

# THE MEASURE OF FINALITY: A DIALECTICAL ANALYSIS OF LEGITIMACY CONCERNS IN INTERNATIONAL INVESTMENT ARBITRATION

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**Abstract:** Over the last two decades, the institution of investment treaty arbitration has increasingly attracted a particular type of academic criticism. In challenging the overall coherence of an international adjudicative social practice, the spectre of a legitimacy crisis has successively established itself in the scholarly language-game orbiting investor-State dispute settlement. This article offers a structural explanation of legitimacy concerns by exploring the epistemic framework within which legitimacy issues materialise. On the basis of a dialectical analysis, it is argued that legitimacy challenges are intrinsically linked to evaluations of performances of arbitral reasoning, in particular, and to the epistemic condition of the doctrine of finality in general. Procedural autonomy (contract) and the latent dependency of proceedings on State authorities (adjudication) will be conceptualised as the two defining moments underlying the doctrine of finality. The article concludes by applying the developed analytical template of finality as a measure of legitimacy in order to review the legal reasoning in the two cases of *Lauder/CME v The Czech Republic*, as well as in *Ampal-American and Others v Egypt*, paradigmatic instances of concurrent treaty arbitration proceedings.

## A. INTRODUCTION: LEGITIMACY, CRISIS AND FINALITY

Over the last two decades, the spectre of a legitimacy crisis in international investment law (IIL), and in investor-State dispute settlement mechanisms (ISDS) in particular, has attracted increasing scholarly attention. While this specialised field of law, together with the institutions and academic controversies it has generated, is still young, any discussion of legitimacy may draw on an established scholarship of many centuries' standing. A prominent figure in this tradition is the sociologist Max Weber, who, writing during the early 20<sup>th</sup> century, formulated what he believed to be universal categories of legitimisation for systems of social interaction. Within every legal order, in which the conformity of those who are acting subjects to it relies primarily on a belief in the lawfulness of adjudicative processes and the legality of law-issuing authorities, affirmations and concerns evoking the term 'legitimacy' have a binary argumentative structure. A legal order's legality is recognised as legitimate, Weber notes, either because the procedural rules of dispute settlement are derived from a 'voluntary agreement of

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the interested parties on the relevant terms', or because relevant rules are regarded as 'imposed on the basis of what is held to be legitimate authority.'<sup>1</sup>

Constituting a legal system without positive law proper, IIL provides a particularly striking example of this type of legal order. Rules in this special regime, within the broader international law on state responsibility, are not recognised as legitimate based on tradition or on a commonly shared transcendental ideal of justice; on the contrary, the conformity to rules on trans-border investment is, in principle, a social practice of professionals independent of effective mechanisms of sanctions or threats. Therefore, the social reality of arbitration makes itself available to both Weberian categories of legitimisation: legal authority, as much instantiated as governed by consent (arbitral proceedings of investor-State tribunals), on the one hand, and legal authority recognised as imposed by legitimate authorities (sovereign State entities), on the other.

Even though merged into a well-defined procedural legal framework, the practice and underlying principles of investor-State arbitration has raised a number of fundamental legitimacy questions which have not remained unnoticed by scholars. The ensuing debates have taken the form of both re-evaluations and re-affirmations of overall developments in the legal practice of international investment protection. The discordant arguments of the rising number of critics and advocates of the pivotal institution of investor-State arbitration may roughly be summarised as either calls for substantial change, a modest adjustment of existing rules and practices, or non-interference on grounds of denial of the existence of a substantive 'legitimacy crisis'.

As much to differentiate between these stances as to elucidate their unifying *raison d'être*, this article begins by offering a structural exposition of different positions of approval and disapproval in the literature. It will be shown that perceptions of legitimacy or illegitimacy of final rulings are uniquely linked to procedural, ie voluntary and autonomy-based, aspects of investor-State arbitration. These, in turn, are related to the process of concrete enforcement, or, as it will be termed, the contextual recognition of the rulings' finality by legitimate authorities. Accordingly, reading the doctrine of finality as the fundamental jurisdictional and epistemic condition in arbitral proceedings that makes legitimacy an issue, the article then introduces a Weber-inspired conceptual template for analysing the legal reasoning of arbitral tribunals according to two defining features of the doctrine of finality, namely *contract* and *adjudication*.

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<sup>1</sup> Max Weber, *The Theory of Social and Economic Organization* (AM Henderson and Talcott Parsons trs, The Free Press 1947) paras 7, 130.

Understood as the right and duty of tribunals in session to omit the reasoning of other case-related awards and contextual determinants whenever found appropriate, the moment of *contract* will be shown, in parallel to the Weberian notion of consensual legitimacy, to mark the quintessence of autonomy in arbitral reasoning. The moment of *adjudication*, on the other hand and in stark contrast to international commercial arbitration, will denote the unique context-dependent relation between foreign investor and respondent State as expressed in the legitimate expectation of recognisability and enforceability of arbitral awards. In this way, the term ‘adjudication’ reflects the Weberian ‘belief in legitimacy’ based on the recognition of the legality of the authority which recognises and enforces rules on trans-border investment.

Exemplifying what is then proposed as the dialectical nature of the doctrine of finality and its significant bearing on the structure of legitimating arbitral reasoning, these two moments will then provide an analytical framework for re-examining the decisions on *Lauder/CME v Czech Republic*,<sup>2</sup> two cases which attained prominence by leading to two contrary rulings on effectively identical facts. Through a new reading of what has become a *locus classicus* of legitimacy issues in international investment arbitration, it will be demonstrated that perceptions of legitimacy and illegitimacy of ISDS tribunals’ legal reasoning arise from and react to the intertwined moments of contract, related to context exclusion, and adjudication, adhering to context-dependence. Affirmed by the tribunal’s reasoning amidst parallel treaty proceedings in 2016 in *Ampal-American and Others v Egypt*,<sup>3</sup> it will be concluded that the crisis in the legitimacy of investor-State arbitration continues to be epistemically conditioned by an understanding of arbitral finality that perceives context-independence (contract) and context-dependence (adjudication) as oppositional rather than merely differential determinants of arbitral reasoning.

## **B. PERCEPTIONS OF A LEGITIMACY CRISIS**

Legitimacy concerns in ISDS have only recently begun to receive broader public and media attention, such as in the context of negotiating the EU-Canada Comprehensive Economic Trade Agreement (CETA), the EU-US Transatlantic Trade and Investment Partnership (TTIP) and the US-Mexico-Canada Agreement (USMCA), or have started to attract significant intergovernmental attention since UNCITRAL entrusted its Working Group III in 2017 with a

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<sup>2</sup> *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award, 3 September 2001; *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Final Award, 14 March 2003.

