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REPORT

Fiddlers on the Roof? International Organizations in the International Investment Regime as Traditional Global Governance

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Fiddlers on the Roof? International Organizations in the International Investment Regime as Traditional Global Governance

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Abstract:

The main elements of the international investment regime include decentralized networks of thousands of mostly bilateral international investment agreements (IIAs) and ad hoc investor-state dispute settlement (ISDS) tribunals. Nevertheless, a handful of international organizations (IOs) also take part in the regime and strive to shape its rules and direction. This paper seeks to assess the role of such IOs in this context, taking into account recent theoretical insights with respect to possible flexible and informal modes of global governance, such as experimentalism, orchestration, and public-private partnerships (PPPs). After mapping several modes of governance, we examine and compare the role of two United Nations (UN) bodies, the UN Conference on Trade and Development (UNCTAD) and the UN Commission on International Trade Law (UNCITRAL), in the regime. We find that they play an important part in it, but mostly in capacities traditionally reserved to IO, such as collection and dissemination of information, policy advice, forums for inter-state negotiations and discussions, and rule and norms entrepreneurs. Even though we identify some elements of PPP, especially in the case of UNCTAD, the functions of these two IOs fit more comfortably with coordination and centralization rather than experimentalization and orchestration modes of governance.

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- *"Here in Anatevka, we have traditions for everything"*, Tevye the Milkman, from the *Fiddler on the Roof*.

1. Introduction

What are the governance roles of IOs in the international investment regime? This regime – that is "the set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge" (Krasner 1982, 2) in the area of foreign direct investment (FDI) and the activities of multinational corporations (MNCs) – is a 'radically decentralized' one (Wagner 2014, 75). For better or for worse, in contrast to other issue-areas of global concern, such as trade, finance, and health, a multilateral institution that regulates FDI and MNCs is nowhere in sight. Despite several attempts to advance global regulation, often within the confines of an international organization (IO), at least since the late 1940s, neither a would-be 'World Investment Organization' (Bonnitcha et al. 2017, 19-22) nor even a multilateral agreement on rules and procedures is in existence, with the failure of negotiations in the 1990s towards a Multilateral Agreement on Investment (MAI) (Muchlinski 2000) still serving as a cautionary tale, to say the least.

Instead, cross-border capital flows are tackled by more than three-thousand international investment agreements (IIAs), most of which are bilateral investment treaties (BITs), many of which were signed in the 1990s.[1] In addition, and largely based on these treaties, more than a thousand investment disputes between investors and host states have been (or still are) adjudicated by international arbitrators in an institutionally dispersed system known as investor-state dispute settlement (ISDS). Importantly, these IIAs, while generally similar to each other in their functions, rules and structure, have significant, if nuanced, differences in their normative content, often because of experience by states gained in ISDS with respect to the restrictions that they impose on state regulatory autonomy and space (Thompson et al. 2019). Nevertheless, over the years, several global intergovernmental IOs, or rather subsidiary bodies within them, moved into this issue-area and have engaged in efforts to shape the

[1] Other IIAs are treaties with investment provisions (TIPs), most commonly free trade agreements (FTAs) with an investment chapter.

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international investment regime in a number of different and important ways. These include, at different levels, the International Centre for Settlement of Investment Disputes (ICSID), which is a part of the World Bank Group, the World Trade Organization (WTO), and two United Nations (UN) bodies: the UN Conference on Trade and Development (UNCTAD) and the UN Commission on International Trade Law (UNCITRAL).

Investigating the latter two IOs,[2] this paper examines and compares the role of these actors in the regime. The selection of UNCTAD and UNCITRAL for analysis is useful because both are salient fora for discussion of norms and rules, but the former, with its broader mandate regarding international development, devotes much of its attention in the field of investment to IIA substantive rules, while the latter, with its broader mandate on commercial law, including dispute settlement, insofar as investment is concerned, is focused on ISDS.[3] Moreover, while UNCTAD lacks a lawmaking mandate, UNCITRAL is considered the principal trade lawmaking organ of the UN system (as distinguished and explained below). In addition, these two bodies have attracted scant scholarly attention, largely referred to in subsequent sections, especially in the context of the international investment regime and global governance. This paper is the first, to the best of our knowledge, to fill this research gap, in the comparative sense, with respect to global governance. Generally, we seek to identify the ways in which these IOs, as such, have contributed to the ongoing formation of the international investment regime.

Understanding the manners by and degrees to which these two IOs affect international investment policies ideally requires an analytical framework that links IOs to global governance more broadly. While such a unified framework is currently not at hand, recent writing on global governance

[2] We treat these bodies as IOs even though they are part of the UN 'family.' As we shall see, they have independent secretariats and, in many ways, function as independent IOs.

[3] The WTO's main interaction with the regime is through the Trade-Related Investment Measures (TRIMs) agreement, signed in 1994. This agreement deals with a rather narrow aspect of investment rules and is therefore excluded from the analysis. Significant interactions also exist with the WTO's General Agreement on Trade in Services (GATS), signed at the same time, through GATS 'Mode 3' (Broude 2011) but these have unraveled over the last decade (Alschner 2019). ICSID, for its part, played a crucial role in setting up ISDS rules and procedures in the early days of the regime (St John 2018), but currently has more of an administrative role. We elaborate on this point in the discussion of UNCITRAL below. Another multilateral, but not global, IO that engages with investment policies is the Organization of Economic Cooperation and Development (OECD). Given its restricted membership and relatively limited involvement in this issue area at the time, it is excluded as well.

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identifies several 'modes' of such governance and ponders their attributes and implications. We utilize this body of work as a springboard to examine UNCTAD and UNCITRAL as IOs in a systematic manner. Starting with Abbott et al. (2015), we can distinguish between 'hard' and 'soft' as well as between 'direct' and 'indirect' modes of governance. With respect to the first distinction, a hard governance mode refers to a great deal of delegation to and authority of the purported 'governor' (the IO, in our case). Under these conditions, IOs may set clear obligations, conduct binding dispute settlement, and enforce their rules. Softer modes of governance predominate when IOs do not have such powers. In these circumstances, they have to rely on inducements, persuasion, and epistemic guidance. In addition, when unable to set rules themselves, IOs engage in less intrusive activities, which may be subsumed under the headline of 'coordination' or 'centralization' (Abbott and Snidal 1998; Abbott et al. 2015). These may include such roles as serving as a forum or facilitator for negotiation, the exchange of information and views, the collection and dissemination of information, research, and technical assistance. Even within this matrix, we do identify different forms of global governance in organizations such as UNCTAD and UNCITRAL.

The distinction between direct and indirect modes of governance pertains to the relationships between IOs and other actors in a given international regime. Abbott et al. (2015) are especially interested in the possibility of what they termed 'orchestration,' that is of IOs that delegate responsibilities to mostly non-state 'intermediaries' rather than interacting directly with states. This is not the only way by which IOs can interact with a variety of other non-actors, however. Another possibility is global public-private partnerships (PPPs), defined (with respect to global governance, in contrast to the more common meaning of the term, that relates to business models, e.g., regarding infrastructure projects, indeed as discussed in UNCITRAL) as "voluntary agreements between public actors (IOs, states, or sub-state public authorities) and nonstate actors (nongovernmental organizations [NGOs], companies, foundations, etc.) on a set of governance objectives and norms, rules, practices, or implementation procedures and their attainment across multiple jurisdictions and levels of governance" (Andonova 2017, 2). Adjacent to such 'PPPs' is the concept of 'global experimentalist governance' ('GXG') (De Búrca et al. 2014). As elaborated later on, this approach underscores a bottom-up, trial-

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and-error, process of policy formulation and implementation. GXG may open up the possibility for IOs to learn from more 'localized' non-state actors who experiment with so-called 'outside the box' initiatives, and possibly adopt and disseminate them more widely. To be sure, we are not necessarily endorsing, either descriptively or prescriptively, any of these approaches, but do adopt them as a basis for conceptual exploration.

Our analysis indicates that neither UNCTAD nor UNCITRAL, as IOs, have much authority to set rules, adjudicate disputes, or enforce compliance, but in different ways. Both bodies therefore have to rely on soft modes of governance, perhaps the softest on the spectrum: policy analysis and capacity building, involving both state and non-state actors, in the case of UNCTAD, and similar functions with a more enhanced, yet circumscribed, forum for inter-governmental debates and negotiations in the case of UNCITRAL. It is difficult to identify either orchestration or experimentation in the work of either IO. In this respect, their capacity is in line with more traditional, formal roles of IOs, perhaps emblematic of the UN more generally, and more consistent with conventional theoretical understandings of IOs as arenas for inter-state interaction and bargaining.

This is not to say that these two IOs are merely 'epiphenomenal,' as some realists might argue. Our analysis shows that IOs, even in the absence of real authority, can use their expertise and networks to acquire a degree of *epistemic authority* (Zürn 2018), and in turn to encourage member-states to adapt and change their policies in particular directions. In aggregate, such efforts can assist regime contestation and gradual changes. Interestingly, UNCTAD embraced a well-defined and partial stance towards the rules and norms of the international investment regime, which goes against Zürn's (2018, 52) assertion that non-partisanship and neutrality are essential for epistemic authority. That UNCTAD operates in a relative institutional vacuum in the realm of international investment policies may have helped this IO establishing its reputation and standing, however modest it may be. Concurrently, UNCITRAL has over the last few years, building on its considerable experience as a major 'marketplace of ideas' and facilitator of normative development with respect to private international law and commercial arbitration, served as a forum for discussions over ISDS reform and change. In some circles this has

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garnered attention, at times focusing on process, at times on substance (Roberts and St. John 2021) – but in our view very much in the traditional IO modality of inter-governmental engagement, combined with non-governmental participation, albeit without actual decision-making authority.

Regarding interaction with such other actors, here, too, we uncover little significant evidence of 'new' modes of governance, such as orchestration or GXG. Both UNCTAD and UNICTRAL are, first and foremost, traditional focal arenas for inter-state interaction and centralized functions such as negotiation, information gathering, research and analysis, and technical assistance. From this perspective, we nevertheless identify some elements of partnerships in the activities of these bodies. UNCTAD collaborates with a wide variety of non-state actors, from regional IOs, to local non-governmental organizations (NGOs), to academic institutions. For its part, UNCITRAL, as a forum for development of ideas in such a diffuse system, engages not only with states but with independent legal and academic experts in the context of discussions of ISDS reforms. Ostensibly, such partnerships compensate for these bodies' lack of delegated authority and help in boosting their epistemic one.

Taken as a whole, it appears that the role of IOs in global governance in the area of international investment has followed quite traditional 'old-school' modes, with a lack of real governance beyond preservation of their position as negotiation fora (in the case of UNCITRAL) and policy analysis and capacity-building (in the case of UNCTAD).Hence our reference in title to the "Fiddler on the Roof", as these 'traditions' of intergovernmental IO involvement in governance have not changed despite moving into the modern field of international investment law. The rest of the paper further establishes and substantiates this observation. The next section takes a close look at UNCTAD, first as an IO in general, then in the context of the international investment regime, and finally draws the implications for modes of global governance. The third section engages similarly with UNCITRAL. The final section concludes.

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2. UNCTAD in the International Investment Regime

UNCTAD as an IO

UNCTAD was formed in 1964. This body is not an IO, strictly speaking. It is not even a specialized agency of the United Nations (UN).[4] Rather, it is an organ of the UN General Assembly (UNGA) and depends on the UNGA for its budget and staff. Nevertheless, starting as a one-off conference in Geneva (not focused on international investment), it evolved into a permanent body with several formal organizational features. Its most important ones are the Secretariat and the intergovernmental conference.

