter-claim) or international law (e.g. customary international law, where most actionable concepts expression the idea of sovereignty are found).

As this article will endeavour to show, the accretion and alignment of subtle differences in the conceptual positions taken by investment tribunals (as in the example provided in the previous paragraph) with respect to the two components of the system, i.e. the law and adjudicator, have had systemic consequences. To put it simply, such systemic consequences were not necessary corollaries of how investment treaties or arbitration rules are drafted. Many other scenarios would have been (and are) possible, with the very same rules. What has largely driven the operation of these rules towards

¹⁷ For example: broad definitions of investment, narrow conceptions of admissibility, selective regard for the economic reality of a transaction in some cases but not others, among others.

the current – idiosyncratic – state of affairs is the alignment of certain subtle conceptual positions taken on very specific but eventually fundamental issues. But there are alternative and competing conceptual positions that, on the same legal architecture, could lead – and, in some cases, have led – to a very different system. And this is all the more striking if one considers that, as noted in the previous section, the legal foundations of all these conceptual positions are not entirely clear. One significant implication of the focus on conceptual stances as ‘micro-drivers’ of the system is that the operation of the system could be substantially modified without resorting to radical changes in the system’s architecture.

Combining these three contextual observations, the purpose of the following analysis is to shed light on the current idiosyncratic understanding of the international investment law and arbitration system by reference to some illustrative conceptual stances relating to the jurisdictional, admissibility and merits phases. In doing so, the article hopes to show that the current dynamics of the system is largely driven by the accretion and alignment of conceptual positions that have no clear legally-grounded priority (or claim to priority) over other possible positions relating to the same question.

IV. THE SCOPE OF JURISDICTIONAL POWER

The scope of jurisdiction of investment tribunals is conditioned upon the dispute relating to an ‘investment’ in the host State. The term ‘investment’ is misleadingly simple, and it has been the object of much controversy leading to a rather volatile body of jurisprudence. For that very reason, it provides a useful field of inquiry for the identification of different conceptual positions with potential systemic effects. Rather than merely describing a series of cases and noting their diverging positions, the purpose of this section is to map the conceptual problems that they raise, often implicitly, and the limited set of potential answers that may be given to them. More specifically, three series of problems are discussed: whether the definition of ‘investment’ is subjective or objective; in the latter case whether it contains a requirement that the transaction contributes to the development of the host State; and whether the legality of the investment is a requirement of its existence or of its protection.

A) *Objective v. subjective definitions of investment*

The first problem can be introduced by reference to the *Poštová Banka v. Greece* case.¹⁸ In this case, two financial entities, one based in the Slovak Republic and the other in Cyprus, claimed to hold an investment in Greece, in the form of Greek bonds, which had been allegedly treated in breach of the treaties between, respectively, the Slovak Republic and Greece and Cyprus and Greece. The tribunal decided the case on a pragmatic basis reasoning that the Cyprus investor, as a mere shareholder of the Slovak investor, did not have legal rights over the bonds and, as regards the Slovak investor,

¹⁸ *Poštová banka, a.s. and Istrokapital s.e. v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) (*Poštová banka v. Greece*)

that the bonds were not encompassed by the definition of investment of the applicable treaty. But for present purposes the interest of the decision lies elsewhere, namely in that the tribunal was prompted by the parties to embark on a mapping exercise of the different positions regarding the definition of investment.¹⁹

In this mapping exercise, the tribunal identified two positions followed by arbitral tribunals. The first, which can be traced back to the so-called 'Salini test' holds that there are some core contents of the definition of investment.²⁰ The consequences of such contents vary depending on the context. For arbitration proceedings under the aegis of the International Centre for the Settlement of Investment Disputes (ICSID),²¹ the main implication is that unless the core contents are met an ICSID tribunal would have no jurisdiction over the dispute. Other tribunals have extended this implication beyond the ICSID context emphasising the need to look beyond words, even the words used in a bilateral treaty to define the term investment, and concentrate on the reality of the transaction, which must involve a financial contribution, risk and certain duration.²² The second position holds that the term investment has whatever meaning the States parties to a treaty intended to give it. Thus, even those transactions that epitomise in common language the opposite of making an investment (e.g. debt by contrast to equity, or a sale of goods by contrast to foreign direct investment²³) would be an 'investment' if included in a relevant provision of a treaty.²⁴ Depending on the context, this position may be limited to non-ICSID arbitration, which relies only on a treaty, or even to ICSID arbitration under the theory that Article 25 of the ICSID Convention merely mirrors the definition of investment included in the relevant treaty.²⁵

Faced with these different solutions, the first impression that one may gather concerns the significant volatility of the investment case law. Yet, the two positions, even with their fluctuations depending on whether or not they cover ICSID and non-ICSID contexts, form important poles of attraction. The *Poštová Banka* case offers a good illustration of this point. Indeed, in reaching its conclusion, the tribunal noted that:

¹⁹ *Ibid.*, para 351-359.

²⁰ See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001), para 52. For a recent illustration see *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (10 March 2015), para 216, 229-231.

²¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 ('ICSID Convention' or 'Washington Convention').

²² See e.g. *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award (26 November 2009) ('*Romak v Uzbekistan*'), para 180, 207.

²³ See e.g. *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 December 2010), rejecting a claim based on a sale of goods as manifestly without merit under Article 41(5) of the ICSID Arbitration Rules) or *Romak v. Uzbekistan*, above n. 22, para 242.

²⁴ See e.g. *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010), para 314; *Ambiente Ufficio S.P.A. and Others (formerly Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), para 462.

²⁵ See e.g. *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the application for annulment (16 April 2009) ('*Malaysian Salvors – Annulment*'), para 73.