<sup>3</sup> *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Jurisdiction, 1 February 2016.

broad mandate to work towards and report on possible reforms on an annual basis.<sup>4</sup> However, the academic history of concerns over the legitimacy pull of ISDS can be traced back over at least two decades. José Alvarez, a pioneering proponent of a systemic change in the legal regime governing IIL, assessed the North American Free Trade Agreement (NAFTA) from a critical theory perspective as early as 1997. In his analysis, he enunciates the view that NAFTA's chapter 11 on foreign investment protection and dispute settlement and 'its perceived legitimacy among traditional international lawyers (...) needs to be compared to some troublesome realities on the ground'.<sup>5</sup> Alvarez's methodology of approaching the document through a close reading allows him to differentiate between the *formality* and *actuality*<sup>6</sup> of the effect of legal protection standards such as National Treatment (article 1102), Most-Favored-Nation Treatment (article 1103) and Minimum Standard of Treatment (article 1105). Alvarez demonstrates how this NAFTA chapter employs a rhetoric which presents the relation among the three parties to the treaty as one of 'scrupulous neutrality and equal protection'.<sup>7</sup> He thus finds what we may call the chapter's language-game<sup>8</sup> to be 'grounded in symmetrical and reciprocal rights (...) between the NAFTA parties and their investors' which 'befits the treaty's claim that it is a "fair" contract between "sovereign equals"'.<sup>9</sup> Using NAFTA's self-proclaimed standard as a benchmark, Alvarez continues by comparing the alleged equality of arms with the actual standing of Mexican nationals who are commercially active in the highly competitive fields of domestic agriculture and export manufacturing. He finds the reality of investment

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<sup>4</sup> United Nations, 'Report of the United Nations Commission on International Trade Law' (Fiftieth session, Official Records Seventy-second session Supplement No. 17, 3-21 July 2017) paras 263-264. The Working group acknowledged the mandate in its 35<sup>th</sup> session of 2018 (UNCITRAL Working Group III, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-fifth Session' (35<sup>th</sup> Session, New York, 23-27 April 2018) A/CN.9/935 para 100) and invited submission from governments and began to issue annual reports on the 'Possible reform of investor-State dispute settlement (ISDS)' to the secretariat since its 36<sup>th</sup> session (UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS)' (36<sup>th</sup> Session, Vienna, 29 October - 2 November 2018) A/CN.9/WG.III/WP.149).

<sup>5</sup> José Enrique Alvarez, 'Critical Theory and the North American Free Trade Agreement's Chapter Eleven' (1997) 28(2) University of Miami Inter-American Law Review 303, 304. Another prominent and very critical voice is that of Muthucumaraswamy Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration' in Karl P Sauvart (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 39.

<sup>6</sup> Here, Alvarez (n 5) relies on the theoretical framework of a so-called 'critical race theory', which structurally resembles the 'critical theory' as introduced by Max Horkheimer and later developed and popularised by other theorists of the Frankfurt School, most prominently Theodor W Adorno (for sociology and philosophy) and Franz Neumann (for legal theory). Both approaches, 'critical race theory' and 'critical theory', have two aspects in common: firstly, they seek to reveal a gap between theory and reality, or *formality* and *actuality*, which in reality serves the overall interests of a particular group, in order to, secondly, formulate a critique of the reality-interpreting theory—read ideology—in the interest of the group thus *constructed* and disadvantaged socially, economically or politically.

<sup>7</sup> Alvarez (n 5) 304.

<sup>8</sup> For the term and its implications compare Ludwig Wittgenstein, *Philosophical Investigations*, (GEM Anscombe, PMS Hacker and Joachim Schulte trs, Blackwell 2009).

<sup>9</sup> Alvarez (n 5) 304.

proceedings to differ sharply from the treaty's promise of fairness between equals. He concludes that the legally assumed 'symmetry of direct benefits to the national investors of all three NAFTA parties'<sup>10</sup> first and foremost serves the interests of American investors while creating considerable disadvantages for the Mexican economy.<sup>11</sup>

Alvarez's early critique of the wide discrepancies between the formal enunciation of equality and the actual entitlements of unequal foreign investors to protection mechanisms has been echoed by the public and by scholars in their unease over two aspects: the first involving the issue of legal privileges, the second involving questions of national policies and political decision-making. A particular concern under the first heading relates to whether the treaty — or contract-based dispute settlement mechanisms in IIL might be seen as the *exclusive right* of a foreign investor to pursue arbitration against a State whose nationals do not possess a corresponding right. This legitimacy concern is triggered by the question of whether the investor's right to seek compensation via ISDS is a *privilege* in the original sense of the word, ie a private right separated from the overall legal custom in the ancient tradition of the Roman *lex privatum*. Such privileges or priority claim rights are certainly not absent from modern international law. They can, for instance, be found in the universal custom of legal immunity of ambassadors or State officials abroad. However, as remnants and derivatives of the Roman law institution, these privileges are required to reflect an exceptionally significant —if not extralegal— 'standing' of the person or office entitled to the privilege. Leaving aside the issue of whether or not foreign investment protection could indeed be *framed* within the coordinates of a particular social, political or economic standing which would justify exclusive legal claim rights,<sup>12</sup> a question remains over whether the access of foreign investors to dispute mechanisms outside the jurisdiction of the investment hosting State signifies a certain systemic bias within and towards international investment arbitration.

Recently, Sornarajah has restated and extended Alvarez's critique of investment

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<sup>10</sup> *ibid.*

<sup>11</sup> *ibid* 307. The assumed reciprocity of investment protection to individuals through obligation to the host State bears an additional element relating to the obligations and standards of performance expected from foreign investors. Behind the wording of NAFTA's chapter 11 stands another paradigm suggesting that 'all foreign investors, regardless of their bargaining power or the histories of particular companies, are all "*innocents*" abroad, equally needful of protection from all powerful government interests', *ibid* 307 (emphasis added). For a full reciprocity of fair and equitable conduct, not only of investment hosting States, but also of foreign investors, see the illuminating study by Peter Muchlinski, 'Caveat Investor? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) 55 *International & Comparative Law Quarterly* 527.

<sup>12</sup> This is a line of argumentation which was suggested in the decision on merits in *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011. The tribunal held that the foreign investor's right to investor-State arbitration constitutes a compensation for the investor's lack of domestic political rights, see *Lemire v Ukraine* [57].

treaties' rhetorical neutrality which, based on the assumed equality of economic and political standing of the signatories' respective nationals, leads to a privileged treatment of foreign investors. Relating his critical perspective on the subject matter to an analysis of the genre of practitioners' literature on IIL, he establishes that the 'claim to neutrality of the works in the field cloaks the fact that they deal with an asymmetrical system of the law created largely to ensure investment protection'.<sup>13</sup> The use of the notion of neutrality in this critique evidently resonates with Alvarez's qualifying measure as laid out above. The analytical tool of differentiating between *formality* and *actuality* in assessing the law governing international investment, however, is extended to reveal a legitimacy gap not only between treaty wording and economic reality but also between the scholarly discourse and underlying systemic commitments of international investment legal scholarship itself. Sornarajah proceeds to argue that a focus on the 'beneficial aspects of the foreign investment flows (...) enables the making of the policy-oriented argument that foreign investment must be protected by international law'.<sup>14</sup> Embedded within what may be labelled a 'classical theory of foreign direct investment', this strand of scholarship customarily translates issues of inequality into a conceptual framework that is as linguistically neutral as it is heavily reliant on neo-liberal conceptions of economics and its relation to law.<sup>15</sup>

Many of the central aspects of the growing public discomfort and the increased scholarly preoccupation with IIL arise from this manifest chasm between formal and actual equality, the effects of which are not only economic but also bear upon the areas of social rights, environmental and health protection, and human rights. Because 'investment schemes do not take place in a vacuum', Jorge E. Viñuales explains, more attention is now paid to these considerations, which were until recently considered to be 'extraneous' ones.<sup>16</sup> The second legitimacy concern thus orbits broader questions of social justice and economic welfare. The so-called promise of foreign investment to contribute to the host State's economy—an expectation which is heavily reliant upon classical economics and promoted by influential institutions such as the World Bank—has increasingly been called into question in many respects. In the literature, the facts on the ground are thoroughly debated and often regarded as

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<sup>13</sup> Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, CUP 2010) xv, see also Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015), 71.

<sup>14</sup> Sornarajah, *The International Law on Foreign Investment* (n 13) 48.

<sup>15</sup> *ibid* 33–35.

