ICSID Review, Vol. 33, No. 3 (2018), pp. 743–765
doi:10.1093/icsidreview/siy022 Published Advance Access January 3, 2019

BOOK REVIEW

The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions

Yarik Kryvoi[1]

A. Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017), ISBN: 9780198739722, £70.00
C. Tams, C. Schill and R. Hofmann, *International Investment Law and History* (Edward Elgar Publishing 2018), ISBN: 9781786439956, £99.00

I. INTRODUCTION

Nearly nine decades ago, Hersch Lauterpacht asserted that '[t]he function of the law is to regulate the conduct of men by reference to rules whose formal – as distinguished from their historical – source of validity lies, in the last resort, in a precept imposed from outside'.[2] However, scholars have generally avoided the essential question: what makes past cases and developments international law rather than a collection of historical anecdotes?

The protection of aliens under international law has progressed from the alien being a 'clanless' individual or outlaw completely at the mercy of the local lord, with no entitlement to the peace and protection of the locality in the earliest times to the modern, sophisticated investor–State dispute settlement mechanisms.[3] It was only after the end of the Cold War, when foreign investments grew dramatically and hundreds of major investor–State disputes emerged, that interest in investor–State disputes sharpened. Thousands of articles on investor–State disputes emerged as well as a whole new area of legal practice representing investors and States in international arbitration.

[1] Director of the Investment Treaty Forum, Senior Research Fellow in International Economic Law, British Institute of International and Comparative Law. Email: y.kryvoi@biicl.org. The author wishes to thank Caroline Balme for her research assistance.

[2] Hersch Lauterpacht, *The Function of Law in the International Community* (republication, OUP 2011) 3.

[3] Julius Goebel, 'The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars' (1914) 8(4) AJIL 802, 803. For earlier analysis of protection of aliens see Hugo Grotius, and Johann Friedrich Gronovius, *'Hugonis Grotii' De Jure Belli Ac Pacis Libri Tres*, vol 2 (Janssonio-Waesbergii 1704) 342. Emer De Vattel and Joseph Chitty, *The Law of Nations: or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (PH Nicklin & T Johnson 1835) 171–183; Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4(3) AJIL 517–528; Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad, or, the Law of International Claims* (Banks Law Publishing 1915).

© The Author(s) 2019. Published by Oxford University Press on behalf of ICSID. All rights reserved.
For permissions, please email: journals.permissions@oup.com

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

The magnitude of investor–State disputes and their political sensitivity has also brought the questions of fairness and legitimacy of international investment law to the forefront.[4] Intergovernmental organizations such as the International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) recently initiated wide-reaching efforts to reform the investor–State dispute settlement system,[5] while States reassess their international investment agreements and their dispute resolution clauses.[6] Understanding the historical evolution of international investment law and its nature would without any doubt help reform the system of investor–State disputes.

Two recently published books represent the most sophisticated attempts to address the complex questions of the evolution of investor–State arbitration from a historical perspective. In *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy*, Alec Sweet and Florian Grisel (hereinafter Sweet & Grisel) argue that a consolidation of arbitration power has occurred over the past century, and although the structure of authority in international arbitration remains non-hierarchical and pluralist, the regime has gradually acquired the properties of a stable legal system.[7] In this system, '[t]ribunals routinely borrow principles from courts, and they develop principles on their own', creating an arbitral common law that both enhances the autonomy of the arbitral regime and mimics a hierarchically defined legal system.[8] Sweet & Grisel adhere to what can be called a 'progress narrative' of international investment law, where international investment arbitration has evolved from more basic forms to more sophisticated forms.

International Investment Law and History (*IILH*) is a volume edited by University of Glasgow professor Christian Tams, University of Amsterdam professor Stephan Schill and University of Frankfurt professor Rainer Hofmann that includes contributions from academics discussing a broad variety of issues.[9] They discuss methods in historical research, trace important historical developments and explain how history can lead to a better understanding of international investment law.

Sweet & Grisel claim to be outsiders in the field of international arbitration and investor–State disputes, which they argue helps them to adopt an external perspective on the topic.[10] Some of *IILH*'s contributors could be described, in the words of Sweet & Grisel, as 'specialist law professors' who 'have long dominated the literature in this field'.[11] *IILH* seems to disagree for various reasons with the kind of 'progress narrative' that could be attributed to Sweet & Grisel, according

[4] See eg European Commission, *Public Consultation on Modalities for Investment Protection and Investor–State Dispute Settlement in TTIP* (2014) <http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf> accessed 15 August 2018.

[5] See eg International Centre for Settlement of Investment Disputes (ICSID), *ICSID Rules and Regulations Amendment Process* <https://icsid.worldbank.org/en/amendments> accessed 15 August 2018; United Nations Commission on International Trade Law (UNCITRAL), *Investor–State Dispute Settlement Reform* <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html> accessed 15 August 2018.

[6] United Nations Commission on Trade and Development (UNCTAD), *Reform of the International Investment Agreement Regime: Phase 2*, Doc TD/B/C.II/MEM.4/14 (31 July 2017) <http://unctad.org/meetings/en/SessionalDocuments/ciimem4d14_en.pdf> accessed 15 August 2018.

[7] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017) 1, 35 (Sweet & Grisel).

[8] ibid 32–3.

[9] Stephan W Schill, Christian Tams and Rainer Hofmann (eds), *International Investment Law and History* (Edward Elgar 2018) (*IILH*).

[10] Sweet & Grisel (n 7) 6.

[11] ibid.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

to which 'the development of law through time is somehow a progress from less to more and from primitive to sophisticated'.[12]

Both volumes recognize that the growth of foreign direct investments, as well as the rise of non-State actors in international law, has transformed international investment law and led to new forms of dispute resolution that raise serious questions about their legitimacy. Sweet & Grisel's 'progressive judicialization' approach and the *IILH* volume's more sceptical approach towards the progress narratives express two prominent takes on the evolution of international investment law.

What these two books omit, in my view, is a thorough analysis of the historical transformation of the mechanisms of interaction between foreign investors and host States. It is this transformation that has ultimately shaped international investment law as we know it today. Readers will find little information about the evolution of key issues, such as the growing importance of investors as subjects of international law, the transformation of those who resolve disputes from political actors to legal experts and the resolution of disputes on the basis of law rather than fairness. In my view, these developments are pivotal to understanding not only the past of international investment law but also its future.

This essay demonstrates that several fundamental changes in the legal landscape have occurred since the constitution of the early compensation commissions of the eighteenth century leading to the modern system of resolution of investor-State disputes. First, a growing number of multinational enterprises operating globally have become major actors on the international public law plain, in areas that in the past were reserved only for States. Second, international organizations and other non-State actors have dramatically strengthened their influence with efficient international arbitration institutions dominating the system of investor-State dispute resolution after the end of the Cold War.

The methods for resolving investor-State disputes have evolved primarily along the lines of creating specialised institutionalised forms. While early commissioners relied on their subjective understanding of justice and fairness, today the expectation is applying agreed set of rules ("precept imposed from outside" using Hersch Lauterpacht's language), so that failure to do so may result in annulment of the award.

The evolution of various methods of international dispute settlement and the emergence of new methods, such as international investment courts, does not necessarily mean that the older forms of dispute resolution will die like the dinosaurs. They will continue to function, albeit with modifications and will inform the future models of international dispute settlement.

Part II of this essay examines the evolution of investor–State dispute settlement mechanisms from compensation commissions dominated by sovereigns to current legal institutions. Part III traces the evolution of approaches to those who resolve the disputes and appointment mechanisms, which changed from political appointees to legal experts. Part IV shows that when it comes to the applicable law, it has evolved from almost unlimited discretion of adjudicators based on fairness and equity to formal external sources of law. Each part of this review essay starts with an overview of the relevant sections of both volumes and ends with my analysis of a large number

[12] *IILH* (n 9) 166; see also 136–9.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

of historical documents to give a more comprehensive understanding of the historical evolution of international investment law.

II. EVOLUTION OF INVESTOR–STATE DISPUTE SETTLEMENT MECHANISMS

A. *The Progress Narrative versus Alternative Evolutionary Narratives*

Sweet & Grisel offer what can be defined as the progress narrative of international arbitration. According to this narrative, arbitration has progressed through several regimes defined as a 'durable set of institutional arrangements that enables traders to contract across borders and to resolve contractual disputes'.[13] By the twelfth century, the Medieval Law Merchant regime (*lex mercatoria*) governed the vast bulk of long-range trade. During this period, traders used increasingly standardized contracts to settle their disputes with other merchants. The merchants appreciated the quick resolution of disputes, largely avoided adversarial procedure and favoured amicable settlements. In the absence of internationally enforceable laws, the system relied on reputation, which became a transferrable good, and those branded as untrustworthy risked being ostracized.[14]

Around the fifteenth century, a new Westphalian nation-State regime emerged as European State rulers sought to subordinate the merchants' regime to their control. The national legal systems absorbed large parts of *lex mercatoria* and replaced equity-based decisions with enforceable legal judgments of national courts. To manage overlapping jurisdictions, the courts developed private international law, also known as conflict of laws. This led to widely unpredictable decisions, even within the same jurisdiction. During that period, parties preferred to avoid national courts because the process was 'time-consuming, possibly biased in favour of locals, and perhaps even corrupt'.[15] Moreover, the judges often had little expertise with complex commercial cases.