'[t]he rule of interpretation of Article 31 of the VCLT [Vienna Convention on the Law of Treaties]²⁶ must be applied to each treaty in particular, and not seeking to create general categories or classifications of treaties, depending on whether the definition is broad or closed.'²⁷

The majority of the tribunal later seemed to characterise its own approach of the treaty as following a subjective test,²⁸ but it added that it would have reached the same conclusion had it applied an objective test under Article 25 of the ICSID Convention.²⁹

In the context of this article, the gravity pull of these two positions is not mentioned to reassure the reader as to the innocuous character of theory. Indeed, as it will become apparent in what follows, the conceptual distinction carries important practical consequences. It is noted to emphasise the need, for commentators but also for practitioners, to focus on analysing the implications of each conceptual position, rather than on this or that treaty or this or that case. It is the conceptual positions that should be our analytical object. And our task is to identify them and then to spell out in as much detail as possible their legal and policy implications for the operation of the investment arbitration system, keeping in mind the wider context of the SIP triangle. In the next paragraphs, the article provides two prominent illustrations of the implications of siding with one or the other conceptual position.

B) *Contribution to the development of the host State*

One significant implication of retaining an objective definition of the term 'investment' is that such definition involves stable components. Depending on the components that are (or not) considered to define the core of an investment scheme, many transactions or assets may (or may not) be covered. Obvious examples that may be excluded from a traditional objective definition include loans (or other money claims), bonds or other public securities, intellectual property rights, regulatory authorisations, sales transactions or short-term financial placements. In this section, the focus is on one component that received much attention in a stream of cases, namely the contribution to the development of the host State. Although some commentators and tribunals have expressed doubt as to the relevance of this component on grounds of economic liberalism, no one is more ironic than history itself, with its current wave of protectionism and illiberalism in what seemed to be the least exposed quarters. Underpinning the 'development' component is the other – sometimes overlooked – objective of investment treaties, namely the promotion of prosperity through the facilitation of investment flows.

This debate can be introduced by reference to the *Malaysian Historical Salvors v. Malaysia* case.³⁰ The dispute concerned alleged rights derived from a contract for the location and salvage of the cargo of a British vessel that ran aground in 1817 in an area now under Malaysian waters. The sole arbitrator declined jurisdiction on the basis of

²⁶ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 ('VCLT').

²⁷ *Poštová banka v. Greece*, above n. 18, para 287.

²⁸ *Ibid.*, para 360.

²⁹ *Ibid.*, para 371 (the observations of the tribunal seem to be of general application but the section under which they are offered specifically refers to the ICSID Convention).

³⁰ *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Award (17 May 2007).

an objective understanding³¹ of the term 'investment' in Article 25 of the ICSID Convention encompassing not only the usual financial contribution, duration and risk but also the need that the transaction contributes to the development of the host State, derived from the preamble of the ICSID Convention.³² Reasonable minds may disagree, but the decision of the sole arbitrator was cautious and thoroughly argued. Yet, it was met with great scepticism by a majority of an *Ad Hoc* Committee, which annulled the award for its reliance on the need for a transaction to contribute to the development of the host State.³³ The position of the majority of the *Ad Hoc* Committee is itself debatable but, for present purposes, what must be emphasised is that to reach its conclusion the majority of the Committee had to turn the definition of investment in the ICSID Convention first into a very broad objective one (limited to the acknowledgement that 'investment does not mean sale'³⁴) and then into a subjective definition, recognising its dependence upon the 1'700 investment treaties concluded since the adoption of the ICSID Convention:

'While it may not have been foreseen at the time of the adoption of the ICSID Convention, when the number of bilateral investment treaties in force were few, since that date some 2800 bilateral, and three important multilateral, treaties have been concluded, which characteristically define investment in broad, inclusive terms such as those illustrated by the above - quoted Article 1 of the Agreement between Malaysia and the United Kingdom. Some 1700 of those treaties are in force, and the multilateral treaties, particularly the Energy Charter Treaty, which are in force, of themselves endow ICSID with an important jurisdictional reach. *It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term "investment" as found in Article 25(1) of the Convention, risks crippling the institution.*'³⁵

Again, reasonable minds may disagree, and one Committee member strongly disagreed, but the point that deserves to be noted is the move from one pole (the objective definition) towards the other pole (the subjective definition) in order to dismiss the importance of the development component. It is noteworthy that the majority seems to assume that it is an unquestionably good thing to expand the scope of jurisdiction under ICSID even beyond the very limits initially envisioned at the time of the adoption of the ICSID Convention. That was the consensus prevailing in investment arbitration circles a decade ago. It is no longer so obvious. For present purposes, it will suffice to emphasise three points. One is that, as mentioned earlier, the policy – even ideological – cleavage underpinning the debate over the 'development' requirement is deep and opposes neoliberalism to developmentalism. The second is

³¹ The sole arbitrator discusses two stances, i.e. the typical characteristics approach and the jurisdictional approach, but both are expressions of an objective, albeit flexible and pragmatic, definition of the term investment. See *ibid.*, para 70-72.

³² *Ibid.*, para 66 (interestingly, the decision refers here to a case where the reference to the development of the host State was used to reach the conclusion, on the basis of a subjective understanding of the term investment, that a loan constituted an investment because it contributed to the development of the host State), para 124 (noting that when the other components are superficially met, the contribution to the development of the host country becomes more important), and para 125-146 (rejecting the existence of an investment on grounds of lack of contribution to development).

³³ *Malaysian Salvors – Annulment*, above n. 25, para 62-63, 69, 71-72.

³⁴ *Ibid.*, para 72.

³⁵ *Ibid.*, para 73.

that, despite the shifts in perception and the surge in investment cases, the conceptual positions towards which the solutions converge remain relatively stable, namely an objective versus a subjective definition. The third is that a conceptual position such as the subjective definition of investment (or the variations closer to this pole, including very broad 'objective' definitions), has the effect (and *in casu* the declared justification) of promoting investment arbitration.