<sup>16</sup> Jorge E Viñuales, 'Investment Law and Sustainable Development: The Environment Breaks into Investment Disputes' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) 1714, 1716.

contradicting the objectives laid out in preambles of multilateral treaties like NAFTA, which promises to ‘create new employment opportunities and improve working conditions and living standards in their respective territories’.<sup>17</sup>

In the scholarship, the impact of foreign investment or international investment treaty law has been addressed and answered from two separate angles that precisely resemble the division of scholarly attention into accounts of formalism and actuality, as explained above. The formalist approach to the efficacy of international investment would focus on the issue of whether the legal protection of trans-border capital flows leads to the attraction of foreign investment. Salacuse and Sullivan, for example, in ‘evaluating the impact of BITs [Bilateral Investment Treaties] in relation to their intended goals [of] foreign investment protection, investment and market liberalization’ argue that ‘there is strong evidence (...) that BITs have a strong effect on encouraging FDI [Foreign Direct Investment]’.<sup>18</sup> However, one may argue that the issue that is actually at stake is not whether the investment treaty leads to an increase in foreign investments but whether the attraction of foreign investments leads to economic growth and development of the investment hosting country. A critical historical<sup>19</sup> or political interpretation<sup>20</sup> of the available empirical data changes the evaluation of foreign investment or international investment treaty law significantly, as much more attention is paid to the implications for social welfare and political autonomy. In this way, perceiving the generally applied political tool of entering into an investment treaty as effectively a ‘kind of international delegation of governance’<sup>21</sup> ultimately causes the spectre of a legitimacy crisis to materialise into an objective reality. For today’s legal regime which governs international investment not

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<sup>17</sup> North American Free Trade Agreement (NAFTA) (entered into force 1 January 1994), Preamble, (1993) 32(2) *International Legal Materials* 289, 297.

<sup>18</sup> Jeswald W Salacuse and Nicholas P Sullivan, ‘Do BITs really work?: An Evaluation of Bilateral Investment Treaties and Their Great Bargain’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 109, 155. For generally affirmative accounts see Eric Neumayer and Laura Spess, ‘Do Bilateral Investment Treaties Increase Foreign Investment to Developing Countries?’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 225, 248–49 and, in particular, Christopher F Dugan and others, *Investor–State Arbitration* (OUP 2008) 4–6.

<sup>19</sup> Sornarajah, *The International Law on Foreign Investment* (n 13) 48–53; Andrew T Guzman, ‘Explaining the Popularity of Bilateral Investment Treaties’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 72, 96.

<sup>20</sup> See eg Jason Yackee, ‘Do BITs really work?: Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 379, 391.

<sup>21</sup> Tim Büthe and Helen V Milner, ‘Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis’ in Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) 171, 214.

only raises questions regarding singular policies of social and economic welfare in particular countries, but also evokes more general concerns regarding the appropriateness of those (sovereign) political tools in promoting domestic welfare.

A marked shift in the analytical approach can be observed in those who call for only modest adjustments in the practice and theory of IIL. Quite distinctly from those calling for substantial change, more ‘moderate’ scholars do not tend to differentiate between formal and actual equality of the parties affected, nor do they employ the purpose and facts of legal instruments that protect trans-border investment as a template for analysis. Instead, the focus remains on the pivotal role of the contract or treaty based institution of arbitration.<sup>22</sup> While appreciating the overall efficacy of the international legal regime governing investment, Susan D Franck, for example, advocates efforts to render investor-State arbitration more coherent so as ‘to promote greater sensitivity to the public interest and to minimize the risk of inconsistent decisions’.<sup>23</sup> She cautions that:

The ultimate utility of the system (...) will not be fully realized until an appellate court is created which permits correction of legal errors, which might otherwise inappropriately bankrupt developing nations, stifle legitimate regulatory activity, or deprive investors of their legitimate expectations. By using both preventative and corrective forces, arbitration can fulfill its justice-promoting objective and help the law develop in a harmonized and equitable manner.<sup>24</sup>

This view does not consider the legitimacy of dispute settlement mechanisms itself to be at stake; instead, ‘the troubling state of affairs’,<sup>25</sup> as Brower II maintains in congruence with Franck’s argument, is seen as a consequence of the indeterminacy of key provisions in investment treaties. The interpretational impulse of arbitral tribunals in conjunction with an ‘uncoordinated commitment of creative lawmaking (...) creates a considerable likelihood of

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<sup>22</sup> See *inter alia* Charles N Brower, ‘A Crisis of Legitimacy’ (2002) *National Law Journal* 1; Charles N Brower, Charles H Brower II and Jeremy K Sharpe, ‘The Coming Crisis in the Global Adjudication System’ (2003) 19 *Arbitration International* 415; Ari Afilalo, ‘Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis’ (2004) 17 *Georgetown International Environmental Law Review* 51; Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ (n 5).

<sup>23</sup> Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1528, 1625. Regarding the unsuitability of NAFTA’s investment chapter with public interest concerns, compare with Howard Mann, *Private Rights, Public Problems: A guide to NAFTA’s controversial chapter on investor rights* (International Institute for Sustainable Development and World Wildlife Fund 2001) 46.

<sup>24</sup> Franck (n 23) 1625.

<sup>25</sup> Charles H Brower II, ‘Structure, Legitimacy, and NAFTA’s Investment Chapter’ (2003) *Vanderbilt Journal of Transnational Law* 37, 39.



incoherent results'.<sup>26</sup> In other words, it is believed that a harmonisation of arbitral awards would promote legitimacy, either through an appellate mechanism or via an increased effort to standardise arbitral reasoning and treaty interpretation.

The third approach to the legitimacy crisis in IIL resembles the position of modest adjustment in its narrativisation of the state of affairs. Both theoretical strands share legitimacy concerns regarding unpredictability and incoherence in the reasoning of investor-State tribunals while emphasising their procedural autonomy and interpretative authority. Differences in opinion are mainly of a prognostic nature. While both groups of scholars agree that a centralised or less fragmented system of arbitral institutions is desirable in that it may lead to a more consistent body of (treaty) law governing trans-border capital flows, analysts propagating non-interference perceive the current development of certain standards of interpretation and the system's openness to progress much more optimistically. Concerns about unpredictability and incoherence may be 'considerable and in need of serious attention'<sup>27</sup>. This does not imply, however, an immediate need for action: a solution, Brower and Schill insist, 'will come with the passage of time'.<sup>28</sup> In a similar line of argument, Schreuer, while still relating legitimacy to a yet-to-come predictability of awards and coherence of arbitral interpretation, regards it as 'an exaggeration to speak of an acute crisis or a backlash'.<sup>29</sup>

In bracketing a more detailed assessment of the validity of the individual claims brought forward through each of the three approaches, one observation can be made upfront: all commentators appear to univocally agree that the existence of and the solution to legitimacy challenges are related to *procedural performances* of dispute settlement. This trend of focusing on procedural correctness rather than a uniformity of outcomes, furthermore, has been recently shared and restated by the already mentioned UNCITRAL Working Group III. Already in its first report on a 'Possible Reform of ISDS' the Working Group pre-cautioned that a 'consistency and coherence' in arbitral outcome, while being crucial building blocks of general predictability and thus overall legitimacy, 'were not objectives in themselves'.<sup>30</sup>

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<sup>26</sup> *ibid* 66–67. See for a similar diagnosis Brower, 'The Coming Crisis in the Global Adjudication System' (n 22), and for a sceptical account of an appellate body as sufficient cause for coherent awards see Asif H Qureshi, 'An Appellate System in International Investment Arbitration?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1155, 1169.

<sup>27</sup> Charles Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9(2) *Chicago Journal of International Law* 471, 473.

<sup>28</sup> *ibid*.

<sup>29</sup> Christoph Schreuer, 'The Future of Investment Arbitration' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays in Honor of W. Michael Reisman* (Nijhoff 2011) 787, 803.