The UNCTAD secretariat began operation with an annual budget of about five million US$ and 360 employees (Nye 1973, 337). As of 2021, its annual budget has increased to sixty-eight million US$[5] and its staff has increased to more than 450 (UNCTAD 2021). Its Secretary-General is appointed by the UN Secretary-General and confirmed by the UNGA and thus subordinated to these more authoritative bodies. Yet, while it is formally part of the UN Secretariat, the UNCTAD Secretary-General and the Secretariat have over time enjoyed informal independence, partly due its location in Geneva rather than New York (Nye 1973, 335).

With respect to the intergovernmental machinery, UNCTAD's membership is in essence that of the UNGA. Thus, it has 195 Members including all UN Member States as well as the Holy See and the State of Palestine as 'non-Member Observer States.' Member-states are divided into four distinct groups: Asia and Africa (List A), developed countries (List B), Latin America and the Caribbean (List C), and Eastern European and former Soviet countries (List D).[6] The highest-level decision-making body is the Ministerial Conference, which convenes every three or four years.[7] Decisions are made by a majority of

[4] UN specialized agencies are IOs working with the UN, in accordance with relationship agreements between each organization and the UN. A list of these IOs is available here (accessed December 16, 2021).

[5] In addition, UNCTAD has separate extra-budgetary sources – forty-two million US$ in 2021 – to support technical cooperation activities (Taylor and Smith 2007, 1; UNCTAD 2021).

[6] Seven countries do not belong to any of these groups, see UN TD/B/INF.250 (accessed December 16, 2021).

[7] The Trade and Development Board (TDB) manages UNCTAD's activities between Ministerial Conferences, and acts formally as UNCTAD's governing body, meeting several times a year. Originally, the TDB's membership

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two-thirds with each member holding one vote. Nevertheless, decisions are generally not voted on and agreements are reached by informal consultation and consensus (Taylor and Smith 2007, 37). Regardless, these conferences serve as a forum to debate policy issues and their outputs reflect member-states' positions on development-related matters. As such, they provide UNCTAD with guidelines and general direction.

From its inception, UNCTAD was not intended to produce rules or exert authority in its areas of competence. Instead, it was conceived as a forum of discussion and coordination among member-states, especially developing countries. Its main goal was to advance their development agenda and put pressure on economically-developed countries in multilateral negotiations in the UN and the then General Agreement on Tariff and Trade (GATT). As Nye (1973, 334) pointed out some five decades ago, UNCTAD was also known as "Under No Conditions Take Any Decision," – despite elaborate decision-making and conciliation procedures on paper - and has not changed much since then (Taylor and Smith 2007, 1-2). Indeed, with respect to international trade, developed countries insisted on preserving the role of the GATT as the exclusive forum for binding trade negotiations, thus keeping UNCTAD mostly a deliberative forum.[8]

UNCTAD as an Ideational Actor

At the same time, more than many other IOs, UNCTAD was a conceived as a vehicle to promote certain political norms and ideas. That is, it was not intended to be a neutral body but rather to reflect and, more importantly perhaps, articulate and communicate the interests and ideological predilections of developing countries, thereby attempting to counterbalance economic IOs dominated by developed

was 55 states, by election (Article 4-9, UNGA Resolution 1995 (XIX), 30 December, 1964). In 1976 the UNGA adopted resolution 2904 (XXVII) which opened membership of the TDB to all UNCTAD members. Membership of the TDB is currently 157 states (see UN TD/B/INF.250 above).

[8] Nye (1973, 336) points out that many developing countries hoped to shift trade negotiations to UNCTAD, but others were privately content with UNCTAD's role as a device of pressure and coordination in multilateral negotiations. Either way, it is clear that member-states were well aware of the implications of institutional overlap. As Nye (1973, 343) further explains: developed countries were "concerned about boundary issues and problems of duplication, while less-developed countries [were] inclined to welcome the pressure that duplication puts on other organizations." By one account, this has not changed in later decades and became even more evident after the establishment of the WTO (Taylor and Smith 2007, Chapter 6).

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countries (Walters, 1971). At the same time, given that developed countries were also UNCTAD members, they often opposed and frustrated many of the initiatives pushed by developing countries. In this sense, it was a 'partisan forum for political coalitions' (Abbott and Snidal 1998, 10). As such, this IO reflected North-South relations and tensions, and its normative agenda has evolved in congruence with the changing nature of these relations and shifting ideological beliefs in the global South. From this perspective, understanding UNCTAD's policy goals with respect to economic development is imperative to grasp its role within the international investment regime (Finger and Ruchat 2000, 16).

UNCTAD's early years were shaped by its influential Secretary-General, Raul Prebisch, an Argentine economist and a leading proponent of dependency theory. In brief, Prebisch believed that the global economic system benefited the developed core at the expense of the underdeveloped periphery. To rectify this imbalance, he proposed a series of programs that will help closing this development gap (Nye 1973, 354; Taylor and Smith 2007, 11-12). Here, Prebisch's intellectual prowess was instrumental in charting UNCTAD's path ahead. As Nye observed (1973, 349) "Prebisch achieved his effect by catalyzing an inchoate set of ideas prevalent among less-developed countries into a clear doctrine", and furthermore his "style was that of a prophet, and his chosen instruments were words."

In the second half of the 1960s, immediately after its establishment, UNCTAD members attempted to advance "intergovernmental consensus building regarding the state of the world economy and development policies" based on "an ideological mix of Keynesianism and dependency theory" (Taylor and Smith 2007, 13). With the oil crisis of 1973-74 and the increasing bargaining power of developing countries (at least oil-exporting ones), UNCTAD joined the push for a New International Economic Order (NIEO), an ambitious program to redistribute economic resources from developed to developing countries. The adoption of a declaration on NIEO by the UNGA in 1974[9] emboldened more radical voices in developing countries and in UNCTAD. Thus, during the 1970s – perhaps this IO's 'golden age' – it identified more clearly with dependency theories (Taylor and Smith 2007, 15).

[9] A/RES/3201(S-VI), Declaration on the Establishment of a New International Economic Order.

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The pendulum swung back, and much further afield, in the 1980s in the wake of financial crises across the developing world and the economic success of export-oriented Asian countries. By the end of that decade, most developing countries abandoned dependency theories and embraced (with more or less enthusiasm, and for different reasons) neoliberal ideas. With respect to FDI, MNCs were no longer perceived as a menace to economic development and national sovereignty that require close monitoring and regulation. Rather, FDI become an important source of capital and was deemed crucial for growth and prosperity (Fredriksson and Zimny 2004). By some accounts, UNCTAD reflected this ideational shift and accepted "the normative principles of neoliberalism, while advocating ameliorating policies to cope with this "actuality"" (Taylor and Smith 2007, 19, 81-82). In the mid-1990s, under pressure from developed countries as well as newly held convictions of many developing countries, UNCTAD replaced 'ideology' with 'pragmatism,' thereby encouraging economic reforms and liberalization (Finger and Ruchat 200; Taylor and Smith 2007).

This shift is certainly apparent with respect to UNCTAD's engagement with the international investment regime. Paragraph 113 of the Proceedings of the 8th UNCTAD Ministerial Conference (UN 1993) states that "Both industrialized and developing countries should consider ways and means to encourage mutually beneficial flows of foreign direct investment to the developing world. For those interested, such measures could include membership in, and wide utilization of, programmes under the Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC) the conclusion of bilateral investment and double taxation treaties, and the provision of direct incentives."[10] Along similar lines, negotiations of bilateral trade and investment agreements took place under the auspices of the 1996 UNCTAD ministerial conference, held in Midrand, South Africa (Taylor and Smith 2007, 80).

UNCTAD's direction changed once more in the 2000s with many developing countries (among others) believing that neo-liberal globalization has gone too far. This perception resulted in calls for a more 'balanced' approach to economic development, one that gives developing countries greater control

[10] See also Article 168 and Article 37 of the 1996 Midrand Declaration.

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over their development policies. Thus, for the first time, the Sao Paulo Consensus, which was one of the (non-binding) outcomes of the 2004 UNCTAD ministerial conference, underscored the need for member-states' 'policy space' (Taylor and Smith 2007, 84). With respect to IIAs, Article 113 of the Declaration following the 2008 Ministerial Conference in Accra (UNCTAD 2008) stated that "there is a need to balance the interests of home countries, host countries and foreign investors. The settlement of disputes between investors and States deserves special attention, and national capacities to negotiate development-friendly investment agreements need to be enhanced."

Arguably, this position was further refined and developed in the 2010s and remains the guiding principle of the organization into the 2020s.[11] This is certainly the case with respect to international investment policies, in which UNCTAD advocates preserving and reclaiming state regulatory space at the expense of investor protection. More on this below.

UNCTAD and International Investment Policies

As its name suggests, UNCTAD focused on trade and development in the first three decades of its existence, with only limited interest in FDI, IIAs and MNCs. While Ministerial Conferences adopted resolutions on the role of MNCs and FDI, initially approvingly and then much more critically, the UNCTAD Secretariat did not devote much attention to these issues. Instead, the UN established a separate body – the United Nations Centre on Transnational Corporations (UNCTC) – in 1975. The UNCTC was associated with the agenda of the NIEO and was very critical of MNCs (Fredriksson 2003, 5-6). Only in the 1990s did MNCs, FDI, and IIAs become a core competency of UNCTAD, with the UNCTC shut down and its responsibilities transferred to UNCTAD (Fredriksson 2003; Fredriksson and Zimny 2004). Since then, UNCTAD serves as the focal point for such issues within the UN system.

Like in other issue areas, UNCTAD was assigned the responsibility for research, policy analysis, technical assistance and consensus building in the areas of MNCs, FDI, and investment policy, with an increased attention to IIAs (Fredriksson 2003, 7). UNCTAD's secretariat started working on IIAs in

[11] See, e.g., Article 127 (o) of the Bridgetown Covenant (UN 2021).

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1996 within the Division of Investment, Technology, and Enterprise Development (DITE), then directed by Karl Sauvant.[12] Its technical assistance activity is supported by an extra-budgetary trust fund that operates since 2000. Contributors to the trust fund include various states as well as private foundations (UNCTAD 2002, 1-3). We now take a closer look at these functions, with an emphasis on IIAs, which are the main building blocks of the international investment regime.

- **Collection and dissemination of information** – given the decentralized nature of the international investment regime, information on IIAs and ISDS has been scattered across national ministries, regional IOs, and various other public and private bodies. UNCTAD took upon itself to collect and publicize this information. Starting in 1996, it published several compendia of investment-related international agreements concluded since the 1940s (UNCTAD 2002). In 2004 it launched an online database of existing IIAs (UNCTAD 2013, 22), which has increased in coverage and sophistication over the years.

Currently, UNCTAD's online database includes a wealth of data on most BITs and other treaties with investment provisions (TIPs) signed to date and their status (e.g. whether they are in force, renegotiated, or terminated), as well as template IIAs, also known as 'Model BITs.'[13] This 'IIA Navigator' also makes available the texts of many of these agreements and a detailed legal analysis of more than 2,500 IIAs.[14] The latter, labelled 'UNCTAD's Mapping Guide,' was made publicly available in 2016, and was developed with an eye on the organization's membership's agenda for IIA reform and sustainable development (UNCTAD 2017a, 25-26).[15] A parallel 'ISDS Navigator' provides a great deal of information on known ISDS cases, more than 1,100 at the end of 2021.[16] Taken together, these efforts

[12] This unit is currently entitled the Division of Investment and Enterprise (DIAE) and its Director is James Zhan. For its responsibilities and activities, see https://unctad.org/about/organization/division-investment-and-enterprise/products-and-services. Accessed December 25, 2021.

