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UNIVERSITY OF AMSTERDAM



APPROACHES TO FOREIGN DIRECT INVESTMENT IN LEGAL RESEARCH

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Approaches to Foreign Direct Investment in Legal Research

Stephan W Schill and Kerem Gülay*

Abstract

This paper provides a critical introduction to the approaches taken in legal research to address issues relating to foreign direct investment (FDI). It starts from a broad understanding of legal approaches to FDI, as encompassing substance and procedure under both national and international law. On this basis, it provides an overview of the legal regimes governing FDI, analyses the core conceptualizations of the field in legal scholarship and investment law practice, and offers an introduction to methods of legal research relating to FDI. For this purpose, the paper proposes that the complex legal architecture governing FDI, which is based on a multitude of applicable legal instruments under domestic and international law, and involved a diverse set of actors using them in order to shape international investment relations, FDI regulation is best understood as a transnational legal order. On the basis of this approach, the paper then concentrates on the international legal aspects of FDI regulation and provides a typology of research questions that can be asked in IIL and gives an overview of methods of legal research used to tackle them.

Keywords

international investment law; investor-state dispute settlement; international investment agreements; transnational law; transnational legal order; legal research; research methods; doctrinal approaches; empirical legal studies; critical legal studies; law in context; history; framing; public law approaches

I. INTRODUCTION

The significant increase in foreign direct investment (FDI) over the past two decades is part of the so-called ‘second wave of globalization’, which commenced in the 1960s and accelerated rapidly since the end of the Cold War.¹ As a transformative economic and political

* The research leading to this article has received funding from the European Research Council (ERC) under ERC Grant Agreement No. 313355, as part of the research project on ‘Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the *Lex Mercatoria Publica*’ (LexMercPub) carried out at the University of Amsterdam. The literature is up to date as of October 2017 and only occasionally contains more recent literature. The article is published in Markus Krajewski and Rhea T Hofmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) ch 2.

¹ See e.g. Kevin H O’Rourke and Jeffrey G Williamson, *Globalization and History* (MIT Press

phenomenon, it is no wonder that it attracts attention of economists and political scientists.² But the rise of FDI is also deeply intertwined with legal developments and therefore has developed into its own field of legal analysis. Indeed, the (mostly liberalizing) legal regulation of FDI, be it at the national or the international level, has been an area of exponential growth since the early 1990s. More and more countries enact new or amend existing investment laws, in order not only to secure and attract FDI inflows, but also to prevent them from causing societal and environmental harm.³ Similarly, the number of international investment agreements (IIAs), including bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs), which regulate investor-state relations, is on the rise;⁴ and so is resort to international arbitration for the law-based resolution of investor-state disputes.⁵ At the same time, the impact of FDI on sovereignty and constitutional law, and its interrelations with the (national and international) law protecting competing concerns, such as the environment or labour and human rights, are a cause for concern, both in developing and developed countries.⁶

Given the host of new legal issues relating to international investment relations this entails, it is little surprising that FDI has gathered growing interest from lawyers – in domestic, international and comparative circles. Amongst those, the proliferation of the legal literature on the international legal aspects regulating FDI is particularly striking.⁷ This literature forms part of an ever-expanding body of international investment law (IIL)

1999); Richard E Baldwin and Philippe Martin, ‘Two Waves of Globalisation: Superficial Similarities, Fundamental Differences’ NBER Working Paper www.nber.org/papers/w6904 (all websites referenced in this chapter were last accessed on 22 October 2017).

² See the contributions by Sarah Bauerle Danzman (Chapter 1) and Antonius Rickson Hippolyte (Chapter 3) in this Handbook.

³ For a collection of such laws, see International Centre for Settlement of Investment Disputes (ICSID), *Investment Laws of the World* (Oxford University Press 2018).

⁴ United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2018: Investment and New Industrial Policies* (United Nations 2018) 88-89 (exponential growth in IIAs from 50 treaties in 1990s to 3,322 at the end of 2017).

⁵ *Ibid.*, 115 (reporting 767 treaty-based investor-state arbitrations).

⁶ Cf Michael Waibel et al. (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer 2010); David Schneiderman, *Resisting Economic Globalization. Critical Theory and International Investment Law* (Palgrave Macmillan 2013). Similarly, the interplay between different instruments of international and regional economic integration can give rise to difficult political, economic and legal questions. This is particularly the case as regards the relationship between international investment law (IIL) and European Union (EU) law. See e.g. Steffen Hindelang, ‘Repellent Forces: The CJEU and Investor-State Dispute Settlement’ (2015) 53 *Archiv des Völkerrechts* 68.

⁷ To illustrate: 60 new book-length works on IIL and arbitration have been reported between January 2016 and March 2017 alone. Hassan Kamalnejad and Andrew Newcombe, ‘New Works on International Investment Law and Arbitration, Jan 2016 – March 2017’ (*Investment Arbitration Reporter*, 5 April 2017) www.iareporter.com/articles/new-works-on-international-investment-law-and-arbitration-jan-2016-march-2017/. Similarly, a Google Scholar custom range citation search shows 156 results for ‘international investment law’ between 1990–2000; 3,230 results between 2000–2010; and 9,450 results between 2010–2017. See https://scholar.google.nl/scholar?hl=en&as_sdt=0%2C5&q=%22international+investment+law%22&btnG=&oiq=inter.

scholarship, which has developed as part of a new specialized legal field primarily since the early 2000s.⁸

Disciplinarily, this field is characterized by a confluence of approaches by lawyers with diverse professional socializations and epistemic traditions, including public international lawyers, lawyers with a background in international commercial arbitration, and lawyers with a domestic public (administrative and constitutional) law background. Displaying overall considerable epistemological and methodological differences, partly these approaches complement each other in their approaches to investor-state relations, partly they emphasize the tensions arising with competing rights and interests.

Differences in background and focus are also reflected in the diverse terminologies used in the literature to address the international legal aspects of FDI. Some restrict their approach explicitly to the ‘international law on foreign investment’⁹ or the ‘international law of investment claims’,¹⁰ thus excluding national law relating to FDI. Others are even more specific in emphasizing treaties as the central source of law, dealing with the ‘law and practice of investment treaties’.¹¹ Again others take a procedural approach to the subject and focus on ‘investor-state arbitration’,¹² ‘foreign investment disputes’,¹³ or ‘international investment arbitration’.¹⁴ These procedure-oriented approaches often encompass a broad range of national and international sources of FDI regulation, but put the dispute settlement mechanism and its influence on the rights and obligations of investors and states at the centre of analysis. This contrasts with approaches that view the substantive law governing investor-state relations and the role of those making it, as parties to international treaties or investor-state contracts, or unilaterally through domestic legislation, as the centrepiece of the analysis of the legal aspects of FDI.¹⁵

⁸ Stephan W Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’ (2011) 22 *European Journal of International Law* 875.

⁹ M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010).

¹⁰ Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009).

¹¹ Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer 2009). Similarly, Jeswald W Salacuse, *The Law of International Investment Treaties* (2nd edn, Oxford University Press 2015); Kenneth Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press 2010).

¹² Christopher F Dugan et al., *Investor-State Arbitration* (Oxford University Press 2008); Catherine Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010).

¹³ Doak Bishop, James Crawford and Michael Reisman, *Foreign Investment Disputes – Cases, Materials and Commentary* (2nd edn, Kluwer Law International 2014).

¹⁴ Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration. Substantive Principles* (Oxford University Press 2017).

¹⁵ See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) (which contains, however, also a section on investor-state dispute settlement – ISDS); August Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press 2008).