<sup>30</sup> UNCITRAL Working Group III, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-fourth Session - Part II' (34th Session, Vienna, 27 November - 1 December 2017) A/CN.9/930/Add.1/Rev.1 para 11.

Concerns regarding the procedural form of investment treaty arbitration are, however, but one side of the coin of legitimacy. In Weberian terms, as seen above, the key question raised by legitimacy concerns not only addresses forms of authority based on a voluntary agreement over procedural rules, but it also addresses forms of an authority believed to legitimately impose a legal order.<sup>31</sup> Based on a conceptualisation of the doctrine of finality in relation to arbitral procedural practice, I will therefore demonstrate in the following that the other side of legitimacy, albeit apparently unfashionable in a globalised world with transnational rules, is State authority as the formal representative of public interest during and after investment treaty proceedings.

### C. THE TWOFOLD DOCTRINE OF FINALITY

The spectre of a legitimacy crisis should not be diagnosed as a mere lapse of dysfunction within an otherwise effective legal regime governing foreign investment.<sup>32</sup> Rather, it should be approached in terms of *the conditions that make legitimacy an issue*. The slowly but steadily growing legal-theoretical literature on international investment jurisprudence has occupied itself with various aspects of legitimacy concerns and has even begun to reflect directly upon the literature on legitimacy concerns itself,<sup>33</sup> thus creating a specialised scholarship within international investment legal theory.

Already in 2002, Charles N Brower saw a coming crisis of the law governing trans-border investment due to the lack of an appellate mechanism,<sup>34</sup> and his diagnosis has since been reiterated in a number of articles, with varying conclusions drawn. In 2003, for example, in an analysis of NAFTA's investment chapter, Brower II also put his finger on the central role of arbitral awards as causing what he perceived as a 'troubling state of affairs';<sup>35</sup> he saw the root of legitimacy issues in arbitrators' incongruous reasoning surrounding the fair and equitable treatment standard.<sup>36</sup> Other scholars, such as Susan D Franck, have agreed with this initial assessment of legitimacy concerns raised by inconsistent decisions. Yet, while

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<sup>31</sup> See Weber (n 1) 130-31.

<sup>32</sup> Compare with Brower, 'A Crisis of Legitimacy' (n 22) 3: 'In the end, one must accept the fact that some degree of dysfunctionality is inherent in every system of adjudication.'

<sup>33</sup> See, most prominently, Brower and Schill (n 27).

<sup>34</sup> Brower, 'A Crisis of Legitimacy' (n 22).

<sup>35</sup> Brower II, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (n 25) 39.

<sup>36</sup> *ibid* 66. For a general perspective along the same analytical premises on a 'global adjudication system' see also Brower, 'The Coming Crisis in the Global Adjudication System' (n 22), and for a most recent analysis of 'discomforts' with the interpretation of FET standards see Michael W Reisman, 'Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law' (2015) 30(3) ICSID Review – Foreign Investment Law Journal 616, 616.

Brower II<sup>37</sup> looks towards the arbitral tribunals to solve the challenge posed by the incongruity and expansionary tendency<sup>38</sup> of arbitral interpretations, Franck advocates an investment arbitration appellate court as an instrument for reconciling arbitral interpretation and public legitimacy concerns.<sup>39</sup> Finally, in 2009, with one of the first studies to present an extensive reflection on the history of the legitimacy question in the international investment legal scholarship itself, Charles N Brower and Stephan W Schill—in defending a systemic openness of IIL in general—persist in relating legitimacy concerns to the capacity of arbitral tribunals to issue final awards.<sup>40</sup> In this sense, and in order to shed light on the conditions that underlie concerns over legitimacy, I will turn to the doctrine of finality itself, which, being central to IIL, presents us with a conceptually instructive paradox.

Any right to appeal to a higher authority or to seek judicial review in general is, considered in basic logical terms, contradictory to the very idea of finality. Given that in alternative dispute settlement mechanisms the finality of the settlement is, for the most part, the legal principle that substantiates the legitimate expectations of the parties to the dispute, a contradiction with such an idea not only questions the legitimacy of the award, but also the legitimacy of the arbitral reasoning itself. Based on an analysis of the intrinsic correlativity between the idea and the practice of finality—as revealed in this inherent relation between an arbitral award’s finality, the doctrine of finality, the perceived legitimacy of the award and the retrospective view on the legitimacy of the proceedings—I will present a theory of the structure of legal reasoning in investment treaty arbitration. As the legal language-game, however, lends itself more easily to expressing conditions of remedies than to stating procedural exclusions to non-appealable final judgments, it is advisable, if not necessary, to begin an examination of structural aspects of the legal reasoning of investment treaty tribunals by analysing the doctrine of finality in arbitration rules with regard to post award remedies.

It is, furthermore, submitted that the doctrine of finality stands as a paradigm case of a dialectically structured concept. As with all dialectical compositions, the reciprocally interrelated fabric of the principle is manifest in two contradictory functions. That is to say, by being what Schill has identified as an exceptionally poignant signifier of the authority of

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<sup>37</sup> cf also Afilalo (n 22).

<sup>38</sup> See Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ (n 5).

<sup>39</sup> Franck (n 23). Compare also with Christoph Schreuer’s considerations on how to solve concerns about inconsistent arbitral decision-making, in which he suggests several remedies that are all related to some form of appeal mechanism, Schreuer (n 29) 800–02.

<sup>40</sup> Brower ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (n 27).

investment treaty tribunals,<sup>41</sup> the doctrine of finality lies as much at the centre of legitimacy perceptions as of legitimacy concerns. If coherence is the main objective of arbitral reasoning and awards, and if adding to a *jurisprudence constante* is considered the chief duty of tribunals authorised by investment treaties,<sup>42</sup> the doctrine of finality must indeed be perceived to be both a means and an obstacle to a congruent and, consequently, legitimate international system of investment rules.

These apparently dichotomic characteristics of the doctrine of finality bear significantly on the structure of arbitral reasoning. From a purely conceptual point of view ISDS, too, serves two purposes. Investment treaty tribunals are creators of a coherent (read: legitimate) body of international rules on investment protection while, in principle, being fully autonomous in their reasoning and rulings. This parallelism of the doctrine of finality to the structure of investment treaty arbitration makes the elucidation of the relations between the two conflicting aspects of finality essential for an understanding of the ambiguities commonly associated with the objectives or purposes of arbitral reasoning.

#### **D. THE MOMENT OF CONTRACT**

Analogous to the legitimate order based on voluntary agreement, as described above, the term *contract* will be employed to designate the legitimating effects on final awards of an autonomous arbitral performance that meticulously follows the procedural template agreed upon prior to the tribunal's coming into being. This moment of an ideal-typical procedural authority<sup>43</sup> within the doctrine of finality primarily concerns the genuine self-rule of arbitral tribunals in relation to other topically or territorially related arbitral awards, or with regard to international investment jurisprudence in general. In principle and taken to its extreme, there is no binding connection whatsoever between an arbitral body in session and any other past or future investment dispute settlement. The extraordinary and seemingly unlimited power of arbitrators—in itself the source of legitimacy concerns that date back to the very beginning of a critical investor-State arbitration scholarship—<sup>44</sup> resides in this one-sided view of finality.

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<sup>41</sup> Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 255.

<sup>42</sup> See eg Andrea K Bjorklund, 'The Promise and Peril of Arbitral Precedents: The Case of *Amici Curiae*' (2010) 34 *Association Suisse de l'Arbitrage Special Series* 165; Schreuer (n 29) 802; Brower 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (n 27) 474; or, very recently, Marc Bungenberg and Catherine Titi, 'Precedents in International Investment Law' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) 1505, 1508–10.