[13] See: https://investmentpolicy.unctad.org/international-investment-agreements. Accessed December 26, 2021. On Model BITs, see Haftel et al. (2021).

[14] According to UNCTAD (2020, 13-14), the database consists of the texts of 87% of signed BITs and 96% of signed TIPs.

[15] See: https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping. Accessed December 26, 2021.

[16] See: https://investmentpolicy.unctad.org/investment-dispute-settlement. Accessed December 26, 2021.

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made UNCTAD a unique 'one-stop shop' for policy makers, practitioners, and researchers interested in the international investment regime.[17]

- **Research and policy analysis** – a very important regular publication in the area of investment is the annual World Investment Report (WIR), published since 1991 (initially under the auspices of the UNCTC). The 1996 WIR paid special attention to IIAs and their relations to FDI, trade, and business practices. The 2003 WIR revisited this issue in greater depth and a more critical stance. As Fredriksson notes (2003, 30), it "stressed the importance of recognizing the need of developing countries to secure sufficient policy space for national policy making in order to promote development benefits from FDI. It also underlined the need to pay due attention to the balance of host and home country interests, as well as to the potential treatment of good corporate citizenship in the context of international investment agreements (IIAs) – all with a view towards enhancing the development dimension of such agreements."

Alongside the WIR, starting in the late 1990s UNCTAD published numerous papers and reports on IIAs. They, too, underscored the need to balance investors' rights and national developmental goals. In one early example, in 2000 it published a report entitled "International Investment Agreements: Flexibility for Development." This publication calls attention to the need of developing countries to preserve flexibility in their IIAs, such that they can be "adapted to the particular conditions prevailing in developing countries and to the realities of the economic asymmetries between these countries and developed countries" (UNCTAD 2000, 1). Nevertheless, UNCTAD still viewed IIAs as a useful instrument to attract much needed foreign capital. For example, a 2005 paper that examines the ratification of IIAs reminds that "Non-entry into force may entail a lack of certainty and predictability, thereby affecting the confidence of potential investors" (UNCTAD 2005, 6).[18]

In the late 2000s and the early 2010s UNCTAD reports and publications reflected a more critical position vis-à-vis the international investment regime. They emphasized, for instance, the risks of and

[17] For example, in separate research we drew on the UNCTAD Mapping Guide to develop a measure of state regulatory space and then used it to examine several aspects of the international investment regime. See, e.g., Broude et al. (2018), Thompson et al. (2019), Haftel et al. (2021).

[18] See Haftel (2010) and Haftel and Thompson on the sources and implications of IIA ratification.

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the costs associated with ISDS and the ability of states to renegotiate or terminate their IIAs (UNCTAD 2010a, 2013). UNCTAD also used its reports to provide detailed roadmaps to reform IIAs and the international investment regime, more broadly (UNCTAD 2014, 2017b). This is apparent in the Investment Policy Framework for Sustainable Development (IPFSD), which was highlighted in the WIR 2012 (UNCTAD 2012) and the WIR 2015, which its subtitle was 'Reforming International Investment Governance' (UNCTAD 2015). This effort is culminated in a series of publications that propose a 'reform package for the international investment regime' (2017b, 2018). One of these publications, dubbed a 'reform accelerator,' aims to speed up the reforms of old generation IIAs "in order to reduce the risk of ISDS cases against State measures in pursuit of legitimate public policy objectives" (UNCTAD 2020a, 2).

Taken as a whole, the voluminous body of policy analysis strives to inform decision makers in member-states, especially developing countries, about key trends with respect to international investment policies and provides them with a menu for choice. As important, if not more, through these publications UNCTAD strives to position itself as a leading international authority in this issue area. This allows it to set a policy agenda it deems advisable and convince national governments to follow its lead.

- **Training and technical assistance** – with the growing interest in FDI and the lack of a multilateral agreement on its regulation, in the 1990s many developing countries turned their attention to IIAs. In contrast to trade agreements, however, they had little understanding of these agreements and scant experience in their negotiation (Fredriksson and Zimny 2004, 132; Poulsen 2015). UNCTAD was probably the first international body to identify this void and begin to fill it. As Fredriksson and Zimny (2004, 132) argue, the WIR 1996 "initiated a work programme on IIAs aimed at helping developing countries negotiators familiarize themselves in depth with complex investment policy concepts and their development implications."

This program has intensified in the first half of the 2000s with a large number of training courses, national seminars, and 'BIT facilitation events' intended to build governments' capacity in the

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area of international investment policy. In close to one-hundred events around the world in 2000-2005, UNCTAD educated national and regional officials on the content of IIAs and their implications. According to an assessment of this activity, it reached more than 2,000 individuals from about 160 countries, most of them developing ones. This facilitated the dissemination of UNCTAD's policy analysis, described above. The facilitation of BIT negotiation took place in short conferences, commonly in Geneva, during which UNCTAD personnel offered developing countries technical assistance as they hammered out the details of the agreement. Such sessions produced no less than 160 BITs (Karsegard et al. 2005, 7). As already mentioned, UNCTAD was supportive of IIAs during these years, but at least reflected attempts to improve their balance and sophistication.

UNCTAD continued its capacity building efforts in the 2010s, with a focus courses and seminars designed to train IIA negotiators from developing countries. In line with the organization's perspective during these years, such meetings emphasized the need to balance investor protection and national development goals. These meetings also provided technical assistance with respect to the management of investment disputes and alerted government officials about the reality and implications of ISDS, more broadly. Finally, UNCTAD officials provided ad hoc assistance to states and regional IOs that negotiated IIAs or developed Model BITs as well as to those that reviewed their IIA programs or engaged in the renegotiation or termination of IIAs (e.g., UNCTAD 2017a, 26-27). Apparently, UNCTAD stopped organizing BIT facilitation events in the late 2000s, reflecting the fading of its early enthusiasm about IIAs.[19]

- **Consensus building –** since taking on matters related to FDI, UNCTAD served as a forum for discussion of government officials and experts on these issues. In so doing, it encouraged coordination among member-states on investment rules and practices. In the 2000s, for example, several meetings were held in Geneva with the intention to reach agreement on desirable elements of IIAs and their content (UNCTAD 2002, 21-22). UNCTAD also provided a platform for an exchange of ideas and

[19] As UNCTAD (2018, 25) notes, "It is in this context that UNCTAD's technical assistance and advisory services are tailored to assist…[that is, IIA termination] and help member States maximize IIAs' contribution to sustainable development.

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information among a network of IIA experts, several hundred in 2006 (UNCTAD 2006, 8). The role of this network was further institutionalized and enhanced in 2010, with the establishment of an annual 'IIA Conference,' in conjunction with the World Investment Forum (UNCTAD 2010b, 41). The 2019 conference, for example, "brought together over 80 speakers from governments, inter-governmental organizations, business, civil society, and academia, as well as a large audience" and "suggested that new methods and mechanisms – to be identified through policy research and discussions – may be needed to overcome existing barriers to reform [of the international investment regime]" (UNCTAD 2020a, 15).

UNCTAD's Relationships with Non-State Actors

Given its purported position as a global focal point in the area of foreign investment policies, UNCTAD interacts with various non-state actors who are engaged with this issue. These include other IOs, non-governmental organizations (NGOs), and individuals, described in turn. Taken as a whole, it appears that UNCTAD views such partnerships as essential to the fulfilment of its mission.

- **Global IOs –** UNCTAD cooperated with several multilateral IOs over the years, first and foremost the WTO. While UNCTAD was sidelined by the WTO in relations to trade policy, these two IOs were on a more equal footing in the investment area. Here, the WTO relied on UNCTAD's close connections with developing countries and expertise (Fredriksson and Zimny 2004, 133). Joint efforts with respect to policy analysis, technical assistance, and capacity building are especially visible in the early 2000s, in the wake of the 2001 WTO Ministerial Meeting in Doha, and its emphasis on economic development. During these years, UNCTAD developed a technical assistance program "in close collaboration with the WTO." The two IOs also published joint studies and organized several symposia in different developing regions as well as a joint training workshop in Geneva (UNCTAD 2002, 2-5, 7, 18).

Collaboration with the WTO with respect to investment regulation appears to have waned since the late 2000s. Presumably, the WTO accepted the position of UNCTAD as a leading IO with respect to IIAs. Thus, in 2010 Pascal Lamy, the then Director General of the WTO stated that "With respect to

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multilateral investment rule making, there are many doors open to do that, ranging from some form of soft law and code of conduct to more binding instruments like international treaties. This whole spectrum of possibilities is an issue UNCTAD should – and could – work on" (UNCTAD 2010b, 20-21). Indeed, while the DIAE still engages with the WTO on such issues as trade-related investment measures and intellectual property, there is no indication that they interact on issues related to international investment policies. This is surprising, perhaps, given the growing significance of preferential trade agreements with an investment chapter.

Beyond the WTO, the OECD's Directorate for Financial and Enterprise Affairs has an overlapping mandate and competencies with UNCTAD's DIAE. That is, it conducts and publishes research on IIAs and organizes an annual conference on related issues. Similar to UNCTAD, this unit is concerned with the perceived imbalance between investors' rights and state regulatory space and whether and how to reform the international investment regime (Phol 2018; Gaukrodger 2017).[20] Thus, its 2019 meeting was entitled a 'Conference on investment treaties and level playing fields' and the 2021 meeting was labeled a 'Conference on the future of investment treaties.'[21] Consequently, since the 2010s these two IOs collaborated in a couple of ways. Most prominently, they jointly produce annual reports monitoring investment measures of G-20 members, for this group's meetings. In addition, UNCTAD participates in the annual OECD conferences devoted to IIA (UNCTAD 2020a, 15). It should be noted that there is no evidence of collaboration with IOs that deal with ISDS more directly, i.e. UNCITRAL and ICSID.

- **Regional IOs –** UNCTAD collaborates with a large number of regional IOs, mostly in connection of training and technical assistance.[22] From its early years, the DIAE partnered with such

[20] It seems, however, that the OECD is less committed to a particular position in this debate and is therefore less inclined to provide policy prescriptions and advice.

[21] https://www.oecd.org/daf/inv/investment-policy/conference-investment-treaties.htm. Accessed December 29, 2021.

[22] In addition, as already mentioned, UNCTAD assisted several regional IOs to develop their own investment policies and agreements. In one recent example, it worked with the African Union and other stakeholders on the drafting of the African Continental Free Trade Agreement Investment Protocol (UNCTAD 2020a, 14).

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organizations in its efforts to reach and train officials in developing countries. In the early 2000s, it ran symposia in collaboration with the secretariats of such IOs as the Andean Community, the Caribbean Community (CARICOM), the South African Development Community (SADC), and the Association of Southeast Asian Nations (ASEAN) (UNCTAD 2006, 8). This collaboration has continued in the 2010s and into the 2020s. In one example, UNCTAD co-organizes an annual workshop with the Islamic Development Bank and in another it joined forces with CARICOM to organize a regional training session to officials from the latter's member-states.