Building on these different conceptualizations, the present chapter starts from a broad understanding of legal approaches to FDI, as encompassing substance and procedure under both national and international law. On this basis, it provides an overview of the legal regimes governing FDI, analyses the core conceptualizations of the field in legal scholarship and investment law practice and offers an introduction to methods of legal research relating to FDI. For this purpose, section II introduces the complex legal architecture governing FDI. Due to the multitude of applicable legal instruments under domestic and international law, and the diversity of actors using them in order to shape international investment relations, FDI regulation is best understood as a transnational legal order. Sections III and IV then concentrate on the international legal aspects of FDI regulation and provide a framework for engaging in legal research in IIL. Section III provides a typology of research questions in IIL. Section IV gives an overview of methods of legal research. Section V concludes.

II. OBJECT OF STUDY: FDI REGULATION AS A TRANSNATIONAL LEGAL ORDER

Before addressing the approaches to FDI that can be taken in legal analysis and research, it is crucial to have an understanding of the object of inquiry, that is, an overview of the legal instruments governing international investment relations and their interrelations. Without dealing with all nuances in the present context, the law governing FDI consists of both national and international law sources, as well as a variety of soft-law instruments that govern investor-state relations; they address both substantive law and dispute settlement.¹⁶ Given the variety of legal sources and actors at play, as well as the combination between binding and non-binding sources, and interaction between actors at different levels, FDI regulation on the whole is best understood as a transnational legal order, which has been defined as ‘a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions’.¹⁷ The resulting law governing international investment relations, in turn, can be understood as a form of transnational law, which, in Philip Jessup’s classical definition ‘include[s] all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.’¹⁸

¹⁶ Sections II.1 and II.2 draw on Stephan W Schill, ‘International Investment Law as International Development Law’ in Andrea Bjorklund (ed.), *Yearbook of International Investment Law and Policy 2012–2013* (Oxford University Press 2014) 327, 333–44. Section II.3 draws on Stephan W Schill, ‘Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law’ in Samantha Besson and Jean d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2018) 1095.

¹⁷ Terence C Halliday and Gregory Shaffer, ‘Transnational Legal Orders’ in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 3, 5.

¹⁸ See Philip C Jessup, *Transnational Law* (Yale University Press 1956) 2; see further Peer Zumbansen, ‘Transnational Law’ in Jan M Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 728; Caroline Menkel-Meadow, ‘Why and How to Study “Transnational” Law’

1. Domestic Law Relating to FDI

Legal rules regulating FDI can be found both at the domestic and at the international level.¹⁹ Domestic law, in this context, is of primary relevance. It determines what investments are permissible, which procedures apply to the admission of investments, on which conditions investments can be implemented, and what ongoing obligations investors have.²⁰ Domestic law regularly also governs contractual relations between foreign investors and host states in the context of foreign investment projects, for example in the context of concession agreements for the construction and operation of infrastructure projects or the exploitation of natural resources, and sets out mutual rights and obligations.²¹

Domestic law also plays a pivotal role in dispute settlement between foreign investors and host states, including in international fora, such as the International Centre for Settlement of Investment Disputes (ICSID), or the Permanent Court of Arbitration (PCA), and when based on an international treaty. In addition, numerous capital-importing countries have passed specific (domestic) investment laws that promote FDI by providing incentives, particularly tax incentives, and by granting foreign investors special protections.²² Furthermore, national investment guarantees of home countries play an important role in safeguarding investors against political risks in host countries.²³ Overall, national law therefore allows host countries to set the conditions for the operation of investments, the protection of the environment and social concerns, and modify them subsequently.

In light of the great number and variety of domestic laws governing FDI, a significant portion of legal practice and scholarship will approach questions of FDI from a domestic law perspective. Their analytical angles and approaches to legal research will often be influenced

(2011) 1(1) University of California Irvine L Rev 97, 103.

¹⁹ See Patrick Juillard, 'L'évolution des sources du droit des investissements' (1994) 250-IV Recueil des Cours 9, 37 ff. See further on the interplay between different sources of investment law Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press 2013). Note, however, that the distinction between domestic law and international law is not always clear-cut, in particular in the context of investment arbitration, as concrete projects and disputes are often governed by a mix of domestic and international law. See only Convention on the Settlement of Investment Disputes between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, art 42(1), which provides that '[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.'

²⁰ Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007) 177 ff.

²¹ Salacuse (n 19) 159 ff.

²² Muchlinski (n 20) 215 ff; see comprehensively from a comparative perspective the contributions in Wenhua Shan (ed.), *The Legal Protection of Foreign Investment – A Comparative Study* (Hart Publishing 2012).

²³ In comparative perspective, Theodor Meron, *Investment Insurance in International Law* (Oceana-Sijthoff 1976); Vinzenz Bödecker, *Staatliche Exportkreditversicherungssysteme* (De Gruyter 1992).

by the methodologies of the respective national legal discipline in which they are embedded.²⁴ Often, the analysis of domestic legal approaches to FDI will cater principally to national audiences and research communities and contribute comparably little to the international legal discourse on FDI matters. This is different, however, if national approaches do not follow the cultural, disciplinary or language-related idiosyncrasies often connected to domestic legal debates, but are embedded in global discourses and addressed to a global audience. For this purpose, comparative law perspectives dealing with domestic FDI regulation can be helpful, as can approaches that use national laws as case studies for addressing general problems of FDI regulation under domestic law. In most cases, however, it will be analyses of international law aspects that form part of the global legal discourse on FDI.

2. International Law Relating to FDI

While international rules governing FDI only come into play in a second step, in complementing or correcting domestic laws, they have grown tremendously in tandem with the increase in FDI more generally. Yet, unlike in other fields of international economic law, such as international trade or international monetary law, there is no uniform regime governing investments; instead, legal rules are scattered in a variety of bilateral and multilateral agreements, and are complemented by customary rules and general principles of law.²⁵ The agreements concerned mainly address investment liberalization, investment promotion, and investment protection.

Rules on the protection of FDI are typically found in bilateral agreements between states. The rules governing FDI emanated from a lengthy and complex North-South struggle between developed and developing countries. but meanwhile cover international investment relations worldwide. The underlying struggle between the interests of capital-exporting states and their investor and capital-importing states started in the nineteenth century and played out in respect of the content of concession agreements, and other investor-state contracts, and of international treaties relating to foreign investment, the existence and content of the international minimum standard of treatment of foreign investors under customary international law and the forms of protection of foreign investors by means of diplomatic protection, including gunboat diplomacy and inter-state dispute settlement, as well as investor-state dispute settlement (ISDS).²⁶

Rules on investment liberalization, that is, rules that reduce barriers to market access for foreign investors can be found, above all, in international trade law. Thus, the Agreement on Trade-Related Investment Measures (TRIMs)²⁷ and the General Agreement on Trade in

²⁴ See only the contributions in Shan (n 22).

²⁵ For an overview of the sources of IIL, see Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012).

²⁶ For an overview of historical developments in a nutshell see Schill, 'International Investment Law as International Development Law' (n 16) 336 ff.

²⁷ Agreement on Trade-Related Investment Measures (signed 15 April 1994 and entered into force 1 January 1995) 1868 UNTS 186.

