

**Accepted Manuscript in *ELTE Law Journal* 1 (2022):
49–79. Please do not cite without the Author's
Permission**

**A Habermasian response to the legitimacy crisis of
investment arbitration***
Rafael Quintero Godínez

This article presents the Habermasian theory of adjudication's role in and legitimacy to achieve three major objectives, first, to develop a diagnosis of the legitimacy crisis of investment arbitration; second, to understand why dominant positivistic approaches cannot solve it; and third, to propose argumentative strategies so that investment arbitrators can address this crisis.

Keywords

Investment arbitration – Habermas theory of constitutional adjudication – Legitimacy crisis – International human rights

1 Introduction

This article advances the argument that the legitimacy crisis of investment arbitration rests upon three factors drawn from the Habermasian theory of the role and

* PhD Candidate at the Warwick Law School (e-mail: R.Quintero-Godinez@warwick.ac.uk). I am indebted to the Mathias Corvinus Collegium for sponsoring my visiting research fellowship at its Law School, which resulted in the publication of this article. Similarly, I would like to express my gratitude to the ELTE Law Journal's anonymous reviewers. Finally, I would like to express my appreciation to Prof Ralf Rogowski, Dr Velimir Zivkovic, and Dr Carlos Humberto Reyes Díaz for providing feedback on earlier drafts of this paper. This piece's conclusions and any errors are entirely mine.

legitimacy of constitutional adjudication. These are, first, that investment arbitration tribunals have not safeguarded the normative content enshrined in international human rights that shapes the architecture of international law. Second, investment arbitral tribunals have not fully opened the *channels* for inclusive opinion- and will-formation processes, ensuring that the interests of all those affected by their decisions are taken into account. Third, investment tribunals have not yet fulfilled the role of custodians of the deliberative democracy of international law.

The central argument of this article is based on three major premises. First, the debate surrounding the legitimacy crisis of investment arbitration is, for the most part, undertheorized and lacks a conceptual framework to develop a crisis diagnosis. Second, the legitimacy crisis of investment arbitration is a symptom of the democratic deficit in global governance caused by the partial collapse of the Westphalian political order. Third, to address this issue, I evaluate the possibility of applying the idea of Habermas's model of deliberative democracy concerning the adjudicatory process of constitutional courts. Ultimately, this model—at least at the theoretical level—would help investment arbitration address some of its legitimation problems.

To develop these arguments, this paper proceeds as follows. Section 2 introduces the Habermasian theory of the role and legitimation of constitutional adjudication in a democratic system. Section 3 presents the academic debate concerning the legitimacy crisis of international investment arbitration and explains why it remains undertheorized, as well as the problems that it brings about. Section 4 links Habermasian theory to the diagnosis of the legitimacy crisis of investment arbitration in light of the notion of international law as a constitutional democratic system and explains why it helps to solve some of the investment arbitration legitimacy concerns. Finally, Section 5 delivers the final remarks for this piece.

2 The Habermasian theory of the role and legitimacy of constitutional adjudication

This section introduces the Habermasian notion of the role and legitimacy of constitutional courts. Habermas analyses the role and legitimacy of constitutional courts

from the vantage point of the separation of powers between the democratic legislature and the judiciary.¹ He offers three ways in which this debate can be framed. These are, first, the dissolution of the liberal paradigm of law;² second, the methodological errors in the self-understanding of constitutional courts;³ and, third, the role of constitutional courts as guardians of democratic legislative procedures.⁴ In the following sections, I present the details of this threefold scheme.

2.1 The expansion of judicial functions as a dissolution of the liberal paradigm of law

Constitutional courts perform functions that overlap with democratic legislatures, particularly concerning judicial review, which breaks the liberal paradigm of law in terms of separation of powers.⁵ In concrete terms, this is seen when constitutional courts analyse whether certain legislative statutes are constitutional, or whether they contradict a

¹ Jürgen Habermas, *Between Facts and Norms*. Contributions to a Discourse Theory of Law and Democracy (William Rehg tr, The MIT Press 1996) 239.

² *ibid* 239–241.

³ *ibid* 264.

⁴ *ibid* 240.

⁵ I argue that investment arbitration tribunals closely resemble, at the functional level, constitutional courts, due to three aspects of their arbitration practice. First, they have to decide every investment dispute presented to them, even when the law does not offer a solution (see: Article 42(1) of the ICSID Convention). Second, arbitral tribunals have developed their own principles to assess their own jurisdiction and to determine the applicable law via the self-reference of their decisions, based on the principle of *Kompetenz-Kompetenz* (see: William W Park, ‘The Arbitrator’s Jurisdiction to Determine Jurisdiction’ (Boston University School of Law Public Law & Legal Theory 2007) 4.) Finally, investment tribunals have developed their own understanding and practices in the zone of structural coupling between the legal and political systems, by influencing who gets to decide, when, how, and what collective goals are being pursued by investment arbitration (see: Cédric Dupont and Thomas Schultz, ‘Towards a New Heuristic Model: Investment Arbitration as a Political System’ (2016) 7 *Journal of International Dispute Settlement* 3, 6.). Following a functionalist analysis of the role of constitutional courts, Habermas reaches a different, although it may also be seen as complementary, approach towards the functions of constitutional courts. He argues that the three tasks that these courts perform are settling intragovernmental disputes; reviewing the constitutionality of norms; and constitutional complaints *per se* (Habermas, *Between Facts and Norms*. *Contributions to a Discourse Theory of Law and Democracy* (n 3) 240. The reason why the functions of the courts discussed previously differ from the ones presented by Habermas are that this article draws its understanding of the functioning of constitutional courts from the autopoietic theory of law, in the tradition of Niklas Luhmann (*Law as a Social System* (Fatima Kastner and others eds, Klaus A Ziegert tr, Oxford University Press 2004).) and Gunther Teubner (*Law as an Autopoietic System* (Zenon Bankowski ed, Anne Bankowska and Ruth Adler trs, Blackwell 1993), as interpreted by Ralf Rogowski in ‘Constitutional Courts as Autopoietic Organisations’ in Christian Boulanger and Michael Wrase (eds), *Die Politik des Verfassungsrechts— Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten* (Nomos 2013), while Habermas develops his understanding based on his own vision of the functioning of constitutional courts. Habermas, *Between Facts and Norms*. *Contributions to a Discourse Theory of Law and Democracy* (n 3) 240.;

consistent system of rights.⁶ Habermas argues that, in principle, this task belongs to parliament, but it is transferred to constitutional courts.⁷ This raises the question of why the legislative branch delegates this function to the judicial review of constitutional courts, if nothing restricts the legislature from reserving it to a parliamentary committee of self-review?⁸ Moreover, if the legislature were to engage in a process of self-reflection on its decisions, this would prompt legislators to endorse the normative content of constitutional principles throughout their deliberations.⁹ So, the question remains: what justifies the legislature's decision not to examine the constitutionality of its own decisions?

Habermas argues that the legislature does not engage in a 'quasi-judicial review of its own'¹⁰ is because of the risk of losing the normative content of constitutional principles; that is, even if a parliamentary committee is staffed by legal experts, moral and ethical considerations in parliamentary deliberations could be deemed as negotiable commodities subject to political compromises.¹¹ Considering that moral and ethical principles penetrate almost all areas of the legal order, there is a demand that cases with constitutional implications be interpreted constructively—in other words, 'sensitive to context and referring to the legal system as a whole'.¹²

When facing normative issues to decide a case, constitutional courts engage in 'constructive' interpretation. This becomes more evident when considering that constitutional courts almost exclusively decide cases in which several basic rights collide¹³—namely, hard cases dealing with implicit limitations on basic rights, the

⁶ Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 241.

⁷ *ibid* 240–242.

⁸ *ibid* 240.

⁹ *ibid* 241.

¹⁰ *ibid*.

¹¹ *ibid*.

¹² *ibid* 246.

¹³ There are other interpretations of 'hard cases'. For instance, Bengoetxea defines 'hard cases' as those in which the solution to the legal controversy depends upon finding the rational interpretation of a norm, the meaning of which may not be clear due to the polysemy, vagueness, generality and ambiguity of its terms. Instead of the Dworkinian notion of constructive interpretation, Bengoetxea argues that to decide hard cases, judges are required to elaborate on arguments beyond purely analytic and deductive reasoning in the form of syllogism. This is, in Bengoetxea's terms, a justification of the second-order with pre-established law that involves elements of foreseeability and rationality, namely consistency of the decision with pre-established law; coherence with established law; and consequentialist reasoning See: *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford University Press 1993) 168–171.

principle of proportionality, the limitation of immediately valid fundamental rights by a third party's fundamental rights, and the protection of basic rights through organisational and procedural provisions.¹⁴ When adjudicating cases of collision, constitutional courts develop normative arguments and key constitutional principles based on moral and ethical considerations, as well as on public policy factors, to safeguard the unity and consistency of the legal order.¹⁵ Why? This is because the normative content of rights can no longer be solely considered as negative rights that grant liberties vis-à-vis an interfering administration. Instead, they have become the architectonic principles of the legal order,¹⁶ which constitutional courts develop and then replicate in further decisions. As Habermas explains:

In cases of collision, these concepts serve to interrelate various norms with a view to the unity and consistency of the Constitution: With the development of key relational concepts in the light of cases and problems, the Federal Constitutional Court has acknowledged and underlined the 'open' structure of the Basic Law, within limits that must be specified. To some extent, one can understand these key concepts, which have grown out of the practice of decision making itself, as procedural principles that mirror the operations of constructive interpretation as required by Dworkin, that is, the interpretation of the individual case in terms of the entirety of a rationally reconstructed legal order.¹⁷

In this way, the legitimacy of transferring the task of judicial review concerning the constitutionality of legislative acts lies in seeking to safeguard the normative content that shapes the architecture of the legal order while maintaining its unity and consistency.¹⁸

¹⁴ Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 248.

¹⁵ That is, the orientation to fundamental norms and principles means the judiciary must turn its attention from its former focus on the institutional history of the legal order and attend primarily to problems of the present and future. *ibid* 246.

¹⁶ *ibid* 247.

¹⁷ *ibid* 248.

¹⁸ *ibid* 247–248.