Eventually, according to Sweet & Grisel, the regime of *new lex mercatoria*, with arbitration at its core, has replaced the Westphalian State regime. [16] In the twentieth century, private actors strengthened this system and initiated the adoption of the New York Convention, which constitutes 'the basic constitutional framework' of international commercial arbitration.[17] The Unidroit Principles of International Commercial Contracts, the UN Convention on Contracts for the International Sale of Goods and the UNCITRAL Model Law on International Commercial Arbitration sought to codify rules of international arbitration centres and defined the normative system of the new regime.[18]

[13] Sweet & Grisel (n 7) 39.

[14] ibid 39; see also Paul Milgrom, Douglas North and Barry Weingast, 'The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs' (1990) 2(1) Economics & Politics 1.

[15] Lawrence Newman, 'A Practical Assessment of Arbitral Dispute Resolution' in Thomas E Carbonneau (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (Juris, Huntington 1998).

[16] ibid 41.

[17] ibid 41; Convention on Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) (New York Convention).

[18] Newman (n 15) 43–4; Unidroit, *Principles of International Commercial Contracts* (3rd edn, Transnational 2010); United Nations Convention on Contracts for the International Sale of Goods (opened for signature 10 April 1980, entered into force 1 January 1988); UNCITRAL Model Law on International Commercial Arbitration (2006).

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

Sweet & Grisel do not make 'a sharp analytical distinction' between international commercial arbitration and investor–State arbitration[19] or between private and public process.[20] According to them, arbitration grew popular because the parties tried to avoid local law and courts and preferred international arbitration with transnational and international norms.[21] The authors argue that today international arbitration has largely become 'a form of litigation'[22] with judges and legislators reducing 'the judicial review of awards to virtually nil'.[23]

The authors do not think, however, that the system is perfect. They argue that 'the institutional evolution of the field generated its own peculiar legitimacy dilemmas that are best resolved through further judicialization'.[24] To address those legitimacy concerns, they recommend routine publication of important awards, mechanisms of appellate supervision and an enhanced interface between domestic and international tribunals and courts. They also advocate more structured proportionality analysis to better balance property rights and the public interest.[25]

The contributions to *IILH*, on the other hand, offer different accounts of the evolution of international investment law, with most authors explicitly or implicitly rejecting the progress narrative. Andreas Klick cautions that history is a narrative of possible constructions of historical documents and events; asserting objectivity is an exercise of authority—thus, power.[26] According to Klick, one narrative depicts the history of international investment law in a favourable light, as progress, whereas the other depicts it as a struggle and backlash. Interpretation of historical events is a powerful tool, and the claims to 'the' objective history of international investment law should be viewed with suspicion because of the inevitable bias of various narratives in interpreting history.[27]

Kate Miles portrays the system of investor–State dispute settlement as a result of post-colonial oppression and imperialism created for the benefit of the capital-exporting countries. She further argues that 'the story of international investment law is the story of international law, central ideas articulated at key moments in history in international law are also critical for the formation of investment rules'.[28] She views it as a part of commercial and political expansionism of certain European States from the sixteenth century to the early twentieth century.[29] For a long time, expropriation of an alien's property was the basis for military intervention in the host State.[30] Then new independent States emerged, and the World Bank, with capital-exporting States, wanted to protect their assets abroad in the wake of decolonization.[31]

Heather Bray assesses the evolutionary narratives against the risk of reviewing history through a modern lens.[32] She notes that the evolutionary approach 'gives us

[19] Sweet & Grisel (n 7) 6.
[20] ibid 171.
[21] ibid 1–4.
[22] ibid 252.
[23] ibid 3.
[24] ibid 218.
[25] ibid.
[26] *IILH* (n 9) 49.
[27] ibid 51, 68–9.
[28] ibid 150.
[29] ibid 151.
[30] ibid 159.
[31] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 19–21, 41–2.
[32] *IILH* (n 9) 108–10.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

the necessary tools to prevent problems of the past' and 'offers a portrait of what legal principles of international governing bodies have survived and which have perished'.[33] To show the process of evolution, she discusses international claims commissions and the origin of the disputes that led to their establishment. She notes that some peace treaties provided private parties with direct access to mixed tribunals established to resolve post-war claims.[34] Bray argues that the older mechanisms such as compensation commissions are not inferior to investment treaty arbitration.[35]

Jason Webb Yackee questions whether the modern treaty-based arbitration founded on pre-dispute resolution clauses and detached from diplomatic and political considerations is an adequate form of protecting foreign investors. He examines in great detail the 1864 Suez Canal dispute with Egypt and concludes that the *ad hoc* arbitration structure gives significantly more room for legal, political and diplomatic considerations. This method, in his view, may be more likely to succeed in complicated high-stake disputes, saving the parties' relationship for future cooperation.[36]

Arbitration between investors and States occurred long before the drafting of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States Convention (ICSID Convention), argues Taylor St John.[37] She examines mixed claims commissions and analogous forms of dispute resolution with the emergence of permanent arbitral institutions in the early twentieth century and after the Second World War. She observes that investor–State arbitration was deliberately separated from substantive law to make it more acceptable to governments.[38]

According to Yuliya Chernykh, the possibility of an individual asserting a direct claim against the State goes back to international human rights law when the European Court of Human Rights was established in 1959. She observes that, although individually negotiated agreements were concluded between States and investors in the past, the investors were never sure whether the State would comply with the arbitration agreement and the rendered award.[39] She traces the impact of the proposed Abs-Shawcross Convention on the Contemporary System of Investor–State Disputes, with a right of the private investor to pursue an international remedy against States at its core. Chernykh also highlights the impact that an individual may have on the system of international investment law by examining the impact of Sir Elihu Lauterpacht's role in proposing the mechanism of investor–State disputes. She shows that history assists us in better understanding international law.[40]

[33] ibid 110.
[34] Eg, the Treaty of Versailles with Germany (28 June 1919) (Treaty of Versailles) set up mixed commissions between Germany and each allied party; the Agreement between the United States and Germany Providing for the Determination of the Amount of the Claims against Germany (10 August 1922).
[35] *IILH* (n 9) 134.
[36] ibid 100.
[37] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (ICSID Convention).
[38] ibid 304.
[39] ibid 248.
[40] ibid 285.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

B. *The Path of Evolution: From Compensation Commissions to Modern Investor–State Arbitration*

Both volumes refer to the history of mechanisms used to resolve disputes related to foreign investments but give a rather fragmented picture when it comes to the transformation of those mechanisms. By analysing primary historical sources, I will attempt to give a brief overview of the evolution from my perspective.

States began to systematically address injuries suffered by foreigners on their territory in at least the late eighteenth century, largely through so-called claims commissions.[41] These commissions usually emerged in response to civil insurrections[42] or wars[43] that impacted the property of foreigners, companies or private individuals.[44] Individuals could not directly confront the foreign State for mistreatment; instead, their home States would take up their citizens' claims as their own.

The first such claims commissions appeared under the Jay Treaty and dealt with disputes over boundaries and compensation owed to British creditors for obligations incurred by Americans before the 1776 Revolution, as well as questions arising from Britain's treatment of American shipping in the then-ongoing war with revolutionary France.[45] Another early example is the United States–Mexico Commission, established to settle the claims of American citizens arising out of political turmoil in Mexico. Establishing the commission helped the USA to avoid resorting to hostile measures against Mexico.[46]

In the nineteenth century, the number of conventions concluded between States aimed at arbitrating mass claims of such nature grew dramatically.[47] By engaging in inter-State arbitration in the interests of private individuals, States desired to improve relations that could otherwise have resulted in worsening and even armed conflicts.[48]

[41] Those commissions could hear hundreds of claims (eg, the commission under the Convention for the Settlement of Claims between the United States and Great Britain (8 February 1853), in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol 5 (Washington 1898) 4743, settled 115 claims; the 1857 United States–New Granada Commission (based on Convention Concerning the Adjustment of Claims against the Republic of New Granada (10 September 1857) art 1, reprinted in Moore, ibid 4694) settled 109 claims amounting to $496,235.47 and the 1868 Convention for the Settlement of Claims (United States–Mexico) (4 July 1868), reprinted in Moore, ibid 4773, settled over 2,000 claims.

[42] See Agreement for Settlement of Certain Claims of Citizens of the United States on Account of Wrongs and Injuries Committed by Authorities of Spain in the Island of Cuba (11–12 February 1871) in Moore, ibid 4802.