Services (GATS)²⁸ contain investment-related regulations. TRIMs, for example, prohibits trade-related investment measures, such as local content requirements. GATS mode 3, together with the relevant annex provisions, creates a limited right of establishment for covered services and hence also functions as a basis for sectoral investment liberalization. Still, even though further investment issues have been discussed regularly within the World Trade Organization (WTO), most recently as part of the Singapore Issues in the Doha Development Round,²⁹ investment matters were excluded from further negotiations after the Cancun summit.³⁰

Investment-related provisions, in particular concerning investment liberalization and market access, can also be found in European Union (EU) law, namely with the right of establishment and free movement of capital.³¹ Likewise, the OECD Codes of Liberalization of Capital Movements and Current Invisible Operations contain commitments to non-discrimination and thereby aim at investment liberalization in specific sectors between OECD Members.³² Furthermore, a growing number of bilateral free trade and regional economic integration agreements, including so-called mega-regionals, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)³³ or the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada,³⁴ contain rules on market access for foreign investments.³⁵

²⁸ General Agreement on Trade in Services (signed 15 April 1994 and entered into force 1 January 1995) 1869 UNTS 183.

²⁹ World Trade Organization, 'Ministerial Declaration' (2001) 41 ILM 746 para 20.

³⁰ World Trade Organization, 'Decision by the General Council' (August 2004) www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf.

³¹ See Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment* (Oxford University Press 2009). On the legal framework of the EU's involvement in foreign investment relations see Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011).

³² OECD, 'OECD Codes of Liberalisation – User's Guide' (2008) www.oecd.org/dataoecd/21/23/38072327.pdf. See Matthias Ruffert, 'Capital, Free Flow of' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (online edition) www.mpepil.com paras 17–19.

³³ Comprehensive and Progressive Agreement for Trans-Pacific Partnership Agreement (signed 8 March 2018, entered into force 30 December 2018) <https://www.mfat.govt.nz/assets/CPTPP/Comprehensive-and-Progressive-Agreement-for-Trans-Pacific-Partnership-CPTPP-English.pdf>.

³⁴ Comprehensive Economic and Trade Agreement (signed 30 October 2016, provisionally applied since 21 September 2017), Official Journal of the European Union, L 11, 14 January 2017, p 23.

³⁵ See comprehensively UNCTAD, *Investment Provisions in Economic Integration Agreements* (United Nations 2006), www.unctad.org/en/docs/iteit200510_en.pdf. For the development under mega-regionals, see Stephan W Schill and Heather L Bray, 'The Brave New (American) World of International Investment Law: Substantive Investment Protection Standards in Mega-Regionals' (2016) 5 *British Journal of American Legal Studies* 419, 425–9. In addition, treaties of friendship, commerce and navigation (FCN treaties), which the United States had concluded prior to setting up its own investment treaty program in the 1980s, as well as US investment treaties often also include rules on investment liberalization and market access. See Kenneth J Vandeveld, *The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties* (Oxford University Press 2017) 421 ff (addressing the issue under FCN treaties); Kenneth J Vandeveld, *U.S.*

International rules on investment promotion, that is, rules aiming at the creation of incentives for foreign investment, in turn, are sometimes contained in the form of generally binding treaty commitments.³⁶ More often, however, they are implemented on the basis of policies of international financial institutions and only become binding for concrete projects through individualized commitments, and thereby, to an extent, straddle the divide between hard law and soft law.³⁷ They can be found, for example, in the development policy activities of the World Bank Group (International Bank for Reconstruction and Development, International Finance Corporation, International Development Association, and especially the Multilateral Investment Guarantee Agency)³⁸ and other development banks.³⁹ Similarly, rules promoting investment are also often part of International Monetary Fund (IMF) conditionalities.⁴⁰ These international organizations thus aim, through various mechanisms, such as investment guarantees, technical cooperation, information and advisory services, and conditionalities in loan contracts, at creating a positive climate for investment, both domestic and foreign. Overall, however, the development of a framework for thinking about these types of activities in a comprehensive fashion from a legal perspective is still in its infancy.

This is different with respect to investment protection, which constitutes the core area of the international law relating to FDI. This law, which protects against so-called political risks that arise out of interferences of host states with foreign investments, is contained today in more than 3,300 bilateral, regional, and sectoral investment treaties and investment chapters in FTAs.⁴¹ Although there is no uniform multilateral regime addressing investment protection, the agreements are based on rather uniform substantive principles protecting foreign investors against certain government interferences, such as the protection against expropriation without compensation, fair and equitable treatment (FET), and national and most-favoured nation treatment.⁴²

International Investment Agreements (Oxford University Press 2009) 235 ff (dealing with the issue under US BITs).

³⁶ For examples see Stephan W Schill and Marc Jacob, 'Trends in International Investment Agreements, 2010–2011: The Increasing Complexity of International Investment Law' in Karl P Sauvant (ed.), *Yearbook on International Investment Law and Policy 2011–2012* (Oxford University Press 2013) 141, 152–4.

³⁷ The rules in question straddle the hard law-soft law divide because, absent a project-specific commitment which creates hard law, they remain in the realm of soft law. Furthermore, even if they become binding, they are commitments under national, not international law.

³⁸ Cf Maurizio Ragazzi, 'World Bank Group' in Wolfrum (n 32).

³⁹ See e.g. Sope Williams-Elegbe, *Public Procurement and Development Banks – Law Practice and Problems* (Bloomsbury and Hart Publishing 2017).

⁴⁰ See Daniel R Kalderimis, 'IMF Conditionality as Investment Regulation: A Theoretical Analysis' (2004) 13 *Social and Legal Studies* 103.

⁴¹ See UNCTAD, *World Investment Report 2018* (n 4) 89. FCN treaties also include rules on investment protection; see Vandeveld, *First Bilateral Investment Treaties* (n 35) 379–535. FCN treaties, however, do not provide for dispute settlement mechanisms between foreign investors and host states.

⁴² For an analysis of the content of these treaty standards see Catharine Titi, 'Scope of International Investment Agreements and Substantive Protection Standards' in Markus Krajewski and Rhea T

Moreover, unlike in customary international law or international trade law, investors can invoke the rights granted under the agreements directly by initiating international arbitration proceedings. They are generally neither limited to recourse to the host country's domestic courts, nor dependent on their home country's decision to exercise diplomatic protection. The arbitral proceedings take place mostly under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)⁴³ and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.⁴⁴ This permits foreign investors to seek damages for the violation of the rights granted under the treaties and, as the case may be, enforce them. Enforcement is governed, depending on the applicable rules of procedure, either by the ICSID Convention or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁴⁵ Since the late 1990s, the number of these proceedings has increased to over 750.⁴⁶ Despite certain inconsistencies in the interpretation and application of the agreements in question, a governance structure has evolved that is comparable to a multilateral regime.⁴⁷ This structure of what we call IIL is at the heart of the international law relating to FDI.

3. Soft Law in FDI Regulation

FDI regulation, however, is not only governed by binding (national and international) legal rules. Non-binding soft-law instruments, which are created by a variety of different actors, including inter-governmental and international organizations, but also by private, non-governmental bodies, influence FDI regulation as well.⁴⁸ Soft law in the field addresses a

Hofmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) ch 6. For a classic overview over the content of traditional investment treaties see Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff 1995); see further, e.g., McLachlan, Shore and Weiniger (n 14); Newcombe and Paradell (n 11) 122 ff; Dolzer and Schreuer (n 15). Newer investment agreements have evolved both with respect to substantive content and procedure. See Stefanie Schacherer, 'TPP, CETA and TTIP between Innovation and Consolidation – Resolving Investor-State Disputes Under Mega-Regionals' (2016) 7 *Journal of International Dispute Settlement* 628; Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19(1) *Journal of International Economic Law* 27; Schill and Bray (n 35); Stephan W Schill, 'Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals' in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA* (Oxford University Press 2017) 111.

⁴³ See supra note 19.