- **Non-governmental organizations** – similar to regional IOs, NGOs engage with UNCTAD on capacity-building and technical assistance (Taylor and Smith 2007, 42). One specific area of collaboration is the training of other NGOs with respect to civil society involvement in international investment policy. In one early example, in 2001 UNCTAD co-organized a pilot seminar with the Dutch Foundation for Research on Multinationals (SOMO) and the Labour Resource and Research Institute (LaRRI) for NGOs from the Southern African region. Participants included twenty representatives from twenty-one NGOs, community-based organizations, and trade unions (UNCTAD 2002, 10). UNCTAD partnered with the Consumer Unity and Trust Society (CUTS), an Indian NGO, to run annual workshops for other NGOs in India. This type of collaboration has continued and further expanded in the 2010s. During these years, UNCTAD partnered with such NGOs as the International Institute for Sustainable Development (IISD) to organize workshops on IIAs, ISDS, and their implications.

UNCTAD also collaborates closely with academic institutions, mostly in the context of research and policy analysis, but also in organizing training sessions.[23] For example, the mapping of IIA content was reportedly accomplished in collaboration with thirty universities in twenty-three countries (UNCTAD 2018, 25). More broadly, UNCTAD consults with a large number of academics from around the world as it conducts research for its various reports, apparent from the list of individuals their help is acknowledged in these publications (Frederiksson 2004, 35). Beyond that, UNCTAD also co-

[23] For example, in the early 2000s training sessions were organized in collaboration with Senghor University (Egypt), the National University of Singapore, Jawaharlal Nehru University (India), the University of Pretoria (South Africa), and more (UNCTAD 2002, 24-25).

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organizes academic conferences with universities and academic associations in order to promote "knowledge sharing of academic experts from different fields, pooling resources and creating synergies for the conduct of further IIA-related research" (UNCTAD 2018, 88). A session of the 2014 World Investment Forum Multi-Disciplinary Academic Conference, convened jointly with the Graduate Institute of International and Development Studies (IHEID), the Academy of International Business (AIB), the Society of International Economic Law (SIEL), and the European International Business Academy (EIBA) is one such example.

UNCTAD and Modes of Governance

The description of UNCTAD's structure and activities presented above offers several lessons for its governance role within the international investment regime. In terms of various modes of governance, this IO is certainly on the softer end of governance means. Member-states have delegated no formal authority to UNCTAD in the area of international investment policies (as well as other issue-areas).[24] As discussed earlier, bilateral and regional treaties are the main instruments of rule-making and the provision of frameworks for binding dispute settlement. Ad hoc arbitration bodies and domestic courts are the primary tools to adjudicate investment disputes and to enforce their rulings.

Given its limited formal authority, UNCTAD had to substitute "ideational and material inducements for legal obligation and coercive threat" (Abbott et al. 2015, 9). As we have seen, UNCTAD adopted a relatively clear ideational stance, even if its position has changed over time. It then acquired some informal, epistemic authority within the international investment regime (Zürn 2018). It has achieved this status by combining, sometimes effectively, several 'soft' governance strategies. These strategies, outlined next, fit more comfortably with Abbott and Snidal's (1998, 9) attribute of

[24] As the then UNCTAD's secretary-general, Rubens Ricupero, lamented in 2000, "the organization…does not set rules on trade and investment, has no enforcement authority and does not resolve disputes involving the national interests of its members" (cited in Taylor and Smith 2007, 83). UNCTAD adopted this approach early on and it was intentional, at least in part. As Nye (1973, 144) explains: "Prebisch believed that in the early years the best way to use the organization to promote changes in the norms governing international economic relations was by having intellectually independent secretariat producing studies closely geared to UNCTAD international meetings. Consequently, UNCTAD's budget has been devoted primarily to meetings and studies."

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'centralization,' which refers to "a concrete and stable organizational structure and an administrative apparatus managing collective activities" rather than 'independence' (see also Haftel and Thompson 2006). Particularly relevant here are 'support for state interaction' and 'coordination and norm elaboration' (Abbott and Snidal 2006, 10-16).

More concretely, UNCTAD, first, invested a great deal of effort in conducting and publishing policy analyses on relevant issues. Second, it used these analyses to form ideas about desirable investment rules and needed reforms and then to campaign for their adoption in intergovernmental forums. Third, it disseminated its advice, backed by the information it collected and analyzed, to relevant officials and stakeholders through technical assistance and capacity building measures. As Fredriksson (2003, 33) points out "the interplay of research and policy analysis with technical assistance work and consensus-building, including close interaction with Governments via the intergovernmental machinery, constitutes one of UNCTAD's special strengths."

Arguably, UNCTAD turned its lack of formal authority into an advantage. Because it did not engage in rule-making that requires consensus among its very heterogeneous member-states (and since 1976, as noted, almost universal membership even in the TDB), it enjoyed greater freedom to adopt and endorse controversial positions or propose innovative ideas that some stakeholders have found difficult to swallow,[25] although actual effects are difficult to gauge. In particular, UNCTAD's emphasis on the need to balance investor protection with state regulatory space, and especially the importance of sustainable development, however unclearly defined, had very limited support in the early 2000s. This idea gradually gained traction in the late 2000s and the 2010s, with some credit to UNCTAD's persistent analysis and advocacy work.[26] In doing so, UNCTAD contested predominant neoliberal ideas and

[25] In an early argument along these lines, Walters (1971, 821) argues that "The clearest manifestation of UNCTAD's role as an interest articulator on behalf of the LDCs is the abandonment of the traditional concept of a neutral secretariat for an international organization. The secretariat of UNCTAD services caucus meetings of the LDCs but not of Western or Eastern states. One Western delegate to UNCTAD observed that "this is not a secretariat- it's a sectariat!"

[26] To be sure, UNCTAD was not the sole proponent of a more balanced approach to international investment rules. States hit by costly investment claims stand out among the vocal critics of the international investment regime and as the first to change their IIA policies (Poulsen and Aisbett 2013; Haftel and Thompson 2018; Thompson et al. 2018).

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provided a forum for discussion of normative shifts within the international investment regime.

Looking at this reality from the perspective of regime complexity, it is worth reiterating that IIAs and ISDS were not part of UNCTAD's original mandate. It took on FDI only in the 1990s and quickly became a focal point for all related issues within the UN system. With the failure of the MAI, it became clear that IIAs are the main instruments through which member-states design international investment rules and UNCTAD began to offer some systematic analyses of development in this area. As we have seen, UNCTAD has gradually increased the resources devoted to this matter as well as the activities and output. Significantly, it was able to leave its mark on the regime's norms and rules because it encountered little competition from other IOs.[27] Unlike other policy areas, in which UNCTAD's role was secondary – that is, in comparison with the WTO with respect to trade and the World Bank with respect to development finance – it was helpful that UNCTAD worked in a relatively institutional-free environment with respect to investment. Thus, UNCTAD's scope expansion into the area of investment policies strengthened its broader claim for relevance and legitimacy in global economic governance.[28]

Abbott et al. (2015) underscore the distinction between direct and indirect modes of IO governance. They are especially interested in the combination of soft and indirect governance labeled 'orchestration,' and emphasize the presence of intermediaries in the governing process (Abbott et al. 2015, 12). There is little evidence to suggest that UNCTAD is engaged in orchestration in the sense that it delegates responsibility to other non-state actors. UNCTAD commonly works directly with national governments in such functions as technical assistance, capacity building, and consensus building.

At the same time, UNCTAD is not shy of working with other non-state actors in order to advance its agenda and disseminate ideas and information. As detailed above, it partnered with global

[27] ICSID may be a partial exception, but it's main focus is on ISDS rather than IIAs.

[28] Similarly, with the growing focality of the WTO with respect to intellectual property rights, the World Intellectual Property Organization (WIPO) has expanded to other issue-areas, such as development (Gehring and Faude 2014; Haftel and Lenz 2021).[29] We should add that UNCTAD's collaboration with non-state actors is on the less formal end of PPPs and does not constitute a transnational public-private governance initiative (TGI), defined as "Multistakeholder partnerships that *formally* involve states along with IGOs, nongovernmental organizations (NGOs), and business actors" (Reinsberg and Westerwinter 2021, 61; emphasis ours).

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and regional IOs as well as with civil society groups and academic institutions in various activities. This approach fits comfortably with the notion of public-private partnerships (PPPs), mentioned in the introduction. Indeed, UNCTAD appears to be at the center of PPPs involved in international investment policies, and perhaps their main entrepreneur and 'assembler.' This reality is in line with Andonova's (2017, 3) observation that "it is IOs that often lead or provide the forum and normative glue for [PPPs], crafting a political space for the interface between public purpose and private practice in international relations."

To further elaborate, UNCTAD's partnerships meet most, if not all, aspects of PPPs (Andonova 2017, 8-10). First, it is a decentralized network with multiple sources of authority and it pools various competencies of different actors. This is apparent from UNCTAD's collaboration with diverse actors ranging from global and regional IOs to local NGOs and academic experts. Second, this network is not highly legalized and flexible.[29] Some of UNCTAD's partnerships are short-lived but others are more long-lasting, depending on particular goals or circumstances. Third, and importantly, actors self-select into this network. That is, for the most part, UNCTAD partners with like-minded states and non-state actors. In doing so, it is able to retain, amplify and disseminate its normative position and the policy prescriptions emanating from it.

From this perspective, one might argue that UNCTAD's collaboration with like-minded public and private actors is one manner by which it compensates on its lack of formal authority. That is, working with other actors that see eye to eye on investment rules and practices, UNCTAD boosts its epistemic authority and centrality in this area. Interestingly, this seems to go against one of Andonova's (2017, 42) hypotheses that "IOs are more likely to engage in the development of global partnerships when they have greater agency autonomy. Such autonomy to enable coalitions for change is most likely when governments are in broad agreement on objectives and norms of cooperation." The UNCTAD

[29] We should add that UNCTAD's collaboration with non-state actors is on the less formal end of PPPs and does not constitute a transnational public-private governance initiative (TGI), defined as "Multistakeholder partnerships that *formally* involve states along with IGOs, nongovernmental organizations (NGOs), and business actors" (Reinsberg and Westerwinter 2021, 61; emphasis ours).

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case study is more consistent with her argument that "as IOs open the doors to greater interaction with advocacy or business entities, they can inadvertently or deliberately augment their autonomy by bringing in external resources and reducing financial dependence on the principals or by increasing their informational advantage. Such collaboration can shift the focal point of policy trajectories toward a more activist direction that is favored by the agency or toward the preferences of some principals compared to others." In short, PPPs can enhance the autonomy even of IOs that are short on this quality.

Before concluding in the interim with respect to UNCTAD, we ponder the possibility that UNCTAD's is engaged in GXG (De Búrca et al. 2014). GXG requires the fulfilment of five criteria. First, *an inclusive, participatory, and nonhierarchical process is set up through which states and other participating units reflect and identify a broadly shared perception of a common problem*. The first part of this criterion is likely present, as described above, but the second part is more questionable. At least since the middle 2000s international investment rules are contested and one is hard pressed to identify a broadly shared understanding of a common problem. Second, *a framework understanding is articulated with open-ended goals.* Here, again, there is no consensus on the problem and how to solve it, so goals are difficult to articulate.