C) *Legality of investments*

Another implication of retaining an objective or a subjective definition of investment concerns the legality of investments. This point is useful to understand how conceptual positions may accrete and align with each other. Some tribunals have considered that the legality and even the good faith of the investment are a definitional feature, rather than a condition for the protection of investments. Indeed, in *Anderson v. Costa Rica*³⁶ the tribunal considered that there could be no investment in a transaction that was a hoax (a so-called 'Ponzi scheme') and therefore had no legal existence. In a similar vein, the tribunal in *Phoenix v. The Czech Republic* reasoned that the restructuring of an investment scheme for the purpose of gaining protection under the applicable treaty was not merely inadmissible; it meant that there was no 'investment' under the treaty.³⁷ Although at the jurisdictional level the end result of this position may be similar to that of considering illegality as a condition for the protection of an otherwise existing investment, there are potentially significant implications of retaining one or the other stance.

These implications can be understood by reference to the widely accepted distinction between initial and subsequent illegality of an investment.³⁸ This distinction has been used to separate jurisdictional effects (a tribunal has no jurisdiction because, in case of initial illegality, there is no protected investment) from consideration at the merits stage (a tribunal can assert jurisdiction but, in its consideration of the merits, it will take into account the illegality in the operation of the investment). Such a distinction would only be possible if legality is not a definitional component of the term 'investment'. Indeed, if an asset, transaction or scheme needs to be lawful in order to be an investment, then it is less relevant when it became unlawful. As soon as it became so, there no longer is an investment, which is a pre-condition for a tribunal to exercise jurisdiction. By contrast, if legality is not a definitional component, then different forms of illegality

³⁶ See *Alasdair Ross Anderson and others v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (19 May 2010), para 51-61.

³⁷ See *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009), para 114.

³⁸ On this distinction see *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007), para 345; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), para 420; *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award (18 July 2014), para 1354-1356; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award (18 July 2014), para 1354-1356; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award (18 July 2014), para 1354-1356; *Copper Mesa Mining Corporation v. Republic of Ecuador*, UNCITRAL, PCA No. 2012-2, Award (15 March 2016), para 5.54 ff; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016), para 289ff.

may display different effects in a procedure. Such effects may concern not only jurisdiction, but also admissibility or the merits and, hence, the distinction between initial and subsequent illegality remains fully relevant. An investment that has been made legally but subsequently becomes inconsistent with the laws of the host country (e.g. an intellectual property right that has been declared invalid, a regulated company that has continued operation without obtaining or renewing a permit or without meeting important safety standards, an extractive industry scheme that has massively polluted the surrounding area or bullied the affected populations by means of a private military company) would exist for jurisdictional purposes but the claims may not be admissible (i.e. the tribunal may not use its adjudicative power) or the company's actions may be such that the measures taken by the host State are entirely justified on the merits of the case. Such a wider set of effects only comes into play if legality is not a definitional component but a condition to be taken into account in deciding whether or not to grant protection to an investment and to what extent. The latter conceptual position may be consistent with both an objective definition of investment (if the definition does not consider legality as a definitional trait) or a subjective one. But the interesting point lies elsewhere, namely in the fact that the second conceptual position (legality is not a definitional trait) opens the way for jurisdiction to be more easily accepted, as certain forms of illegality must be dealt with at the merits. This is another example of alignment and, as discussed next, such alignment can go much further if the test for considering an investment illegal (particularly the applicable law and the seriousness of the illegality) is narrow and stringent.

As before, reasonable minds may disagree as to the most appropriate stance but what must be emphasised is the fact that legality has converged towards two different conceptual positions, one where it is viewed as a definitional component and the other – more frequent – where it is considered as a requirement conditioning the extent of protection of an investment. Within the latter position, a number of finer-grained positions can be identified, particularly as regards the laws that must be taken into account in defining legality or the effects of initial illegality (jurisdiction or admissibility). These more specific positions have significant implications from the perspective of both systemic effects and the SIP triangle, as they provide different degrees of relevance to laws protecting other interests. Over time, the scope of the laws that must be taken into account to assess the initial (il)legality of an investment has been broadened. One could interpret these developments as a jurisprudential line suggesting the emergence of a general principle under which a range of laws, including not only fundamental prohibitions (e.g. corruption)³⁹ but also domestic investment laws⁴⁰ as well as other governing laws (e.g. environmental permits),⁴¹ are relevant for the assessment of initial (il)legality. But it is also possible to interpret this body of cases as pointing to a limited set of parallel conceptual positions, particularly because early

³⁹ See e.g. *Inceysa Vallisoletane, SL v. El Salvador*, ICSID No ARB/03/26, Award (2 August 2006) ('*Inceysa v. El Salvador*'), para 252, 257, 264.

⁴⁰ See e.g. *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award (12 July 2010), para 119.

⁴¹ See e.g. *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015), para 372, 378.

stances have been iterated in subsequent cases.⁴² Whether different stances are steps in an incremental line or parallel convergences is difficult to decide in a context as volatile as investment treaty arbitration. What can instead be asserted with some confidence is that one of the two conceptual positions (legality is not a definitional trait) and some conceptual positions within it (narrow and stringent conception of illegality only by reference to corruption or, at the most, to domestic investment laws) have the potential to align in such a way that would open jurisdiction and promote investment arbitration. As discussed next, this potential is confirmed by the different conceptual positions relating to the consequences to be derived from the initial illegality of an investment.

D) THE UNCERTAIN PLACE OF ADMISSIBILITY

Conceptually, the difference between considerations of jurisdiction and admissibility is very clear: whereas the former relate to whether a tribunal has the power to adjudicate a dispute, the latter concern the question of whether the tribunal should use this power. Significantly, whether a matter relates to jurisdiction or admissibility has also several practical implications. One commentator notes that the scope of review applicable to a tribunal's decision on the existence of its adjudicative power is different from the one applicable to decisions in the exercise of the tribunal's jurisdiction, including admissibility.⁴³ It could be added that the burden and standard of proof applicable to jurisdictional and admissibility matters may also differ. Whereas the claimant bears the burden of proving the facts and conditions sustaining jurisdiction, the burden of establishing reasons why a tribunal should not use its adjudicative power would normally lie with the respondent, and the standard may for some of those reasons be more demanding.⁴⁴ In light of these and other potential differences,⁴⁵ characterising an objection as a matter of jurisdiction rather than as one of admissibility is not a purely academic exercise. Yet, in practice, tribunals have taken different stances that can be illustrated by reference to two main questions, namely the (il)legality of investments and indirect shareholder claims.