⁴⁴ See David D Caron and Lee Caplan, *The UNCITRAL Arbitration Rules – A Commentary* (2nd edn, Oxford University Press 2013). In certain circumstances, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration(s) (signed 10 December 2014, entered into force 18 October 2017) may also apply to an arbitration and provide for transparency and third-party participation.

⁴⁵ Signed 10 June 1958, 330 UNTS 4739.

⁴⁶ UNCTAD, *World Investment Report 2018* (n 4) 91-92.

⁴⁷ See comprehensively Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009).

⁴⁸ See in depth Marc Jacob and Stephan W Schill, 'Going Soft: Towards a New Age of Soft Law in International Investment Law?' (2014) 8 *World Arbitration and Mediation Review* 1. See further the

variety of aspects, including the management of ISDS and the relationship of investment and non-investment concerns.

Soft law comes about for many different reasons. It can be, for example, a product of the difficulties of formal treaty-making when a large number of actors with great diversity in interest and orientation are involved – and either substitutes for, or fills gaps left unaddressed by, hard law. It can also be a reaction to delegate rule-making to actors that are better placed to address an issue at stake. Soft law can also react to the dynamics of FDI regulation in allowing for the incremental and at times experimental infusion of legal change by trial and error, without the need to settle on durable hard law rules. And finally, soft-law instruments can ease tensions between the system-wide problems FDI regulation addresses and their predominant regulation through national or bilateral approaches.

Prominent and well-established examples of soft-law instruments that play an important role in the management of ISDS are instruments adopted by the International Bar Association (IBA), an organization of the legal profession with national bar associations as members, such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration,⁴⁹ the IBA Guidelines on Conflicts of Interests in International Arbitration,⁵⁰ and the IBA Rules on Party Representation in International Arbitration.⁵¹ These soft-law instruments exercise normative authority independently of the disputing parties' consent; instead, they express standards of behaviour that those involved in the settlement of investment disputes as lawyers (counsel or arbitrator) follow as a matter of professional best practices or professional ethics.⁵²

Examples of soft law that deal with the balance between investment protection and competing rights are instruments addressing corporate social responsibility (CSR), an area of mounting interest in the past years.⁵³ In this field, several soft-law instruments have been developed by international organizations, including the United Nations (UN) Global Compact,⁵⁴ the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,⁵⁵ the UN Guiding Principles on Business

contributions in Andrea K Bjorklund and August Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar 2012).

⁴⁹ IBA Rules on the Taking of Evidence in International Arbitration (adopted 29 May 2010) www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

⁵⁰ IBA Guidelines on Conflicts of Interest in International Arbitration (adopted 23 October 2014) www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

⁵¹ IBA Guidelines on Party Representation in International Arbitration (adopted 25 May 2013) www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

⁵² Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity' (2010) 1 *Journal of International Dispute Settlement* 283.

⁵³ For a general discussion see John G Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' UN Doc A/HRC/8/5 (7 April 2008) paras 51–81; Markos Karavias, *Corporate Obligations under International Law* (Oxford University Press 2013) 6–16.

⁵⁴ For further information on the UN Global Compact see www.unglobalcompact.org.

⁵⁵ See Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human

and Human Rights,⁵⁶ or the OECD Guidelines for Multinational Enterprises.⁵⁷ These instruments aim to counter-balance investor rights through the codification of obligations that investors are expected to comply with independently of their rights under IIAs. Such instruments are, albeit still tentatively, starting to be referred to by investment treaty tribunals in order to concretize the standards of treatment in investment agreements and to ground investor obligations.⁵⁸

Similar developments can also be seen with respect to other soft-law instruments that aim to establish best practices for certain areas of government policy that also affect foreign investors. One example are the Principles on Promoting Responsible Sovereign Lending and Borrowing, which were developed by the United Nations Conference on Trade and Development (UNCTAD) and endorsed by the UN General Assembly (UNGA).⁵⁹ These Principles aim to lay down rights and obligations for both lenders and borrowers in sovereign debt transactions and restructurings and have already been referenced in investment treaty arbitrations.⁶⁰ Other examples that have not yet been invoked in investment treaty arbitrations, but may well be in the near future, are the Principles for Responsible Agricultural Investment, which are developed jointly by various UN organizations and the World Bank inter alia to deal with the issue of land-grabbing,⁶¹ or the Santiago Principles, which lay down principles and practices relating to sovereign wealth funds.⁶²

Together with the national and international legal rules discussed above, these and other soft-law instruments govern international investment relations, both in substance and

Rights (13 August 2003) UN Doc.E/CN.4/Sub.2/2003/12/Rev.2
<http://undocs.org/E/CN.4/Sub.2/2003/12/Rev.2>.

⁵⁶ See UN Office of the High Commissioner for Human Rights (OHCHR), *Guiding Principles on Business and Human Rights* (UN 2011)
www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁵⁷ OECD, *OECD Guidelines for Multinational Enterprises* (OECD 2011)
www.oecd.org/daf/inv/mne/48004323.pdf.

⁵⁸ See *Hesham T M Al Warrag v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) para 577; *Urbaser SA et al. v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2006) paras 1195–9. Moreover, CSR instruments are referenced increasingly in more recent IIAs; see e.g. Canada-Panama FTA (adopted 14 May 2010, entered into force 1 April 2013) art 9.17.

⁵⁹ UNCTAD, ‘Principles on Promoting Responsible Sovereign Lending and Borrowing (amended and restated as of 10 January 2012)
http://unctad.xiii.org/en/SessionDocument/gdsddf2012misc1_en.pdf; see also UNGA Res 68/304 (9 September 2014) UN Doc A/RES/68/304 <http://undocs.org/A/RES/68/304>.

⁶⁰ See *Ambiente Ufficio SpA and Others v Argentine Republic*, ICSID Case No ARB/09/9, Decision on Jurisdiction and Admissibility (8 February 2013), Dissenting Opinion of Santiago Torres Bernárdez, para 330.

⁶¹ See Inter-Agency Working Group on the Food Security Pillar of the G20 Multi-Year Action Plan on Development, *Options for Promoting Responsible Investment in Agriculture, Report to the High-Level Development Working Group* (3 June 2011) Annex 1,
http://unctad.org/sections/dite_dir/docs//diae_dir_2011-06_G20_en.pdf.

⁶² See International Working Group of Sovereign Wealth Funds (IWG), *Sovereign Wealth Funds: Generally Accepted Principles and Practices* (October 2008) www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf (‘Santiago Principles’).

procedure. It is this complex legal framework that forms the object of analysis of legal inquiries into, and legal research on, FDI regulation.

III. RESEARCH QUESTIONS IN INTERNATIONAL INVESTMENT LAW

Despite the transnational character of IIL, the international discourse on FDI regulation focuses principally on the international legal aspects of the field. In-depth analysis of national FDI regulation, by contrast – and unrightfully so – generally plays only a subordinate role in international or comparative legal circles. Instead, as mentioned before, in the area we call IIL, legal research and writing are booming.⁶³ The resulting increase in literature, and the variety of approaches and methods employed make it difficult – already for senior researchers, but even more so for more junior lawyers and students – to get a sense of direction and develop a ‘map’ of the different approaches to research in the field. In this and the following sections, we therefore aim to develop such a map in order to offer guidance for engaging in technically solid and legally (and ideally also socially) meaningful research in IIL. We do so by developing a typology of both research questions (addressed in this section) and research methods in IIL (addressed in Section IV).