[43] The USA concluded a convention with Spain 'to terminate all differences on account of the losses sustained by the citizens of the United States in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty, during the late war between Spain and France'; Treaty of Friendship, Limits, and Navigation between the United States and Spain (27 October 1795) art 21 in Moore (n 41) 4796.

[44] See eg, Convention for the Settlement of Claims between the United States and Great Britain (n 41); Convention for the Adjustment of Claims between Ecuador and the United States (25 November 1862) in Moore (n 41) 4711; Convention between Great Britain and Brazil, for the Settlement of Outstanding Claims by a Mixed Commission (2 June 1858), reprinted in *British and Foreign State Papers* (*BFSP*) (London, Her Majesty's Stationery Office) 48-18.

[45] Treaty of Amity, Commerce and Navigation between Great Britain and the United States (19 November 1794) (Jay Treaty) in Moore (n 41) 4720.

[46] US President John Quincy Adams argued in the Congress that the 'just' claims of US citizens should not be sacrificed or abandoned by the United States; and that the existing relations between Mexico and the US would not warrant the use of any 'measure of hostility against the Mexican Government or people' or 'the continued suspension of amicable negotiations between them' in Moore (n 41) 1215–16.

[47] At least 90 commissions were recorded for this century.

[48] See eg, Convention for the Indemnification of Those Who Have Sustained Losses, Damages, or Injuries in Consequence of the Excesses of Individuals of Either Nation during the Late War Contrary to the Existing Treaty or the Laws of Nations between Spain and the United States (11 August 1802) in Moore (n 41) 4798.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

Some agreements were specifically carved out to allow the individual claims of identified citizens or companies.[49]

The commissions created after the First World War focused on repairing the consequences of the war. The Allied Powers and the Associated Powers signed several major treaties with the Central Powers to achieve it.[50] The main convention, the 1919 Treaty of Versailles concluded with Germany, established mixed tribunals with jurisdiction to decide on disputes, including those concerning compensation for damage to property and rights or interests by application of war measures.[51]

In the second half of the twentieth century, commissions addressing the claims of foreign nationals and corporations played a prominent role in dealing with the effects of the Second World War. As after the First World War, the Allied Powers and the Associated Powers entered into treaties of peace with the Axis powers. Those treaties dealt with loss of property and interests suffered by nationals and corporations of the Allied powers during the war.[52]

In the latter half of the twentieth century, commissions were few and far between and rivalled by the inception of the ICSID and UNCITRAL systems. Nevertheless, three major commissions saw the light of day in the wake of regional wars: the Iran–United States Claims Tribunal, the United Nations Compensation Commission and the Eritrea–Ethiopia Commission.

The 1981 Iran–United States Claims Tribunal has a highly developed procedural framework compared to earlier claims commissions. It came into existence as part of other measures attempting to resolve the crisis in relations between Iran and the USA arising out of the hostage crisis at the US Embassy in Tehran and the subsequent freezing of Iranian assets by the USA.[53] Breaking with tradition of compensation commissions, the claimants themselves—either nationals or corporations of the USA or Iran—rather than States were entrusted with directly submitting their claims directly to the Tribunal.[54]

The 1992 United Nations Compensation Commission served to process claims and order the payment of compensation for losses and damage suffered as a direct

[49] See eg, Convention for the Settlement of the Claim of Cotesworth and Powell between the United States and Colombia (14 December 1872) in Moore (n 41) 4697; Agreement of Arbitration, Convention for the Arbitration of the Case of the 'Montijo' between the United States and Colombia (17 August 1874) in Moore (n 41) 4698; Convention for the Arbitration of the Case of the 'Costa Rica Packet' between Great Britain and the Netherlands (16 May 1895) in Moore (n 41) 4948.

[50] Treaty of Versailles (n 34); Treaty of St Germain-en-Laye with Austria (10 September 1919) 226 CTS 8; Treaty of Neuilly with Bulgaria (27 November 1919) 226 CTS 332; Treaty of Trianon with Hungary (4 June 1920) 6 LNTS 188; Treaty of Lausanne with Turkey (24 July 1923) 128 LNTS 11.

[51] Treaty of Versailles' (n 34) sec 4: 'Property, Rights and Interests' relating to property, rights and interests of foreign nationals in enemy territory. Art 297(e) provides that '[t]he nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal.'

[52] See eg, Treaty of Peace with Italy (10 February 1947) UKTS No 50 (1948) Cmd 7481, part 9 Settlement of Disputes, art 83; Treaty of Peace with Japan (8 September 1951) UKTS No 33 (1951) Cmd 8601.

[53] 'Having consulted extensively with the two Governments as to the commitments each was willing to undertake in order to resolve the crisis, the Government of Algeria recorded those commitments in two Declarations made on 19 January 1981. The 'General Declaration' and the 'Claims Settlement Declaration', collectively 'Algiers Declarations', were then adhered to by Iran and the United States.' See the website of the Iran–United States Claims Tribunal <https://www.iusct.net/Pages/Public/A-About.aspx> accessed 15 August 2018.

[54] Except in the case of those amounting to less than $250,000, which had to be submitted by the government of the national. ibid, art 3.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

result of Iraq's unlawful invasion and occupation of Kuwait in 1990–91.[55] The Provisional Rules for Claims Procedure stipulated that claimants could be individuals, corporations, or any other private or public legal entity.[56] However, only governments could submit claims, which set back the advancement of the individual as a subject of international law, as was previously witnessed in the progressive approach of the Iran–United States Claims Tribunal.[57]

The current growth of investor–State dispute settlement began to emerge in the 1990s after the end of the Cold War and followed the global growth of foreign direct investments.[58] The popularity of investor–State disputes resulted in hundreds of registered cases decided by the well-oiled ICSID and UNCITRAL dispute settlement machinery, where investors can assert claims directly against States and secure internationally enforceable awards without interference of their home States.[59]

Unlike the fragmented approach offered by the reviewed books, this section attempted to paint an integrated review of historical evolution of international disputes involving the interests of foreign investors. This review has demonstrated that an important transition has happened over the last several decades: after the end of the Cold War the vast majority of investor–State disputes find resolution not through compensation commissions run by States but through specialized ICSID or UNCITRAL arbitration, with investors directly asserting claims against States. However, it must be noted that compensation commissions did not cease to exist with the emergence of ICSID and UNCITRAL rules, but secured a much more solid procedural foundation.

III. EVOLUTION OF APPOINTMENT OF ADJUDICATORS

A. *The Rise of International Arbitrators*

Both reviewed volumes agree that although the second half of the twentieth century largely shaped the investor–State dispute settlement as we know it today, its main pillars such as appointment of arbitrators and approaches to applicable law can be traced back to earlier dispute settlement systems. In *IILH* Yackee examines the nineteenth-century dispute involving the Suez Canal Company and Egypt arising out of the Egypt's discontinuance of what essentially was forced labour. In 1864, the Emperor of France offered to settle the dispute between the Suez Canal Company and Egypt via arbitration.[60] Once a specially appointed arbitral commission rendered its award, Napoleon III signed it as his own

[55] The United Nations Compensation Commission (UNCC) was created in 1991 as a subsidiary organ of the United Nations Security Council under Security Council resolution 687 (1991) <https://www.uncc.ch/> accessed 15 August 2018.

[56] The UNCC Provisional Rules for Claims Procedure, annexed to Security Council Decision no S/AC.26/1992/10 (26 June 1992) art 1.

[57] ibid, art 5.

[58] UNCTAD, *Special Update on Investor–State Dispute Settlement: Facts and Figures* (November 2017) Issue 3, 5 <https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf> accessed 15 September 2018.

[59] See eg, Yaraslau Kryvoi, *The International Centre for Settlement of Investment Disputes* (3rd edn, Kluwer 2016) 13–19.