<sup>43</sup> See also Loukas A Mistelis, 'Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement' (2013) 28 *ICSID Review—Foreign Investment Law Journal* 64, 69.

<sup>44</sup> Compare with the three early pilot studies of Aron Broches. Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 *ICSID Review* –

Ultimately, in their capacity to decide exclusively according to the facts of the case at hand, arbitral bodies are also entitled to disregard any other award delivered by some other tribunal whenever they deem this necessary. Finality in its moment of contract, therefore, signifies a legitimate (excluding) authority to decide; *in praxi*, this manifests itself as the deliverance of a *final and self-sufficient interpretation* of standards of treatment as expressed in the respective investment treaty.

Taking part in the same dialectics of finality's moment of contract is the practical division and scholarly comparison between arbitration as governed by *ad hoc* procedural rules (such as UNCITRAL), and arbitral tribunals within the legal framework of an institution (eg ICSID). UNCITRAL has supplemented its 2013 Arbitration Rules with *Rules on Transparency in Treaty-based Investor-State Arbitration* that specify issues of transparency and third-party submission in arbitral proceedings. Article 34(2), the relevant article relating to finality, however, has been a restatement of the 2010 UNCITRAL *Rules on Arbitration*: 'All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay'.<sup>45</sup>

The UNCITRAL Rules are simply silent on the matter of an appellate body and on general measures to review an award. This, on the one hand, is part of their success because proceedings under these rules—in focusing strictly and context-independently on the *hic et nunc* facts of the case—incorporate completely the *moment of contract* par excellence. On the other hand, as Balaš remarks, precisely because of the non-existence of (internal) post award remedies, UNCITRAL arbitration:

(...) can reach a level of predictability [for disputing parties] only with great difficulty and national courts having jurisdiction in motion to set aside arbitral awards not only apply a municipal law that differs from state to state, but also vary in their decision-making under similar rules.<sup>46</sup>

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Foreign Investment Law Journal 287; Aron Broches, 'Observations on the Finality of ICSID Awards' (1991) 6 ICSID Review – Foreign Investment Law Journal 321; David D Caron, 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal' (1992) 7 ICSID Review – Foreign Investment Law Journal 21.

<sup>45</sup> UNCITRAL Arbitration Rules (as revised in 2010), (2017) 49(6) International Legal Materials 1640.

<sup>46</sup> Vladimir Balaš, 'Review of Awards' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1152. For the appeal of ad hoc arbitral awards in national courts see also Christoph H Schreuer and others, *The ICSID Convention: A commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (CUP 2009) 900. Unlike Balaš, however, Schreuer emphasises the crucial role of the New York Convention as guardian of arbitral awards.

Turning to ICSID arbitration rules, the focal point for post award remedies as the negation of the doctrine of finality is article 52 of the ICSID Convention, whose first paragraph reads:

- (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
  - (a) that the Tribunal was not properly constituted;
  - (b) that the Tribunal has manifestly exceeded its powers;
  - (c) that there was corruption on the part of a member of the Tribunal;
  - (d) that there has been a serious departure from a fundamental rule of procedure; or
  - (e) that the award has failed to state the reasons on which it is based.

The ‘initiation of annulment proceedings’ remains the sole remedy against ICSID awards; yet, as Schill and others have assessed, ‘the potential of proceedings to restrict the power of arbitral tribunals is limited’.<sup>47</sup> With respect to the above-cited grounds upon which an award can be successfully contested—and keeping in mind that this would also violate the doctrine of finality—the method of interpretation of the reasons for annulment as formulated in article 52 becomes central. The tendency of panels to opt either for a restrictive or an expansionary approach, particularly with regard to article 52(e), seems to indicate an oscillation between the interpretative model of international commercial arbitration and the WTO’s dispute settlement body.

The former simply strengthens the authority of arbitral tribunals by not providing procedural mechanisms for reviews or annulments at all, while the latter is embedded in a consensual system of States which, collectively, may overturn particular arbitral awards made with regard to foreign investment. However, such an impact of States on arbitration is far from the reality or the purpose of the ICSID Convention, as both the restrictive and the expansionary approach to article 52 come nowhere near challenging the exclusive standing of the arbitral panel involved. Even concerns that a review of the procedural aspects mentioned in article 52(a-d) might slip into a review of merits according to an expansionary interpretation of article 52(e)<sup>48</sup> and its *reasons requirement* seem unfounded, as any insufficient, inadequate or contradictory reasons that may be given by a tribunal, or the ‘extremely unlikely’<sup>49</sup> absence of reasons at all, only refer back to a review of procedural aspects. As Alvarez, Reisman and

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<sup>47</sup> Schill (n 41) 254.

<sup>48</sup> See for this position Balaš (n 46) 1152.

<sup>49</sup> Schreuer, *The ICSID Convention: A commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (n 46) 998.

Michael have laconically commented: ‘Without reasons, the [annulment committee] could hardly exercise its powers of review.’<sup>50</sup>

In principle, a tribunal’s obligation ‘to state the reasons on which [an award] is based’, ie to make its reasoning public is, as Alvarez, Reisman and Michael have observed, of particular importance in the area of international investment law, because such an award always has public and possible long-term implications and ‘may have a major political impact on an entire country’.<sup>51</sup> The first and successful application for annulment submitted under ICSID’s article 52 concerned a 1983 settlement in the case of *Klöckner v Cameroon*.<sup>52</sup> In facing the question of the precise implications of the reasons requirement in article 52(e), the committee were given the task of defining a justificatory standard of arbitral reasoning in this particular case in order to determine the relation between the award issuing tribunal and itself as the annulment committee. It stated that:

It is not for the Committee to imagine what might or should have been the arbitrators’ reasons, any more than it should substitute ‘correct’ reasons for possibly ‘incorrect’ reasons, or deal ‘ex post facto’ with questions submitted to the Tribunal which the Award left unanswered. The only role of the Committee here is to state where there is one of the grounds for annulment set out in Article 52 of the Convention, and to draw the consequences under the same Article. In this sense, the Committee defends the Convention’s legal purity.<sup>53</sup>

The noticeable rhetorical retreat to deciding only on procedural aspects of article 52 seems at odds with the eventual (substantial) decision in favour of the foreign investor through which the tribunal’s verdict was annulled. Alvarez and Reisman, in identifying the decision as a precedent for the reasons requirement, see the crux of concerns as residing in the notion of legal purity, which allows annulment on procedural grounds while emphasising the importance of reasons for arbitral awards in general. In their own words:

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<sup>50</sup> Guillermo Aguilar Alvarez, William Michael Reisman and William Michael, ‘How Well Are Investment Awards Reasoned?’ in Guillermo Aguilar Alvarez and William Michael Reisman (eds), *The Reasons Requirement in International Investment Arbitration – Critical Case Studies* (Brill NV 2008) 1, 28.

<sup>51</sup> *ibid* 2.

<sup>52</sup> *Klöckner Industrie-Anlagen GmbH and Others v Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Award, 21 October 1983.

<sup>53</sup> *Klöckner Industrie-Anlagen GmbH and Others v Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision of the Ad Hoc Committee on Annulment, 3 May 1985 [151].