After addressing the distinction between legal, non-legal and interdisciplinary research questions (Section III.1), this section develops, by using examples from the literature, a typology of legal research questions in IIL. As detailed below, we observe three main types of legal research questions that are generally asked. The first deals with the ‘law as it is’ (*lex lata*) and focuses on determining the content of the (substantive and procedural) rights and obligations of investors and states (Section III.2). The second type approaches investment law from the perspective of norms outside of IIL and deals with ‘how the law should be (reformed)’ in light of deficiencies and inadequacies addressed (*lex ferenda*) (Section III.3). Finally, under the third type of legal research questions we group all questions that do not deal with the law in practice, but ask questions that are part of the theory of IIL (Section III.4).

1. Legal, Non-Legal and Interdisciplinary Questions

As in any other legal (as well as non-legal) field, research in IIL should start with a clear research question. This is important not only as a matter of analytical rigor, but also because it influences the selection of appropriate research methods. It determines whether the research in question is at all (or solely) within the realm of legal research, and can therefore be answered by the methodological tools available to legal science, or whether the research is (fully or partially) part of a different discipline (such as economics or political science) and accordingly requires a different methodological arsenal.

⁶³ See supra note 7.

One important task when engaging in legal research in IIL is therefore to distinguish between legal and non-legal research questions. Typically, questions in legal research can be grouped into three different categories.⁶⁴ They can (1) relate to the ascertainment of the content of the law ('What is the law?'); (2) concern the normative evaluation of the law ('Is the law good or bad?' or 'How ought the law to be?'); (3) address the law in its context, that is, either deal with the social consequences of the law ('What effect does the law have on society?'), or explain law's development in light of historical, social, or economic factors ('Why is the law the way it is?' and 'How did the law come about?'). To the extent that all of these questions share a focus on the meaning, functioning and operation of substantive and procedural legal rules and principles, individually or in their entirety, they can be analysed from the perspective of legal science and its methods.

For instance, asking 'What does the obligation to provide FET require of contracting states?' is posing a question about the substantive content of IIL. 'What is the effect of corporate restructuring on the jurisdiction of investment treaty tribunals?' is a question concerning the procedure of ISDS. Conversely, asking 'Should investment treaties afford protection to holders of sovereign bonds?' involves a normative evaluation of investment law and may lead to suggestions for reform of existing IIL. In turn, a question, such as 'What effect does the interpretation of investment treaty standards have on competing human rights of affected populations?', concerns the social effect of the law. Last but not least, a question, such as 'To what extent does IIL emerge from and drive economic globalization?', seeks an explanation of the emergence of the law in light of its social, political and economic context.

Legal research questions can be distinguished from non-legal research questions about FDI, most importantly those that concern economic or political aspects of international investment relations. For instance, the question 'Do IIAs attract investments to host countries?' does not concern the legal aspects of FDI, but relates to the economic effect of concluding investment treaties. It cannot be answered by legal methods, but requires an assessment of empirical evidence using econometric methods.⁶⁵ Likewise, the question 'What was Pakistan expecting when agreeing to include an arbitration clause in its BIT with Germany?' does not principally concern a legal question, but relates to what political decision-makers at the time in fact thought. This question cannot be answered by legal methods either, but would require methods typically used by political scientists or historians, such as interviews of Pakistani officials who negotiated the Germany-Pakistan BIT.⁶⁶

Similarly, research relating to IIL can involve purely historical and sociological questions. Asking, for example, for the historical facts surrounding the creation of certain

⁶⁴ Cf Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 9; Mathias M Siems, 'Legal Originality' (2008) 28 *Oxford Journal of Legal Studies* 147.

⁶⁵ For a discussion of the various econometric studies on the impact of FDI see Jonathan Bonnitcha, Lauge N S Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017) 46–50.

⁶⁶ Lauge N S Poulsen, *Bounded Rationality and the Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015) 47–191.

IAs or the ICSID Convention, without at the same time asking about the impact this history has on the rights and obligations created, their interpretation, and application, falls outside the scope of legal research in the strict sense.⁶⁷ Likewise, certain research questions relating to IIL may be purely of a sociological nature.⁶⁸ Questions such as ‘Who are the dominant players in the field of investor-state arbitration and what do they think about certain legal issues?’ is a sociological question, that only becomes connected to legal research if a connection is made to the ways IIL is interpreted and applied by those actors.

The importance of distinguishing between legal and non-legal research questions notwithstanding, many important research questions relating to IIL are too complex to be answered solely from a legal or non-legal perspective. Instead, many complex research questions require combining legal and non-legal methods. For instance, answering, in a comprehensive fashion, the question ‘Should ISDS provisions be included in an IIA?’ will require recourse to considerations and methods of the legal, economic and political sciences and may involve research of a sociological and historical nature as well. To answer the question comprehensively, one may need to consider the economic impact of including ISDS provisions in IIAs, consider and weigh the political costs, analyse the impact of the inclusion of such provisions on host state compliance with the substantive standards of treatment contained in IIAs, consider the sociological composition of the investment arbitration bar, and view the role of ISDS also in a historical perspective. Questions such as this are interdisciplinary in nature and need to make joint use of the methodologies of legal science and of other disciplines involved.

All in all, a variety of legal, political, economic, sociological, and historical questions can be raised about IIL. Formulating a clear research question is the first, and one of the most important steps when engaging in research in IIL. It marks the boundaries between legal, non-legal and interdisciplinary research, delineates the object of inquiry, and affects the choice of methodology. In light of the foregoing, the following subsections will develop, based on a literature review, a more detailed typology of legal research questions in IIL.

2. Research into the *lex lata*

Mainstream scholarship in IIL focuses to a large extent on determining the (positive) law as it stands (the *lex lata*). Typical research questions that are asked in this context concern the ascertainment, interpretation and application of the substantive and procedural rules that govern the relations between states and foreign investors. They come at various levels of abstraction, ranging from the specific and concrete (‘micro-legal questions’) to the more

⁶⁷ Most research into the history of IIL, by contrast, falls into the category of legal research, because it uses historical insights for purposes of interpretation, for providing a normative critique of IIL, or for explaining the reasons for the content of the law in place. See the references *infra* at notes 85-9 and accompanying text.

⁶⁸ Cf Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) (analysing the socio-institutional structures of international arbitration).

general and abstract ('macro-legal questions').⁶⁹ 'Micro-legal questions' could involve asking for the interpretation of the FET provision in Article 1105 NAFTA,⁷⁰ or whether corporate restructuring with the knowledge of a foreseeable dispute or acts of corruption prevents investors from benefiting from IIA's substantive protections.⁷¹ 'Macro-legal questions' could concern the analysis of how the rights of foreign investors in IIL are balanced with the host states' right to regulate,⁷² or address how investment protection standards apply to sovereign debt and its restructuring.⁷³

In terms of focus, four types of research questions addressing the present state of IIL can be observed in the literature. First, the majority of IIL scholarship focuses on determining the content of the rules and principles governing investor-state relations under IIAs, customary international law, and general principles of law.⁷⁴ This type of 'source-oriented legal research' formulates research questions, such as 'How is state practice identified in the formation of customary international law governing international investment relations?',⁷⁵ or 'What does the FET standard require of states?'⁷⁶ It includes thematic studies on specific substantive standards of treatment⁷⁷ as well as questions relating to the procedure of investment dispute settlement.⁷⁸

The second type of *lex lata* scholarship focuses on actors and their impact on, and understanding of, the content of IIL. For example, 'actor-oriented approaches' ask questions

⁶⁹ On the distinction between micro-legal and macro-legal questions see Siems (n 64) 3–15.

⁷⁰ Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Wolters Kluwer 2013).

⁷¹ Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Oxford University Press 2017) 205–28; Aloysius P Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press 2017).