[60] Sweet & Grisel (n 7) 94; see also TTF Huang, 'Some International and Legal Aspects of the Suez Canal Question' (1957) 51(2) AJIL 277.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

decision, legally binding upon the parties, with no possibility of appeal.[61] The identity of arbitrators strongly affected the basis of their decision—as Yackee notes, 'it is natural to assume that an arbitration whose titular head is the sovereign ruler of the corporate claimant is likely to entail, and to be decided on the basis of, politics rather than law'.[62]

According to Bray, the independence of arbitrators has strengthened over time: investor–State dispute resolution has evolved from diplomatic into more judicial forms.[63] While the Jay Treaty consisted only of nationals of both parties, the Alabama Claims Commission included neutral members. Sovereigns played an important role in the constitution of compensation commissions. For instance, the Alabama Claims Commission included five arbitrators: the USA and the United Kingdom each appointed one arbitrator, while the King of Italy, the president of the Swiss Confederation and the Emperor of Brazil were to appoint the remainder.[64]

Sweet & Grisel have paid little attention to the history of investor–State commissions, unlike some contributors to *IILH*. Sweet & Grisel track the history of the rise of the modern college of arbitrators in the twentieth century back to the 1922 International Chamber of Commerce Arbitration Rules, under which arbitration services were freely provided by arbitrators who decided the disputes on the basis of equity without being paid for their services.[65] It was only subsequently that arbitrators became paid, and users started calling for awards based on law rather than equity as well as for 'appellate review'.[66]

Sweet & Grisel highlight the growing importance of arbitrators, arguing that '[a] relatively small college of elite arbitrators play an outsized role in the system, giving the field more coherence than it might otherwise have'.[67] These 'elite arbitrators-turned-publicists have long laboured to explain and rationalise the evolving system, and to counter legitimacy critiques, as part of broader market-building agenda'.[68] States conferred on tribunals implied law-making powers,[69] and the 'creative law-making' of arbitrators intensified the debate on political legitimacy.[70]

According to Sweet & Grisel, arbitration institutions develop organizational hierarchy over tribunals.[71] On the basis of a specially designed data set, they argue that institutional rules govern about 90 percent of all proceedings, with most of the remaining 10 percent taking place under UNCITRAL Rules.[72] Truly *ad hoc* arbitration is now virtually extinct,[73] and '[a]n arbitral institution that requires tribunals to produce fully reasoned awards, based on law, and subject to the

[61] Sweet & Grisel 94.
[62] ibid 95.
[63] ibid 122.
[64] Treaty of Washington (1871) art 1.
[65] International Chamber of Commerce, International Court of Arbitration, Rules of Arbitration, ICC no 808 (1998).
[66] Sweet & Grisel (n 7) 91–2.
[67] Citing Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387.
[68] Sweet & Grisel (n 7) 224.
[69] ibid 75.
[70] ibid 77.
[71] ibid 169.
[72] Citing *Queen Mary University of London Survey in International Arbitration: Corporate Attitudes and Practice* (2008) 82.
[73] Sweet & Grisel (n 7) 56.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

mandatory review and control of a centralised organ, is already a significant judicialized, hierarchically constituted legal system'.[74]

They maintain that international arbitration centres impose their own administrative authority on parties and tribunals through their procedural rules.[75] Each arbitration centre operates 'as [a] quasi-autonomous legal system through Rules that establish some meaningful form of hierarchy'.[76] The arbitral 'lawmaking has transformed the underlying law and politics of the regime'.[77] Today, parties, tribunals and international arbitral centers presume that settled lines of case law—*la jurisprudence constante*—will not be ignored, at least not without good reasons'.[78] They highlight the nature of the agency relationship between the arbitrator and the party: '[O]nce an agreement to arbitrate is activated, the contracting parties are denied any meaningful control of their Agent.'[79]

B. *The Path of Evolution: From Political Appointees to Professional Adjudicators*

Although both reviewed books appreciate the important role that arbitrators are playing in the system of investor–State disputes, they only occasionally touch upon the evolution of appointment procedures and the identity of arbitrators, which, in my view, are crucial to the fairness and legitimacy of any dispute settlement system. This subsection aims to provide a historical account of the evolution of the profile of persons who have been resolving disputes involving the interests of foreign investors.

In early compensation commissions, the home State and the host State would normally appoint a commissioner who did not necessarily have to be a citizen of the appointing State. When conventions designated a sole arbitrator, it was usually a sovereign of a third neutral State.[80] In case the commissioners disagreed on the dispute at hand, they would appoint an umpire to decide on the claim. Either the commissioners themselves would proceed to such an appointment,[81] or conventions would identify a third member whose appointment would follow even without a disagreement.[82]

Historical documents show that from the middle of the nineteenth century referring the case to a head of State or another official from a third power became envisaged in several conventions. The sovereign or other high-ranking foreign official of an identified third nation would either appoint an umpire[83] or act as

[74] ibid 105.
[75] ibid 107.
[76] ibid 83.
[77] ibid 211.
[78] ibid 220.
[79] ibid 55.
[80] Declaration by which Great Britain and France Mutually Accept the Arbitration of Prussia on the Claims of British Subjects Arising from the Measures Adopted by France in the Years 1834, 1835, on the Coast of Portendic (14 November 1842), reprinted in Moore (n 41) 4936.
[81] See eg, Convention for the Adjustment of Claims of Citizens of the United States against Mexico (n 46); Convention between Guatemala and Mexico, for the Settlement of Claims (26 January 1888), reprinted in *BFSP* 81-255.
[82] See eg, Convention between Great Britain and Brazil, for the Settlement of Outstanding Claims by a Mixed Commission (n 44); Convention between Italy and Chile, for the Settlement of Claims of Italian Subjects Arising Out of the Operations of the Chilean Forces in Peru and Bolivia during the War between Chile and Those Countries (7 December 1882), reprinted in *BFSP* 73-1211, art 2.
[83] Eg, art 2 of the Italy–Chile Convention (n 82) provides that the third member was to be nominated by the King of Brazil; see also Convention Concerning Settlement of Certain Claims of the Citizens of Either Country against the Other (United States–France) (15 January 1880), reprinted in Moore (n 41) 4715.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

umpire himself.[84] For instance, pursuant to the 1857 United States–New Granada (the former name of Colombia) Convention, signed as a result of riots in Panama during which American citizens had incurred damages, the commissioners had to appoint an umpire, but, in the event that they could not agree, the selection was to be made by the minister of Prussia in the USA.[85]

Before the twentieth century, the involvement of heads of State emphasized the political importance and sensitivity of investor–State dispute settlement. One example is the Great Britain–United States Commission set up to restore all property, both public and private, that the USA and Great Britain had seized from each other during the War of 1812.[86] Prior to the establishment of the commission, Great Britain and the USA had first agreed to refer their dispute to Alexander I of Russia, instead of a panel of commissioners.[87] The Czar of Russia then decided that Britain had failed to meet its obligations and should pay an indemnity.[88] It was upon his recommendation that the USA and Britain concluded a convention setting up a commission to decide the amount due to the USA and eventually accepted the commission's decision.[89] Today, the involvement of foreign powers as umpires in investor–State disputes would seem too politicized.

Most agreements provided for the party-appointed commissioners to select the umpire[90] and if the commissioners could not agree, each would nominate a candidate and the umpire would be 'determined by lot' amongst those candidates,[91] a system devised by earlier conventions and used by some later commissions.[92] However, very few conventions envisaged that the parties themselves (that is, the States) should proceed to the appointment of the umpire.[93] This contrasts with the contemporary approach of letting parties appoint the presiding arbitrator.[94]

[84] Convention for the Adjustment of Claims of Citizens of the United States against Mexico (n 46); Convention Concerning the Submission to Arbitration of the Macedonia Claims (United States–Chile) (10 November 1858), reprinted in Moore (n 41) 4689.

[85] Convention Concerning the Adjustment of Claims against the Republic of New Granada (n 41). See other conventions following a similar model: Convention Concerning the Adjustment of Claims of Citizens of the United States (United States–Costa Rica) (2 July 1860) art 2, reprinted in Moore (n 41) 4702; Convention for the Adjustment of Claims between Ecuador and the United States (n 44) art 1.

[86] Convention for Indemnity under Award of Emperor of Russia as to True Construction of First Article of Treaty of December 24, 1814 (Great Britain–United States) (30 June and 12 July 1822), reprinted in Moore (n 41) 4734. Treaty of Peace and Amity between the United States and Great Britain (24 December 1814) (Treaty of Ghent) art 1, reprinted in Moore (n 41) 4728.

[87] The Article as finally agreed on forms of art 5 of the Convention, concluded 20 October 1818. Chapter 9, different as to the Treaty of Ghent (n 86), Award of the Emperor of Russia, Mixed commissions, Domestic commissions, Agreement of Arbitration, reprinted in John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol 1 (Washington 1898) 358.

[88] His Imperial Majesty's Award, St Petersburg (22 April 1822), reprinted in Moore (n 87) 361.

[89] Convention relative to Indemnity under Convention of July 12, 1822 (13 November 1826), reprinted in Moore (n 41) 4738.

[90] Convention for the Settlement of Claims between the United States and Great Britain (n 41); Convention for the Settlement of Claims (United States–Mexico) (4 July 1868), reprinted in Moore (n 41) 4773.

[91] See the 1802 Convention for the Indemnification of Those Who Have Sustained Losses, Damages, or Injuries in Consequence of the Excesses of Individuals of Either Nation during the Late War Contrary to the Existing Treaty or the Laws of Nations between Spain and the United States (n 48) art 1, where five commissioners were appointed—two by each party and the fifth by mutual consent. In case of disagreement on the fifth Commissioner, 'each party shall name one, and leave the decision to lot'; see also determination by lot in the Convention between Great Britain and Brazil, for the Settlement of Outstanding Claims by a Mixed Commission (n 44).

[92] Eg, the Convention for the Settlement of Claims between the United States and Great Britain (n 41).

[93] We have counted three conventions providing for jointly appointed umpires/third commissioner: Convention for the Indemnification of Those Who Have Sustained Losses, Damages, or Injuries in Consequence of the Excesses of Individuals of Either Nation during the Late War Contrary to the Existing Treaty or the Laws of Nations between Spain and the United States (n 48); Convention for the Settlement of Claims between the United States and Chile (7 August 1892), reprinted in Moore (n 41) 4691; Agreement of Truce between Chile and Bolivia (4 April 1884), reprinted in *BFSP* 75-367, art 4.