2.2 The self-understanding and practical effects of constitutional adjudication

Not only does constitutional adjudication raise legitimacy concerns about overlapping functions between the judiciary and the legislature, but also about the impossibility of deciding constitutional questions rationally.¹⁹ These worries come up because constitutional courts interpret norms in a way that looks a lot like implicit lawmaking.²⁰ However, Habermas argues that these concerns rest upon a false methodological consideration of the self-understanding and practical effects of constitutional adjudication. In principle, the constructive interpretation of constitutional courts—where rights are seen as principles of moral and ethical considerations that permeate throughout the legal order—does not differ from the interpretation of basic norms and principles. If anything, a constructive interpretation does not produce any more rationality gaps than the straightforward application of norms.²¹

An adjudication guided by principles implies a redefinition of the liberal paradigm of the system of rights. Rather than interpreting rights as negative liberties between the administration and citizens, constitutional adjudication should interpret rights as systemic norms, constitutive of a democratic legal order.²² Ultimately, this is what Habermas implies as a rethink of self-understanding and the practical effects of constitutional adjudication. Even if judicial review enshrines elements of judicial lawmaking, which draws critics of judicial activism,²³ constitutional courts must examine the contents of disputed norms in connection with a theory of constitutional democracy, ‘according to which citizens can, in the exercise of their right to self-determination, successfully pursue the cooperative project of establishing just (i.e., relatively more just) conditions of life’.²⁴

Therefore, constitutional adjudication has to ensure that the legal order protects the effective exercise of communicative and participatory rights of citizens as a part of a

¹⁹ *ibid* 261.

²⁰ *ibid* 258.

²¹ *ibid* 261.

²² *ibid* 263.

²³ *ibid* 264.

²⁴ *ibid* 263.

democratic constitutional order.²⁵ To do so, constitutional courts must guarantee that the *channels* for the inclusive opinion- and will-formation processes (through which a democratic legal community self-organises) remain intact.²⁶ As Habermas states:

[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about [...]. More specifically, it must start by examining the communication structures of a public sphere subverted by the power of the mass media; go on to consider the actual chances that divergent and marginal voices will be heard and that formally equal rights of participation will be effectively exercised; and conclude with the equal parliamentary representation of all the currently relevant groups, interest positions, and value orientations.²⁷

2.3 Constitutional courts as custodians of deliberative democracy

As previously stated, the legitimacy conditions of a democratic constitutional order require that constitutional courts guarantee that the *channels* for inclusive opinion- and will-formation remain open to political participation for as many interested citizens as possible.²⁸ However, the multiplication and clash of competing interest groups make impartial will-formation difficult to develop.²⁹ Therefore, the influence of interest groups that further their ambitions through the state apparatus at the cost of the general interest is deemed a real problem, and one that threatens the legitimacy of the democratic constitutional order.

²⁵ *ibid* 264.

²⁶ Previously, Habermas had introduced the notion that rational political opinion- and will-formation is possible only as an institutionalised ideal. This is ‘through a system of rights that secures for each person an equal participation in a process of legislation whose communicative presuppositions are guaranteed to begin with’. This is precisely what constitutional adjudication should deal with when courts examine the content of disputed norms in connection with a theory of constitutional democracy. See: *ibid* 110.

²⁷ *ibid* 264–265.

²⁸ In a subsequent chapter in *Between Facts and Norms*, Habermas lays down, following Norberto Bobbio’s theory of democracy, the ‘procedural minimum’ criteria necessary so that democracy can be implemented. These are: (a) the political participation of as many interested citizens as possible, (b) majority rule for political decisions, (c) the usual communication rights and therewith the selection from among different programs and political elites, and (d) the protection of the private sphere, *ibid* 303.

²⁹ *ibid* 275.

In light of the above, constitutional courts should assume the role of custodians of deliberative democracy.³⁰ They should develop interpretation schemes to ensure that the legislature has used some form of rational judgment rather than reacting mechanically to the pressures of interest groups.³¹ The justification is that the legislature should deliberate for the benefit of the public good rather than mechanically respond to private interests. In this way, constitutional courts should not so much examine the outcome of the legislative process, but rather ‘whether it is deliberation—undistorted by private power—that gave rise to that outcome’.³²

What should emerge is a (reasonable) standard of judgement that focuses not so much on examining or justifying the reasonability of political reasons, but a jurisprudence that analyses whether legitimate policies and goals are a by-product of private concerns unfit for public justification.³³ If that is the case, the courts should invalidate the statute or act. This would make it more likely for better arguments to be used in different types of deliberation while still obtaining fair bargaining terms.³⁴

3 The debate concerning the legitimacy crisis of international investment arbitration

3.1 Mapping the legitimacy crisis of investment arbitration

After three decades of the proliferation of investor-friendly bilateral investment treaties (BITs) that have empowered investors to bring international claims against host states, public opinion is changing towards scepticism regarding and strong opposition to

³⁰ *ibid.*

³¹ Cass Sunstein, ‘Interest Groups in American Public Law’ (1985) 38 *Stanford Law Review* 69; and Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 276.

³² Sunstein (n 31) 58; Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 276.

³³ Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 276.

³⁴ *ibid* 279.

the investment arbitration regime.³⁵ As a result, it faces a backlash that has challenged its legitimacy.³⁶ The legitimacy crisis debate has been building for some time, and critical voices are accumulating because the regime has not yet undergone structural transformations.³⁷

In charting the legitimacy crisis of investment arbitration, Langford and Behn identify three broad periods.³⁸ The first period is the pre-crisis (1990–2001) and the build-up to it (2002–2004). Only a handful of cases were filed in this period, and the regime was generally eclipsed by contract-based investment and commercial arbitrations.³⁹ On the other hand, the building-crisis era began with the first high-profile cases that triggered controversy. These included the *Loewen* case, in which the investor suffered arbitrary court procedures that constituted a denial of justice and a breach of the obligation to provide investors with fair and equitable treatment (FET).⁴⁰ Nonetheless, the tribunal rejected the investors' claim on two contentious grounds: first, the investor had failed to pursue its domestic remedies;⁴¹ and second, the reorganisation of the investor following its bankruptcy as a US corporation withdrew the tribunal's jurisdiction.⁴² Because the claim was against the US, some considered that this case 'was a lost opportunity to show that the rule of law applies equally to the world's most powerful country'.⁴³ Also, this period saw the *Aguas del Tunari* case against Bolivia,⁴⁴ which arose out of the *Guerra del Agua*; i.e., 'the ill-fated effort to privatise the water system in Bolivia'.⁴⁵ The sheer

³⁵ Andreas Kulick, 'Narrating Narratives of International Investment Law: History and Epistemic Forces' in Stephan Schill, Christian Tams and Rainer Hofmann (eds), *International Investment Law and History* (Elgar 2018) 65.

³⁶ Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 *The European Journal of International Law* 551, 552.

³⁷ David Schneiderman, 'International Investment Law's Unending Legitimation Project' (2017) 49 *Loyola University Chicago Law Journal* 229, 229–230.

³⁸ Langford and Behn (n 38).

³⁹ *ibid* 554.

⁴⁰ Noah Rubins, 'Loewen v United States: The Burial of an Investor-State Arbitration Claim' (2005) 21 *Arbitration International* 1, 6.

⁴¹ *Loewen Group, Inc and Raymond L Loewen v United States of America* [2003] ICSID ARB(AF)/98/3, Award [162, 215]. In concrete terms, the arbitration tribunal stated that the investor could have pursued the filing a petition of certiorari coupled with the application for a stay to the US Supreme Court. *ibid* 210.

⁴² *Loewen Group, Inc and Raymond L. Loewen v United States of America* (n 41) paras 223–224.

⁴³ These are words expressed by Jacques Werner, cited in an interview in Michael Glodhaber, 'NAFTA Suit Is Alive and Kicking' (2004) 1 *National Law Journal*.

⁴⁴ *Aguas del Tunari, SA v Republic of Bolivia* ICSID ARB/02/3.

⁴⁵ Alexandre de Gramont, 'After the Water War: The Battle for Jurisdiction in Aguas Del Tunari, SA v Republic of Bolivia' (2006) 3 *Transnational Dispute Management* 1.

amount of criticism coming from outside the sphere of investment arbitration⁴⁶ resulted in the investor reaching an agreement with the Bolivian government on a no-pay basis.⁴⁷

The second period is the legitimacy crisis *per se* (2005–2010). What characterises this era is the rising number of contradictory rulings on basically the same subject matter, as well as an increase in the number of controversial cases, in which states' regulatory powers were called into question.⁴⁸ Concerning the first issue, Susan Frank⁴⁹ identified three sets of inconsistent arbitral decisions that caused uncertainty about the meaning of rights in BITs.⁵⁰ First, there were cases dealing with the same facts, related (yet not identical) parties, and similar investment rights: the *Lauder*⁵¹ and *CME* cases⁵² exemplified this issue.⁵³ In these cases, actions and omissions by the Czech media regulatory body were subject to two separate arbitral proceedings conducted at different fora (London and Stockholm), which, moreover, resulted in contradictory rulings.⁵⁴ Second, there were cases involving similar commercial situations and similar investment rights, such as in the *SGS* cases. Here, two ICSID tribunals came to opposite conclusions

⁴⁶ The *New Yorker* magazine, for example, featured an article on the *Guerra del Agua* in Cochabamba entitled William Finnegan, 'Leasing the Rain' [2002] *The New Yorker* <<https://www.newyorker.com/magazine/2002/04/08/leasing-the-rain>>. Taken from: de Gramont (n 47).

⁴⁷ Kyla Tienhaara, 'Third Party Participation in Investment-Environment Disputes: Recent Developments' (2007) 16 *Review of European Community & International Environmental Law* 230, 234.

⁴⁸ Langford and Behn (n 38) 556.

⁴⁹ Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, 1582. Franck explains that there are three categories of inconsistent cases; namely (1) cases involving the same facts, related parties, and similar investment rights, (2) cases involving similar commercial situations and similar investment rights, and (3) cases involving different parties, different commercial situations, and the same investment rights. *ibid* 1558.

⁵⁰ Franck (n 51) 1558 et seq.

⁵¹ *Ronald S Lauder v The Czech Republic* UNCITRAL 2001, Final Award.

⁵² *CME Czech Republic BV v The Czech Republic* UNCITRAL 2003, Final Award.

⁵³ Kevin Williams and Sergey Ripinsky, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008) 145–148; and Giorgio Sacerdoti, 'The Proliferation of Bits: Conflicts of Treaties, Proceedings and Awards' (Bocconi Legal Studies Research Paper No 07-02 2007) 2.