⁷² Aikaterini Titi, *Right to Regulate in International Investment Law* (Nomos 2014); Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration – Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015) 193–7; Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press 2015) 122 ff.

⁷³ See e.g. Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101 *American Journal of International Law* 7.

⁷⁴ See the contributions in Gazzini and De Brabandere (n 25).

⁷⁵ Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016) 9.

⁷⁶ Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 19 and 111 ff. Cf Santiago Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009) 200 ff.

⁷⁷ See e.g. Reinisch (n 15); Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008); Sebastian López Escarcena, *Indirect Expropriation in International Law* (2014).

⁷⁸ See e.g. Douglas (n 10) 39 ff; Eric De Brabandere, *Investment Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2016) 71 ff; Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (2nd edn, Oxford University Press 2017); R Doak Bishop and Silvia Marchili, *Annulment under the ICSID Convention* (Oxford University Press 2013); Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press 2018).

about the role of states as treaty-makers or look at the decision-making of arbitral tribunals in order to understand the content, application and interpretation of IIL.⁷⁹ This could involve a focus on specific dispute settlement institutions and their influence on IIL,⁸⁰ the treaty practice of specific states,⁸¹ the contribution of international or regional organizations,⁸² or the impact of new forms of international treaties, such as ‘mega-regionals’, on IIL.⁸³ Also, the analysis of relations between different actors in IIL, for example that between the EU and its Member States, or that between domestic courts and investment treaty tribunals, would be part of ‘actor-oriented scholarship’.⁸⁴

The third type of *lex lata* scholarship investigates the interaction of IIL with other legal regimes. These ‘regime-oriented approaches’ analyse, for example, the interaction of IIL with general international law,⁸⁵ or with a number of more specific international legal regimes,⁸⁶ such as WTO law,⁸⁷ human rights law,⁸⁸ or international environmental law.⁸⁹ Moreover, exploring the relationship of IIL and domestic law, including constitutional law, or

⁷⁹ Andrés Rigo Sureda, *Investment Treaty Arbitration Judging under Uncertainty* (Cambridge University Press 2012) ff; Catherine Titi, ‘The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration’ (2013) 14 *The Journal of World Investment & Trade* 829–51.

⁸⁰ See e.g. Charles N Brower and Jason D Brueschke, *The Iran–United States Claims Tribunal* (Martinus Nijhoff 1998).

⁸¹ Vandevelde, *U.S. International Investment Agreements* (n 35); Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties* (Oxford University Press 2009).

⁸² See Leon Trakman and Nicola Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013); the role of international organizations in IIL in Africa is discussed in various special issue contributions in Makane M Mbengue and Stephan W Schill (eds), ‘Africa and the Reform of the International Investment Regime’ (2017) 18(3) *The Journal of World Investment & Trade* 367–584.

⁸³ See e.g. Thilo Rensmann (ed.), *Mega-Regional Trade Agreements* (Springer 2017); Griller, Obwexer and Vranes (n 42). See also Benedict Kingsbury et al. (eds), *Megaregulation Contested: Global Economic Ordering After TPP* (Oxford University Press forthcoming).

⁸⁴ On the relationship between domestic courts and international investment tribunals, see Christoph Schreuer, ‘Interaction of International Tribunals and Domestic Courts in Investment Law’ in Arthur W Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation* (Martinus Nijhoff 2011) 71; Jacomijn van Haersolte-Van Hof and Anne Hoffmann, ‘The Relationship between International Tribunals and Domestic Courts’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 962. See also Thiago B Jardim Oliveira, ‘The Authority of Domestic Courts in Adjudicating International Investment Disputes: Beyond the Distinction Between Treaty and Contract Claims’ (2013) 4(1) *Journal of International Dispute Settlement* 175.

⁸⁵ See the contributions in Rainer Hofmann and Christian J Tams (eds), *International Investment Law and General International Law* (Nomos 2011).

⁸⁶ *Ibid.*

⁸⁷ Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge University Press 2016).

⁸⁸ Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate – A Human Rights Perspective* (Routledge 2016). See also the contributions in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersman (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009).

⁸⁹ Jorge Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012).

law of regional economic organizations, forms part of ‘regime-oriented approaches’.⁹⁰ Similarly, research questions analysing the impact of international commercial arbitration on the procedural law applicable to and in investor-state arbitration may form part of regime-oriented research in IIL. Usually, such approaches require expertise in IIL and other disciplines, and involve the development of strategies for conflict resolution, cooperation, and cross-fertilization.⁹¹

The fourth type of *lex lata* scholarship concerns what can be termed ‘sector-specific’ or ‘subject matter-specific approaches’. This can involve the examination of investment issues in specific economic sectors or address what legal limits investment protection imposes on specific government functions or areas of government policy. Examples of sector-specific research could involve questions about the protection, and the concomitant scope for government regulation, of investments in the energy sector, including questions of dispute settlement.⁹² Examples of subject matter-specific research are the impact of IIL on taxation powers,⁹³ on the regulation of financial markets,⁹⁴ or on certain areas of domestic law, such as domestic administrative law or constitutional law.⁹⁵

3. Normative Evaluation and Reform of International Investment Law

Another type of legal research questions explores the normative evaluation of IIL and investigates possibilities for its reform in light of deficiencies and inadequacies. Evidently, this requires an understanding of the law ‘as it stands’. Yet, the approaches that fall under this umbrella go further than merely describing the present state of IIL and address the question ‘what the law ought to be’ (in the sense of the *lex ferenda*). This calls for an evaluation of the law from a normative standpoint that is external to IIL and often, but not always, involves

⁹⁰ See e.g. Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (Kluwer Law International 2010); Hege Elisabeth Kjos, *Applicable Law in Investor–State Arbitration: The Interplay Between National and International Law* (Oxford University Press 2013); Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017). On the relationship between IIL and EU law see Dimopoulos (n 31) 125–94.

⁹¹ Kurtz (n 87).

⁹² Maxi Scherer (ed.), *International Arbitration in the Energy Sector* (Oxford University Press 2018); Nima Mersadi Tabari, *Lex Petrolea and International Investment Law: Law and Practice in the Persian Gulf* (Routledge 2016); Eric De Brabandere and Tarcisio Gazzini, *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Martinus Nijhoff 2014); Thomas Roe and Matthew Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press 2011); Peter Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford University Press 2010); Thomas W Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996).

⁹³ See Arno Gildemeister, *L’arbitrage des différends fiscaux en droit international des investissements* (LGDJ 2013).

⁹⁴ See the contributions in Christian J Tams, Stephan W Schill and Rainer Hofmann (eds), *International Investment Law and the Global Financial Architecture* (Edward Elgar 2017).

⁹⁵ Cf Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014) 52 ff (developing a framework for the analysis of the domestic impact of investment treaties).

recommendations for how IIL should be changed. In fact, while normative approaches to IIL are often critical, they can also be used to justify the present state of the law.⁹⁶

The benchmarks for the normative evaluation of IIL (prior to or independently of making proposals for reform) that can be found in the literature vary widely. They may involve an assessment of the conformity of IIL with normative standards that are widely, or at times even universally, accepted. These standards can consist, for example, in liberal political values that are often protected under constitutional law or international law, like the principle of democracy, the concept of the rule of law, or human rights,⁹⁷ or in otherwise broadly accepted legal concepts, such as the ‘public interest’,⁹⁸ ‘transparency’,⁹⁹ or ‘sustainable development’.¹⁰⁰ But normative evaluation of IIL can also take place against non-legal benchmarks, such as the interests of states in regulatory space,¹⁰¹ the interest of developing countries or the Global South in fair participation in global economic exchange,¹⁰² utilitarian considerations of efficiency or usefulness,¹⁰³ the notion of ‘fairness’,¹⁰⁴ or – more and more commonly – against the notion of ‘legitimacy’.¹⁰⁵

Depending on the outcome of the analysis, normative evaluations of IIL may result in making suggestions for reforming substantive law, or the procedure of investment dispute

⁹⁶ Cf Kate Miles, ‘Investor-State Dispute Settlement: Conflict, Convergence, and Future Directions’ in Marc Bungenberg et al. (eds), *European Yearbook of International Economic Law*, vol 7 (Springer 2016) 273 with Stephan W Schill, ‘In Defense of International Investment Law’ in Marc Bungenberg et al. (eds), *European Yearbook of International Economic Law*, vol 7 (Springer 2016) 309.