[94] The majority of bilateral investment treaties provide for the parties to appoint the president of the tribunal.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

Impartiality constituted a key characteristic required from a sole arbitrator or commissioner. For instance, during the negotiations of the 1839 United States–Mexico Convention, the American representative highlighted the judicial role of the commission, as opposed to following executive orders.[95] The use of the adverb 'impartially' found itself strengthened by the addition of 'without fear, favour, or affection to their own country'.[96] Thus, despite the appointment of commissioners made by the parties to the dispute, States showed determination to free their commissioners from any kind of allegiance they may feel towards the party who appointed them.

It must be noted that the appointment of an umpire did not constitute a necessity in the nineteenth century unless the commissioners could not agree on the outcome of a case. The early conventions of the twentieth century slowly made the norm the nomination of umpires, not just in case of disagreement.[97] The appointment of the umpire also presented a more modern spin in granting the parties to the dispute this selection process rather than the commissioners. Later commissions began addressing the third decider as 'president' or 'third arbitrator' instead of 'umpire'.[98] The latter would also now expressly 'preside over the deliberations and be competent to decide in case of disagreement'.[99]

In the early twentieth century, States increasingly delegated their appointing powers to international institutions. Major conventions of that period allowed each party to appoint a commissioner while a third one was to be jointly selected by the governments concerned, and not just in case of disagreement between the party-appointed members.[100] If the governments concerned failed to reach agreement, the appointment would be entrusted to the Council of the League of Nations, which should ensure that the nominee be a national of a neutral State.[101]

Another example of the increasing role of institutions is the 1910 Agreement between the United States and Great Britain, which provided that the party-appointed

[95] In one dispute, the Mexican representative suggested that their respective governments instruct the commission on two questions of international law: losses in consequence of revolutionary movements and indemnifications for denials of justice by the judicial authorities. His American counterpart refused as 'the commission was to be a sort of joint judicial tribunal; it would not be proper for the commissioners to receive instructions from the executive of either country'. John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol 2 (Washington 1898) 1217.

[96] Convention for the Settlement of Claims between the United States and Great Britain (n 41); Convention for the Settlement of Claims (United States–Mexico) (n 41); United States–France Convention (n 83), Guatemala–Mexico Convention (n 81); United States–Chile Convention (n 93).

[97] Convention Concerning the Adjustment of Claims against the Republic of New Granada (n 41).

[98] Convention between Great Britain and the United Mexican States (26 November 1926), reprinted in 5 UNRIAA 1; Convention between France and the United Mexican States (25 September 1924), reprinted 5 UNRIAA 307.

[99] Protocol of an Agreement between the Ambassador from Mexico to the United States and the Plenipotentiary of the Republic of Venezuela for Submission to Arbitration of all Unsettled Claims of Mexican Citizens against the Republic of Venezuela (26 February 1903), reprinted in 10 UNRIAA 693, art 1; General Claims Convention of September 8, 1923 between the United States and Mexico, reprinted in 4 UNRIAA 7, art 1 (emphasis added).

[100] See Treaty of Versailles (n 34) art 304(a); Treaty of St Germain-en-Laye (n 50) art 256(a); Special Agreement between Norway and the United States (30 June 1921), reprinted in 1 UNRIAA 307, art 1; Treaty of Lausanne (n 50) art 92; General Claims Convention of September 8, 1923 between the United States and Mexico (n 99); Special Claims Convention for the Settlement of American Citizens arising from Revolutionary Acts in Mexico from November 20, 1910 to May 31, 1920 (10 September 1923), reprinted in 4 UNRIAA 772; Convention between France and the United Mexican States (25 September 1924), reprinted in 5 UNRIAA 307; Convention between Germany and the United Mexican States Relating to the Compensation to Be Granted to German Nationals for Damage Suffered on the Occasion of the Revolutionary Disturbances in Mexico (16 March 1925), reprinted in 5 UNRIAA 561; Convention between Great Britain and the United Mexican States (26 November 1926), reprinted in 5 UNRIAA 1; Convention between Italy and Mexico for the Settlement of Italian Claims Arising from Revolutionary Acts in Mexico (13 January 1927), reprinted in *BFSP* 127-780 (together, the 1923–27 Mexico Conventions).

[101] See eg Treaty of Versailles (n 34) art 3.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

arbitrators should appoint the umpire and devised a detailed system in case of disagreement on this point by relying on the Permanent Court of Arbitration.[102] Some conventions of the early twentieth century, unlike those of the nineteenth century, expressly required that the commissioners be nationals of the State parties.[103]

In the second half of the twentieth century, despite the emergence of new forms of investor–State dispute resolution, States continued to rely on compensation commissions to resolve disputes. For instance, the Treaty of Peace with Italy featured a chapter on referring issues to a conciliation commission made up of two commissioners—a 'representative' of each party to the dispute. If no agreement was reached, the parties could jointly appoint a third member who would be a national of a third country, thereby adhering to the procedure espoused by all the previous commission studies so far.[104] The 1952 Agreement for the Settlement of Disputes with Japan[105] provided for the same structure creating the Japanese Property Commissions, with the difference that the appointment of a third member was automatic.[106]

Some of the new commissions emerged on the basis of detailed procedural rules making their institutional foundation much stronger. The most notable examples are the Iran–United States Claims Tribunal, the United Nations Compensation Commission established to resolve Iraq–Kuwait disputes and the Eritrea–Ethiopia Commission.

The composition of the Iran–United States Claims Tribunal established in 1981 follows the traditional pattern of party-appointed arbitrators (three by each party) and that of three members chosen by the first six and, thus, not jointly by the parties—an unusual feature for a contemporary tribunal. If the six arbitrators cannot agree on such appointment, an 'Appointing Authority' takes over the process.[107] The fifty-nine commissioners of the United Nations Compensation

[102] Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding between the United States and Great Britain (18 August 1910), reprinted in 6 UNRIAA 17, art 3 (each of them proposes two candidates taken from the general list of the members of the Permanent Court of Arbitration, exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the umpire is determined by lot. The umpire presides over the tribunal, which gives its decisions by a majority of votes).

[103] Protocol of February 13, 1903 between Great Britain and Venezuela, reprinted in 9 UNRIAA 349; Protocol of February 13, 1903 between Germany and Venezuela, reprinted in 10 UNRIAA 357; Protocols of February 13, 1903 and May 7, 1903 between Italy and Venezuela, reprinted in 10 UNRIAA 477; Protocol of February 27, 1903 between France and Venezuela, reprinted in 10 UNRIAA 9; Protocol of an Agreement of 17 February 1903 between the Secretary of State of the United States of America and the Plenipotentiary of the Republic of Venezuela for Submission to Arbitration of All Unsettled Claims of Citizens of the United States of America against the Republic of Venezuela (17 February 1903), reprinted in 9 UNRIAA 113; Protocol of an Agreement between the Ambassador from Mexico to the United States and the Plenipotentiary of the Republic of Venezuela for Submission to Arbitration of All Unsettled Claims of Mexican Citizens against the Republic of Venezuela (26 February 1903), reprinted in 10 UNRIAA 693; Protocol of an Agreement between the Plenipotentiary of Her Majesty, the Queen of the Netherlands, and the Plenipotentiary of Venezuela for Submission to Arbitration of All Unsettled Claims of the Government and Subjects of the Netherlands against the Republic of Venezuela (28 February 1903), reprinted in 10 UNRIAA 707; Protocol of an Agreement between the Plenipotentiary of his Majesty the King of the Belgians and the Plenipotentiary of Venezuela for Submission to Arbitration and Payment of All Unsettled Claims of the Government and Subjects of Belgium against the Republic of Venezuela (7 March 1903), reprinted in 9 UNRIAA 319; Protocol of an Agreement between the Plenipotentiary of the Republic of Venezuela and the Envoy Extraordinary and Minister Plenipotentiary of His Majesty, the King of Spain, for Submission to Arbitration of All Unsettled Claims of Spanish Subjects against the Republic of Venezuela (2 April 1903), reprinted in 10 UNRIAA 735 (together, the 1903 Venezuela Conventions).

[104] Treaty of Peace with Italy (10 February 1947), UKTS 50 (1948) Cmd 7481, part 9 Settlement of Disputes, art 83.

[105] Treaty of Peace with Japan (8 September 1951), UKTS No 33 (1951) Cmd 8601.

[106] Agreement for the Settlement of Disputes arising under Article 15(a) of the Treaty of Peace with Japan (12 June 1952), UKTS No 54 (1952) Cmd 8675, art 2.