⁵⁴ While in the *Lauder* case the London *ad hoc* tribunal found that although the Czech government took arbitrary and discriminatory measures, '[t]he Claimant has indeed not brought 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'. Hence, it concluded that 'there was no direct or indirect interference by the Czech Republic in the use of Mr Lauder's property or with the enjoyment of its benefits'. (*Ronald S Lauder v The Czech Republic* (n 51) paras 201–202. On the other hand, in the *CME* case, the Stockholm arbitration tribunal considered 'immaterial whether the State itself (rather than local investors or other third parties) economically benefits from its actions' when analysing whether an expropriation happened. Therefore 'The Czech Republic's actions in this case—threatening destruction of CME's investment through regulatory proceedings once the foreign investor's profits appeared too large' amounted to 'expropriation by consent'. *CME Czech Republic BV v The Czech Republic* UNCITRAL 2001, Partial Award [150–151, 153].

regarding the extent to which an umbrella clause may elevate a breach of a contractual claim into a breach of a relevant BIT.⁵⁵ Third, there were cases involving different parties and different commercial situations, but the same investment rights. Frank points out that at least three different NAFTA cases came to different interpretations on whether *fair and equitable* was a guarantee of minimum treatment under customary international law, or whether it was an independent standard of protection.⁵⁶

Concerning the issue of controversial cases, Burke-White⁵⁷ analyses four cases decided by early 2008 against Argentina, in the aftermath of its worst economic crisis.⁵⁸ Although Argentina invoked the treaty-based defence of non-precluded measures provisions in its BITs,⁵⁹ as well as the customary defence of necessity, in three of the four

⁵⁵ In *SGS v Pakistan*, the tribunal stated that there is no basis on which contractual claims could be elevated to investment treaty claims, when there is no intent by the contracting states that the umbrella should have such a far-reaching scope (*SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan* [2003] ICSID ARB/01/13, Decis Trib Object Jurisd [167].) However, in *SGS v Philippines*, the tribunal accepted that the umbrella clause was clear and unambiguous, so that the State's failure to comply with its contractual obligations amounted to a breach of the provisions of the investment treaty (*SGS Société Générale de Surveillance SA v Republic of the Philippines* [2004] ICSID ARB/02/6, Decis Trib Object Jurisd [109]). That said, as Sanderson notes: '[w]hile commentators have been keen to see the two SGS cases as extreme poles, the differences in outcome in these cases is more nuanced and, in fact, the polarisation between the broad and the more restrictive approaches may have only truly been established in subsequent cases' 'Umbrella Clauses in Investment Treaty Arbitration' (*LexisNexis*) <https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/59XM-CHD1-DXSN-60B9-00000-00?utm_source=psl_da_mkt&utm_medium=referral&utm_campaign=umbrella-clauses-in-investment-treaty-arbitration>.

⁵⁶ Franck (n 51) 1576–1582. In concrete terms, Franck refers to the following three cases: first, to *SD Myers v Canada*, in which the tribunal concluded that international law must ultimately determine whether the regulation is sufficiently egregious to amount to an instance in which 'a foreign investor has been denied 'fair and equitable treatment' (*SD Myers, Inc v Government of Canada* [2000] Partial Award (UNCITRAL) [264–269]. Second, to *Metalclad v Mexico*, in which the tribunal considered that 'fair and equitable' is a positive right independent of customary international law (*Metalclad Corporation v The United Mexican States* [2000] ICSID ARB(AF)/97/1, Award [99–101]. And third, to *Pope & Talbot v Canada*, in which the tribunal concluded that the 'fair and equitable treatment' standard in article 1105 did not mean that NAFTA States should provide minimum standards of treatment under international law; but rather, it was a standard in addition to minimum guarantees under international law (*Pope & Talbot Inc v The Government of Canada* [2001] Award (UNCITRAL) [105–118]). As a result of these discrepancies, the NAFTA Free Trade Commission enacted a binding interpretation which clarified NAFTA's FET clause meaning, under Article 1105. It asserted that this provision does not require that host States give treatment in addition to or beyond that which is required by the minimum standard of treatment under customary international law (NAFTA Free Trade Commission, 'NAFTA's Notes of Interpretation of Certain Chapter 11 Provisions' (2001).

⁵⁷ William W Burke-White, 'The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System' (2008) 3 *Journal of WTO & International Health Law and Policy* 199, 221.

⁵⁸ *CMS Gas Transmission Company v The Republic of Argentina* [2005] ICSID ARB/01/8, Award.; *CMS Gas Transmission Company v The Republic of Argentina* [2007] ICSID ARB/01/8, Annulment.; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* [2007] ICSID ARB/01/03, Award.; and *Sempra Energy International v The Argentine Republic* [2007] ICSID ARB/02/16, Award.

⁵⁹ These provisions exempt certain actions taken by states in response to extraordinary circumstances. William W Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The

cases, ICSID tribunals held Argentina liable for adopting several measures to stabilise its economy, such as the conversion of all its financial obligations into the Argentinian peso. This triggered the legitimacy concern on the diminishment of the States' ability to develop policy responses to overcome critical situations.⁶⁰ Moreover, the crisis narrative was exacerbated, due to a large number of cases that deteriorated the protection of basic human rights, environmental standards and sustainable development goals,⁶¹ as well as cases against Bolivia, Venezuela and Ecuador, due to the enactment of expropriation laws⁶². Consequently, several States denounced the ICSID Convention. While states such as Argentina adopted a neither-in-nor-out approach by maintaining its BITs and ICSID membership,⁶³ Bolivia, Venezuela and Ecuador denounced the ICSID Convention.⁶⁴

The last period is the late crisis and its counter-crisis (2011–present). This era includes major controversial cases, in which the powers of sovereign States to regulate public affairs were called into question, which, in turn, spurred a debate on the chilling effect of international investment disputes.⁶⁵ Examples of such cases are the *Phillip*

Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 307, 321.

⁶⁰ Burke-White (n 59) 222. Burke also acknowledges two other causes of legitimacy concerns: first '[t]he tribunals reached opposite conclusions, based on different interpretations of the treaty's NPM terms and different understandings of the necessity defense in customary international law', *ibid* 221. Secondly, the composition of the tribunals and the precedential value of ICSID awards, *ibid* 222.

⁶¹ For instance, when the tribunal in *Suez v Argentina* needed to address the role of human rights on investment disputes; it concluded that human rights operate independent from investment protections, so that they are of no relevance to investment treaty obligations (*Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* [2010] ICSID ARB/03/19, Decis Liabil [257–265]).

⁶² Langford and Behn (n 36) 556; Michael Waibel, and others, 'The Backlash Against Investment Arbitration: Perceptions and Reality' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010) xlix.; Cf with Detlev Vagts, who argues that the backlash against investment arbitration resembles the awakening of the 'spirit of Carlos Calvo' in 'Foreword to the Backlash against Investment Arbitration' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010) xxiv.

⁶³ Yoram Z Haftel and Hila Levi, 'Argentina's Curious Response to the Global Investment Regime: External Constraints, Identity, or Both?' (2020) 23 Journal of International Relations and Development 755, 755–758.

⁶⁴ Waibel, and others (n 64) xlix.; and Langford and Behn (n 38) 556. Cf Devashish Krishan, Todd Weiler and Freya Baetens, 'Thinking About BITs And BIT Arbitration: The Legitimacy Crisis That Never Was', *New Directions in International Economic Law* (Brill/Nijhoff 2011) 130.

⁶⁵ Catharine Titi, *The Right to Regulate in International Investment Law* (Nomos/Hart 2014); for an opposing view on this subject see: Martins Paparinskis, 'International Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26 European Journal of International Law 663. See also, Leif Johan Eliasson and Patricia Garcia-Duran Huet, *Civil Society, Rhetoric of Resistance, and Transatlantic Trade*. (Springer 2019) 63 who quote the Corporate Europe Observatory, which mentions that '[s]ometimes the mere threat of an investor-state dispute can be enough to kill legislation because the policy-maker is

Morris regulation cases,⁶⁶ the *Vattenfall* cases against Germany,⁶⁷ and *Chevron*'s US \$18 billion denial of justice case against Ecuador.⁶⁸ On top of this, developed countries such as Australia⁶⁹ and Czechia initiated an internal policy review of terminating and renegotiating some of their BITs.⁷⁰ Also, as of 2015 a second wave of high-profile cases were decided against, *inter alia*, Venezuela,⁷¹ Zimbabwe,⁷² Canada,⁷³ and Russia.⁷⁴ Additionally, during that period, 67 intra-EU ISDS cases have been initiated related to activities in the supply of energy and financial services,⁷⁵ most of which were brought against three EU member states: Spain (28 cases), Italy (10 cases), and Croatia (7 cases).⁷⁶ This period is also marked by an increase in the number of publications regarding additional aspects that have triggered the legitimacy crisis of investment arbitration, along with suggestions of reforms to tackle them.⁷⁷ Examples of legitimacy concerns identified

afraid of being sued, and that shows that investor-state disputes are also an enormous threat to our democracy'.

⁶⁶ *Philip Morris Asia Limited v The Commonwealth of Australia* [2017] UNCITRAL PCA Case No. 2012-12, Award; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* [2016] ICSID ARB/10/7, Award.

⁶⁷ *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany* [2011] ICSID ARB/09/6, Award [12].; *Vattenfall AB and others v Federal Republic of Germany* [2018] ICSID ARB/12/12, Decis Achmea Issue [232].

⁶⁸ *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (II)* [2009] UNCITRAL PCA Case No. 2009-23, Pending.

⁶⁹ Later on, Australia reversed its anti-ISDS policy and signed the TPP in February 2016.

⁷⁰ Langford and Behn (n 38) 557.

⁷¹ *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela* [2019] ICSID ARB/07/30, Award; *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2014] ICSID ARB(AF)/09/1, Award.; *Venezuela Holdings, BV, et al (case formerly known as Mobil Corporation, Venezuela Holdings, BV, et al) v Bolivarian Republic of Venezuela* [2014] ICSID ARB/07/27, Award.

⁷² *Bernhard von Pezold and Others v Republic of Zimbabwe* [2015] ICSID ARB/10/15, Award.; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe* [2015] ICSID ARB/10/25, Award.

⁷³ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* [2015] UNCITRAL PCA Case No. 2009-04, Award Jurisd Liabil.

⁷⁴ *Yukos Universal Limited (Isle of Man) v The Russian Federation* [2014] UNCITRAL PCA Case No. 2005-04/AA227, Final Award PCA Case No 2005-04/AA227; *Hulley Enterprises Limited (Cyprus) v The Russian Federation* [2014] UNCITRAL PCA Case No 2005-03/AA226, Final Award; and *Veteran Petroleum Limited v The Russian Federation* [2014] UNCITRAL PCA Case No 2005-05/AA228, Final Award.

⁷⁵ About 83 per cent of the intra-EU cases related to activities in the services sector. Half of the services cases related to the supply of electricity, gas, steam and air (77 cases) and 15 per cent to financial and insurance services (24 cases). UNCTAD, 'Investment Policy Hub' <https://investmentpolicy.unctad.org/publications/1193/fact-sheet-on-intra-european-union-investor-state-arbitration-cases>.

⁷⁶ This is about 40 per cent of the total of 174 known intra-EU investor-State disputes that have been registered from 1987 until July 2018. *ibid*.