⁹⁷ See e.g. David Schneiderman, *Constitutionalizing Economic Globalization Investment Rules and Democracy’s Promise* (Cambridge University Press 2008); Gus Van Harten, ‘Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law’ in Stephan W Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 233; Diane Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance and Investment* (Oxford University Press 2015).

⁹⁸ Andreas Kulick, *Global Public Interest and International Investment Law* (Cambridge University Press 2012) 223–332.

⁹⁹ See Julie Maupin, ‘Transparency in International Investment Law: The Good, the Bad, and the Murky’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 142.

¹⁰⁰ See Stephan W Schill, Christian J Tams and Rainer Hofmann (eds), *International Investment Law and Sustainable Development: Bridging the Gap* (Edward Elgar 2015); Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer 2010).

¹⁰¹ Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press 2009).

¹⁰² M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2013) 95 ff.

¹⁰³ Bonnitcha (n 95).

¹⁰⁴ Roland Kläger, *Fair and Equitable Treatment’ in International Investment Law* (Cambridge University Press 2011).

¹⁰⁵ Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 218 ff.

settlement, or both. Consequently, a growing literature in IIL deals with investment law reform (ILR).¹⁰⁶ This literature not only highlights the deficiencies of IIL, but also proposes changes to the existing law and practice and deals with questions about institutional design. It considers, inter alia, who should introduce change, that is, whether it is states by reasserting control over law-making or law application, or arbitral tribunals by reinterpreting existing IIA commitments in order to reach a more appropriate balance between investment protection and public interests.

Revolving around concrete policy proposals advanced by states, supranational or international organizations, and now institutionalized in a reform process on ISDS under the auspices of UNCITRAL,¹⁰⁷ ILR literature also considers the object of what should be reformed. This involves questions, such as: Should substantive standards of treatment be concretized and, if so, how? Should policy space for regulatory action be included expressly? Should investor access to international arbitration be restricted or maintained? Finally, ILR literature addresses how the reform in IIL can and should be realized, whether through a new multilateral treaty, through re-negotiation of IIAs currently in force, or informally by developing soft-law instruments, for examples on CSR? Overall, the questions raised in ILR literature do not only echo in IIL scholarship, but also resonate with the public debate on this increasingly controversial topic.

4. Theoretical Research

Apart from research questions relating either to ascertaining the content of IIL, normatively evaluating it, or making proposals for reform, a great number of legal inquiries do not focus principally on the law in practice, but rather dwell upon more abstract, theoretical legal questions in relation to IIL.¹⁰⁸ These can relate to the forms of legal reasoning in IIL, the clarification and use of core legal concepts, or the structural features of IIL.¹⁰⁹ Theoretical research principally poses questions that aim to understand how and why IIL operates the way it does, rather than to evaluate that mode of operation against a certain normative benchmark. This notwithstanding, certain overlaps can exist between purely theoretical inquiries into, and normative evaluation of, IIL. For instance, when asking whether IIL is a tool of neoliberal politics which formalizes economic exploitation of the periphery by the centre, theoretical

¹⁰⁶ See e.g. Andreas Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017); Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law – More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016); Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System – Journeys for the 21st Century* (Brill 2015).

¹⁰⁷ See United Nations, Report of the United Nations Commission on International Trade Law, Fiftieth session (3-12 July 2017), UN Doc No A/72/17, paras 240-65; for an overview over reform policy proposal, see also UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 113–17.

¹⁰⁸ Siems (n 64) 156–62 terms this ‘scientific legal research’.

¹⁰⁹ Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge University Press 2016) 256–60. On the analysis of structural aspects in international law more generally, see David Kennedy, *International Legal Structures* (Nomos 1987).

inquiries on whether or not IIL indeed formalizes international economic relations, and normative evaluation on whether or not it serves the interests of some states more than others, come together.

Theoretical approaches take many forms and can be grouped on the basis of different criteria. At the most general level, theoretical inquiries one can observe in IIL literature can be divided into approaches that ask research questions relating to IIL from a system-internal perspective and approaches that involve research questions on IIL from an external perspective. Rather than focus on the interpretation and application of specific rules and principles in IIL, internal theoretical inquiries generally are concerned with the character and functioning of IIL at a system- or regime-level. These approaches date back to Dolzer and Stevens' seminal study that reviewed BIT practice not in relation to a specific country, but rather as part of a newly emerging pattern of global treaty practice, and in fact a newly emerging legal field.¹¹⁰

Internal approaches can ask a large variety of questions about fundamental concepts of IIL, about structures of reasoning, or institutional aspects relating to the legal regulation of investor-state relations or investment dispute settlement. Examples include inquiries into the use of the concept of legitimacy in IIL and investment arbitration¹¹¹ or the question whether IIL is sensibly conceptualized as a multilateral system or a web of bilateral relations.¹¹² Similarly, the question whether IIL should be characterized as a public law or a private law discipline and what theoretical tools may be useful in gaining a comprehensive understanding of the field are theoretical inquiries into IIL.¹¹³ While analysing IIL in an abstract fashion, these approaches usually understand IIL in its functioning as part of the existing institutional and social context; they take a perspective that is internal to IIL.

External approaches, by contrast, while often asking similar questions about the character and functioning of IIL at large, do so from a perspective outside of IIL. One prominent external approach is the Critical Legal Studies (CLS) approach. It views IIL as part of a super-structure that produces, reproduces and justifies inequalities and hierarchies. IIL, according to CLS accounts, is the centre's penetration into markets and politics abroad, from which it draws disproportional benefit due to the presence of an essentially parasitic relationship.¹¹⁴ CLS approaches employ deconstructionist philosophy and Marxist rhetoric not only as methods of research, but also in the formulation of research questions.¹¹⁵ CLS questions can involve the role the language of IIL plays in establishing and perpetuating power relationships or focus on investment law's 'inherent biases' to view investor-state

¹¹⁰ Dolzer and Stevens (n 15).

¹¹¹ See e.g. Stone Sweet and Grisel (n 105) 218 ff.

¹¹² Schill (n 47).

¹¹³ For further discussion of framing and theoretical approaches in IIL see *infra* Section IV.

¹¹⁴ Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013).

¹¹⁵ On CLS, see Roberto Unger, *The Critical Legal Studies Movement – Another Time, A Greater Task* (London Verso 2014).

relations through the eyes of principles of investment protection.¹¹⁶ Similarly, inquiries into the politics behind IIL,¹¹⁷ or whether IIL has adverse effects on environmental protection, are examples of research questions that can be generated by the CLS approach.¹¹⁸ At the same time, CLS is not the only external approach asking research questions relating to IIL. Another prominent external approach are Third World Approaches to International Law (TWAIL), which ask for the impact of IIL on developing countries and their role in shaping IIL.¹¹⁹

As the example of CLS approaches shows, the formulation of research questions is often closely tied in with a specific theoretical approach to IIL. Consequently, it is important to be aware of the interplay between theoretical approaches and the formulation of research questions; in fact, the way in which research questions are posed is itself influenced by non-legal considerations. As discussed in the next section, which addresses the contribution of framing and methodologies to resolve research questions in relation to IIL, the same holds true even when staying within the realm of internal approaches to IIL.