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With a theory of ‘legal purity,’ the *Klöckner* committee established a very high standard for reasons. Consistent with such a theory, the committee’s methodology did not include an assessment of the gravity of the defect in the reasons.<sup>54</sup>

While Alvarez and Reisman put their fingers precisely on the argumentative centrepiece of the *Klöckner* committee when deducing from it that ‘there should be a formal rather than a substantive test of reasons’,<sup>55</sup> there is a further peculiar *coincidence of opposites*: the committee’s nullification of the award, on the one hand, coincides with a strengthening of the autonomy of the arbitral tribunal on the other. The distinction between formal and substantive, between procedural and merits review, as brought to light by Alvarez and Reisman, fits perfectly into a solely internal review mechanism that—in leaving substantial reasoning untouched—portrays itself as a procedural system of exclusion and non-interference.<sup>56</sup> However, it is also this institutionalised non-interference and self-reference in ICSID proceedings which prevents the playing out of power politics. According to Schill, barring the influence of State parties to ICSID proceedings ‘constitutes (...) a particularly effective remedy as it allows even investors from relatively weak countries to enforce investment treaty obligations against a powerful host State’.<sup>57</sup> Given those advantages through formal equality, the two opposite principles (of annulment and arbitral autonomy) brought together by the *Klöckner* committee and in other cases have remained the subject of contention.<sup>58</sup> Schreuer translates this opposition into the two conflicting principles:

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<sup>54</sup> Alvarez, Reisman and Michael (n 50) 6.

<sup>55</sup> *ibid* 5.

<sup>56</sup> Because the review committee does not have an ‘intrinsic superiority over the arbitral tribunal’, Pierre Mayer argues, ‘it should not too easily come to the conclusion that the tribunal erred in its factual finding; it should use *self-restraint*’. Pierre Mayer, ‘To What Extent Can an Ad Hoc Committee Review the Factual Findings of an Arbitral Tribunal?’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing 2004) 243, 248, (emphasis added).

<sup>57</sup> Schill (n 41) 254.

<sup>58</sup> In the wake of the *Klöckner* committee and focusing on the then more recent ICSID annulment applications of *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002, and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v The Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Decision on Annulment, 3 July 2002, Eric A Schwartz, one of the respondent’s arbitrators involved in the *Wena case*, went so far as to portray ICSID’s article 52 as a mere safeguard ‘of certain minimal procedural standards’. Schwartz’s harsh verdict on article 52 of the ICSID Convention comes down to the perception of its *raison d’être* as an enhancement ‘of the likelihood that parties to the process will feel comfortable that justice has been done’. See, Eric A Schwartz, ‘Finality at What Cost? The Decision of the *Ad Hoc* Committee in *Wena Hotels v. Egypt*’ in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing 2004) 43, 85. Schreuer, on the other hand, understands the decisions in *Wena v Egypt* and *Vivendi v Argentina* to signal a paradigm shift in the ICSID appellate mechanism away from the ‘early activism of the *Klöckner case*’. The annulment mechanism of ICSID’s article 52, Schreuer continues, ‘has found its proper place’ because the *Wena* and *Vivendi* decisions ‘have helped to dispel the fears about frequent attacks on awards for trivial reasons’. Schreuer’s verdict on article 52 thus differs diametrically from Schwartz’s, as he concludes: the ICSID review mechanism ‘now presents itself as what it was designed for: an unusual remedy for unusual situations’. In



One is the principle of finality; the other is the principle of correctness. Finality is designed to serve the purpose of efficiency in terms of an expeditious and economical settlement of disputes. Correctness may be an elusive goal that takes time and effort and may involve several layers of control, a phenomenon that is well known from domestic court procedure.<sup>59</sup>

In accordance with an overall preference for finality over correctness in international adjudication, the solution as adopted by ICSID's article 52 is precisely that of a limited or formal review process, as piloted by the *Klöckner* committee. Schreuer remarks that:

The desire to see a dispute settled is regarded as more important than the substantive correctness of the decision. Annulment is the preferred solution to balance these two objectives. It is designed to provide emergency relief for egregious violations of a few basic principles while preserving the finality of the decision in most respects.<sup>60</sup>

In this sense, the absence of a functioning mechanism for reviewing arbitral decisions on merits, as the negation of finality's moment of contract, signals the exceptionally strong finality of investor-State arbitral awards. Structurally, the *legal limitation* of review mechanisms to procedural aspects (annulments) connects the process of review with a review of *arbitral performance*, thus affirming the exclusionary zest of arbitral proceedings when in session. Against this background, Schill's verdict on the ICSID annulment does not read as a realist's statement but actually confirms finality's moment of contract itself.

Finally, in practice, annulment committees have assumed a role as 'guardians of the arbitral award' rather than as a control organ of investment tribunals, and thus have strengthened the power of arbitral tribunals vis-à-vis States.<sup>61</sup>

## E. THE MOMENT OF ADJUDICATION

Echoing Weber's notion of an order imposed by an authority believed to be legitimate, finality's second moment designates the *exclusive* relation between arbitral awards and State authorities. That is to say, the doctrine of finality, understood as adjudication, is intrinsically linked to a heightened legitimate expectation or, in Weberian terms, a belief on the side of the

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Christoph H Schreuer, 'Three Generations of ICSID Annulment Proceedings' in Emmanuel Gaillard and Yas Banifatemi (eds), *Annulment of ICSID Awards* (Juris Publishing 2004) 17, 42.

<sup>59</sup> Schreuer, *The ICSID Convention: A commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (n 46) 903.

<sup>60</sup> *ibid.* The centrality of upholding the issued award, ie the guaranteeing of the award's finality, has also been stressed by Mayer (n 56).

<sup>61</sup> Schill (n 41) 254.

investor to get the award legitimated by recognition and enforcement in the respective national legal order of the investment hosting State. In principle, such exclusive standing of an arbitral award in ISDS differs sharply from awards issued by international commercial arbitral bodies or tribunals, because the driving force behind recognition and enforcement of awards contains—already in the objectives of investment treaties with arbitration clauses—traces of State consent. Unlike international awards between two commercial actors of different nationality, an investor-State award is not issued under the proviso of domestic judicial review. Formally, the approval of arbitral proceedings as a means of dispute settlement has already been given or offered by the host State when entering into an investment treaty containing an arbitration provision. By contrast, international awards on commercial matters are first settled privately in order to seek the approval of the respective home State afterwards. In accordance with the above-developed absence of State intervention into proceedings, this temporal difference *a priori* prevents any doubt to arise about the legitimate authority of awards by investment treaty arbitrations.

Regardless of State approval before or after the arbitral award has been issued, however, the convention that secures the recognition and enforcement of awards internationally is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. One of the world's most successful international conventions with respect to the number of signatories, the New York document essentially ensures the doctrine of finality as recognition and enforcement of awards. These two aspects prevent a re-issuing of identical claims by identical claimants (recognition in a broader reading of *res judicata*), and the actual and exclusive realisation of a particular award within the territory of a particular country (law enforcement).

With regard to a differentiation between State approval prior to and after the issuing of arbitral awards, however, the New York Convention demonstrates a distinctive effect on the recognition and enforcement of awards from investment treaty arbitration. This peculiar effect on the finality of awards can again be highlighted by focusing *ex negativo* on the conditions of a refusal of recognition and enforcement from parties to the agreement. While the Convention's article V(1) touches upon procedural aspects, paragraph (2) introduces merit-based aspects of a possible judicial review from domestic courts. It states that:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country. Or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

This passage is crucial in distinguishing the recognisability and enforceability of international investment from commercial awards, because a review of arbitral awards according to their initial arbitrability and their effect on general public policy represents a challenge to finality which affects only arbitral awards on commercial matters. The difference to commercial arbitration is the general State approval of arbitral proceedings in the investment treaty which is given prior to any decision on arbitrability, let alone on the merits of the dispute. The matter of arbitrability has already been dealt with and concluded in the respective investment treaty. In this way, and for commercial arbitral awards, the Convention stands as a legal document that may be applicable, yet for arbitration involving foreign investment it merely signifies an enforcing re-affirmation of the state of affairs. According to the developed terminology, the New York Convention serves as legal ground for recognition and enforcement after international commercial arbitration: it is a restatement of the prior exclusivity of the award issued by investor-State tribunals.