[107] Claims Settlement Dispute Declaration (n 53) art 3, para 1; see also arts 5–8 of the Tribunal Rules, which also apply to the appointment of the other arbitrators.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

Commission established in 1991 were appointed for fixed terms by its executive secretary, usually from a Register of Experts established by the Secretary-General of the United Nations (UN) in 1991, subsequently regularly updated and maintained by the Secretariat.[108]

The 2000 Eritrea–Ethiopia Commission, which dealt with claims arising out of the war between the two countries, could hear claims affecting both individuals and corporations but those were to be filed by the corresponding States.[109] The selection of commissioners followed the now classical approach of two members appointed by each party, but the president would be chosen by the four arbitrators who, if they failed to agree on his nomination, would refer the matter to the UN Secretary-General and would proceed to the appointment after consultation with the parties.[110] The members of this Commission held permanent positions and heard all claims.[111]

The ICSID Convention established a self-contained system specifically designed for resolution of investor–State disputes establishing the right of private investors to assert claims directly against host States, without relying on the assistance of their home State, and to appoint arbitrators.[112] The 1985 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules created a solid foundation for *ad hoc* or non-institutional arbitration.[113] These rules cover all aspects of the arbitral process, including those on the appointment of arbitrators with the State and the investor having equal procedural rights.

This overview shows that the system of appointment and the characteristics of those who resolve investor–State disputes has evolved over time. The initial default preference for an even number of commissioners in the nineteenth century demonstrates that States hoped to solve their dispute without the need for a deciding umpire. The home State and the host State would normally appoint a commissioner who did not have to be a national of the appointing State and was supposed to be impartial. With time, however, the involvement of the third adjudicator (the umpire) has become the norm.

In early commissions, political appointees or even sovereigns themselves resolved disputes. However, with time, the demand for neutral professional adjudicators and specially established dispute resolution institutions has grown. Initially, institutions such as the League of Nations and the Permanent Court of Arbitration occasionally served in investor–State disputes only as appointing authorities but with time, specialized international organizations with self-contained appointment, procedural and enforcement mechanisms, such as the Iran–United States Claims Tribunal and the International Centre for Settlement of

[108] UNCC Provisional Rules for Claims Procedure (n 56) arts 18–20.

[109] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (12 December 2000) art 3 (2000 Algiers Agreement): 'Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons.'

[110] ibid art 5.3.

[111] They were Sir Elihu Lauterpacht, CBE QC (President); Prince Bola Adesumbo Ajibola (appointed by Ethiopia), W Michael Reisman (appointed by Eritrea), Judge Stephen M Schwebel (appointed by Eritrea) and Sir Arthur Watts, KCMG QC (appointed by Ethiopia).

[112] Kryvoi (n 59).

[113] At present, there exist three different versions of the Arbitration Rules: (i) the 1976 version; (ii) the 2010 revised version; and (iii) the 2013 version that incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor–State Arbitration <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html> accessed 15 August 2018. Arbitration Rules of the United Nations Commission on International Trade Law (1976).

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

Investment Disputes, have become the dominant forces in investor–State dispute settlement.[114]

In the nineteenth and early twentieth centuries, the procedural control of the claims commissions, including all appointment decisions, belonged to the States rather than investors. States sought redress for injuries caused to their nationals by other States and controlled the dispute settlement proceedings.[115] Claimants could very rarely present their own arguments and submit their evidence as conventions required that submissions be filed and presented by official agents.[116] State representatives and agents oversaw the whole process, including the appointment process, though some commissioners sometimes injected flexibility into the proceedings.[117] Only in the second half of the twentieth century were investors empowered to assert direct claims against host States and appoint arbitrators.

IV. EVOLUTION OF APPLICABLE LAW

A. *The Judicialization Theory and Its Critisism*

Applicable law determines not only rights and obligations of the parties but also the general fairness and legitimacy of dispute resolution. Both reviewed books touch upon the issue of applicable law, but from different perspectives. Sweet & Grisel introduce three models of arbitral governance based primarily on the source of formal validity of applicable law: the contractual model, the judicial model and the pluralist-constitutional model.[118] Their main theory is the progressive development of judicialization, which refers to 'the process through which third-party dispute resolution emerges in a community, and develops authority over its institutional evolution'.[119] They argue that the consolidation of the judicial model leads to the demise of the contractual model, based on contracts between the parties.

They suggest that the international arbitration regime has evolved as a tightly networked judicial system based on precedent, defined as 'that stream of normative materials, issuing from past awards that (a) parties pled in submissions, and (b) tribunals rely upon when they justify either their awards or their approach to decision-making'.[120] According to them, '[m]uch arbitral law is made through what is, in fact, a common law process and dissents are part of that process'.[121] They believe that the arbitration system is still largely based on

[114] As of 2018, the Iran–United States Claims Tribunal has finalized over 3,900 disputes <http://www.iusct.net> accessed 15 September 2018. According to UNCTAD, the total number of known cases was nearly 900 with investors asserted 61% of all known investor–State disputes under the ICSID Rules or the ICSID Additional Facility Rules and 31% under UNCITRAL Rules (*ad hoc* arbitration) between 1987 and July 2017. UNCTAD (n 58) 5.

[115] Convention for the Settlement of Claims (United States–Peru) (4 December 1868), reprinted in Moore (n 41) 4788; Agreement for Settlement of Certain Claims of Citizens of the United States on Account of Wrongs and Injuries Committed by Authorities of Spain in the Island of Cuba (n 42); Guatemala–Mexico Convention (n 81).

[116] Convention for the Settlement of Claims between the United States and Great Britain (n 41); Convention for the Settlement of Claims between Peru and the United States (12 January 1863), reprinted in Moore (n 41) 4787.

[117] The commission set up under the 1857 Convention Concerning the Adjustment of Claims against the Republic of New Granada (n 41) where claimants were often represented by their own attorneys.

[118] Sweet & Grisel (n 7) 24–33.

[119] ibid 25.

[120] ibid 119, 169; see also ibid 74: 'Publication of awards and reliance of parties and arbitrators on them has generated a 'precedent-based jurisprudence.'

[121] ibid 106.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

equity decision-making by businessmen and 'a reputation system of enforcement requires very little investment in hierarchy'.[122]

The New York and ICSID Conventions perform the constitutional function of the new pluralist-constitutional model of arbitral governance and contribute 'to the progressive construction of a system which has identifiable constitutional features' with 'a substantive body of "higher law" norms which are binding on all international judges, including arbitrators'.[123] Sweet & Grisel argue that following New York Convention obligations, States preclude merit review of awards, 'while narrowing the inarbitrability and public policy exceptions to practical irrelevance. There are virtually no important instances of a court in the USA, the United Kingdom, or France refusing to enforce a major award on such grounds since 1970s.'[124] This statement is likely to sound controversial to lawyers practising international arbitration, as disputing the limits of public policy and arbitrability remain 'bread-and-butter' for them in all major jurisdictions.[125]

Some other statements can also be disputable as a matter of arbitration practice. For instance, according to Sweet & Grisel, '[i]n nearly all ICSID Convention cases... [n]ational rules and practices are typically the object of the tribunal's scrutiny, not the source of the applicable law'.[126] The argument goes that 'the arbitral order develops doctrine that asserts its own primacy which should prevail if it conflicts with other norms, such as those of national systems'.[127] Moreover, '[w]hile no-one denies that tribunals are obliged to respect applicable mandatory rules, they are otherwise relatively unconstrained by state law when it comes to interpreting contracts'.[128] These statements undermine the importance of the parties' agreement on applicable law and contradict the language of the ICSID Convention,[129] its drafting history[130] and practice on annulment of investment awards by ICSID annulment committees.[131]

Sweet & Grisel highlight inconsistent reasoning in decisions of investor–State tribunals on the same points of law and similar facts, which 'has spurred demand for appellate supervision without mechanisms of coordination associated with appeal'.[132] They observe that the regime has failed to develop 'stable standards of

[122] ibid 60.
[123] ibid 30–2, 74; New York Convention (n 17).
[124] ibid 64.
[125] See eg International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report on the Public Policy Exception in the New York Convention* (October 2015) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E> accessed 15 August 2018.
[126] Sweet & Grisel (n 7) 107.
[127] ibid 169.
[128] ibid 140.
[129] According to art 42 of the ICSID Convention, the Tribunal shall apply the rules of law as may be agreed by the parties, and in the absence thereof, the law of the contracting State party to the dispute (including its rules on the conflict of laws).
[130] In the process of drafting of the ICSID Convention, it has been confirmed on multiple occasions that 'failure to apply the proper law could amount to an excess of power if the parties had agreed on an applicable law'. *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1970) vol 1–4, vol 2, 851.
[131] See eg *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v Democratic Republic of the Congo*, ICSID Case No ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo (29 March 2016) para 108 (unofficial translation from French): 'It is nevertheless necessary to distinguish between the non-application by the arbitral Tribunal of the normally applicable law that constitutes a ground for annulment, and the misapplication of the applicable law, which does not constitute an excess of power and is therefore not a ground for annulment.'
[132] Sweet & Grisel (n 7) 130, 132.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

review, or appropriate doctrines of deference to public interests, as one expects well-functioning judiciaries to do'.[133]