Third, *implementation of these broadly framed goals is left to "lower-level" or contextually situated actors who have knowledge of local conditions and considerable discretion to adapt the framework norms to these different contexts.* Fourth, *continuous feedback is provided from local contexts, allowing for reporting and monitoring across a range of contexts, with outcomes subject to nonhierarchical peer review*. And fifth, *goals and practices are periodically and routinely reevaluated and, where appropriate, revised in light of the results of the peer review and the shared purposes*. Taken together, these three conditions underscore two aspects that make it difficult to apply GXG to the UNCTAD case study. First, the dynamics of GXG are mostly bottom-up rather than top-down (Keohane and Victor 2015). While UNCTAD may have borrowed some ideas from national governments, NGOs, or academic experts, it seems that much of its efforts and activities are devoted to educating and assisting other actors.

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Perhaps more importantly, GXG assumes that the main cooperation problem is uncertainty about the cost, benefits, and outcome of specific policies. That is why it relies on the knowledge and experience of local actors and requires routine reevaluation. In the international investment regime, on the other hand, the main problem is the distribution of cost and benefits rather than uncertainty. More specifically, it is fairly well understood which sets of rules benefit foreign investors (and perhaps home countries) and which favor the flexibility and policy goals of host countries. The main challenge is to balance these two, commonly (but not always) opposite, objectives. While some experimentation with respect to specific reforms may take place (e.g. the EU's multilateral investment court), it is difficult to argue that this approach is central to UNCTAD's role within the regime and that GXG is the most useful framework to analyze this IO.

3. UNCITRAL in the International investment regime

UNCITRAL as an IO

We turn now to the second IO we have chosen to focus on in this study of the varying governance roles of IOs in the investment regime, namely the UN Commission on International Trade Law (UNCITRAL). Like UNCTAD, UNCITRAL is neither an IO in its own right, nor a UN specialized agency, but rather a subsidiary organ of the UNGA, dependent as well on the latter for budget and staffing. Understanding the budget and personnel structure of UNCITRAL itself is not a clear-cut task. The main reason for this is that while UNCITRAL, as an inter-governmental Commission, reports to, and is answerable to the UNGA through the latter's Sixth (Legal) Committee, it is the International Trade Law Division (ITLD) of the UN Office of Legal Affairs (OLA) that functions as UNCITRAL's Secretariat, with a dedicated staff, located since 1979 in Vienna "while formally remaining a part" of OLA in New York (UNCITRAL 2013:9). Indeed, merely to illustrate this institutional connection, the Secretary of UNCITRAL, at this time Anna Joubin-Bret – an experienced commercial and ISDS counsel and arbitrator herself[30] - serves concurrently as Director of ITLD,[31] as have her predecessors.

[30] https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf (Last visited: January 2, 2022).

[31] See https://legal.un.org/ola/div_itld.aspx (last visited: December 26, 2021).

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As derived from OLA's budget with respect to the Programme of Work relevant to UNCITRAL ("Progressive harmonization, modernization and unification of the law of international trade"), it appears that over the last several years and indeed last two decades, the annual budget of UNCITRAL has varied approximately between 3-4 Million USD, including extra-UN budgetary sources, with a staff of about 20-25 persons (post and non-post)[32] – strikingly low numbers, indeed paling in comparison with UNCTAD, but not incommensurate with the primarily supporting and facilitating role of the Secretariat, at least on its face.[33] This relatively low budget has been a perennial issue, regardless of UNCITRAL's engagement with ISDS. Thus, in 2001, the UNCITRAL Secretary at the time, Gerold Hermann, stated publicly, in the context of contract law, that "[T]he Secretariat's lack of resources is a particularly disappointing feature" (Hermann, 2001). In 2011, much attention was devoted to bolstering the budget in order to ensure the practice of holding the Council's annual meetings on an alternating basis in New York and a European city (Geneva, 1969-1977 – Vienna, since 1978, given the UNCITRAL Secretariat's relocation then to the Austrian capital).[34] This has been an ongoing issue as participants in UNCITRAL and subsidiary Working Group meetings are expected to self-fund, and despite the establishment in 1993, by the UNGA, of a Trust Fund to assist the participation of delegates from developing countries.[35]

Notably, this budgetary and employment infrastructure is only around 13% of OLA's overall budget; and it covers the numerous areas that UNCITRAL attends to, of which ISDS is only one. It can be roughly estimated that as an IO, UNCITRAL's institutional international investment law dedicated

[32] UNGA A/74/6, *Proposed programme budget* for 2020, Part III, International justice and law, Section 8, Legal affairs, pp. 37 and 88 (24 April, 2019); and UNGA A/62/6 *Proposed programme budget for the biennium 2008-2009*, Part III International justice and law, Section 8, Legal affairs, pp. 29 and 33 (30 April, 2007).

[33] Block-Lieb and Halliday (2017) refer to UNCITRAL as "a tiny UN entity", which nevertheless has succeeded in its lawmaking function.

[34] Loken, 2013. Barring current Covid-19 conditions, this practice has been maintained over time, also in the Commission's subsidiary Working Groups. Reasons put forward for this have been "the proportionate distribution of travel costs among delegations; the influence and presence of UNCITRAL globally; and the needs of developing countries, many of which [do] not have representation in Vienna"; UNGA Official Records, A/66/17, Report of UNCITRAL, 44th Session (Supp. No. 17) 27 June-8 July, p. 71.

[35] UNGA, A/CN.9/WG.III/WP.158, UNCITRAL Working Group III (ISDS Reform), Possible reform of investor-State dispute settlement (ISDS) Information on options for implementing a work plan - Note by the Secretariat, 25 January, 2019, p. 35.

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budget is less than 1 Million USD per annum. To be sure, such budget assessments are subject to inter- and intra-organizational and other accounting considerations, but this overall budget reflects upon the actual role and influence of UNCITRAL as a platform for inter-state and inter-actor action, rather than a more independent IO. Nevertheless, as we shall see, the UNCITRAL Secretariat has played a significant role in facilitation, consolidation and progress in and of negotiations and legal instruments in a variety of international commercial law fields, including in the area of ISDS reform.[36] Indeed, by one account, UNCITRAL, through its Working Group III (WGIII) has in the last years acted as a "centralised" or "common" hub for the "radically decentralized" investment law regime (Roberts and St. John, 2019).

Established in 1966 by the UNGA *ab initio* as a standing Commission with the authority to contribute to international law-making, UNCITRAL's original mandate was "to further the progressive harmonization and unification of the law of international trade". [37] We will elaborate on the development of the interpretation and application of this remit in the next section. Suffice it to say that through UNCITRAL's state Membership, this mandate has arguably developed to include a much broader range of issues, and for our present purposes, most importantly – ISDS. Indeed, prominent commentators have over time been proved wrong - or prescient - in the contemporary assessment that one "cannot help being struck by the modesty of the Commission's goals when viewed against the totality of problems that beset international trade" (Farnsworth, 1972).

Unlike UNCTAD, UNCITRAL - as implied by its status as a UNGA Commission - was from its initiation envisioned as a Member-driven, political body partaking in international rule-formation, albeit without *a priori* binding authority. Article 8 of UNCITRAL's Founding Resolution sets out the modes of fulfilling its mandate. These include reference to coordination of the work of organizations working in this field, including explicit reference to the establishment of a "close collaboration" with UNCTAD (formed, as noted above, two years earlier, in 1964); promotion of wider participation in

[36] See below on the role of the Secretariat with respect to WGIII.

[37] UNGA Resolution 2205 (XXI) of 17 December 1966 (the "Founding Resolution").

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existing conventions and model laws; promotion of ways and means to ensure uniform application of these; collection and dissemination; and liaising with other UN organizations concerned with international trade. The entry of a new IO into the arena of commercial lawmaking could not, at the time, be taken for granted, given what has been identify as a crowded "lawmaking ecology" in the field.[38]

Importantly, among these methods of action is that of "preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field".[39] Along the spectrum of modalities, this would seem to be the main methodology in which UNCITRAL, or rather its Members, have been the most active and influential.[40] In other words, UNCITRAL was envisioned as a space (or "site" (Cohen 2011) for intergovernmental engagement and negotiation over internationally recognized norms, yet without *a priori* binding authority. Much like other (if not most) classical UN-styled IOs, the political process of negotiation conducted in UNCITRAL results in legal texts that states may then choose to formally ratify. Thus, for example, one of UNCITRAL's success stories has been the adoption in 1980 of the UN Convention on Contracts for the International Sale of Goods (CISG), which entered into force in 1988.[41] The CISG aims to provide a uniform set of rules governing international commercial contracts for the sale of goods, that apply between parties whose place of business is in the contracting states. Yet despite its evident success, it has been ratified by less than 100 states, indeed reflecting the lion's share of international trade volumes, but with notable exceptions, such as the United Kingdom (Moss 2005).

The central forum of UNCITRAL is the Commission itself, whose Members are exclusively states, Members of the UN. Commission Members are elected on a rotating basis by the UNGA for six-

[38] Block-Lieb and Halliday (2017 Ch. 2) use this term and provide a very insightful analysis of the entry of UNCITRAL to the commercial law scene.

[39] Ibid., Article 8(c).

[40] Article 8 of the Founding Resolution also include the catch-all sub-section (h), enabling UNCITRAL to take "any other action it may deem useful to fulfill its functions", as a reflection of the doctrine of implied powers.

[41] for a celebration of the CISG's 25th anniversary, see https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/viac_joint_conference (last visited: 17 January, 2022).

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years (subject to a staggered three-year expiry of half of first-round elected Members).[42] Elections observe a predetermined distribution of seats among the five regional groupings of the UN (Africa, Asia-Pacific, Eastern Europe, Latin America and Caribbean, Western Europe and Others (WEOG)). Originally composed of 29 elected States (regarding the first elections, see Contini, 1968), the Commission was expanded in 1973 to include a total of 36 Members,[43] and in 2003, dramatically increased to 60 Members.[44] Other states may participate in proceedings of the Commission but have no right to vote. While participation of non-state entities is accepted, and even encouraged, this is not without criticism by some states such as France, that this participation exerts an influence that echoes that of stronger states (Kelly, 2011).

On one hand, this latest expansion of the Commission's Membership testifies to the (at least perceived) importance of its rule-making role. As an early commentator noted in 1979, "[T]he success of the Commission and the importance of its work have led to keen competition to obtain and retain membership" (Honnold, 1979). On the other hand, however, it also manifests UNCITRAL's position as a relatively conventional political rule-making forum. The UNGA, in its Resolution to expand Commission Membership, was careful enough to note, perhaps overstatedly, that the Commission is a "technical body"; and that the increase of Members will have neither budgetary implications for the OLA/ITLD Secretariat, nor serve as a "precedent for the enlargement of other bodies in the [UN] system". The first caveat can be interpreted on the background of recurrent budgetary pressures in the UN system, as already noted. The second can be understood on the backdrop of ongoing pressures, at least at the time, to expand representative participation in UN bodies, such as the UN Security Council (e.g., the 2005 Annan Report "In Larger Freedom", calling for UN Security Council Membership reform).[45]

While the Commission serves as UNCITRAL's main body, and the OLA/ITLD serves as its Secretariat

[42] Article 2 of the Founding Resolution and subsequent Resolutions on Membership.

[43] UNGA Resolution 3108 (XVIII) of 12 December, 1973.

[44] UNGA Resolution 57/20 of 21 January, 2003.

[45] UNGA, Fifty-Ninth Session, A/59/2005, In larger freedom: towards development, security and human rights for all - Report of the Secretary-General, 21 March, 2005, p. 43.