A) *Illegality between jurisdiction and admissibility*

In the previous section, the focus was on the role of (il)legality in assessing whether a tribunal has jurisdiction over a claim. Two main positions were identified in this regard depending on whether legality is a definitional component of the term investment or a

⁴² For a subsequent iteration of the approach followed in *Inceysa v. El Salvador* see *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award (19 September 2013), para 3.170 – 3.171. For a subsequent iteration of the approach in *Saba Fakes v. Turkey* see *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013), para 165.

⁴³ See Z. Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), para 307.

⁴⁴ See e.g. *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility (17 December 2015), para 495, see 509 and 536 for an application; *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015), para 212.

⁴⁵ See e.g. *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability (29 December 2014), para 149.

condition for its protection. As noted earlier, in the latter case, the effects of illegality may concern not only jurisdictional matters but also admissibility matters or even the merits of the case. Such a broader palette of possible effects has resulted in an additional spectrum of conceptual positions regarding what is essentially the same problem, namely that the investment was initially tainted by a violation of the laws of the host State.

There are two main conceptual positions that serve as poles of attraction to the solutions envisaged by tribunals. Illegality is most often framed as defeating 'consent' and therefore depriving the tribunal of its jurisdictional basis. As discussed in the previous section, there is some variability as to the types of illegality, but the end result is that States have not consented to provide protection to such assets or schemes. By way of illustration, in *Inceysa v. El Salvador*, this conclusion was reached both in connection with international public policy and, in clearer terms, as regards the prohibition of unlawful enrichment:

'In conclusion, the Tribunal considers that because Inceysa's investment was made in a manner that was clearly illegal, it is not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre. Therefore, this Arbitral Tribunal declares itself incompetent to hear the dispute brought before it.'⁴⁶

The underpinning rationale is not that there is no investment but that, due to its illegality, States cannot have intended to afford it protection, including through the possibility to bring an investment claim before an arbitral tribunal.

The effects of illegality are, however, not always stated with such clarity. A case at the borderline between jurisdiction and admissibility is *World Duty Free v. Kenya*, where the tribunal considered that a contract secured by means of a bribe paid to the then Kenyan President could not be enforced. The tribunal seems to consider that there was no basis for jurisdiction as the contract was not valid, but it stated its conclusions in language reminiscent of inadmissibility:

'In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.'⁴⁷

The conceptual position taken by the tribunal is blurred by the fact that the instrument on which the claimant relied to assert the jurisdiction of the tribunal was the contract secured by corruption, rather than an overarching investment treaty, the validity of which would not depend on the validity of a contractual transaction.

A clearer conceptual position regarding the inadmissibility implications of illegal transactions is provided by the decision in *Churchill Mining and Planet Mining v.*

⁴⁶ See *Inceysa v. El Salvador*, above n. 39, para 257.

⁴⁷ See *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006), para 157.

Indonesia.⁴⁸ In this case, the tribunal reasoned that a claim based on rights that had been secured by fraud or forgery, even if such acts were attributable to the entity that had transferred these rights to the claimant, were inadmissible.⁴⁹ Underpinning this conclusion are some case-specific considerations, including the fact that the Claimants had been negligent in inquiring into the processes used by its local partner as well as, quite surprisingly, in presenting some of the forged documents at stake as evidence in the arbitration proceedings. Interestingly, the tribunal expressly referred to the palette of effects that may arise from fraudulent conduct:

'[t]he legal consequences of fraudulent conduct depend to a large extent on the circumstances of each case, which may include the applicable treaty, the seriousness of the fraud, the role of the disputing parties or third parties in relation to the fraud, the nexus between the fraud and the claims, and the time when the fraud was committed. A review of international cases shows that fraudulent conduct can affect the jurisdiction of the tribunal, or the admissibility of (all or some) claims, or the merits of a dispute'⁵⁰

This statement is correct if one sees, as many tribunals, the (il)legality of the investment not as a definitional component but as condition for its (full) protection. At the same time, the tribunal is implying that a finer-grained inquiry is necessary to understand the implications of fraudulent conduct.

The three decisions discussed in the previous paragraphs do not illustrate three conceptual stances, but only two, with *World Duty Free v. Kenya* somewhat in the middle to further highlight that there are two main poles of attraction for the solutions offered by tribunals. If a merits dimension is added, a range of new possibilities arises but only provided that the relevant claim falls under the jurisdiction of a tribunal and is admissible. Significantly, the assessment of (il)legality not merely at the jurisdictional level but at the admissibility stage could potentially encompass cases where the illegality is subsequent and, yet, the proceedings are stopped before the merits because the tribunal should not be using its adjudicative powers. Seen from the perspective of accretion and alignment of conceptual positions, this analysis confirms the point mentioned in the previous section, namely that certain conceptual positions (legality is not a definitional trait of investment, it must be narrowly and stringently assessed, and only initially illegality is a matter for jurisdiction, with subsequent illegality pertaining to the merits of the dispute) can align in such a way as to favour investment claims reaching the merits stage of investment proceedings. This is only visible at a finer-grained scale, where the analysis is sufficiently close to the topography to detect patterns in the possible alignment of subtle conceptual positions, with potentially important systemic effects. As discussed next, further alignment can be found in certain conceptual positions relating to indirect shareholder claims.

B) *Indirect shareholder claims*

The question of indirect shareholder claims presents some similarities with that of the characterisation of the term investment. Indeed, for a claim brought by a shareholder of

⁴⁸ See *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award (6 December 2016), para 508.

⁴⁹ *Ibid.*, para 508.