⁷⁷ Although Langford and Behn do not give any information on this point, a search at the 'Most-Cited Law Journals' in HeinOnline reveals that from 2010 to date (June 20th 2021) there are 96 publications containing the words 'Legitimacy Crisis Investment Treaty Arbitration', while only 74 from 2000 to 2009. See: <https://heinonline.org/HOL/LuceneSearch?terms=Legitimacy+Crisis+Investment+Treaty+Arbitration&fa>

in the academic literature are the bias of arbitrators,⁷⁸ lack of transparency during the proceedings,⁷⁹ and the need to expand the participation of third parties.⁸⁰

On the other hand, the counter-crisis period has produced a countervailing trend, characterised by negotiations and the conclusion of new regional mega-agreements which aim to safeguard the regulatory powers of states. One example is the recently concluded United States-Mexico-Canada Agreement, which includes a caveat to investment protection when governments adopt or maintain measures to protect legitimate public welfare objectives.⁸¹ In the same vein, a new era of modern investment agreements, such

ce_quers=partof%3Atop30&collection=all&searchtype=advanced&typea=text&tabfrom=&submit=Go&sendit=&all=true&yearlo=2000&yearhi=2010

⁷⁸ Gus Van Harten, 'Perceived Bias in Investment Treaty Arbitration?' in Michael Waibel and others (eds), *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010).; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 *Osgoode Hall Law Journal* 211.; Cf Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28 *The European Journal of International Law* 731, who, unlike Van Harten, assert that 'the results of the experiment suggest that, because of a cognitive predisposition to help the party with fewer resources, or because of the contemporary contested standing of ISDS, or to ensure buy-in on the part of litigants (and secure 'customers' for this arbitration system), arbitrators tend to 'compensate' perceived economically weaker parties who are successful in a proceeding when exercising discretion'.

⁷⁹ Schneiderman (n 39) 259. He argues that pre-award transparency, for instance, is hardly available in ICSID and UNCITRAL tribunal practice.

⁸⁰ Avidan Kent, 'The Principle of Public Participation in ICSID Arbitrations' in Marie-Claire Cordonier Segger and CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992-2012* (Routledge 2017) 554.

⁸¹ Additionally, UNCTAD has outlined various reform packages that advocate, *inter alia*, (i) Safeguarding the right to regulate: Clarifying or circumscribing provisions such as most-favoured-nation (MFN) treatment, fair and equitable treatment (FET) and indirect expropriation, as well as including exceptions, e.g. for public policies or national security; (ii) Reforming investment dispute settlement: Improving the arbitral process, e.g. by making it more transparent and streamlined; limiting investors' access, e.g. by reducing the subject matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by 'mailbox' companies; introducing an appeals facility (whether bilateral, regional or multilateral); and creating a standing international investment court; (iii) Promoting and facilitating investment: granting outward incentives or investment insurance can be conditioned on the sustainable development impact or good governance record of the benefitting investment; (iv) Ensuring responsible investment: options include not lowering standards clauses and provisions on investor responsibilities, such as clauses on compliance with domestic laws and on corporate social responsibility; (v) Enhancing systemic consistency: owing to the fragmentation of international law into different 'systems' that pursue their own objectives, past investment cases have revealed tensions between investment and these other parts of international law. Addressing this relationship in investment treaties can help avoid conflicts and provide arbitral tribunals with guidance on how to interpret such interaction; (vi) An investment court system composed of a first instance Tribunal and an Appeal Tribunal operating on similar principles to the WTO Appellate Body UNCTAD, 'World Investment Report 2015. Reforming International Investment Governance' (2015) xi–xii. Additionally, a special issue of *The Journal of World Investment & Trade 'Comparative and International Investment Law: Prospects for Reform'* gathers a series of articles that take the domestic level of investment governance to set forth suggestions for reform to the investment law regime. See: Georgios Dimitropoulos, 'Comparative and International Investment Law: Prospects for Reform – An Introduction' (2020) 21 *The Journal of World Investment & Trade* 1.

as the Indian⁸² and the Southern African Development Community Model Bilateral Investment Treaty⁸³ templates, contain provisions on compliance with domestic laws and corporate social responsibility. Moreover, at the level of arbitral proceedings themselves, there have been attempts to respond to the backlash. For example, recent arbitral awards have underscored the fact that regulatory changes to the legal framework of host states cannot be deemed unfair *per se* when States implement actions to protect basic human rights.⁸⁴ Other awards have also set forth that when analysing governmental regulations that may be detrimental to investors' rights, the arbitral tribunal must take into account the forceful defence of environmental regulations and protection provided in the BIT.⁸⁵

Despite these responses, there remains discontent over the lack of a systemic reform of the investment arbitration regime.⁸⁶ For instance, Langford et. al. find that the lack of consistency and coherence in the interpretation of legal issues remains largely unsolved.⁸⁷ Furthermore, Steininger has identified a serious lack of uniform methodology in the judicial interpretation and application of human rights law by arbitrators.⁸⁸ Another issue that lingers unresolved is that the current arbitration rules provide for limited transparency. For example, Regulation 22 of the ICSID Administrative and Financial Regulations states that the ICSID Secretary-General may only publish arbitral awards or minutes and other records of proceedings if both parties agree. In addition, Rule 32 of the Rules of Procedure for Arbitration Proceedings of the ICSID states that, unless either party objects, the tribunal may allow other persons to participate in the oral procedure.⁸⁹

⁸² In particular, see the following articles of this treaty: Article 1(4) and 1(5) Definition of investment and of investor; Article 12 Corporate Social Responsibility; Article 32.1(IV) General Exceptions to protect the environment.

⁸³ In concrete terms, see the following articles of this treaty: Article 2 Definition of Investment; Article 13: Environmental and Social Impact Assessment; Article 15 Minimum Standards for Human Rights, Environment and Labour; and Article 16: Corporate Governance Standards.

⁸⁴ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* [2016] ICSID ARB/07/26, Award [623–624].

⁸⁵ *Adel A Hamadi Al Tamimi v Sultanate of Oman* [2015] ICSID ARB/11/33, Award [389–390].

⁸⁶ Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 *American Journal of International Law* 361, 361.

⁸⁷ Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' (2020) 21 *The Journal of World Investment & Trade* 188, 250.

⁸⁸ Silvia Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 *Leiden Journal of International Law* 33, 55.

⁸⁹ In this sense, see: *Bernhard von Pezold and Others v Republic of Zimbabwe* [2012] ICSID ARB/10/15, *Proced Order No 2* [63]. There, the tribunal stated that '[t]he Petitioners' request to attend the hearings in these proceedings must be denied in any event because the Claimants' objection constitutes an absolute bar to granting the request'.

3.2 A response to mapping the legitimacy crisis of investment arbitration

The chronological framework of Langford and Behn offers the advantage of tracking the progress of the legitimacy crisis in an orderly way. However, it lacks a theoretical framework with which to deploy a crisis analysis. Although this may be due to the fact that the debate surrounding the legitimacy crisis of investment arbitration has developed chaotically and randomly, it does not render the theorization of the debate less problematic. For example, the first period of the legitimacy crisis—i.e., the building crisis—is said to be challenging given the rising number of high-profile cases that triggered controversy. Indeed, both the *Loewen* and the *Aguas del Tunari* cases sparked a fair amount of criticism. However, the underlying reasons for their being symptomatic of a legitimacy crisis are not given. Granted, the tribunal in the *Loewen* case may have missed the opportunity to prove to the world that the rule of law applies to the world's most powerful country as equally as to others; likewise, the privatization of the water supply in Bolivia undermined indigenous populations' human right to access water. Both have merit as real concerns.

The same can be said about the second and final periods of the crisis. Contradictory rulings and controversial cases are unavoidable in any adjudicatory system; however, they do not *per se* trigger legitimacy concerns. In the Netherlands, for example, there are contradictory rulings on the status of food-delivery riders as employees.⁹⁰ The US Supreme Court has dealt with several controversial cases, in issues including racial segregation in education,⁹¹ abortion,⁹² police procedures to ensure the protection of a criminal suspect,⁹³ the individual's right to possess a firearm unconnected with service in a militia,⁹⁴ and so on. However, in neither country did contradictory rulings or controversial cases spur a legitimacy crisis debate.

⁹⁰ Nuna Zekic, 'Contradictory Court Rulings on the Status of Deliveroo Workers in the Netherlands' (2019) 17 Comparative Labor Law & Policy Journal.

⁹¹ *Brown v Board of Education of Topeka* [1964] SCOTUS 347 U.S. 483.

⁹² *Roe v Wade* [1973] SCOTUS 410 U.S. 113.

⁹³ *Miranda v Arizona* [1966] SCOTUS 384 U.S. 436.

⁹⁴ *District of Columbia v Heller* [2008] SCOTUS 554 U.S. 570.

This is why it becomes apparent that debating the legitimacy of any adjudicatory system demands a conceptual framework from which to develop a crisis diagnosis. So far, the discussion on the legitimacy crisis of investment arbitration has served to point out perceived problems and chart the trajectory of the crisis, but what is necessary is a thorough examination of why controversial, contradictory rulings and the increase in the number of publications develop a crisis of legitimacy based on a theoretical framework from which one can develop a crisis diagnosis.

4 The diagnosis of the legitimacy crisis of investment arbitration

In light of this, the following section applies the Habermasian theory of the role and legitimacy of constitutional adjudication to diagnose legitimacy concerns in international investment arbitration. Three aspects are examined in particular. The first is whether investment tribunals have developed normative arguments and key principles based on moral and ethical considerations, as well as public policy, to safeguard the unity and consistency of the international legal order. The second is whether investment tribunals have guaranteed that the *channels* for the inclusive opinion- and will-formation processes are open to the democratic legal community of international law. The last question is whether investment arbitration tribunals have done their job as guardians of international law's democracy.

4.1 Human rights as normative principles of the international legal order

As previously mentioned, the Habermasian paradigm no longer considers rights to be exclusively negative liberties in a constitutional order. Instead, they are deemed as architectonic principles that permeate throughout the legal order, which constitutional courts integrate into the legal system by means of constructive interpretation. To analyse the legitimacy crisis of investment arbitration, it is argued that investment tribunals may

uphold the legitimacy of this public adjudicatory system⁹⁵ through integrating a constructive interpretation (one that incorporates international human rights norms) in their deliberations. To further this argument, I discuss two issues; first, whether international law embeds a system of rights similar to constitutional rights that investment tribunals can integrate into their judicial review. Second, even if such a system or rights exist, are investment tribunals in a position to engage in a constructive interpretation, similarly to constitutional courts?