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and legal service provider, there is a significant, third (or rather second) layer of governance, namely the subsidiary Working Groups: "The commission, at its annual plenary sessions, sets the agenda, including future work topics; monitors the work of the working groups; reviews technical assistance efforts; and finalizes texts prepared by working groups. Working groups draft the substantive instruments for specific issue areas (Kelly, 2011). UNCITRAL has traditionally broken up into six Working Groups. The areas of law allotted to each group have changed over time.[46] Without losing sight of the more general institutional issues, we will later on focus on the work of the Working Group on ISDS reform – WGIII.

At this point we wish to clarify our choice to focus on UNCITRAL, in comparison with UNCTAD, as a central global governance institution in international investment law, despite the parallel activities of other actors. This choice is for two main reasons. First, the rules of commercial arbitration developed in and recommended by UNCITRAL (the "Arbitration Rules"),[47] initially in 1976,[48] and as amended in 2010[49] and 2013,[50] while originally intended for international commercial arbitration (that is, mainly settling commercial disputes between private entities), have been adopted as the arbitration rules applicable in many IIAs, and applied in practice in numerous ISDS cases. According to UNCTAD's ISDS 'Navigator' database, mentioned above,[51] approximately one-third (351 out of 1070) of known ISDS cases have been handled under UNCITRAL arbitration rules. Indeed, ICSID rules[52]

[46] Currently, the six Working Groups are devoted to the following topics: Working Group I - Micro, Small and Medium-sized Enterprises; Working Group II - Arbitration and Conciliation / Dispute Settlement; Working Group III - Investor-State Dispute Settlement Reform; Working Group IV - Electronic Commerce; Working Group V - Insolvency Law; Working Group VI - Judicial Sale of Ships https://uncitral.un.org/en/about/methods (Last visited 6 January, 2022).

[47] For a very good and current discussion of the Arbitration Rules, see Montineri, 2013.

[48] UNGA, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C., as adopted by UNGA Resolution 31/98 of 15 December, 1976.

[49] UNGA, Sixty-fifth Session, Supplement No. 17 (A/65/17), chap. III, as adopted by UNGA Resolution 65/22of 6 December, 2010.

[50] UNGA, Sixty-eighth Session, Supplement No. 17 (A/68/17), chap. III and annex I, as adopted by UNGA Resolution 68/109 16 December, 2013. The importance of this amendment is the incorporation of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") developed in UNCITRAL.

[51] See fn. 16.

[52] The rules applicable under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159.

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have been used almost twice as much (in 657 cases, including recourse to the ICSID Additional Facility as well as UNCITRAL Rules[53]). This may be attributed inter alia to the simpler enforcement process of ICSID decisions[54] and other differences such as cost allocation,[55] although the actual ratio may be higher in favor of UNCITRAL Rules, as they may be used in unreported cases, in particular such investment-related disputes that are contract-based rather than treaty-based).[56] However, while ICSID rules are more frequently used in ISDS, for present purposes related to global governance, in comparison we consider UNCITRAL to be the more important IO.

This, as our second selection consideration, is because UNCITRAL has over the last decade and certainly over the last few years, been a significant multilateral forum for debates on ISDS reform, first, through the development of the 2013 Rules on Transparency,[57] and more recently, through the work of its WGIII, which has since 2017 devoted its work to ISDS reform, as will be set out in some more detail below. As one commentator has noted, UNCITRAL is "a venue for [these] reform debates and an actor navigating a complex series of relationships with other key stakeholders" (Roberts 2018). To be sure, ICSID as an organization has also thrown down the gauntlet in the arena of ISDS reform through a series of working papers and consultations launched around the same time as UNCITRAL's WGIII, in 2017 (ICSID 2021). Nevertheless, the range of potential structural reforms to the international investment regime is much broader and more overt in UNCITRAL WGIII than in ICSID, e.g., the discussion of a

As implied by its title, the ICSID Convention was designed specifically with ISDS in mind, in contrast to the UNCITRAL Rules.

[53] Under UNCITRAL Rules, parties to a dispute may select a an "Appointing Authority" which may serve as the administering institution of the arbitration. According to the UNCTAD Navigator, in some 30 disputes ICSID has served in this role, with the ICSID Secretary-General as Appointing Authority.

[54] Arbitral awards made under UNCITRAL Rules must be formally recognized and enforced in domestic jurisdictions under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (330 UNTS3) as applied by domestic law, including several grounds for refusal; in contrast, awards under ICSID are directly recognized in accordance with the ICSID Convention.

[55] UNCITRAL Arbitration Rules allocate legal and arbitral costs by default to the losing party, whereas ICSID has left this question open, making the latter more attractive to claimants (Gaukrodger and Gordon 2012:22).

[56] On the importance of contract-based investment disputes, see Brower 2019.

[57] See UNGA Resolution 68/109 of December 16, 2013; and https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf for the rules themselves (last visited: January 16, 2022). This is in effect the latest amendment to the UNCITRAL Arbitration Rules, leading to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention"), which currently has only 9 ratified accessions.

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Multilateral Investment Court (MIC) in WGIII, promoted mainly by the European Union (EU),[58] whereas ICSID has assumed "a nuanced posture, driving incremental reforms while remaining supportive of systemic changes" (Roberts 2018: 418) – ultimately addressing very particular issues in the ICSID Rules. We therefore now focus our attention on UNCITRAL.

UNCITRAL as an Ideational Actor

UNCTAD and UNCITRAL were established in concurrent institutional and chronological settings: by the UNGA, and the mid-1960s, on the backdrop of decolonization and the Cold War. In the present context it is notable that neither of these IOs was established with the fields of FDI and certainly not ISDS distinctly in mind. UNCITRAL's Founding Resolution does not even mention investment. At that time much of the international investment law-related activity corresponded to shifts in the contemporary legal regime of FDI and the contemporaneous establishment of ICSID. Vandevelde (2017) provides a fascinating description, from a US perspective, of the shift from virtually unenforceable Friendship, Commerce and Navigation (FCN) post-War treaties in parallel to the establishment of ICSID, within the World Bank, as a remedy to this problem, from the global North's perspective. The last FCN (between the US and Thailand) was signed in May 1966, a few months subsequent to the signing of the ICSID Convention and a few months before the latter's entry into force, and in parallel to processes in UNCTAD and the establishment of UNCITRAL in December 1966. This underscores the point that despite this flurry of international diplomatic and legal activity related to FDI, UNCITRAL at the time was not envisioned as an actor relevant to investment or ISDS.

Having said that, there are significant motivational, ideational and operative differences between UNCTAD and UNCITRAL at their foundation, which should be understood integratively. First, while as described above, UNCTAD had and continues to have a predominant 'North-South' dimension, UNCITRAL at its initiation was much more about enabling 'East-West' trade, i.e., albeit with the assistance of developing states. Indeed, the very idea of such a Commission was first formally floated by the Permanent Representative of Hungary (then part of the Soviet bloc, but in the process of

[58] Among many, see Swoboda 2022.

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economic reforms (Balassa 1970) in 1965, and as Farnsworth (1972: 315) testifies, the existing international commercial law organizations were "dominated by the industrialized free-enterprise nations of Western Europe, who, even where they do not form a numerical majority of the membership, exercise a controlling influence over their activity. It is therefore not surprising that the initiative to throw at least some of this activity into the United Nations came from an Eastern European country and received support from many developing nations". No less striking in this respect is the statement of the Delegate of the Soviet Union to the UN Sixth (Legal) Committee in final debates over the creation of UNCITRAL that there are "many obstacles to the development of trade, due primarily to the activities of monopolies, neo-colonialism, the existence of closed economic groupings and certain irregularities left over from the cold war". Incidentally, the same Delegate also noted that the "The recommendations of UNCTAD on the normalization of international trade were being put into effect very slowly", reflecting not only a critique of UNCTAD, but a perceived compensatory interaction of expectations towards the two new IOs (UNCITRAL 1971: 49). Indeed, it is accepted (Carey 1967; Cohen 2011: 576) that the reports upon which UNCITRAL was ultimately founded, were based upon the work of Clive Schmitthoff, then a law Professor in London, regarding the facilitation of international trade in East-West relations (Schmitthoff 1964) – an early expression of the role of academics in UNCITRAL, which is still prominent today.[59]

This is surely not to say that UNCITRAL has been devoid of North-South content and division. Indeed, UNCITRAL's Founding Resolution, in its Preamble, refers to furthering "the interests of all peoples, in particular those of developing countries. In 1978, the Commission established a working group on the "New International Economic Order" (NEIO), which functioned as Working Group V until 1994, but evidently the resistance to the potential politicizing effects led it to a consensus position whereby "UNCITRAL should remain concerned with trade law rather than trade policy" (Selby 1980), and in practice dealt mainly with the development of a Model Law on Public Procurement, which

[59] On the Schmitthoff Report's role in the design of UNCITRAL, see Block-Lieb and Halliday 2017: Ch. 2). On Schmitthoff, who was born in 1903 in Berlin as Maximillian Schmulewitz, see Adams 2004.

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received the recommendation of UNGA,[60] but has since been for all intents and purposes replaced in 2011 with a different Model Law developed in Working Group I (UNCITRAL 2014).

Second, UNCITRAL was first and foremost envisioned as a *law* commission, as its title implies, one to deal with the development of legal unification and harmonization in areas of international trade. Much of the negotiation toward the elaboration of its original structure and roles were conducted in the framework of the UNGA's Sixth (Legal) Committee and it reports to it to this day. In some respects, for example regarding the selection of topics for discussion, it was modeled on the International Law Commission (ILC) (Contini 1968: 669). Indeed, UNCITRAL was the first such UN body established with a view to the development of law since the establishment of the ILC in 1946. However, while the ILC is composed of independent experts, albeit elected through a typical UN regional and political process, as we have seen the institutional make-up of the UNCITRAL is of state representatives. As noted, UNCITRAL, like the ILC, receives its Secretarial services from the UN's OLA, once more indicating its legal affairs focus.

Third, UNCITRAL's original mandate was mainly with respect to private, commercial international law, i.e., development of harmonized laws that apply to private international transactions. This is in contrast both to the more overtly political and economic development concerns of UNCTAD, and to the primarily public law function of the GATT/WTO system (Cohen 2011:1). But this latter distinction is not without its own politics. By one account, "the extent to which UNCITRAL should take up public law questions is an issue that by consensus has been deferred; the United States and other Western countries strongly expressed the view that UNCITRAL's province is private law" (Selby 1980: 961). To be sure, the latter is somewhat of a blurred distinction, as is the very distinction between public and private law in the era of the regulatory state (Shamir 2014). UNCITRAL has developed rules in a variety of transactional fields such as insolvency or electronic communications in commerce, that clearly require enforcement through public law. The GATT/WTO system, although premised on relations between states, surely impacts upon private commercial transactions in a myriad of ways. Block-Lieb

[60] UNGA Resolution 49/54 of 9 December 1994

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and Halliday (2017: Ch. 2) accord great weight to the original framing of UNCITRAL as an IO dealing with private rather than public law in its successful establishment and continued legitimacy.