⁵⁰ *Ibid.*, para 494.

a company which is, in turn, a shareholder of a company constituted in the host State, to be possible, the claimant must qualify as a 'foreign investor' holding an 'investment' under the terms of the applicable treaty. Aside from the questions arising from the term 'investment' itself, which have already been discussed, two additional points relate to whether there is a 'foreign investor' under the treaty as well as to whether it is a proper claimant. These three questions (investment, foreign investor, admissibility) have offered three different avenues to address the issue of indirect shareholder claims, with diverging solutions within each avenue.

A convenient way of organising the discussion is to proceed chronologically, starting with the position under general international law as formulated by the ICJ in the *Barcelona Traction* case.⁵¹ The facts of the case are well-known. Belgium brought an action before the ICJ against Spain in an attempt to exercise diplomatic protection of the Belgian shareholders of a Canadian company active in Spain, for losses sustained by the company. One of the preliminary objections submitted by Spain was that Belgium lacked *jus standi* to bring a claim on behalf of Belgian interests in a Canadian company and, therefore, the claim was inadmissible. The Court framed the question in admissibility terms inquiring whether the losses allegedly suffered by Belgian shareholders were a result of a breach of rights of which such shareholders (rather than the company itself) were the beneficiaries. The Court concluded that because the company had a separate legal personality and the measures challenged affected the company's rights (and not the shareholders' rights, but merely their interests),⁵² therefore Belgium had no *jus standi* to bring a claim. There is some controversy as to whether the ICJ chamber in the *ELSI* case⁵³ abandoned this stance in favour of the admissibility of shareholder claims. But in a more recent decision, the full court confirmed the position taken in the *Barcelona Traction* case according to which the legal personality of companies means that a company has 'rights over its own property, rights which it alone is capable of protecting'.⁵⁴ But the Court also noted that an exception to this rule – allowing the 'protection by substitution' of shareholder for the company – can be introduced by an investment treaty.⁵⁵

The discussion of the *Barcelona Traction* case provides the fall-back conceptual position against which the investment case law has framed the question of indirect shareholder claims. Two such framings, each allowing for different conceptual positions, can be identified. Both dismiss the relevance of the *Barcelona Traction* stance, but on different grounds. On the one hand, a treaty may assimilate a local company controlled by foreign shareholders to a foreign company. Thus, an otherwise local company could bring a claim to protect its own rights as if it were a foreign investor. On the other hand, the definition of investment could be broadened to include 'shares' in local companies. The 'rights' – by contrast to mere interests – of which

⁵¹ *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3.

⁵² *Ibid.*, para 44.

⁵³ *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15.

⁵⁴ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, para 61.

⁵⁵ *Ibid.*, para 88.

shareholders are direct beneficiaries are thereby broadened in such a way that a shareholder bringing a claim for measures against the local company is exercising its own rights, not protection (of the company) by substitution. In both cases, questions of admissibility are thus converted (sometimes debatably) into questions of jurisdiction because what a tribunal must assess is whether there is an 'investment' by a 'foreign investor' under the applicable treaty and potentially the ICSID Convention. Thus, whereas the *Barcelona Traction* stance focuses on admissibility, these two other avenues focus on jurisdiction. Up to now, the situation is relatively simple, although it may raise questions such as those discussed in connection with the definition of investment.

The analysis becomes more complex when the shareholders' claim becomes genuinely indirect. The situation then involves at least three layers, namely the shareholders (nationals of State A) of a company incorporated either in a third State (State B) or in the host State (State C), which is itself a shareholder of a company incorporated in host State. The applicable treaty, including the arbitration clause, is between State A and State C. The equation could be much more complex if there are more than three layers of shareholding, different levels of participation (majority or minority), and several applicable treaties. The three avenues identified in the previous paragraphs arise again, but for present purposes two of them are relevant, namely the question of whether there is an investment (for jurisdictional purposes) or whether the indirect shareholder claim is admissible.

The first question is whether there is an 'investment' under the applicable treaty or potentially the ICSID Convention as well. Investment tribunals have taken two conceptual positions in this regard. Some tribunals, relying on either specific wording of the applicable treaty or on a broad interpretation of it, have considered that indirectly held shares amount to an investment.⁵⁶ This is problematic because it means that the legal personality of the company in State B is ignored, even if corporate screen is preserved for other purposes such as tax optimisation or other form of corporate structuring. The suppression of this corporate layer could rely on the 'economic reality' of the transaction, but then such economic reality should also count for other purposes. For example, the distinction between treaty and contract claims should be excluded based on the economic reality of the transaction or a counterclaim against the parent company (in State C) based on an arbitration clause in the contract with the investment vehicle in the host State should be allowed on the basis of the economic reality of the transaction. The economic reality of the ownership/control structure is thus selectively taken into account. It is relied upon to ignore the intermediate corporate layers and thus

⁵⁶ On this question see generally D. Bentolila, 'Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration' (2010) 2 *Trade, Law and Development* 87, at 115ff, referring to: *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 August 2004), para 137-142; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction (29 June 1999), para 45-46; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction (11 May 2005), para 90/91; *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005), para 63; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Objections to Jurisdiction (17 June 2005), para 33-35; *Lauder v Czech Republic*, UNCITRAL Arbitration Rules, Final Award (3 September 2001), para 77.

to allow for indirect shareholder claims but it is not relied upon (hence the intermediate corporate layer re-emerges despite the economic reality underlying it) for tax purposes or for enabling a counterclaim against the parent company. Selectivity is even clearer if one compares the suppression of the intermediate corporate screen with other questions where disregard of formalities would be much more warranted, such as the artificial distinction between treaty and contract claims, which in economic reality relate to the very same transaction. Whether disregarding the intermediate corporate screen is an explicit (through a focus on the 'economic reality' of the transaction) or an implicit step (by inflating the definition of investment so as to turn any interest into a direct right), this solution greatly facilitates treaty shopping, parallel proceedings and potentially double-recovery. The accretion and alignment process with systemic implications arises from the selectivity of the reference to the economic reality of the transaction. What is aligned – however contradictory this may be once the alignment is unveiled – are conceptual positions where such reality is disregarded (e.g. distinguishing treaty and contract claims for the same dispute, or blocking a counterclaim against the parent company) with conceptual positions where it is given effect (e.g. to enable indirect shareholders' claims). A different conceptual position is, however, possible with respect to indirect shareholder claims. Indeed, some tribunals have applied a more rigorous test, stating that the shareholders in State A have no rights on the assets of either the intermediate company in State B or C (which includes the shares in the company in State C) or the end company in State C. This was the reason why the tribunal in the *Poštová Banka* case declined jurisdiction *ratione materiae* to hear the claim of the Cyprus investor, itself a shareholder of the Slovak investor, who had identified as its investment the Greek bonds owned by the Slovak investor.⁵⁷ Despite their stark difference of approach, the two conceptual positions share the fact that they analyse the 'indirectness' of the claim through the prism of jurisdiction.