4.1.1 Whether international law embeds a system of constitutional rights

The constructive interpretation that Habermas suggests for courts to integrate the normative architectonic principles into the legal system resembles Gardbaum's three-fold model to analyse the constitutionalisation of international human rights.⁹⁶ This model describes three general characteristics of constitutional law, which, for the most part, are met by international human rights law. These are the *architectonic principles that permeate throughout the international legal order*.⁹⁷ According to Gardbaum, the main features of constitutional rights are the following. First, it is law made by a special, episodic, and self-consciously constituent power.⁹⁸ Second, it is law that occupies the highest hierarchical position in the legal system.⁹⁹ Third, it is law *entrenched* against ordinary methods of reform through additional procedural requirements.¹⁰⁰

⁹⁵ Venzke and Von Bogdandy argue that while ICSID tribunals are judicial bodies that engage in public adjudication, given the inherent law-making in their adjudicatory practice, they cannot be considered constitutional courts in the same way as the Court of Justice of the European Union, the European Court of Human Rights and the and the Inter-American Court of Human Rights. This is for two reasons. First, because it would be possible for investment tribunals to justify their de-coupling from an effective legislature. Second, if they engage in creative and expansive interpretation of their legal foundations, say the ICSID Convention, that would be considered illegitimate. See: *In Whose Name?: A Public Law Theory of International Adjudication* (Oxford Scholarship Online 2014) 128–130. Although this paper acknowledges, just as Venzke and Von Bogdandy do, that ICSID tribunals are not ontological constitutional tribunals, what we consider is their functional nature. Hence, their factual nature is inconsequential.

⁹⁶ Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749, 753 et seq.

⁹⁷ Gardbaum includes two. These are '(i) there is no single international human rights system but regional and global ones which overlap and interact in complex ways; and (ii) there is no single international legal source of human rights law and many of the sources also overlap' *ibid* 754.

⁹⁸ *ibid* 753.

⁹⁹ *ibid* 754.

¹⁰⁰ *ibid*.

How does the three-fold model apply to international human rights law? Concerning the first criterion, Gardbaum argues that the birth of the Universal Declaration of Human Rights (UDHR), the International Covenant of Economic, Social, and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR)—together known as the International Bill of Rights¹⁰¹—were the product of a constitutional moment.¹⁰² The International Bill of Rights was an appropriate and effective response to the threats and challenges of a rising political movement that created a new paradigm.¹⁰³ Indeed, the framers of the UDHR, ICCPR, and ICESCR were responding to the barbarous acts that outraged the conscience of mankind resulting from the Second World War. This is why these laws were seen as a way to protect the ideal of free human beings.

With respect to the hierarchical status of international human rights, Gardham acknowledges that, aside from the most important human rights that have achieved *jus cogens* pedigree,¹⁰⁴ there is no consensus on the hierarchical status of human rights norms.¹⁰⁵ That said, at the regional level, the supremacy of human rights over other international treaty obligations has been acknowledged.¹⁰⁶ For example, in the *Mangold* case, the European Court of Justice (ECJ) elevated the prohibition of discrimination on grounds of age to a general, unwritten, principle of EU law which triumphs over

¹⁰¹ Surya Prakash Sinha, 'The Axiology of the International Bill of Human Rights' (1989) 21 *Pace Yearbook of International Law* 21, 22; and Gardbaum (n 98) 749.

¹⁰² Gardbaum (n 98) 756.

¹⁰³ Anne Marie Slaughter and William W Burke-White, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1, 2.; and Bruce Ackerman, 'A Generation of Betrayal?' (1997) 65 *Fordham Law Review* 1519, 1519.

¹⁰⁴ Gardbaum (n 98) 756. Asif Hameed considers that *jus cogens* norms are those identified in the commentaries of the International Law Commission of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, including the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, and torture. In particular, Commentary 5 of Article 26 (Compliance with peremptory norms), 'Unravelling the Mystery of Jus Cogens in International Law' (2014) 84 *British Yearbook of International Law* 52, 83. Moreover, these principles of *jus cogens* coincide with those set out in international jurisprudence, such as in *Prosecutor v Furundžija*, in which the tribunal stated that 'this revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination'. *Lašva Valley, Prosecutor v Furundžija (Anto)* [1998] Judgement (ICTY) [147].

¹⁰⁵ Whether Article 103, the supremacy clause of the UN Charter, incorporates mandated or authorised human rights measures remains uncertain. Gardbaum (n 98) 756.

¹⁰⁶ Takis Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 *Cambridge Yearbook of European Legal Studies* 361.

secondary laws.¹⁰⁷ Similarly, in the case *Test-Achats*, the ECJ found Article 5(2) of the Directive 2004/113/EC to be against the Charter of Fundamental Rights of the European Union. The ECJ considered that permitting proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor is against Articles 21 and 23 of the Charter. This is because any discrimination based on sex is prohibited and equality between men and women must be ensured in all areas.¹⁰⁸

Lastly, most human rights norms contain a more onerous process of amendment than the general or treaty amendments contained in article 40 of the Vienna Convention on the Law of Treaties.¹⁰⁹ For instance, Article 51 of the ICCPR sets forth a four-stage process for its amendment. Moreover, the ICCPR contains no provision on termination or withdrawal, because, as stated by the UN Human Rights Committee, the parties to the Covenant deliberately intended to exclude the possibility of denunciation, since the rights enshrined in the Covenant belong to the people living in the territory of the State party.¹¹⁰

This shows that there is at least a reasonable argument to be made that the International Bill of Rights can be thought of as enshrining a form of quasi-constitutional law at the international level, particularly that of constituent power and entrenchment.¹¹¹

4.1.2 How can investment tribunals engage in an international constructive interpretation?

Coming to the second question, namely whether investment tribunals are able to integrate international human rights norms as constitutional rights in their deliberations,

¹⁰⁷ *Werner Mangold v Rüdiger Helm* [2005] ECJ (Grand Chamber) C-144/04, Judgment [75–78].

¹⁰⁸ *Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] ECJ (Grand Chamber) C-236/09, Judgment [17]. Similarly, in *Atala Riffo v Chile*, the Inter-American Court of Human Rights deemed that the sentence of the Chilean Supreme Court (whereby it reverted the custody of the children the former male partner of Ms Atala on the basis that the mother's sexuality (after her divorce, Ms Atala began to live with her female partner) would cause irreversible damage to the children's development) amounted to discrimination on the grounds of sexual orientation, which is impermissible under Inter-American Convention of Human Rights *Atala Riffo and Daughters v Chile* [2012] Inter-American Court of Human Rights 12.502, Judgm Merits Repar Costs [90].

¹⁰⁹ Gardbaum (n 98) 758.

¹¹⁰ UN Human Rights Committee, 'CCPR General Comment No 26: Continuity of Obligations' (1997) CCPR/C/21/Rev.1/Add.8/Rev.1 <<https://www.refworld.org/docid/453883fde.html> [accessed 20 June 2021]>.

¹¹¹ Gardbaum (n 98) 753–754.

the answer is also in the affirmative, based on Santacroce's analysis. He argues that the application of human rights law to international investment disputes rests on four grounds (which may operate separately or cumulatively). These are: (i) that international human rights law is part of international law, which governs the merits of investment disputes; (ii) the presence of express references to human rights in relevant international investment treaties; (iii) the presence of implied references to human rights in relevant investment treaties; and (iv) the principle of systemic integration.¹¹²

Considering the first point, Santacroce argues that not only can investment tribunals interpret human rights norms, but they also have jurisdiction over host states' counterclaims for breaches of human rights by the investors.¹¹³ Recent investment decisions confirm this point. For instance, the tribunal in the case of *UP and CD Holding* stated that human rights and *jus cogens* are part of the corpus of general norms of international law that cannot be derogated in the application of international investment norms.¹¹⁴ Also in *Urbaser*, the tribunal established jurisdiction over Argentina's counterclaim for the investor's breach of the human right to access to water.¹¹⁵

Regarding the applicability of human rights norms because of their express reference in BITs, one must look at the specific BITs governing the relevant investment dispute. Although most BITs do not contain specific human rights provisions, there are some shining exceptions worth mentioning. For instance, the preambles of the EU–Singapore and the UK-Japan free trade agreements state that the parties have 'regard to the principles articulated in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948'. The latter goes so far as to include a denial of benefits clause in the event that a host State adopts or maintains measures that are related to the protection of human rights.¹¹⁶ Moreover, BITs may even

¹¹² Fabio Giuseppe Santacroce, 'The Applicability of Human Rights Law in International Investment Disputes' (2019) 34 ICSID Review – Foreign Investment Law Journal 136, 136.

¹¹³ *ibid* 139.

¹¹⁴ *UP (formerly Le Chèque Déjeuner) and CD Holding Internationale v Hungary* [2018] ICSID ARB/13/35, Award [217]. The tribunal based this determination on the International Law Commission, Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification And Expansion of International Law' (2006) UN Doc. A/CN.4/L.682 108.

¹¹⁵ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (n 86) para 1154.

¹¹⁶ Article 8.13 a.

impose express obligations on investors to comply with relevant human rights norms, as established in Article 14(b) of the 2017 Intra-MERCOSUR Investment Facilitation Protocol. As Santacroce notes, the importance of these types of references is that they mainly provide a basis for the direct application of such a body of law to the substance of the investment treaty dispute.¹¹⁷

The implied reference to human rights in BITs refers to instances where there is not a direct reference to human rights norms, but rather refer to values that fall within the scope of the protection by international human rights principles, such as human life, human health, due process of law, the protection of the environment and public welfare.¹¹⁸ Examples are the preamble of the Model Text for the Indian Bilateral Investment Treaty, which seeks to align the objectives of foreign direct investment (FDI) with sustainable development and inclusive growth; or the Southern African Development Community Model Bilateral Investment Treaty, which recognises that FDI should aim to reduce poverty, increase productive capacity, economic growth, transfer technology and further human rights and human development.¹¹⁹ According to Santacroce, the implied reference to those values in BITs suggests that human rights principles and instruments can be employed as interpretative tools that may help to determine the rights and obligations of both States and investors.¹²⁰

This last point refers to the application of human rights norms in light of the principle of systemic integration, enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties. Two cases are emblematic in showing that human rights norms should be employed as interpretative tools in investment arbitration disputes.¹²¹ The first is the decision ICSID *ad hoc* Committee in *Tulip v Turkey*. The importance rests in the Committee's reckoning: (i) of human rights as an influence on international investment

¹¹⁷ Santacroce (n 114) 146.

¹¹⁸ *ibid* 146–147.

¹¹⁹ Santacroce also mentions the US Model BIT, which states that, under US Model BIT (2012), the parties would enter into the agreement 'Desiring to achieve [its] objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights. *ibid* 147.

¹²⁰ *ibid* 148.