#### **F. FINALITY REALISED: THE LAUDER/CME V THE CZECH REPUBLIC CASES**

Finality's moment of *contract* has been located at the centre of a structure of context-independence of arbitral decisions, derived from the autonomy of arbitral tribunals and an exceptionally strong finality of arbitral awards. Finality's moment of *adjudication*, on the other hand, in matching the recognition of awards with judicial finality and materialising the exclusive relation between arbitral award and respondent State through enforcement, essentially links the arbitral award with State authority. Understood in their unity, the moment of contract and the moment of adjudication constitute the *doctrine of finality*. Finality's contractual moment derives from procedural autonomy's rendering of itself as legitimate; finality's adjudicative moment derives from and depends upon legitimate State authority as either a consenting or enforcing factor.

So far, however, such unity of contract and adjudication remains a relation of mere notional differences. Only when notional differences turn into actual opposites does it become evident that the doctrine of finality in ISDS is indeed dialectically structured and strongly

linked to the epistemic field that gives rise to legitimacy concerns. An instructive *locus classicus* which shows the actual divergence between contract and adjudication are the two concurrent or parallel proceedings concerning *Lauder/CME v Czech Republic*. Here, the issue of legitimacy was imminently pressing as the Czech Republic won and lost cases on identical grounds before two different arbitral tribunals, thus demonstrating a manifest opposition between the two moments of finality.

The initial dispute concerned the question of whether the abrogation of a television broadcast licence issued in February 1993 by the Czech authorities to CME (a company of Dutch nationality) represented an illegitimate expropriation, given that the foreign investor's property right was protected by a bilateral investment treaty. The investor's interest was represented by two claimants who initiated two separate proceedings. Ronald Lauder, an American controlling shareholder in CME, had heavily invested in media outlets throughout post-Communist Europe.<sup>62</sup> He filed a claim against the Czech Republic before a tribunal seated in London (UK) on grounds of the US-Czech Republic BIT of 1991.<sup>63</sup> For its part, CME brought a claim before a tribunal in Stockholm (Sweden), seeking roughly the same compensation for damages of more than USD 500 million on grounds of the 1991 BIT signed between the Netherlands and the Czech Republic.<sup>64</sup> Facing a change in the Czech media law as of 1 January 1996, Lauder and CME separately claimed that the previously granted broadcasting licence was effectively abrogated by the Czech authorities. Both proceedings were then conducted under UNCITRAL Arbitration Rules, and in 2001 the arbitral tribunal based in London denied Ronald Lauder an award on liability, finding that the claimant did not produce 'sufficient evidence that any measure or action taken by the Czech Republic would have had the effect of transferring his property or of depriving him of his rights to use his property or even of interfering with his property rights'.<sup>65</sup>

While the London proceedings were initiated on 19 August 1999 with Mr Lauder giving notice of arbitration to the Czech Republic and the tribunal holding the first procedural hearings on 17 March 2000, the composition of the arbitral tribunal in Stockholm was not complete until the appointment of the Czech representative in October 2001. Therefore, when finally holding

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<sup>62</sup> See *Lauder v Czech Republic* (n 2) [5].

<sup>63</sup> Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investments (entered into force 19 December 1992) Act No 187/1993, S Treaty Doc No 102-31.

<sup>64</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (entered into force 1 October 1992) Act No 569/1992.

<sup>65</sup> *Lauder v Czech Republic* (n 2) [202].

the first procedural hearing on 17 November 2001 between *CME v Czech Republic*, the award of the London arbitral tribunal, issued on 3 September 2001, had already come into existence and had to be addressed by the Stockholm tribunal which would then deliver its decision on 14 March 2003. Eventually rendering an award on liability in favour of CME, the Stockholm tribunal also took on the task of discussing the *res judicata* issues which the London award had forced upon its reasoning. It stated its views on the London proceedings throughout the award but concentrated en bloc on the doctrine of finality in a passage entitled ‘The London award does not control this arbitration’.<sup>66</sup> Its striking sketchiness makes it all the more worthy of detailed analysis:

The Tribunal further is of the view that the principle of *res judicata* does not apply in favour of the London Arbitration for more than one reason. The parties in the London Arbitration differ from the parties in this arbitration. Mr. Lauder is the controlling shareholder of CME Media Ltd, whereas in this arbitration a Dutch holding company being part of the CME Media Ltd. Group is the Claimant. The two arbitrations are based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical. Both arbitrations deal with [the] same investment in the Czech Republic. However, *the Tribunal cannot judge whether the facts submitted to the two tribunals for decision are identical*.<sup>67</sup>

Following the rhetorical framework as set out by the tribunal, it is indeed debatable whether CME is a company that happens to be controlled by an American shareholder (Stockholm arbitration), or if the American shareholder Mr Lauder controls a company that happens to be incorporated under Dutch law (London arbitration). In both cases, however, either the BIT between the Czech Republic and the Netherlands or that between the Czech Republic and the United States would be applicable. Moreover, according to an earlier statement of the same tribunal, and mitigating the comparable difference between the applicable investment treaties, it can be read that:

In these proceedings, the differences between the two treaties (the U.S. Treaty and the Dutch Treaty) are insignificant (...) The rights upon which CME relies *are essentially the same* in the London and the Stockholm proceedings.<sup>68</sup>

Given that the doctrine of finality does not allow conceptual *over-riding* but rather requires *over-trumping reasons* for any justifiable rejection, the essence of the reasoning of the

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<sup>66</sup> *CME v Czech Republic* (n 2) [426]–[437].

<sup>67</sup> *ibid* [432] (emphasis added).

<sup>68</sup> *ibid* [202] (emphasis added).

arbitral tribunal in *CME v Czech Republic* lies in the linguistic usage of ‘identical’. The decision on how to relate to the London award issued in *Lauder v Czech Republic* and, therefore, the critical argument regarding the tribunal’s own jurisdiction reads as follows:

The principle of *res judicata* requires, for the ‘same’ dispute, identical parties, the same subject matter and the same cause of action (...) Moreover, the fact that one tribunal is competent to resolve the dispute brought before it does not necessarily affect the authority of another tribunal, constituted under a different agreement, to resolve the dispute –even if it were the ‘same’ dispute.<sup>69</sup>

In effect, the Stockholm tribunal’s usage of the terms ‘same’ or ‘identical’ serves as a criterion with which to distinguish between the ‘objective’ *facts of the case* and the *submitted facts of the case*. While the latter depend on the parties’ submission, the oral presentations and arbitrators’ evaluations, the objective facts of the case are not an endeavour ordinarily pursued within the boundaries of the department of law, but rather appear to fall within the remit of ontological investigations. Yet any decision on the identity of facts necessitates, now epistemologically speaking, the application of a measure of factual objectivity as well. It is with the rhetorical distinction (between the sameness and identity of facts) that the Stockholm tribunal opted for a one-sided view on finality, because the hidden preconception in *CME v Czech Republic* is that facts submitted for decision to any two tribunals are *never identical*. Certainly, in this particular case, the rhetoric of an *identity* of claims, claimants and applicable treaties serves but one practical purpose, which is the autopoietic creation of a sound authority of a tribunal to decide. Moreover, such practice of fact limitation is indeed part of a general argumentative structure of international investment jurisprudence, as confirmed by the 2010 ad hoc annulment committee in *Fraport v Philippines*:

When its task is limited to the determination of its jurisdiction, which has been objected to by the Respondent, the Committee observes that a dispute settlement organ should only consider the factual records to the extent necessary to make the determination regarding its own jurisdiction.<sup>70</sup>

As regards the *doctrine of finality*, however, the distinction between the sameness and identity of facts carries a threat to the reputation of investor-State arbitration as an institution, and —on the doctrinal ground of challenging finality as such— the conflicting outcomes of

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<sup>69</sup> *ibid* [435].