A different way of approaching this question is through the prism of admissibility,⁵⁸ as the ICJ has done in its case law. The question would then be whether the claimants (shareholders in State A) are the proper party to bring a claim in light of the object of the claim and, more specifically, whether they hold rights protected under the applicable treaty or mere interests. Depending on the challenged measures and the affected rights, the proper party to bring the claim may be the company in State C (if considered a 'foreign investor' under the treaty or simply through domestic remedies) or the intermediate company in State B or C (if a suitable treaty is applicable). In such a case, a claim brought by the shareholders in State A would simply be inadmissible (as was the claim brought by Belgium on behalf of Belgian shareholders in the

⁵⁷ *Poštová banka v. Greece*, above n. 18, para 228-247. A variation of this approach, also emphasising a less expansive interpretation of the term investment, is provided by *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award (2 November 2012). In this case, the tribunal considered that investment requires an active role: 'protection of the UK-Tanzania BIT requires an investment made by, not simply held by, an investor... it would be unreasonable to read the BIT to permit a UK national with subsidiaries all around the world to claim entitlement to the UK-Tanzania BIT protection for each and every one of the investments around the world held by these daughter or granddaughter entities', para 257, 270.

⁵⁸ See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/08, Decision on Annulment (25 September 2007), para 75, 89-97.

Barcelona Traction). This conceptual position would have significant implications not only for the limitation of treaty shopping, parallel proceedings, and potentially double-recovery, but also for the proper role of economic reality in investment proceedings. It does not seem consistent that for purposes of indirect shareholder suits, the economic reality of a transaction is taken into account (thus facilitating access to investment treaty arbitration) but, when it comes to determining other questions (e.g. whether treaty and contract claims are essentially the same), the economic reality of the transaction is disregarded (thus further facilitating access to investment treaty arbitration and even limiting the impact of a carefully negotiated contract, often required by a tender process).

As noted in previous sections, reasonable minds may and have disagreed on such questions, but the point here is different, namely that the analytical level at which such questions should be analysed is given by these conceptual positions. Some of these positions, when aligned, may become subtle micro-drivers of systemic proportions. And the identification and analysis of these conceptual positions must take into account their systemic effects. As discussed in the next section, the same reasoning is applicable to conceptual positions taken by tribunals in connection with the consideration of the merits of a case.

E) (OVER-)RELIANCE ON INVESTMENT TREATIES

International lawyers working on and writing about international investment law have tended to focus their attention to a great extent on investment treaties, whether Bilateral Investment Treaties (BITs) or investment chapters in Free Trade Agreements (FTAs). International investment agreements certainly play an important role, as they provide a very frequent basis for investment claims. However, they are far from being the only source of the law applicable to foreign investment disputes, which equally encompasses at the very least domestic law, contractual arrangements, as well as other customary and treaty-based rules of international law.

(Over-)reliance upon investment treaties is partly the result of some confusion between jurisdiction and applicable law. The fact that an arbitration clause may be limited to claims for breach of the relevant investment treaty does not mean that the only applicable law is that treaty. This should be a truism for any tribunal. Arbitration clauses may be relevant to determine the scope of the law applicable to the dispute, but they are not decisive. Questions of treaty law or State responsibility, which arise from treaty and customary international law, or legal aspects on which international law says little, such as corporate structure or intellectual property rights, are regularly addressed in investment disputes. Even when the treaty contains a clause defining the applicable law as 'the treaty and other rules of international law', some questions will necessarily have to rely on domestic law. This is, however, not the issue that needs to be addressed here. Instead, the focus of the next sections is on the relations between treaty and custom in investment disputes in order to highlight, as before, different conceptual positions taken in the jurisprudence and some of their implications.

A. *Treaty and custom in investment arbitration*⁵⁹

As noted earlier, reference to customary law in investment arbitration is not a particularly controversial question. Tribunals routinely make reference to the customary law of treaties, particularly to the rules on treaty interpretation, or to customary rules on State responsibility. This is rather obvious. What is more difficult to map is the exact operation of such references. Over-reliance upon investment treaties as *lex specialis* may obscure the many ways in which customary norms can be articulated with provisions in an investment treaty: (i) to interpret such provisions; (ii) as governing norms superseding treaty provisions (most notably because of the hierarchy of peremptory norms, which are of customary nature); and last but not least (iii) as governing norms supplementing treaty provisions for questions not addressed by the latter.

Keeping in mind these three forms of interaction may have significant practical implications, as can be shown by reference to the expression of State sovereignty in foreign investment disputes.⁶⁰ The third and often neglected form of interaction between treaty and custom is perhaps the only proper avenue for the operation of customary concepts expressing the idea of sovereignty in an actionable manner. This point was emphasised by the tribunal in *AAPL v Sri Lanka*, which is the very decision that recognised the possibility of investment claims based only on investment treaties, in the absence of any contractual arrangement:

'[I]t should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by *direct reference to certain supplementary rules*, whether of international law character or of domestic law nature.' (emphasis added)⁶¹

It is of course possible that the wording of an investment treaty may exclude certain customary norms (which are not of peremptory nature), including certain actionable concepts expressing the idea of sovereignty. But that is only the case when the parties have specifically intended to do so, and one would expect an investment tribunal to analyse whether and to what extent a specific treaty provision (or a set of them) excludes partly or entirely an otherwise applicable customary norm. A tribunal must not avoid such a necessarily fine-grained analysis by merely stating that it is applying the treaty, because treaties are 'not a self-contained closed legal system' and their application requires resort to supplementary norms.