¹²¹ *ibid* 149.

arbitration;¹²² (ii) the systemic nature of international law;¹²³ (iii) that investment tribunals should not restrict themselves to apply only the norms to the treaty upon which their jurisdiction is based;¹²⁴ (iv) that international human rights norms and jurisprudence has been employed in investment cases as interpretative devices on several points concerning individual rights;¹²⁵ and (v) in particular, that provisions in human rights instruments dealing with the right to a fair trial and any judicial practice are relevant to the interpretation of the concept of a fundamental rule of procedure of the ICSID Convention.¹²⁶ The second is the award in the case *Urbaser v Argentina*. There, the tribunal stated that, based on the principle of systemic integration, the relevant BIT of the dispute has to be interpreted in harmony with other rules of international law of which it forms part, including those relating to human rights.¹²⁷

International law is a legal system, the rules and principles of which interact with each other.¹²⁸ Systemic integration is at the heart of this idea, which says that international norms should be interpreted in light of their normative surroundings.¹²⁹ ‘The rationale for such principle is that all treaty provisions receive their force and validity from general law’.¹³⁰ For this reason, tribunals should not restrict themselves to the treaty upon which their jurisdiction is based and which constitutes the treaty under dispute.¹³¹ This is

¹²² *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* [2015] ICSID ARB/11/28, Decis Annu [86]. It is worth mentioning that the Committee draws much of its understanding of the nature of the principle of systemic integration from the Fragmentation Report of the International Law Commission, which expresses that international law is a legal system the rules and principles of which interact between each other and that its norms are to be interpreted by reference to their normative environment. See: Study Group of the International Law Commission, ‘Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (2006) UN Doc A/CN.4/L.682 177–178.

¹²³ *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (n 123) paras 87–88.

¹²⁴ *ibid* 89.

¹²⁵ *ibid* 91.

¹²⁶ *ibid* 92.

¹²⁷ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (n 85) 1200.

¹²⁸ Study Group of the International Law Commission (n 124) 177–178. In the same vein, McLachlan expresses: ‘[o]ne of the characteristics which distinguishes international law from other legal systems is its horizontality. Lacking a single legislature or court of plenary competence, and depending in all aspects fundamentally on state consent, international law lacks developed rules for a hierarchy of norms. It draws its normative content from a wide range of sources operating at different levels of generality’ ‘The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention’ (2005) 54 *The International and Comparative Law Quarterly* 279, 282.

¹²⁹ McLachlan (n 130) 282.

¹³⁰ Study Group of the International Law Commission (n 116) 208.

¹³¹ *ibid* 212.

particularly important in *ad hoc* tribunals, such as investment tribunals, because ‘a case-specific mandate is not a license to ignore systemic implications’.¹³² Moreover, as several ICSID tribunals have stated, a BIT is not:

[a] self-contained closed legal system limited to provide for substantial 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 domestic law nature.¹³³

In this sense, it is certainly the case that the days when investment tribunals could reject human rights arguments¹³⁴ and matters pertaining to international human rights law are over.¹³⁵

In the last two points, I have argued that international human rights function as constitutional rights, as well as that investment tribunals are in a position to integrate them as interpretative tools in solving investment disputes. At this stage, the parallel with constructive interpretation becomes clearer. In the Habermasian theory of the role of constitutional adjudication, constitutional courts enhance the legitimacy of the legal system by integrating constitutional rights, because they secure the unity of the legal order. The idea here is that rights are architectonic principles of the legal order that permeate the legal system. Integrating rights as interpretative devices guarantees that the legal order is embedded with the normative legitimacy enshrined in constitutional rights. Just as in other constitutional tribunals, such as the ECJ,¹³⁶ investment tribunals should integrate

¹³² *Glamis Gold, Ltd v The United States of America* [2009] UNCITRAL ICSID, Award [6].

¹³³ *Asian Agricultural Products Ltd v Republic of Sri Lanka* [1990] ICSID ARB/87/3, Award [21]; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine* [2015] ICSID ARB/08/11, Award [113].

¹³⁴ For instance, when the tribunal in *Suez v Argentina* needed to address the role of human rights on investment disputes; it concluded that human rights operate independently from investment protections, so that they are of no relevance to investment treaty obligations (*Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* (n 61) 257–265).

¹³⁵ Santacroce (n 114) 155.

¹³⁶ Bo Vesterdorf, ‘A Constitutional Court for the EU?’ (2006) 4 *International Journal of Constitutional Law* 607, 617.

human rights norms as interpretative tools to decide investment disputes. In this way, their judicial review makes sure that the democratic legitimacy rules have been met.¹³⁷

4.2 Investment tribunals must ensure that the *channels* for inclusive opinion- and will-formation remain open

As discussed earlier, the Habermasian paradigm suggests that, to guarantee a democratic constitutional order, courts must safeguard the effective exercise of communicative and participatory citizens' rights. To accomplish that goal, courts should ensure that *channels* for inclusive opinion- and will formation remain open. When this idea is transposed into the crisis diagnosis of the legitimacy of investment arbitration, one has to analyse whether there are blocking stoppages that prevent arbitration tribunals from considering divergent and marginal voices to be heard during the proceedings they conduct. My theoretical argument is that the more inclusive arbitration proceedings become, the more investment arbitration would reduce its democratic deficit.¹³⁸ In this sense, this argument argues against the formalistic view of Born and Forrest, who endorse the position that investment tribunals have to ensure that *amicus curiae* participation does not disrupt the arbitral proceedings or impose undue cost or prejudice.¹³⁹

To further my theoretical argument, two issues are examined; first, whether there are procedural norms functioning as obstacles that prevent the *channels* for the inclusive opinion- and will formation further the democratisation of international law. Given that the ICSID Convention has set forth the main investment arbitration forum¹⁴⁰, I confine the analysis to the Rules of Procedure for Arbitration Proceedings of ICSID. Second, why is it that Born's and Forrest's positions render the legitimacy crisis of investment

¹³⁷ Ernst-Ulrich Petersmann, 'Human Rights, Constitutionalism, and 'Public Reason' In Investor-State Arbitration' in Christina Binder and others (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 893.

¹³⁸ Jürgen Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', *The Divided West* (Polity Press 2006) 122; Hans-Jörg Trenz and Klaus Eder, 'The Democratizing Dynamics of a European Public Sphere: Towards a Theory of Democratic Functionalism' (2004) 7 *European Journal of Social Theory* 5, 13.

¹³⁹ Gary Born and Stephanie Forrest, 'Amicus Curiae Participation in Investment Arbitration' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 626.

¹⁴⁰ Until 9 June 2021, ICSID has served 685 times as the administering institution of ISDS disputes, encompassing more than 60% of the total case load of 1104 known treaty-based ISDS cases. See: UNCTAD, 'Investment Policy Hub' <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

arbitration unsolved? This last point is the entry gate to the following section, in which I discuss how investment tribunals could ensure inclusive *channels* for opinion- and will formation to guarantee democratic-generating procedures.¹⁴¹

4.2.1 Do procedural norms of the ICSID Rules of Procedure block democratic *channels* for inclusive opinion- and will formation?

The democratic *channels* for inclusive opinion- and will formation refer to the deliberative and representative procedures that secure incumbent parties' equal access and inclusion in binding decision-making processes through democratic forms of participation.¹⁴² When these *channels* are blocked, there is a real danger that the asymmetries of power lurking behind dominating acts would promote the juridification of a hegemonic legal façade.¹⁴³ In this sense, the importance of dislodging barriers from democratic *channels* lies in impeding dominant interests from imposing their agenda on decision-making processes, under the guise of impartiality.¹⁴⁴ When we transpose this idea into the diagnosis of the legitimacy of investment arbitration, it has to be analysed whether the decision-making processes inside the proceedings take *equal* account of the interests of all incumbents—regardless of their political and economic power.¹⁴⁵

Only conflicts of legal nature arising directly out of an investment (jurisdiction *ratione materiae*) are within the jurisdiction of ICSID.¹⁴⁶ In other words, international investment disputes concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for a breach of a legal obligation.¹⁴⁷ On top of that, one of the parties must be a contracting state and the other party must be a national of another contracting state (jurisdiction *ratione personae*).¹⁴⁸ Indeed, the role of the

¹⁴¹ Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' (n 140) 131.

¹⁴² *ibid* 141.

¹⁴³ *ibid* 182.

¹⁴⁴ *ibid* 142.

¹⁴⁵ *ibid* 122.

¹⁴⁶ *El Paso Energy International Company v The Argentine Republic* [2006] ICSID ARB/03/15, Decis Jurisd [97–100].

¹⁴⁷ Board of Governors of the International Bank for Reconstruction and Development, 'Report of the Executive Directors on the ICSID Convention' (1964) Resolution No. 214 para 26. See: Article 25(1) of the ICSID Convention.

¹⁴⁸ Executive Directors, 'Report of the Executive Directors on the ICSID Convention' (1965) para 28. While a natural person who was a national of the State party to the dispute would not be eligible to be a

parties is the ‘foundation stone of arbitration generally, and of international arbitration in particular’.¹⁴⁹ Hence, arbitrators’ deference to the parties have led them to identify with the parties’ interests, instead of with public interests.¹⁵⁰ As Karton expresses: ‘arbitrators also defer to party interests by preserving near-total confidentiality in the face of increasing criticism’.¹⁵¹

Scholars, such as Trakman, consider that confidentiality is key to the successful practice of international commercial arbitration because that is the very reason parties resort to arbitration rather than to litigation.¹⁵² Given that commercial arbitration is a private forum to settle legal disputes between private parties, it makes sense that confidentiality is one of its main and fundamental principles.¹⁵³ However, arbitral investment tribunals are judicial bodies that engage in public adjudication given their lawmaking practices;¹⁵⁴ dealing with matters of public interest, such as the subject of the human right to water;¹⁵⁵ or assessing the relationship between the rights of indigenous

party in proceedings, a juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings if that State had agreed to treat it as a national of another Contracting State because of foreign control. See: Article 25(2) of the ICSID Convention. As Michael Waibel explains: “The scope of jurisdiction of investment tribunals can conceptually be split into four dimensions: subjects (*ratione personae*); geography (*ratione loci*); time (*ratione temporis*); and subjects-matter (*ratione materiae*). Since international jurisdiction depends on consent as to all its elements, and failure to meet any of these four is fatal to jurisdiction of a given tribunal, the division into these four elements of jurisdiction is descriptive”. ‘Investment Arbitration: Jurisdiction and Admissibility’ in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (C H Beck, Hart, Nomos, Baden-Baden, 2015) 1212.

¹⁴⁹ Martin Hunter and others, *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (6th ed., Oxford University Press 2015) 135.; *M&C Corporation v Erwin Behr BmbH & Company KG and Dr Heinz Etzel* [1994] ICC 7453/FMS, Award [53].

¹⁵⁰ Joshua DH Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (Oxford University Press 2013) 90.

¹⁵¹ *ibid* 96.

¹⁵² Leon E Trakman, ‘Confidentiality in International Commercial Arbitration’ (2002) 18 *Arbitration International* 1, 17–18.; Karton (n 152) 80.

¹⁵³ Alvaro Galindo and Ahmed Elsis, ‘Non-Disputing Parties’ Rights in Investor-State Dispute Settlement: The Application of the Monetary Gold Principle’ in Katia Fach Gómez (ed), *European Yearbook of International Economic Law* (Springer 2021) 175.