With these observations in mind, it could be said that in the main, UNCITRAL, as an IO serving as an intergovernmental forum, has remained true to its original ideational goals, namely, the progressive harmonization, modernization and unification of international commercial law, while adapting to shifting international political economies, primarily after the end of the Cold War. It has also been quite successful in achieving these goals. UNCITRAL has served as a forum for the drafting of numerous international instruments (binding, in the case of treaties, only on those states who ratify them, and in the case of "Model Laws", only on those states who choose to incorporate them domestically), in a variety of areas of commercial law. It has fostered an impressive number of conventions, on the carriage of goods by sea, the CISG, international bills of exchange, letters of credit, electronic communications in international contracts, and most recently, a convention on international settlement agreements resulting from mediation. It has also served as a forum for negotiation of Model Laws relating to secured transactions, procurement, insolvency, commercial conciliation and more. Cohen (2011) attaches great importance to the shift in UNCITRAL in the 1990s from negotiation of conventions to a focus on Model laws and legislative guides, which are more flexible – essentially functioning as soft rather than hard law.

To be sure, the record of actual state subscription to these instruments has been mixed. Farnsworth (1972) noted five decades ago that "UNCITRAL decided that its program must be workable, at the cost of being modest". Nevertheless, the Commission has been very active, as evident from its considerable output (UNCITRAL 2013, Annex I). This tension between practicability and ambition, in what is ultimately a member-driven IO, is quite clear in the area of arbitration related to ISDS, and current debates in UNCITRAL WGIII, to which we turn now.

UNCITRAL and Investment Arbitration Rules

UNCITRAL's important role in the international investment regime, as a negotiation forum, was quite clearly not established by prior design but rather by convenience and path-dependence, primarily on the basis of the utility of its Arbitration Rules for ISDS, rules that as noted already, were originally designed

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for commercial arbitration, not for investment. Insofar as the international investment system as a whole has been likened to a platypus in its combination of public international law, ISDS and reliance on commercial arbitration rules (Roberts 2017), this quite well describes UNCITRAL's engagement with investment protection law: a creature of public international law, indeed an inter-governmental IO, mainly concerned with international commerce, but on this basis drawn into the arena of ISDS.

It is important to note that UNCITRAL, as a traditional UN Commission, has generally not staked a claim to enter into *substantive* law issues. For example, although UNCITRAL's initial work program from 1968 included the topic of the "elimination of discrimination in laws affecting international trade" – a substantive topic of significance with respect to international investment protection law, (through the disciplines of National Treatment and Most-Favoured Nation Treatment), this was not taken up in practice by the Commission (UNCITRAL 2013: 11). This is evident also in the current work of WGIII, whose mandate is on ISDS reform, ostensibly with a focus on procedure rather than substance.

To be sure, the substance-procedure distinction is not as clear-cut as it might seem, often as vexing as the public-private divide discussed above, in legal theory and practice. For some, certainly in areas of private international law, UNCITRAL's output, such as the CISG, the distinction is a 'fulcrum, or axis', for others it is 'artificial and illusory' (Carruthers 2004: 691 and 994). Procedures determine outcomes, whether in administration or adjudication; substance may influence procedural decisions (Malcai and Levine-Schnur 2014). Thus, when applied to ISDS in general and UNCITRAL Arbitration Rules in particular, discussions about technically procedural issues such as transparency of proceedings, arbitrator appointment or third-party funding (TPF), are not conducted *in abstracto* but very much with the different interests of substance in mind (on TPF in UNCITRAL WGIII debates, see Brekoulakis and Rogers 2019; on the law and economics of TPF see van Aaken and Broude 2020). Indeed, this was a preliminary issue for discussion in the shift of WGIII to ISDS reform in 2016, though set aside at the

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time.[61]

The 1976 UNCITRAL Arbitration Rules in combination with the 1980 CISG were early on considered a great success within the original objectives of UNCITRAL, on the backdrop of efforts to harmonize international trade law dating back to the 19th century (see, e.g., Suy 1981), though not devoid of political cold-war and decolonization elements. Then, with the advent of ISDS in the mid-1980s and early 1990s, UNCITRAL Arbitration Rules were increasingly considered as one of the main options for investment arbitration in IIAs.[62] This was amplified not least through the option of recourse to UNCITRAL Arbitration Rules in Article 1120(1)(c) of the 1993 North American Free Trade Agreement, an IIA that greatly increased the use and salience of ISDS in practice. Indeed, this was a driver – but one out of several - towards the 2010 revision of the 'modernizing' Arbitration Rules, negotiated in UNCITRAL Working Group II. The revision does not refer explicitly to ISDS, but in its first Article refers to application in "a defined legal relationship, whether contractual or not", thus including treaty-based disputes (Moens and Trone 2011). The UNGA Resolution adopting the revised Rules does make express reference to "investor-State disputes" in the fourth recital of its Preamble,[63] leaving no room for doubt in this regard. Perhaps more importantly, soon after, UNCITRAL served as the venue for the negotiation of the Rules on transparency, incorporated in the Rules in 2013, and the subsequent Mauritius Convention (Shirlow 2016; on the trend towards transparency in ISDS, and UNCITRAL's early role, see Maupin 2013).

As a continuation of this increased engagement with ISDS, beginning in 2016, UNCITRAL's WGIII, previously focused on online dispute resolution, took on the timely and intensive mandate of negotiations on ISDS reform. It is well beyond the scope or needs of this paper to discuss the issues that are currently being debated, on a regular basis, in WGIII, all of which have crucial though varying

[61] See UNGA A/CN.9/917 Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS) Note by the Secretariat, 20 April, 2017, para. 14, under title of "Reform of the dispute settlement regime versus reform of the substantive investment protection standards".

[62] In the UNCTAD IIA Navigator, referred to previously, the first IIA that refers to UNCITRAL Arbitration Rules is the 1985 China-Kuwait BIT, still in force.

[63] Supra fn. 47.

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importance for ISDS – a standing multilateral mechanism, an appellate mechanism, an advisory center, arbitrator selection and appointment, dispute prevention and mitigation, reflective loss, costs, TPF – and their underlying issues (Puig and Shaffer 2018). These issues, to belabor a point, appear, in the UNCITRAL tradition, to be procedural, but they have great significance for substantive issues, primarily state regulatory space and the legitimacy of international arbitration and ISDS.

In all these aspects, without in any way discounting its importance, it should be evident that UNCITRAL as an IO and a UN commission continues to function as a quite traditional inter-governmental negotiation forum, involving primarily states, and subject to their consent.

In this context, while not in contradistinction from this traditional position, the role of the Secretariat is prominent, and this reflects on its engagement with other actors, including non-state actors. Formally, by its own depiction, "the secretariat is responsible for preparing working papers for working group meetings, providing administrative services to that working group and reporting on working group sessions" (UNCITRAL 2013: 7). However, it does draft "texts on topics that are being considered for possible future inclusion in the work programme" (UNCITRAL 2013:9), thus taking an active role in the formulation of policy. In the current WGIII ISDS reform process, the Secretariat has issued a considerable volume – both quantitively and qualitatively – of understated "Notes from the Secretariat" (e.g., UNCITRAL 2021). Roberts (2018), who focuses on the negotiation dynamics of UNCITRAL members, states that "[a]s an international organization striving for legitimacy and resources in a world of scarcity, UNCITRAL's Secretariat actively scouts promising new topic areas for work". This is not surprising, given the not uncommon 'entrepreneur' position that the UN Secretariats has undertaken (Andonova 2017: Ch. 3).

While we will return to this in our discussion of UNCITRAL's relative governance role in the investment regime, we will note that UNCITRAL and its Secretariat have taken on some tasks, similar to UNCTAD's, albeit not always in the area of international investment.

- **Collection and dissemination of information**

UNCITRAL follows standard UN dissemination policies. Moreover, it has developed, and continues to develop, a significant online, searchable database on international commercial arbitration – the CLOUT

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system – "Case Law on UNCITRAL Texts",[64] on the UNCITRAL Model Law of Commercial Arbitration, on which UNCITRAL has deservedly taken great pride.[65] Although there is to our knowledge no analysis of its effect, CLOUT is a very useful resource regarding available data on case law.[66] It focuses, however, quite exclusively on the comparative use of this Model Law in domestic legal systems. It does not relate other than indirectly to investment law.[67] Similarly, UNCITRAL has issued a Yearbook reporting its work over the years.[68] Unlike UNCTAD's research-based WIR, the UNCITRAL Yearbook is mainly a report of the Commission's work and proceedings.

- **Training and technical assistance**

UNCITRAL does not focus (nor have the resources) in this field. It has a law library in Vienna for the use of delegates and visitors, holds seminars and conducts some technical cooperation and assistance activities in the area of law reform vis-à-vis its Model laws. The Secretariat has reported that "the demand for UNCITRAL technical assistance has grown dramatically in recent years. Because the regular budget does not include funds for such activities, these activities can only be conducted if funds can be obtained from other sources" (UNCITRAL 2013:26). These technical assistance and training activities are not directly in the areas of ISDS.

- **Consensus building**

In principle, decisions by the Commission are taken by consensus,[69] but as noted, they are not binding, i.e., the adoption of texts of a Model law, or revision to Rules, such as the Arbitration Rules, ultimately depends on the extent to which they will be adhered to and incorporated by states and other parties (see UNCITRAL 2013: 13-21 on the different types of instruments that UNCITRAL produces).

[64] See https://www.uncitral.org/clout (Last visited : 23 January, 2022).

[65] "The CLOUT system is instrumental in promoting the uniform interpretation of UNCITRAL texts through their application by courts and arbitral tribunals worldwide, contributing to the development and refinement of a global interpretation of those texts, and enhancing their acceptability." (UNCITRAL 2013:22)

[66] See the most recent UNCITRAL report on CLOUT – UNGA A/CN.9/1017, 3 June 2020, Publications to promote a uniform interpretation and application of UNCITRAL texts (CLOUT and digests) and support their implementation and enactment - Note by the Secretariat.

[67] https://undocs.org/A/CN.9/SER.C/GUIDE/1/REV.3, January 15, 2018 (Last visited: January 13, 2022).

[68] https://uncitral.un.org/en/library/publications/yearbooks.

[69] Note by the Secretariat: UNCITRAL rules of procedure and methods of work (A/CN.9/638/Add.4).

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UNCITRAL's Relationships with Non-State Actors

UNCITRAL regularly interacts with non-state actors engaged in areas within its mandate, including ISDS. As with respect to UNCTAD above, these include other IOs, non-governmental organizations (NGOs), and individuals, with an emphasis on academic and practical expertise (somewhat intertwined in the area of ISDS). These will be briefly described in turn.

- **Global Organizations -** UNCITRAL has a very good record of engaging and collaborating with other global organizations in areas of interest. This is not surprising, in itself, as UNCITRAL is part of the UN system, and its Founding Resolution requires it to coordinate the work of organizations working in this field. One example, not as such in the area of investment law, is the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2010) which "was developed in cooperation with the World Intellectual Property Organization (WIPO) and other intellectual property organizations" (UNCITRAL 2013: 12). The current work of UNCITRAL WGIII with respect to ISDS has garnered the interest of several global IOSs, such as ICSID, UNCTAD, the OECD, the WTO and the Hague Conference on Private International Law.[70]
- **Regional Organizations –** similarly, in relevant fields, UNCITRAL welcomes the participation of observers from regional IOs. (UNCITRAL 2013:6). Thus, in recent meetings of WGIII, participation included representatives from the African Union (AU), the Economic Community of West African States (ECOWAS), the Gulf Cooperation Council (GCC) and the Organisation of African, Caribbean and Pacific States (ACP).[71] Moreover, UNCITRAL has a regional centre for Asia and the Pacific (UNCITRAL 2013:27), located in Incheon, South Korea.[72]
- **Non-Governmental Organizations –** while at its apex, and indeed through-and-through, UNCITRAL is an inter-governmental IO, it has "always drawn on the expertise and practical know-how of the businessmen and lawyers whom it is ultimately to serve" (Suy 1981: 140). Non-governmental

[70] UNGA A/CN.9/1054, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed fortieth session (Vienna, 4 and 5 May 2021), 27 May, 2021, p. 2.