One of the most frequent examples of such supplementary norms is provided by the customary rules on treaty interpretation and application codified in the VCLT, although the supplementing role has a wider scope. As noted by the tribunal in *Accession Mezzanine v. Hungary*:

⁵⁹ This issue has been addressed in J. E. Viñuales, 'Customary Law in Investment Regulation' (2013/2014) 23 *Italian Yearbook of International Law* 23.

⁶⁰ On this question see J. E. Viñuales, 'Sovereignty in Foreign Investment Law', in Z. Douglas, J. Pauwelyn and J. E. Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press, 2014), pp. 317-362.

⁶¹ *AAPL v. Sri Lanka*, above n. 1, para 21.

'There are a few essential points to be made in this context. *First, the interpretation and application of the BIT is governed by international law, as is any treaty, and the expropriation clause is, obviously, a key part of the BIT. Second, it may not be possible to consider the scope and content of the term "expropriation" in the BIT without considering customary and general principles of international law, as well as any other sources of international law in this area [...]* The BIT in this case, as in almost all cases, has no definition of "expropriation" within its text, nor does it contain guidelines that would assist the Tribunal in determining whether or not there has been a compensable taking of property. Expropriation has been and is now part of international law, and the change from dispute resolution under the system of diplomatic protection to investor-state arbitration has not modified that. It is true that BITs have become the most reliable source of law in this area, as have the awards of ICSID, other investor-state tribunals acting under the UNCITRAL Arbitration Rules, and other modern-day tribunals, such as the Iran-U.S. Claims Tribunal, state practice, and writings of scholars. *But that is not inconsistent with the continuing relevance of customary and general principles of international law, at least as to BIT obligations that are silent as to scope and content, as well as any other sources of international law with respect to expropriation.*' (emphasis added)⁶²

This quotation reflects the tendency of tribunals to look at investment treaties as 'the most reliable source of law in this area' but, at the same time, it highlights that even for questions that are addressed in investment treaties, such as expropriation, reference to customary law may still be necessary for interpretive purposes. Thus, under this conceptual position, even if the investment treaty applies as *lex specialis*, that does not mean that customary law on that very specific point becomes irrelevant. It may apply together with the treaty provision in order to clarify the contents of this provision.⁶³

A fortiori, when the applicable treaty does not govern the question expressly, the supplementary role of custom should be expected to be much greater. The overall import of the treaty (a treaty provision or a set of them) may still be understood as excluding custom, but this reasoning must be sufficiently spelt out in the tribunal's decision, rather than simply assumed. Yet, as discussed next in the light of two examples, there is still significant room for improvement in this area. Tribunals have indeed tended to assume that treaties displace the customary concepts expressing sovereignty or, in other words, even for matters not addressed in the treaty, they have disregarded the possible combined application of treaty and custom (which, as discussed earlier, other tribunals have confidently asserted for customary norms that specifically address the same matter as the applicable treaty provision). Understanding the supplementary role of custom, and its operation in the investment context, is important not only because investment treaties rarely address the extent of a State's regulatory powers explicitly but also because, when they do so (e.g. through reservations on public emergency or environmental regulatory powers) this is not to be

⁶² See *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezelő v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondents Objection Under Arbitration Rule 41(5) (16 January 2013), para 67-68.

⁶³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para 25 ('The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself').

considered as replacing (and excluding) the customary norms expressing State sovereignty.

B. *The case of the police powers doctrine*

Different understandings of the relations between treaty and custom, with the attendant consequences for the expression of sovereignty in foreign investment disputes, can be found at the roots of conceptual positions on the operation of the police powers doctrine.

This concept essentially emphasises the duty and power of States to regulate for the public good, even if that has adverse economic consequences for individuals and companies. Given its relevance for the disputes that arise in connection with foreign investment transactions, it has been frequently applied in investment proceedings, sometimes to dispose of a claim.⁶⁴ The customary basis of this concept is widely recognised, either explicitly or implicitly (e.g. through a reference to 'general international law'). One frequently quoted precedent is the award of the tribunal in *Saluka v. Czech Republic*, where it is stated that:

'the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are "commonly accepted as within the police powers of States" forms part of customary law today'.⁶⁵

This case is useful for the discussion in this section not only because it is an oft-cited *locus* of the police powers doctrine, which was effectively applied *in casu*,⁶⁶ but also because it illustrates one conceptual position on the interaction between treaty and custom as it relates to the operation of the police powers doctrine. Indeed, the tribunal's reasoning implies that the customary norm could only be applied if it has been incorporated into the applicable treaty:

'The Tribunal acknowledges that Article 5 of the Treaty [an expropriation clause] in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.' (emphasis added)⁶⁷

⁶⁴ See e.g. *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para 603; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002), para 103, 112; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) ('*Saluka v. Czech Republic*'); *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award (24 December 2007), para 268; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010), para 149-150; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (27 December 2010), para 197; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award (7 July 2011), para 145; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para 236-241, 243; *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (Redacted) (14 February 2012), para 569-570, 584; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012), para 396-401; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), para 490-493.

⁶⁵ *Saluka v. Czech Republic*, above n. 64, para. 262.

⁶⁶ *Ibid.*, para 265.

⁶⁷ *Ibid.*, para. 254.