Elevating all normative materials from past awards to the status of precedent would the raise concerns of many *IILH* contributors. As Yackee observes in that volume, 'the formal award is the obvious starting point for historical analysis, but, if it can be helped, it should not be the last'.[134] According to Jörg Kammerhofer, 'legal history can serve us by showing us how the history of law may be an important reservoir of argument in international investment law and may be able to 'ground' arguments in a certain sense'.[135] He warns against making 'the almost imperceptible shift from arguing that the law is nothing but . . . the sum-total of its factual "sources"', which may eliminate the need to have legal analysis altogether.[136]

Mona Pinchis-Paulsen focuses on the distinction between 'the past as law' and 'the past as history'. She explains how the law evolves from historical facts and how legal techniques have given them authority and meaning. On the basis of her analysis of over 5,000 primary documents, she shows how the fair and equitable treatment standard was deliberately construed using 'open-ended provisions to provide a broad and flexible way to ensure that the balance of a negotiated treaty would not be upset by unforeseen circumstances'.[137]

Jean Ho, having analysed in depth the evolution of contractional protection in international law, concludes that 'the scope of contractual protection under investment treaties should be a matter of treaty interpretation, and not historical exegesis'.[138] She also notes that the consequences of replacing the proper law of contract (that is, normally the host State law) with international law as the *de facto* proper law has alarmed scholars and States, particularly developing States.[139]

According to Taylor St John, lawyers work with historical documents because they aid interpretation.[140] Analysing the political context in which treaties were drafted, Yackee notes that historical research has its own unique methods of defining and identifying sources, approaches to evaluating reliability of sources, dealing with contradictions and interpreting. The most reliable primary source research means working with archives. He notes that 'historical [international investment law] research can tend to look more like reshuffling of existing historiography into new normative arguments rather than either the production of new historical knowledge or the verification of received historical wisdom'.[141] In this case, the investment law scholar 'begins to look more like a policy analyst than a historian, though good historical work can certainly help to support the normative (or instrumental) claim'.[142]

While Sweet & Grisel only occasionally mention public interest, Muin Boase's contribution to *IILH* calls to introduce 'public law' concepts to give arbitrators greater power to balance competing interests, including the explicit right to

[133] ibid 231.
[134] *IILH* (n 9) 97.
[135] ibid 165.
[136] ibid 169.
[137] ibid 193.
[138] ibid 214.
[139] ibid 236–8.
[140] ibid 286.
[141] ibid 86.
[142] ibid 89.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

sanction investor misconduct.[143] He shows how the British Empire regulated overseas activities of the British India Company and the Levant Company with a particular focus on bribery.[144] He notes that 'whilst international investment law codified and elevated the responsibility of the host state towards the foreign investor, it did not qualify the obligations of the home state which remain in the background'.[145] Boase argues that international law obliges investors to follow a certain minimum standard of conduct, including refraining from 'bribery, serious environmental pollution, organised coups, carrying out forced labour, and international crimes, all of which are recognised by almost all states as being unlawful'.[146]

B. *The Path of Evolution: From 'Fairness' to the Rule of Law*

Both volumes touch upon issues of applicable law but without spending much time evaluating the approaches in past investor–State disputes. A crucial question here, as the quote of Lauterpacht at the beginning of this review essay suggests, is to distinguish between historical validity of various precedents, treaties and norms and their formal legal validity. As discussed above, reliance on historical narratives rather than legal analysis is the task of historians rather than lawyers. Moreover, historical research uses its own methods, different from those employed by legal science. Looking back at laws applied in historic investor–State disputes can help us see the trends and inform today's understanding of law.

For early compensation commissions, provisions on applicable law almost invariably referred to principles of justice and equity, starting from the 1794 Jay Treaty.[147] In the eighteenth and nineteenth centuries, applicable law played no vital role in the functioning of the commissions; some commissions' only tasks consisted of evaluating the extent of alleged damages suffered by the claimants rather than liability.[148] It was unusual to reference the rules of international law or decisions of other tribunals. Occasionally, however, commissions referred to international law. For instance, the 1795 United States–Spain Convention, designed to take up the claims relating to the capture of American vessels by Spanish warships and privateers taking part in the then ongoing conflict between European powers, listed the 'law of nations' as applicable law.[149] Some conventions mentioned principles of international law, practice and even jurisprudence laid down by modern tribunals of a similar character of higher authority and prestige.[150]

143 ibid 363.
144 ibid 331–3.
145 ibid 329.
146 ibid 323–4.
147 Treaty of Amity, Commerce and Navigation between Great Britain and the United States (19 November 1794), reprinted in Moore (n 41) 4720, art 7; see also Convention for the Settlement of Claims between the United States and Great Britain (n 41); Convention Concerning the Adjustment of Claims against the Republic of New Granada (n 41) art 1; United States–Costa Rica Convention (n 85); United States–France Convention (n 83); Guatemala–Mexico Convention (n 81).
148 See eg Convention for the Settlement of Claims of the 'United States and Paraguay Navigation Company' (United States–Paraguay) (4 February 1859), reprinted in Moore (n 41) 4781, art 1; Convention Concerning the Adjustment of Claims against the Republic of New Granada (n 41).
149 The 1795 Treaty of Friendship, Limits, and Navigation between the United States and Spain (n 43) art 21, provided that 'the three Commissioners so appointed shall be sworn impartially to examine and decide the claims in question, according to the merits of the several cases, and to justice, equity, and the laws of nations'; see also 1863 Convention for the Settlement of Claims between Peru and the United States (n 116) art 3.
150 Chile–Italy Convention (n 82) art 6; Convention between Belgium and Chile, for the submission to the Tribunal established by the Convention between Italy and Chile of December 7, 1882, of Claims of Belgian Subjects arising out of the War between Chile and Peru and Bolivia, BFSP 75–496; Convention between Germany and Chile, for the Settlement of the Claims of German Subjects arising out of the Operations of the Chilean Forces in Peru and Bolivia

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

More commonly, conventions referred to the existing conventional rules between the State parties to assist the commissioners in their task. For instance, the 1802 United States–Spain Convention addressing private claims for acts committed during the war between the two States tasked the commissioners with 'judg[ing], according to the laws of nations and the existing treaty and with the impartiality justice may dictate'.[151] The 1839 United States–Mexico Convention went even further than referencing the constituting treaty by including expressly in the referential set of rules a treaty of amity between the two state parties.[152]

The law applied by claims commissions in the early twentieth century did not differ much from the principles followed by those of the previous century. The legal set of rules still included justice and equity[153] as well as good faith,[154] with some conventions not even mentioning applicable law.[155] Express references to general international law only occasionally featured in the relevant conventions[156] and more often the commissions relied on conventions between the disputing States.[157] For example, some of the conventions concluded between Venezuela and other States also made a point of maintaining some existing treaties between the parties despite the state of war between the two States.[158] The Commission to the 1922 United States–Germany Agreement adopted a wide-encompassing approach as regards applicable law, which included other agreements between the two parties.[159] This reveals an evolution of applicable law towards a more

during the War between Chile and those Countries, 23 August 1884, BFSP 75–1102, Article II; Convention d'Arbitrage entre la Suisse et le Chili (Switzerland-Chile Convention), 19 January 1886, BFSP 77–826.

[151] United States–Spain Convention for the Indemnification of Those Who Have Sustained Losses, Damages, or Injuries in Consequence of the Excesses of Individuals of Either Nation during the Late War Contrary to the Existing Treaty or the Laws of Nations (n 41) art 2; Convention for the Adjustment of Claims between Ecuador and the United States (n 44) art 2, providing that the commissioners shall '[c]arefully examine and impartially decide according to justice, and in compliance with the provisions of this convention, all claims that shall be submitted to them'; Convention for the Settlement of Claims against Venezuela (United States–Venezuela) (n 103) art 3.

[152] Convention for the Adjustment of Claims of Citizens of the United States against Mexico (n 46) art 1.

[153] Venezuela Conventions (n 103).

[154] Treaty of Lausanne (n 50) art 95.

[155] Special Agreement between the United States and Germany providing for the Determination of the Amount of Claims against Germany (n 34).

[156] See eg General Claims United States–Mexico Convention (n 99); Claims Convention between the United States of America and Panama (28 July 1926), reprinted in 6 UNRIAA 293, stipulating that the commissioners should decide 'in accordance with the principles of international law, justice, and equity'; see also Special Agreement for the Submission to Arbitration of Pecuniary Claims Outstanding between the United States and Great Britain (18 August 1810), reprinted in 6 UNRIAA 17, art 7, providing that the members of the tribunal shall 'make a solemn declaration in writing that he will carefully examine and impartially decide, in accordance with treaty rights and with the principles of international law and of equity, all claims presented for decision'. See also Special Agreement between Norway and the United States (n 100) art 1, which simply refers to 'principles of law and equity'.

[157] Venezuela Conventions (n 103).