[71] Ibid..

[72] See https://uncitral.un.org/en/TA/regionalcentre_asia_pacific (Last visited: 25 January, 2022).

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organizations may take part as observers with limited delegations, and as noted already, this has not been uncontroversial, though not necessarily in the area of ISDS (Kelly 2011).

As the Secretariat has candidly revealed, "On several occasions, substantive preparation of a text has not been undertaken by a Working Group, but by the secretariat in consultation with experts. For example, a preliminary draft of the 1976 arbitration rules, with commentaries, was prepared by the secretariat in consultation with experts in the field and then presented to the Commission and subsequently revised by the secretariat in light of the Commission's deliberations" (UNCITRAL 2013:9). Furthermore, the Commission may "seek the assistance of outside experts from different legal traditions, conducting ad hoc consultations with individuals or convening meetings of groups of experts in a particular field, as required. Such groups have included academics, practising lawyers, judges, bankers, arbitrators and members of various international, regional and professional organizations." (UNCITRAL 2013: 9). It is also clear – and generally accepted – that state delegations may include delegates from academia, civil society and the private sector.

With respect to ISDS reform – the current ambit of UNCITRAL WGIII – these practices appear to have endured. WGIII in its current agenda works on the basis of a rough framework that was drawn up with a close collaboration between the Secretariat and an academic institution (the Centre for International Dispute Settlement (CIDS)), described as a "joint research center of the Graduate Institute of International and Development Studies and the University of Geneva Law School",[73] as approved by the Commission and UNGA.[74] This academic involvement has been expanded and indeed institutionalized in the form of the "Academic Forum on ISDS",[75] a constellation of approximately 150 academics that has been very active in informing the process through a series of concept papers and side events related to the WGIII agenda items.

UNCITRAL and Modes of Governance

[73] See https://www.cids.ch/the-center (Last visited: January 25, 2022).

[74] See UNGA A/CN.9/917, supra note 59, 2-3.

[75] See https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/disclosure-register-isds-academic-forum.html (Last visited: January 25, 2022). For full disclosure, one of the authors of this paper is a member of the forum.

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We now generally apply the same framework of analysis employed above with respect to UNCTAD, in order to discern UNCITRAL's mode (or modes) of global governance. We will not repeat the theoretical dimensions and typologies, which cover a spectrum of modes such as formal IOs (Abbott and Snidal 1998), soft/indirect distinctions including orchestration (Abbott et al. 2015), GXG (De Búrca et al. 2014), and Public-Private Partnership (Andonova 2017). On these we graft other related observations regarding the governance function of UNCITRAL (albeit not in the area of ISDS), as an IO that engages in "normative modeling" (Cohen 2011) or "Inventive Global Governance" (Block-Lieb and Halliday 2017).

In our view, despite these different approaches, UNCITRAL is, at the end of the day, a mainly traditional, UN-based intergovernmental IO, much along the formal lines identified by Abbott and Snidal (1998). As we have seen, this entails – indeed requires – an active Secretariat, engagement with other organizations, governmental and non-governmental, and inputs from outside the organization, including agenda-setting. Thus, while elements of other modes of governance may appear in its work, these do not alter the basic mode of global governance that has been pursued since UNCITRAL's establishment in the 1960s. This might be a disappointing conclusion for those seeking new modes of global governance, in both descriptive and prescriptive terms, but as we shall see in the next and final section, it does have implications for the critique and future development and reform of the international investment regime in general and ISDS in particular – if not for global governance more generally.

In the terms of Abbott et al. (2015), UNCITRAL is a governance infrastructure that is in the main both soft (i.e., no or little delegation *to* the organization) and direct (i.e., acting mainly vis-à-vis states). UNCITRAL's mandate in international trade law may be broad, with ISDS only a fraction of it, but it has no authority that goes beyond the decisions of its membership, taken through the Commission or, more importantly, in the Working Groups. Moreover, these decisions, if in the form of Model laws, legislative guides or other focal points such as the Arbitration Rules, are in and of themselves not binding. They cannot constitute an advanced mode of delegation to the organization for several reasons. First, since the practice is one of consensus, this means that states have not 'let go', and still want strong control over outcomes.

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Second, as noted, nonetheless outcomes are not binding. Indeed, most of them are subsequently subject to formal adoption by states, that are entirely voluntary. States can choose whether, and how to incorporate rules in their legal systems, even when adopted by consensus in UNCITRAL. Third, commercial and also investment arbitrations involve private parties, and even when acting within the framework of UNCITRAL Arbitration Rules, they may choose to adopt procedures that stray from the Rules, whether ex ante or ex post. As a side note, although a centerpiece of UNCITRAL in general and its contribution to the investment regime is its Arbitration Rules, it is important to recognize that UNCITRAL and its Secretariat are not involved in actual ISDS proceedings. UNCITRAL is not an appointing authority for arbitrators, and does not serve as an administrator for disputes. Moreover, UNCITRAL's main interlocutors as well as addressees are states.

Is UNCITRAL nevertheless an "orchestrator", soft and indirect (Abbot et al. 2015) within its mandate in general and in the area of ISDS reform in particular? Block-Lieb and Halliday (2017 Ch. 5) – academics who themselves participated as delegates in UNCITRAL work, and hence are not entirely removed from the question - yet opining on the basis of multimethod research, have noted with respect to (non-ISDS) Working Groups that "[b]ecause the Secretariat employs fewer than a dozen of its own staff, UNCITRAL could not have achieved a fraction of its historic output except through the assistance of volunteer delegates". They describe the establishment of expert groups by invitation, purportedly at the behest of the UNCITRAL Secretariat, colloquia, "inner circles and networks", and "corridor politics". As we have seen, for example, with respect to the Academic Forum in WGIII on ISDS Reform, such practices exist also in our area of interest, the international investment regime. This indicates a degree of 'indirect' governance. However, despite this participation of non-state actors, it is hard to say that they have received delegated responsibility *from* the IO, or that they act as intermediaries of international commercial law-making. To be sure, the implementation of UNCITRAL outcomes is to large extent left to governments, non-state actors, commercial entities, lawyers, arbitrators etc., but our interest here is in the form of governance that UNCITRAL takes as a law-making forum.

Although very different in nature from UNCTAD, it is possible to discern in UNCITRAL some elements similar to the concept of PPP (in the governance sense) posited by Andonova (2017), e.g., with

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respect to the UN Secretariat, to which UNCITRAL is ultimately related. UNCITRAL has acted as a facilitator, a 'site' (Cohen 2011) or a 'space', an 'assembler' for rulemaking, and in this course of action, it has engaged with both state parties, as a matter of course, and a range of non-state actors. Having said that, while the nature of application of UNCITRAL outcomes is decentralized, as PPP would expect (non-binding, requiring application by states etc.), it is highly legalized, as a UN-mandated law-making Commission. Moreover, participants in UNCITRAL processes, primarily states, do not self-select: they are elected members of the Commission and the Working Groups. That is to say that they must gain a mandate from their regional grouping, for example, even when they wish to take on the task. Quite naturally, actors do choose their own modus operandi in negotiations (see, e.g., Block-Lieb and Halliday (2017) such as the composition of delegation and prior consultation mechanisms.

We consider now whether UNCITRAL work can be characterized as GXG, addressing the five criteria posited for this mode of governance (De Búrca et al. 2014). Regarding the first criterion - an inclusive, participatory, and nonhierarchical process set up for states and other participating units to reflect and identify a broadly shared perception of a common problem, this might be broad enough to include the work of UNCITRAL WGIII, although the process cannot truly be said to be nonhierarchical, given the dominance of states, and the role of the Commission vis-à-vis the working groups. As noted above regarding UNCTAD's role, it is also far from clear that there is a broadly shared perception of a common problem, despite the formulation of agenda items by consensus in the WGIII (Roberts 2018).

Second, regarding a "framework understanding" with open-ended goals, the agenda of WGIII can be seen as a framework, but the goals are restricted (e.g., not including substantive law issues, as discussed above) and contested. Most importantly, regarding the third, fourth and fifth conditions – leaving implementation to lower-level and contextually situated actors; continuous feedback from local contexts with reporting and monitoring; and routine reevaluation of goals – as with UNCTAD (despite the differences), it seems that GXG is not a useful way to understand the modalities in which UNCITRAL has engaged with the international investment regime. To some extent, in other (commercial) parts of its work output, implementation has been left to states, but the discretion to adapt norms is not very high. UNCITRAL can be considered as GXG only if state-driven law-making

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processes are considered to be 'bottom-up', or 'local' (belying their transboundary nature), but then all international law-making processes in which states are the central actor would qualify as GXG. Moreover, there is practically no 'experimental' governance in UNCITRAL, unless one considers the facilitation of debate regarding new initiatives, such as the multilateral investment court, as experimental; and there is no overt reporting and monitoring.

Finally, Cohen (2011:568), uses the term 'Normative Modeling' "through which legal norms, principles, and standards for the global political economy are articulated" to describe UNCITRAL's work, as a "site" for such (again, not in the ISDS context). Block-Lieb and Halliday (2017: Ch.10), refer to UNCITRAL's 'inventiveness', and the 'technologies' it has used in its law-making roles. In sum, we believe that UNCITRAL in general and with respect to ISDS reform in particular (in WGIII), has been operating over the last years very much in line with traditional inter-governmental IO practices. Indeed, with Secretariat involvement, engagement with non-state actors and so on, but ultimately serving as a forum for inter-state negotiation towards the development and perhaps reform of rules.

4. Conclusions

In conclusion, we return to the question we embarked upon. What are the governance roles of IOs in the international investment regime? Evidently this is not at all a simple question, though in context the answer might be simpler. The international investment regime is highly diffuse, and lacks a centralized governance authority. We have looked, in quite some detail, at what we consider to be the main intergovernmental IOs engaged in the regime and in ongoing changes and reforms (UNCTAD and UNCITRAL). These two IOs share similarities – for example being both part of the UN system and organs of UNGA, born at a comparable, not unrelated, historical point in time, and not charged with international investment at the outset – but there are also many differences. Thus, UNCTAD is not a UN lawmaking forum, whereas UNCITRAL is. UNCTAD enjoys universal membership, whereas UNCITRAL, as a lawmaking commission, and its working groups, has a more selective membership. UNCTAD has a more concrete organizational infrastructure, while UNCITRAL, as an IO, is a very small part of the UN Secretariat.

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To be sure, many of these distinctions hinge on a fundamental question that we cannot answer here: who is the relevant segment of the IO? Is it the formal decision-making fora of its membership? Is it an independent entity with delegated authority? Is it the bureaucracy that maintains the organization? The answer to these questions is different with respect to UNCTAD and UNCITRAL, but if a common denominator is to be found, it is that both IOs, albeit in different ways, function as meeting places, as sites and facilitators for negotiation and debate. Many, if not most, of the governance literature we have discussed can be reduced to this, as is only to be expected in a system that has maintained its diffuseness and avoided institutional centralization.

More importantly, we find that both IOs have been working in ways that would have been well-recognized decades ago, and can therefore be considered tradition: bureaucratic centralization, engagement with non-state actors, adoption of non-binding instruments. Ultimately, plus ca change, plus la meme chose. Tevye would have put it differently: tradition.

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