¹⁵⁴ Ingo Venzke, ‘Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication’ (2016) 17 *The Journal of World Investment & Trade* 374, 399.; Eloise Obadia, ‘Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration’ (2007) 22 *ICSID Review - Foreign Investment Law Journal* 349, 364–365.

¹⁵⁵ *Agua del Tunari, S.A. v. Republic of Bolivia* (n 46).; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (n 63).; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (n 84); Tamar Meshel, ‘Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond’ (2015) 6 *Journal of international dispute settlement* 277.

peoples to use, manage, and conserve their lands vis-à-vis foreign investors' rights to extract minerals therefrom.¹⁵⁶

This is why investment decisions may potentially affect parties beyond those immediately involved in the dispute.¹⁵⁷ Indeed, given the public interest in the subject-matter of this case (water distribution and provision of sewage services), the *Suez/Vivendi* tribunal opened the door to accept and consider *amicus curiae* from five NGOs.¹⁵⁸ However, the tribunal acted *ex officio*, because investment rules were completely silent concerning submissions of *amicus curiae* briefs.¹⁵⁹ Moreover, in proceedings conducted under the ICSID Arbitration Rules, Rule 32(2) stated that the consent of both the investor and the host state was *sine qua non* for NDPs to attend the hearings.¹⁶⁰

Given that the procedural rules did not have adequate means for the wider public to participate or to be engaged in investment disputes, an amounting pressure for greater public participation came about.¹⁶¹ As a result, ICSID amended its Arbitration Rules in 2006.¹⁶² On the one hand, a new provision, Arbitration Rule 37, codified discretionary powers to arbitral tribunals to allow *amicus curiae* submissions, and only provides only for consultation with the parties.¹⁶³ On the other hand, the new Rule 32(2) now states that unless either disputing party objects, the tribunal may permit non-disputing parties (NDPs) to attend or observe all or part of the hearings.¹⁶⁴

While some argue that these changes have made investment arbitration more accessible to the public,¹⁶⁵ the new ICSID rules do not completely ensure that the

¹⁵⁶ *Bear Creek Mining Corporation v Republic of Peru* [2017] ICSID ARB/14/2, Award.

¹⁵⁷ Obadia (n 156) 365.

¹⁵⁸ *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic* [2005] ICSID ARB/03/19, Order Response Petition Transpar Particip Amic Curiae [19–21].

¹⁵⁹ Fernando Dias Simoes, 'Myopic Amici? The Participation of Non-Disputing Parties in ICSID Arbitration' (2017) 42 North Carolina Journal of International Law and Commercial Regulation 791, 800; Antonio R Parra, 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes' (2007) 22 ICSID Review - Foreign Investment Law Journal 55, 66.

¹⁶⁰ Simoes (n 161) 800.

¹⁶¹ Daniel Barstow Magraw Jr and Niranjali Manel Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2009) 15 ILSA Journal of International & Comparative Law 337, 340–341.

¹⁶² Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 ICSID Review - Foreign Investment Law Journal 427, 433.

¹⁶³ Born and Forrest (n 141) 643.

¹⁶⁴ Obadia (n 156) 375.

¹⁶⁵ *ibid* 350.

channels for inclusive opinion- and will-formation processes take into account all of those who are affected by investment tribunal awards.¹⁶⁶ First, the modified Rule 32(2) essentially changes the language from ‘the tribunal shall decide with the consent of the parties’ to ‘the tribunal shall decide unless either party objects’.¹⁶⁷ Second, while, as Antonietti suggests, a party's refusal to make itself available for such consultations may result in the tribunal upholding its decision,¹⁶⁸ we have learned that when tribunals believe that an amicus brief may unfairly prejudice the claimant, its application for submission is denied.¹⁶⁹

4.2.2 A critique of the formalistic view of Born and Forrest

In light of the foregoing, it is worthwhile to consider Born and Forrest's position, according to which amicus participation in arbitration should be limited to the consensual nature of party autonomy.¹⁷⁰ In concrete terms, they make two main points. First, they contend:

[A]llowing amicus participation in the absence of the parties’ consent therefore gives rise to many of the same issues that would arise from requiring a party to arbitrate against a non-signatory [... which] would be would be contrary to the parties’ arbitration agreement and the consensual nature of the arbitration.¹⁷¹

I argue against this premise because, as previously stated, investment tribunals conduct public adjudication, the outcomes of which affect parties other than those involved in the dispute.¹⁷² To reduce the democratic deficit of investment arbitration, arbitrators must ensure the effective exercise of divergent and marginal voices’ communicative and participatory rights during arbitral proceedings.

¹⁶⁶ Simoes (n 161) 802–803.

¹⁶⁷ *ibid* 800.

¹⁶⁸ Antonietti (n 164) 435.

¹⁶⁹ *Bernhard von Pezold and Others v Republic of Zimbabwe* (n 89) para 62.

¹⁷⁰ Born and Forrest (n 141) 639 *et. seq.*

¹⁷¹ *ibid* 640.

¹⁷² See, for example, the recognition of the *Methanex* tribunal, which acknowledged that investment disputes are of public interest, wherein ‘substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties’ (*Methanex Corporation v United States of America* [2001] Decis Trib Petitions Third Pers Interv Amici Curiae (UNCITRAL) [49]).

Their second argument is that, to secure the requirements of ICSID Arbitration Rule 37, arbitrators ‘should ensure that [amicus curiae] participation does not disrupt the arbitral proceedings or impose unfair cost or prejudice on the parties to the arbitration the requirements’.¹⁷³ However, the closed character of this positivistic approach makes arbitration proceedings impermeable to extra-legal principles of democracy, reason or justice.¹⁷⁴ As Habermas puts it ‘[t]he legitimation of the legal [positivistic] order as a whole shifts to its origin, that is, to a basic norm or rule of recognition that legitimates everything without itself being capable of rational justification’.¹⁷⁵ However, this raises a problem: why should the voices of marginalised communities be silenced, even when the determinations of arbitral tribunals have an impact on their interests?¹⁷⁶ For positivists, the solution rests on the idealistic notion that cases have to be decided based on established law—nothing more and nothing less.¹⁷⁷ From that angle, it makes sense that Born and Forrest reject the view whereby investment tribunals would allow amicus participation without citing any apparent legal basis.¹⁷⁸ Otherwise, they argue, Arbitration Rule 37 would be rendered ineffective.¹⁷⁹

However, this positivist approach suffers from the same flaw as ‘legitimacy through legality’.¹⁸⁰ That is, it considers any decision reached without recourse to non-legal normative considerations of morality or political philosophy to be appropriate.¹⁸¹ Positivists argue that a legal decision is *prima facie* valid because it has been impartially justified; namely, its impartial application precedes a valid decision.¹⁸² Even so, because legal decisions are not neutral in their application—but rather a Pandora’s box of

¹⁷³ Born and Forrest (n 141) 652.

¹⁷⁴ Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 202.

¹⁷⁵ *ibid.*

¹⁷⁶ Cf. *Bernhard von Pezold and Others v. Republic of Zimbabwe* (n 91) para 62.

¹⁷⁷ Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 201.

¹⁷⁸ Born and Forrest (n 141) 636.

¹⁷⁹ *ibid* 652.

¹⁸⁰ Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 202.

¹⁸¹ Brian Leiter, ‘Legal Formalism and Legal Realism: What Is the Issue?’ (2010) 16 *Legal theory* 111, 111.

¹⁸² Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 202.

pluralistic interpretations¹⁸³—their legal validity does not guarantee their justice.¹⁸⁴ In their attempt to achieving their own goals, positivistic decisions become solipsistic and imperialistic.¹⁸⁵ Solipsistic, because they seeing nothing other than their own interests; and imperialistic, because everything taking place in the world is judged from their own perspective.¹⁸⁶ When facing dogmatic interpretations, Koskenniemi reminds us that ‘every conceptual move is a move in a game of power, where the one who has mastery over the concept will also have the power to decide’.¹⁸⁷

Positivist positions reveal a lack of awareness of their own structural bias under the guise of impartiality.¹⁸⁸ Only themselves and their own preferences are valid, which, mechanically, they translate into the preferences of everyone else.¹⁸⁹ That is why they endorse the motto of Rule 37(2), *NDPs should not disrupt the proceedings!*¹⁹⁰ Or, in Mexican diplomatic terms, *NDPs, eat and leave!*¹⁹¹ The need to legitimise investment arbitration can be found here, and it is through democratic means, such as allowing amicus participation, transparency and dissemination of information in investment disputes that channels for democratic opinion and will-formation will be opened to all those affected by arbitration investment decisions.¹⁹²

¹⁸³ Susan S Silbey, ‘After Legal Consciousness’ (2005) 1 Annual Review of Law and Social Science 323, 352.

¹⁸⁴ Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (n 3) 202.

¹⁸⁵ Martti Koskenniemi, ‘International Law: Constitutionalism, Managerialism and the Ethos of Legal Education’ (2007) 1 European Journal of Legal Studies 8, 9.

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid* 13.

¹⁸⁸ Martti Koskenniemi, ‘Hegemonic Regimes’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 318.

¹⁸⁹ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2009). In particular, part 8.2 Nihilism, Critical Theory and International Law, in which Koskenniemi asks: ‘Why is it that concepts and structures that are themselves indeterminate nonetheless still end up always on the side of the status quo?’ *ibid* 605–606.

¹⁹⁰ Cf. *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co (Private) Limited v Republic of Zimbabwe* [2012] ICSID ARB/10/25, Proced Order No 2 [49–50].

¹⁹¹ It refers to the famous incident in which then Mexican President, Vicente Fox, in the occasion of the International Conference on Financing for Development of March 2002, expressed to former Cuban President Fidel Castro: ‘comes y te vas’ (“eat and leave”), as a way of suggesting ‘arrive at the meeting and leave immediately’. (Rafael Velázquez Flores, ‘Política Exterior y Derechos Humanos En México: Tendencias a Finales Del Siglo XX y Prioridades a Inicios Del XXI.’ (2017) 11 IUS 137, 150.)

¹⁹² Magraw and Amerasinghe (n 163) 340–341.

4.3 How can investment arbitration tribunals become custodians of the legitimacy of the international legal order?

Aside from the arguments advanced in section 4.1,¹⁹³ two additional avenues for investment tribunals to serve as custodians of the democratic international legal order can be advanced. First, Rule 37 should be interpreted as if the consent of the parties was not a precondition for allowing *amicus* participation. The incorporation of *amicus curiae* briefs puts arbitration tribunals in a better position to determine whether public policies were the result of legitimate concerns for public justification¹⁹⁴ or whether they were a by-product of arbitrary and discriminatory measures, which could imply an international law delinquency and/or a BIT violation.¹⁹⁵ Second, allowing *amicus* participation should be interpreted as a response to a call for more transparency; specifically, as a moral argumentation principle that would remove communicative stumbling blocks that obstruct the participatory rights of all those who investment awards affect.¹⁹⁶ Ultimately, these would develop schemes of interpretation to ensure that the legislature has exercised some form of rational judgment rather than reacting mechanically to the pressures of the formal parties in the dispute.