[158] See Great Britain–Venezuela Convention (n 103) art 7: 'The Venezuelan and British Governments agree that, inasmuch as it may be contended that the establishment of a blockade of Venezuelan ports by the British naval forces has ipso facto created a state of war between Venezuela and Great Britain, and that any treaty existing between the two countries has been thereby abrogated, it shall be recorded in an exchange of notes between the undersigned that the Convention between Venezuela and Great Britain of October 29, 1834, which adopted and confirmed mutatis mutandis the treaty of April 18, 1825, between Great Britain and the State of Colombia, shall be deemed to be renewed and confirmed or provisionally renewed and confirmed pending conclusion of a new treaty of Amity and Commerce.' See Italy–Venezuela Convention (n 103) art 8: 'The Treaty of Amity, Commerce and Navigation between Italy and Venezuela of June 19, 1861, is renewed and confirmed.'

[159] The Convention stayed silent on the subject, simply referring to the terms of the 'Treaty of Versailles'. The Commission found in most of its decisions that it would be 'controlled' by the 'Treaty of Berlin' and that where no 'Treaty of Berlin' provision was applicable, the Commission may apply conventions binding upon the two States, international custom, common rules of municipal law, general principles of law, and, as subsidiary means for determination of law, judicial decisions and teachings of most highly qualified publicists; provided that Commission will not be bound by any particular code or rule of law, but shall be guided by justice, equity and good faith.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

defined set of external rules—one that encompasses not only fairness as understood by the commissioners.

Most post-Second World War peace treaties had no clauses on applicable law. Apparently, the liability of the Axis Powers was not in question, and their bargaining position to negotiate applicable law provisions was very weak.[160] As the United States–Japan Commission noted in one decision: '[T]he liability of the Government of Japan is determined in this case by the terms of the Treaty of Peace and the Compensation Law rather than by the general provisions of international law.'[161]

The more recent claims commissions offered a more systematic approach to applicable law with international law explicitly mentioned. The Iran–United States Claims Tribunal established in 1981 abides by a wide clause on applicable law that allowed it to decide 'on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances'.[162]

The terms 'on the basis of respect for law' function like an umbrella clause allowing for the 1955 Treaty of Amity between the United States and Iran to find application,[163] which therefore was not suspended or terminated despite the tense relations between the two States. The Iran–United States Claims Tribunal has interpreted this clause to give it extraordinary latitude in choosing among different sources of law, including that specified in an applicable contract, a municipal legal system selected by choice of law rules, the general practices of international commercial usage (*lex mercatoria*) or principles of public international law.[164]

The 1991 United Nations Compensation Commission exercised its mission within the confines of relevant UN Security Council resolutions, the criteria established by its Governing Council[165] for particular categories of claims and relevant decisions of the Governing Council. In addition, where necessary, commissioners were supposed to apply 'other relevant rules of international law'.[166] These provisions created a hierarchy of norms, with UN Security Council resolutions and Governing Council criteria at the top, and other international law rules coming next.

[160] For example, the agreements establishing the Japanese Property Commissions stipulate that claims for compensation are to be made in accordance with the provisions of the 1951 Treaty and the corresponding national legislation. Art 15(a) of the 1951 Treaty of Peace with Japan and the Allied Powers Property Compensation Law (Japanese Law no 264, 1951), pursuant to art 1 of the Agreement for the Settlement of Disputes Arising under Article 15(a) of the Treaty of Peace with Japan (12 June 1952).

[161] The United States—Japanese Property Commission established pursuant to the Agreement of 12 June 1952 for the Settlement of Disputes Arising under art 15 (a) of the Treaty of Peace with Japan (United States, Japan) (29 June 1960, 23 July 1960), reprinted in 14 UNRIAA 447, 477–8.

[162] Claims Settlement Dispute Declaration (n 53) art 5.

[163] Mohsen Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* (Kluwer Law International 1999) 114.

[164] *Amoco Int'l Finance Corp v Iran*, AWD no 310-56-3, 15 Iran–US CTR 189, 215 (14 July 1987) para 90; see also *INA Corp v Iran*, AWD no 184-161-1, 8 Iran–US CTR 373, 404-07 (12 August 1986) 2 (Ameli J, dissenting) (citing Claim no A/30, 39).

[165] 'The Governing Council is the organ of the Commission that sets its policy within the framework of relevant United Nations Security Council resolutions. As such, it established the criteria for the compensability of claims, the rules and procedures for processing the claims, the guidelines for the administration and financing of the Compensation Fund and the procedures for the payment of compensation. The Governing Council reports regularly to the Security Council on the work of the Commission.' See <https://www.uncc.ch/governing-council> accessed 15 August 2018.

[166] UNCC Provisional Rules for Claims Procedure (n 56) art 31.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

The 2000 Eritrea–Ethiopia Commission, however, is obliged to apply relevant rules of international law, which the Commission's Rules of Procedure define as the same rules provided for under Article 38(1) of the Statute of the International Court of Justice (ICJ Statute).[167] The Commission pronounced on the applicability of conventional rules between the parties by finding that the outbreak of the war had *ipso facto* suspended or terminated agreements regulating trade and commercial relationships between the parties.[168]

Finally, Article 42 of the ICSID Convention provides that the tribunal shall apply the rules of law as may be agreed by the parties, and in the absence thereof, the law of the contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. The report of the executive directors explains that '[t]he term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the ICJ Statute, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.'

This historical review shows that despite occasional references to the 'law of nations' early compensation commissions did not pay much attention to the issues of applicable law and instead applied principles of justice and equity. That approach highlights that the political aspects of dispute resolution, also discussed in the subsection on appointments of this review essay, dominated over the legal analysis. Gradually, however, the commissions started to rely more on conventional rules existing between the disputing parties, putting the disputes into the broader context of trying to improve relations between the host State and the home State.

In the twentieth century, the practice of the Iran–United States Claims Tribunal, which widely relied upon *Lex mercatoria* and principles of public international law, was followed by the growing acceptance of Article 38 of the ICJ Statute as the starting point for identifying and applying the external rules of international public law. Today, investor–State tribunals often engage in a sophisticated analysis of applicable law problems, relying on a variety of sources including treaties, customary international law, general principles of law, legal doctrine and other sources,[169] going far beyond the notions of fairness and equity that were sufficient for the early compensation commissions. Moreover, failure to respect the relevant applicable law may lead to annulment within the ICSID system or setting aside or non-enforceability under the New York Convention.

V. CONCLUSION

This review essay has demonstrated that the tradition of investor–State dispute resolution has deep historical roots and a solid foundation in international law. Both reviewed volumes seek to challenge the dominant paradigms of international investment law in an effort to explain the nature of the legal regime and its

[167] Eritrea–Ethiopia Claims Commission's Rules of Procedure 2001 art 19 <https://pcacases.com/web/sendAttach/774> accessed 15 August 2018. Statute of the International Court of Justice (opened for signature 26 July 1945, entered into force 24 October 1945).
[168] Partial Award – Economic Loss throughout Ethiopia's Claim 7, Award, 19 December 2005, para 18.
[169] Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' (2008) 19(2) EJIL 301.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

evolution. While some consider history itself to be a source of law, for others, history merely provides a framework—a context in which law operates.

Although both reviewed volumes take different approaches to the evolution of international investment law, they often fail to pay enough attention to the fact that international investment law constitutes a part of international public law with which it shares same history, adjudicators and even sources of law. Many problems that international investment law faces are not unique and solutions can be found in other areas of international law. The strengthening of private actors has occurred not only in international investment law but also in international human rights law, international humanitarian law and international criminal law.[170] In these areas, the individual has gained the legal status of 'subject' of international law, in the sense of having their own international law rights and obligations.

When it comes to sources of international law, today investor–State tribunals, like other international dispute resolution bodies, look to Article 38 of the ICJ Statute for the definition of primary sources of international public law (international conventions, international custom and general principles of law) and subsidiary means for the determination of rules of law (judicial decisions and teachings of the most highly qualified publicists). These primary sources and subsidiary means are also explicitly recognized in the report of the ICSID executive directors.[171]

Additional sources also come into play in international investment law, such as domestic law and contracts (particularly investor–State contracts) depending on the parties' agreement. In this context, labelling historical facts and decisions of other tribunals as 'primary sources' should generally be avoided, as historical facts are normally sources for historical analysis but not for legal analysis, unless they serve as subsidiary means to determine unwritten law.

Both old and new methods of investor-State dispute resolution will continue to co-exist. In some situations, it will be institutional or ad-hoc arbitration based on a treaty, an investment contract or domestic legislation. In other situations, it will be compensation commissions or specially established investment courts. As this essay has demonstrated, history offers States and investors a rich menu of mechanisms to choose from and good lessons for future reforms.

Downloaded from https://academic.oup.com/icsidreview/article/33/3/743/5272700 by University of Basel user on 24 January 2022

[170] See Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011).

[171] ICSID, *ICSID Convention, Regulations and Rules* (April 2006) <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf> accessed 15 August 2018.