Taken out of context, this statement would be questionable. The application of the police powers doctrine, as a customary norm, does not depend upon a clause incorporating it into the treaty, unless the treaty otherwise excludes the application of relevant customary law. Indeed, for a directly relevant and widely recognised customary norm not to apply, there must be a *lex specialis* clearly excluding its application. However, the tribunal barely addressed the *lex specialis* question. Moreover, a relevant customary norm may continue to apply to shape the content of the applicable treaty provision, as in the *Accession Mezzanine v. Hungary* case. This is what the *Saluka* tribunal suggested – thereby clarifying its reasoning – when it referred, in the same paragraph, to Article 31(3)(c) of the VCLT:

‘[i]n interpreting a treaty, account has to be taken of “any relevant rules of international law applicable in the relations between the parties” – a requirement which the International Court of Justice (“ICJ”) has held *includes relevant rules of general customary international law*’ (emphasis added).

This statement is certainly correct, but it misses four important points, namely (i) that customary law does not require ‘incorporation’ to be taken into account, (ii) that it may be taken into account not only for ‘interpretation’ purposes but also (iii) to govern a situation which is not specifically addressed in the treaty and, above all, (iv) that there are no legal grounds to assume, without further and specific reasoning to this effect, that a treaty not addressing a given question nevertheless acts as *lex specialis* (and in the very specific form of exclusionary *lex specialis*) with respect to a customary norm that specifically addresses such a question.

This implicit conceptual position on the relations between custom and treaty is far from innocuous because the police powers doctrine is one of the main legal expressions of sovereignty relevant for investment disputes. The position of *Saluka* on this point can be contrasted with the position of the tribunal in *Chemtura v. Canada*. Relying on the recognition of the doctrine in *Saluka*, the tribunal in *Chemtura* simply stated that it was applicable with the result that the Canadian measure challenged by the investor was a valid exercise of Canada’s police powers.⁶⁸ There is no discussion, in this context, of whether the applicable treaty incorporates the customary norm or not. The customary norm was deemed applicable and it effectively provided a ground (in addition to the absence of a substantial deprivation) to reject the expropriation claim brought by the investor.

As in previous sections, the main point in discussing these cases is to emphasise that the analysis should be conducted at the level of conceptual positions as well as to focus on their implications for the broader system of international investment law. One major implication is the room left to the customary expression of sovereignty by sometimes implicit and unconsidered understandings of the role of treaties or, more specifically, by an over-reliance upon them to the detriment of customary law. If, as discussed earlier

⁶⁸ See e.g. *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, UNCITRAL, Award (2 August 2010), para 266 (‘[T]he Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent’s police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation.’).

in this article, a range of conceptual positions can accrete and align to facilitate access to the merits stage of investment arbitration proceedings, the alignment is extended by a conceptual position concerning the relations between investment treaties and custom that, effectively, undermines the role of sovereignty in foreign investment disputes. This process of accretion and alignment is therefore important in generating the systemic effects that have triggered so much criticism of the investment law and arbitration system.

V. CONCLUSION

Step by step, by a slow process of accretion and alignment, the investment case law has pushed the protection of investors to the very limits of what the system's architecture could permit. This point is critical. The system has been pushed to its limits by the accumulation of expansive – and unconsidered – conceptual positions up to what appears, nowadays, to be an unsustainable state. Criticism addressing legitimacy issues without identifying specifically the mechanisms that have to be adjusted to defuse the potential crisis of the system is useful but faces a major problem: what is to be done? Criticism that answers such a question by recommending fundamental and far-reaching reform is also useful, but it faces another problem: how realistically, how rapidly and how generally such changes can be implemented? And even if such reforms can be implemented, to what extent changes at the broad architectural level will be sufficient for the system to operate as expected. This is why I believe that it is important to pay attention to the micro-drivers shaping the functioning of the system. Very similar architectures can operate in very different ways depending on the conceptual positions that emerge and govern certain specific questions with systemic implications. To conclude the analysis, it is useful to recall the main point developed in this article by reference to some illustrations derived from the investment case law, namely that, as legal scholars, we should focus our efforts on identifying the conceptual positions that arise from the jurisprudence, their accretion and alignment, as well as their broader implications. This point has implications for legal scholarship, teaching and practice.

As legal scholars, we carry the main responsibility for looking at the wider body of case law, from investment tribunals but also from other international *fora*, and distilling the essential conceptual positions that arise from it. It is only once these conceptual positions have been identified that their legal and policy implications can be explored, both for other issues within the investment case law (e.g. the role of 'economic reality' which is used, on the one hand, to disregard corporate structures and facilitate indirect shareholder claims while, on the other hand, it is deemed of limited relevance when it comes to distinguishing treaty and contract claims) and for the wider international investment law system. If legal scholars do not perform this task, it is highly unlikely that practitioners will. By their very profession, they are expected to argue a specific conceptual position, not to seek objectively what is the state of the law. As for arbitrators, they may to some extent identify conceptual positions. Yet, their role is not one of scholarship, despite the frequent *obiter dicta* one finds in the case law, but one

of deciding specific disputes, which are much more influenced by factual and intra-tribunal considerations.

In turn, it is only through the distillation effort conducted by legal scholars that the teaching of international investment law will be made more sensitive to the impact of conceptual positions as micro-drivers of the entire system through a process of accretion and alignment. Rather than merely discussing a limited set of representative cases advancing different solutions, our teaching could greatly benefit from understanding both the overall import of the case law and its doctrinal and policy implications. It is only by making future academics and practitioners aware of (i) the need to focus on conceptual positions, (ii) the existing conceptual positions emerging and crystallising on different questions, (iii) the process of accretion and alignment, (iv) their impact as micro-drivers of the system as it operates at present, and (iv) perhaps also their broader implications for other values and interests, that excessive solutions will be corrected or abandoned and the pendulum will swing towards the centre, rather than towards the opposite extreme.

Last but not least, as a practising investment lawyer, the author of these lines is well aware of the many constraints involved in deciding and arguing a case. Yet, it is submitted that arbitrators have a role to play in considering more critically and fully the implications of the conceptual positions they take on specific issues. What may be appropriate in the specific circumstances of one case may also give rise to a range of unintended consequences capable of driving the system off the road or of greatly undermining its legitimacy. One butterfly flapping its wings here or there may not make much of a difference. But the dynamics of the entire system may indeed change if too many butterflies flap their wings in the same unconsidered direction.