<sup>70</sup> *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on Annulment, 23 December 2010 [84].

both parallel proceedings have indeed attracted serious criticism. Already in 2002, at a time when the Stockholm tribunal was still in session, Schreuer and Reinisch expanded the issue from *CME/Lauder* to broader implications. In an expert opinion for the tribunal, and addressing the *res judicata* issue for the Stockholm arbitration, they put much argumentative weight on a statement by Lowe, who, analysing international arbitration in general, writes that ‘inconsistent findings by different tribunals on the same facts deprive the law of its predictability and hence of its ability to provide effective guidance; and hence, they threaten to undermine (...) the Rule of Law’.<sup>71</sup> On this basic cause-effect argument, Schreuer and Reinisch went on to suggest that:

Ending the Stockholm proceedings would be crucial to preventing a seriously damaging effect on the international arbitral process. Trust and confidence in the time- and cost-effective settlement of international business disputes would be seriously eroded if the Stockholm proceedings continued.<sup>72</sup>

I have proposed above that the two *Lauder/CME* awards are evidence of a transition from difference to opposition of the two moments of finality. The Stockholm tribunal, in introducing the measure of ‘identity’, claimed the non-applicability of the London award on grounds of the difference in facts submitted to different tribunals while, in principle, acknowledging the sameness of facts and legal grounds. De facto, however, the approval of submitted facts—in excluding externalities—is a *withdrawal from context to self-reference*.<sup>73</sup> Moreover, it is a determination of jurisdictional criteria in the form of an *over-determination*. On the other hand, both tribunals issued differing awards that, nevertheless, have an exclusive relation to the investment hosting country. In other words, what the *Lauder/CME* awards signify is exactly the *relation of dialectical opposition* between the two moments of finality. This is to demonstrate that, if played out *in praxi* as oppositional moments, contract and adjudication are the conditioning epistemic factors prior to legitimacy perceptions and concerns.

The continued effect of this problematic epistemic framework of arbitral reasoning in *Lauder/CME* was evident in the 2016 case of *Ampal-American and Others v Egypt*. Here the

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<sup>71</sup> Vaughan Lowe, ‘Res judicata and the Rule of Law in International Arbitration’ (1996) 8 *African Journal of International and Comparative Law* 38, 48.

<sup>72</sup> *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Legal Opinion Prepared by Christoph Schreuer and August Reinisch, 22 May 2002 [140].

<sup>73</sup> A certainly affirmative account of this dynamic, however, can be found in the methodological distinctions between dispute-orientation and legislator-orientation as deployed by Ole Kristian Fauchald in his empirical analysis of the ICSID jurisprudence. He writes: ‘The more a tribunal restricts its arguments to those presented by the parties to the dispute, the more it can be regarded as “dispute-oriented”’; in Ole Kristian Fauchald, ‘The Legal Reasoning of ICSID Tribunals: An Empirical Analysis’ (2008) 19(2) *European Journal of International Law* 301, 307.

tribunal found itself in the ‘not (...) desirable situation’<sup>74</sup> to decide on its jurisdiction while four parallel proceedings over the same investment had already been filed —two of which treaty-based and under UNCITRAL arbitration rules—, which prompted the respondent to argue that this situation of concurrent proceedings amounts to an abuse of the arbitral process. Although the tribunal, tellingly, did not engage with the reasoning of the Stockholm tribunal in *CME v Czech Republic*, it assessed the situation with the same linguistic tool kit that distinguishes between the ‘objective’ *facts of the case* and the *submitted facts of the case*. The tribunal agreed with the respondent that the ‘four parallel arbitrations with, essentially, the same factual matrix, the same witnesses and many identical claims may look abusive’<sup>75</sup>, it was, however, not supporting the respondent’s submission that the claimant did not act in good faith.<sup>76</sup> Dismissing the concurrent contract-based arbitral proceedings as irrelevant because distinct from the treaty based proceedings, the tribunal found it a purely ‘jurisdictional matter’<sup>77</sup> whether or not it should be possible to make multiple treaty based claims arising from the same investment. Mirroring the Stockholm reasoning that identical facts submitted to different tribunals are objectively not the same facts of the case, the tribunal treated the problem of concurrent arbitral proceedings and the possible abuse of process as ‘merely the result of the factual situation’ of two claims pursued before two tribunals ‘in respect of the same tranche of the same investment.’<sup>78</sup> However, as institutional arbitration, and thus in stark contrast to the ad hoc *Lauder/CME* cases, the tribunal in *Ampal-American and Others v Egypt* had to consider article 26 of the ICSID convention and, consequently, ordered the claimant to elect one tribunal with then exclusive jurisdiction for the pursuing the claim. The investor chose, subsequently, the ICSID tribunal,<sup>79</sup> yet the reasoning itself proved that, at least as with regards to ad hoc ISDS, the spectre of a crisis legitimacy arising out of *Lauder/CME* continues to be epistemically conditioned by an understanding that perceives jurisdictional matters (contract) and the merits of a case (adjudication) as oppositional rather than merely differential determinants of the same performative arbitral endeavour.

## G. CONCLUSION

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<sup>74</sup> *Ampal-American and Others v Egypt* (n 3) [329].

<sup>75</sup> *ibid* [328].

<sup>76</sup> *ibid* [328], [331].

<sup>77</sup> *ibid* [329].

<sup>78</sup> *ibid* [331].

<sup>79</sup> *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and Mr. David Fischer v Arab Republic of Egypt*, ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017.



In the cases of *Lauder/CME* the moment of contract rendered the establishment of two different tribunals a reality, while the moment of adjudication made both awards applicable to the investment hosting State. By providing, as Brower has noted, ‘a graphic illustration of a situation in which similar legal issues and virtually identical facts produced totally conflicting arbitral decisions,’<sup>80</sup> the diametrically different outcomes of both proceedings continue to place an evident question mark on the sources of arbitral authority itself. In this article, the exclusion of other awards and contexts (contract) and the contextual exclusivity between the award and respondent State (adjudication) were revealed as the two moments underlying the doctrine of finality. The case studies, furthermore, served as an illustration of the tribunals’ isolation of the moment of contract. It was seen that the strong conceptual tie between finality’s moments of contract and adjudication led to a differing but recognisable and enforceable award in *CME v Czech Republic* on the same grounds as in *Lauder v Czech Republic*. However, in isolating the moment of contract while relying on the moment of adjudication, the tribunal’s one-sided *over-determination* of its context-independent autonomy also produced an oppositional relation between the two moments of finality, as it was also evident in the case study of *Ampal-American and Others v Egypt*. This oppositional relation in the dialectics of the doctrine of finality, it was argued, is the epistemic condition in the understanding of ISDS authority which makes legitimacy an issue.

Finally, from a purely conceptual point of view, this implies that the practice of an institutional amalgamation of arbitral authority according to jurisdiction and merits seems at odds with a balanced perspective on finality’s two moments. The analysis thus suggests that if one tribunal decided on jurisdiction and a different tribunal on the merits of the case, the problematic overemphasis on the excluding aspects of the procedures may be reduced. This is because a decision on jurisdiction and on merits by two different tribunals upholds arbitral authority’s autonomy while, simultaneously, preventing the procedural and logical necessity of tribunals to retroactively confirm their jurisdiction by simply moving on to deciding upon the merits.

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<sup>80</sup> Brower, ‘A Crisis of Legitimacy’ (n 22) 2.