The interpretation of Rule 37(2) in the *Biwater* case shades light on the first issue. When the tribunal analysed whether it had jurisdiction to accept *amicus curiae* submissions, it expressed that:

Rule 37(2) requires a tribunal to consult with the parties, but does not ascribe to either or both parties together a veto over a decision by a tribunal to exercise its discretion as it sees fit for the best result in the matter before it.¹⁹⁷

¹⁹³ In which I argue that investment tribunals are in a position to integrate international human right norms as interpretative tools in solving investment disputes.

¹⁹⁴ Examples are to address ‘water management and the consideration of biodiversity; social issues concerning the indigenous communities; and the problem of small-scale illegal miners’. See: *Crystalex International Corporation v Bolivarian Republic of Venezuela* [2016] ICSID ARB(AF)/11/2, Award [379]. Similarly, the fulfilment of tax obligations is considered a legitimate policy concern. See: *Spyridon Roussalis v Romania* [2011] ICSID ARB/06/1, Award [503].

¹⁹⁵ *Joseph Charles Lemire v Ukraine* [2010] ICSID ARB/06/18, Decis Jurisd Liabil [489].

¹⁹⁶ Jürgen Habermas, *Moral Consciousness and Communicative Action* (Polity Press 1990) 67.

¹⁹⁷ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [2006] ICSID ARB/05/22, Petition Amic Curiae Status [10].

Moreover, when assessing the meaning of the FET standard¹⁹⁸ under Article 2 of the BIT,¹⁹⁹ the tribunal took into account the *amicus curiae* briefs of the petitioners.²⁰⁰ In particular, the tribunal employed those *amici* briefs as countervailing factors to frame the scope of the FET standard, such as limiting expectations to only those that are reasonable and legitimate.²⁰¹ For example, tribunal determined that *Biwater Gauff* could not have had legitimately expected any special arrangement with respect to the timing of payment by Government institutions of their water and sewerage bills.²⁰²

Concerning the second issue, investment tribunals in the cases of *Methanex*²⁰³ and *Glamis*²⁰⁴ have emphasised that accepting *amicus* submissions would make arbitral proceedings more open and transparent, whereas blanket refusals to do so would harm them.²⁰⁵ The decision of the tribunal to deny the application to make *amicus* submission in *Bernhard von Pezold* illustrates this point.²⁰⁶ The tribunal favoured a positivistic interpretation of Rule 37(2)(a), in which NDPs are only seen as legal clerks to assist it in making the ‘correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided.’²⁰⁷ As a result, the tribunal determined that the NDPs²⁰⁸ were insufficiently independent or neutral, given that the indigenous communities (one of the NDPs) were at odds with the claimants' primary position in the proceedings—namely, in relation to some of the lands over which the claimants assert exclusive control.²⁰⁹ Nevertheless, a conflict of interests should not *per se* disallow NDPs

¹⁹⁸ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* [2008] ICSID ARB/05/22, Award [586].

¹⁹⁹ The Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments of 7 January 1994

²⁰⁰ The petitioners for *amicus curiae* status, namely: The Lawyers' Environmental Action Team, The Legal and Human Rights Centre, The Tanzania Gender Networking Programme, The Center for International Environmental Law, and The International Institute for Sustainable Development: see *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (n 199).

²⁰¹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (n 200) paras 601–602.

²⁰² *ibid* 630–635.

²⁰³ *Methanex Corporation v. United States of America* (n 174).

²⁰⁴ Howard Mann, ‘Glamis Gold Ltd. v. United States of America’ in Nathalie Bernasconi-Osterwalder and Lise Johnson (eds), *International Investment Law and Sustainable Development. Key cases from 2000–2010* (IISD 2011) 62.

²⁰⁵ *Methanex Corporation v. United States of America* (n 174) para 49.

²⁰⁶ *Bernhard von Pezold and Others v. Republic of Zimbabwe* (n 91) paras 63–64.

²⁰⁷ *ibid* 49; *Suez, Sociedad General de Aguas de Barcelona SA, and InterAguas Servicios Integrales del Agua SA v The Argentine Republic* [2006] ICSID ARB/03/17, Order Response Petition Particip Amic Curiae [23].

²⁰⁸ The European Center for Constitutional and Human Rights and four indigenous communities of Zimbabwe.

²⁰⁹ *Bernhard von Pezold and Others v. Republic of Zimbabwe* (n 91) paras 51, 56.

from submitting an *amicus* briefing. If anything, it is the very conflict that makes it relevant to hear NDPs' voices, because arbitration decisions affect parties beyond those involved in the dispute. This is why the Habermasian paradigm provides a venue for legitimacy. Rather than favouring exclusion and secrecy, it understands that a real process of argumentation welcomes transparency for concerned parties and adjudicators cooperating in an intersubjective process of finding common solutions.²¹⁰

A paradigmatic example is Philippe Sands' Partial Dissenting Opinion in the *Bear Creek Mining* case. In this case, the rights of local communities of indigenous peoples to use, manage and conserve their lands in an area of Peru known as Santa Ana, collided with the investor's right to exploit and extract silver in those lands.²¹¹ Due to massive and growing protests caused by the Santa Ana Project, the Peruvian government was left with no option but to revoke the licence it had granted to the investor to operate it.²¹² Sands considered that the investor contributed to the social unrest, given that it had failed to reach the necessary understanding with those living in the communities most likely to be affected by its project.²¹³ However, he also took into account that the government violated the obligation to offer FET to the investor.²¹⁴ Measuring both interests at play, he concluded that the amount of damages and the allocation of the costs of the arbitration procedure should have been reduced by half based on the theory of contributory fault.²¹⁵

Sand's argumentation shows the importance of arbitrators giving a fair hearing to every voice affected by their decisions.²¹⁶ However, black-letter positivism, as advocated by Born and Forrest or the *Bernhard von Pezold* tribunal, is a formalism *sans peur et sans reproche*; one that refuses to criticise legally valid rules and principles, even when they coexist with injustice,²¹⁷ which lead us to a state in which everything is admissible only because the law says so.²¹⁸ In this sense, the Habermasian paradigm does not advocate a

²¹⁰ Habermas, *Moral Consciousness and Communicative Action* (n 198) 67.

²¹¹ *Bear Creek Mining Corporation v. Republic of Peru* (n 158) para 288.

²¹² *Bear Creek Mining Corporation v Republic of Peru* [2017] ICSID ARB/14/2, Partial Dissent Opin Philippe Sands 2.

²¹³ *ibid* 6.

²¹⁴ *ibid* 2.

²¹⁵ *ibid* 4.

²¹⁶ Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 191) 501.

²¹⁷ *ibid* 496.

²¹⁸ *Ibid.*, at 431.

particular legal or political position; rather, an ethical one.²¹⁹ The underlying idea is to provide arbitrators with an ethical standing from which they can start their investigations and participation in legal and political processes.²²⁰

5 Conclusion

To begin with, the debate over investment arbitration's legitimacy crisis is haphazard. Furthermore, given the variety of views on the causes of the legitimacy crisis in investment arbitration, it is critical to conduct a theoretical crisis diagnosis to reach, at least, a sensible prognosis.²²¹ This helps us to avoiding superficial analysis as to the roots and solutions to this legitimacy crisis.²²²

Second, the Habermasian theory of the role and legitimacy of constitutional adjudication serves to avoid endorsing positivists views that have rendered the investment arbitration process lacking trust and transparency. As Cross and Schliemann-Radbruch argue, incorporating the views of NDPs would have the beneficial effect of offsetting the effects of a legal regime that remains mute on the issue of increased transparency,²²³ because if positivist positions continue to dominate NDPs' faith in arbitral proceedings, we would be condoning the externalities of an international economic order that produces a particular kind of law that acts as a safety valve, favouring corporate trade and investor

²¹⁹ Jan Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues' (2013) 27 *Temple international and comparative law journal* 417, 420.

²²⁰ *ibid.*

²²¹ Such as Franck (n 51)., Sheldon Leader, 'Human Rights, Risks, and New Strategies for Global Investment' (2006) 9 *Journal of International Economic Law* 657, and Gus Van Harten, 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12 *Review of International Political Economy* 600.

²²² For example, Butler believes that incorporating NDP submissions into investment arbitration could boost its legitimacy and transparency. This paper clearly agrees with this viewpoint. However, the reasons of agreement are not the same. While she bases her thesis on what 'commentators' such as Frank and Leader have alleged, even if those scholars have divergent views on the origins of the crisis, While for Frank the crisis stems from contradictory rulings ((n 51) 1568.), Leader argues the crisis arises as a result of the failure to include the interests of all affected members of civil society in investment agreements ((n 223) 664.

²²³ Ciaran Cross and Christian Schliemann-Radbruch, 'When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations' (2013) 6 *The Law and Development Review* S67, 77–78.

rights enforcement at the expense of the international legal order's democratic legitimacy.²²⁴

Finally, this paper proposes a viable alternative for how investment arbitration tribunals can become custodians of investment arbitration legitimacy through constructive interpretation while giving life to the architectonic principles of the international legal order. This is why, to ensure the effective exercise of communicative and participatory rights of divergent and marginal voices, investment arbitrators should allow *amicus* participation while avoiding positivists' positions under the pretext of safeguarding the stability and legality of the proceedings, otherwise there is a real danger that investment awards will harbour despotism.²²⁵ Naturally, there will always be those concerned with the high cost of *amici* briefs submission,²²⁶ even when '[t]here shall be no order as to costs'.²²⁷ Keep in mind that *it's not the economy, stupid*,²²⁸ but rather the democratic legitimacy of the international legal order that is at stake!

²²⁴ Claire Cutler, 'Legal Pluralism as the "Common Sense" of Transnational Capitalism' (2013) 3 *Oñati socio-legal series* 719, 730.

²²⁵ Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' (n 140) 122.

²²⁶ Lion Fritsche, 'Amicus Curiae Interventions in Investment Arbitration -Legitimacy at Whose Costs?' [2020] *Bucerius Law Journal* 40.

²²⁷ *Bernhard von Pezold and Others v. Republic of Zimbabwe* (n 91) para 65.

²²⁸ Stuart N Soroka, Dominik A Stecula and Christopher Wlezien, 'It's (Change in) the (Future) Economy, Stupid: Economic Indicators, the Media, and Public Opinion' (2015) 59 *American Journal of Political Science* 457, 459.