IV. THEORIES AND METHODS IN INTERNATIONAL INVESTMENT LAW

There are different ways in which one can think about IIL. IIL literature looks at the questions addressed in Section III from several different ‘frames of thought’ and investigates them by utilizing a variety of methodological tools. Frames can be defined as ‘principles of organization which govern events ... and our subjective involvement in them’.¹²⁰ This notion refers to the pre-existing thought structures, such as beliefs or assumptions, that inform our perception and analysis. Frames underlie and precede the choice of legal method used to answer research questions, and, as suggested above, even influence the formulation of the research questions themselves. In turn, a method can be defined as a structured way of knowledge production that legal research typically ought to fulfil in order to be seen as plausible and scientifically accepted.¹²¹

¹¹⁶ Cf José E Alvarez, ‘Contemporary International Law: An “Empire of Law” or the “Law of Empire”’ 24(5) *American University International Law Review* (2009) 811, 834 (responding to approaches conceptualizing IIL as hegemonic law and arguing that the new BITs take a balanced stance).

¹¹⁷ Cf Martti Koskenniemi, ‘It’s Not the Cases, It’s the System’ (2017) 18 *The Journal of World Investment & Trade* 343 (arguing that the contradiction is not between investor interests and countervailing public values, but between ‘the autonomous power of domestic political communities and de-localized processes of economic globalization’). See also Schneiderman (n 6).

¹¹⁸ Tienhaara (n 101).

¹¹⁹ See e.g. Sornarajah (n 102); see also Pahuja (n 102) 95 ff.

¹²⁰ Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harvard University Press 1974) 10–11.

¹²¹ For an exposition of various methods in social sciences, see Ellen Perecman and Sara R Curran (eds), *A Handbook for Social Science Field Research Essays and Bibliographic Sources on Research Design and Methods* (Sage 2006).

Against this background, this section provides a summary of the most frequently used frames and methods of research. We start by laying out the three most common frames used in IIL literature (Section IV.1). Subsequently, we turn to the methodologies available to lawyers for addressing legal questions outlined in Section III. We categorize these methodologies as doctrinal versus non-doctrinal (or ‘law in context’-) approaches. Amongst doctrinal approaches, we discuss black letter law analysis, hermeneutics and comparative law (Section IV.2). As part of non-doctrinal methodologies we discuss ‘law and ...’-approaches to IIL (Section IV.3). Finally, we address empirical legal studies (Section IV.4).

1. Frames and Framing in International Investment Law

Formulating research questions in IIL and choosing methods to answer them is to a great extent influenced by pre-existing theoretical and disciplinary frames. For the study of IIL, the choice of frames does not only have a stylistic effect on the problem analysis (as well as on the formulation of research questions); it can affect the very outcome of the research, whether concerning the interpretation of the *lex lata*, its normative evaluation, or its theoretical analysis. In the context of IIL, frames refer to different ways of conceptualizing IIL as part of different legal disciplines or different ‘epistemic’ or ‘interpretative communities’.¹²² Typically, scholarship captures IIL through three different (but not necessarily mutually exclusive) frames: public international law, private law, and (domestic and international) public law.¹²³ These approaches place IIL into different legal and epistemic contexts, approach legal research from different angles, and influence core underlying assumptions about the functioning and effect of IIL.

The underlying assumption of a public international law frame is that IIL is a specialized treaty regime that consists principally of IIAs and the ICSID Convention; it is embedded in general international law and has points of interaction with other specialized treaty regimes,¹²⁴ such as human rights law or international trade law.¹²⁵ In the public international law frame, states are the principal subjects of rights and obligations, whereas investors are (at the most) beneficiaries of the rules in place. This frame treats IIL as a construct of inter-state relations, attributes great importance to the sources of international

¹²² Peter M Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’ (1992) 46 *International Organization* 1, 4, 16–17 (defining an epistemic community by shared normative and casual beliefs, as well as a shared notion of validity and a common policy enterprise); Michael Waibel, ‘Interpretative Communities in International Law’ in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Cambridge University Press 2015) 147.

¹²³ See Schill (n 8); Vadi (n 109); Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2013) 107(1) *American Journal of International Law* 45; Gus Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims Against the State’ (2007) 56 *International Comparative Law Quarterly* 371.

¹²⁴ See e.g. De Brabandere (n 78) 15–54.

¹²⁵ See e.g. Kurtz (n 87); Andrew Mitchell, Elizabeth Sheargold and Tania Voon, ‘Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment’ (2016) 17 *The Journal of World Investment & Trade* 7.

law, including customary international law and general principles, and to the history of diplomatic practices. It prioritizes inter-state considerations, the concept of sovereignty, and ideas of public world order over concerns arising from the individual relationship between a host state and a foreign investor and stresses the ‘systemic integration’ of IIL and other international legal regimes.¹²⁶ Similarly, investor-state arbitration is seen as part of public international law dispute settlement, not international commercial arbitration.¹²⁷ Thus, what distinguishes public international law approaches from other frames is that they generally disconnect IIL from both domestic law and the field of international commercial arbitration.

A second approach frames IIL from a private law perspective.¹²⁸ It views IIAs in essence not as instruments of public world order, but rather as ‘creatures of contract’ through which contracting parties strike bilateral *quid pro quo* bargains and allow for private ordering between investors and host states.¹²⁹ Similarly, investor-state arbitration is understood as part of the universe of international commercial arbitration, a private form of settling disputes, not only because arbitral procedures in ISDS and commercial arbitration resemble each other, but also because a significant number of investment arbitrators come from the world of commercial arbitration.¹³⁰ Albeit significantly challenged today, the private law framing remains important in IIL scholarship, in particular in respect of the legal analysis of ISDS,¹³¹ and is reflected in the decision-making of some investment tribunals.¹³² It places the analysis of IIL within a private law framework, emphasizing, for example, the equality of the disputing

¹²⁶ On systemic integration, see Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54(2) *International Comparative Law Quarterly* 279; on systemic integration in IIL, see James Crawford, ‘International Protection of Foreign Direct Investments: Between Clinical Isolation and Systematic Integration’ in Hofmann and Tams (n 85) 17; Susan Karamanian, ‘The Place of Human Rights in Investor-State Arbitration’ (2013) 17(2) *Lewis and Clark Review* 423.

¹²⁷ See e.g. De Brabandere (n 78) 71 ff.

¹²⁸ Julian Arato, ‘The Logic of Contract in the World of Investment Treaties’ (2016) 58 *William and Mary Law Review* 351; Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009) 289–91.

¹²⁹ Bernard Kishoiyan, ‘The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law’ (1994) 14 *Northwestern J Int’l L & Business* 327, 333 and 373 (arguing that BITs merely amount to private ordering for boosting investor confidence through arbitration); Peter Muchlinski, ‘Corporations and the Uses of Law: International Investment Arbitration as a “Multilateral Legal Order”’ (2011) 1(4) *Oñati Socio-Legal Series* 1 (arguing that IIL is not a multilateral order but an ‘unstructured process of privatized legal entrepreneurship’).

¹³⁰ Gabrielle Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1313; Stephan Wilske and Martin Raible, ‘The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues?’ in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (Oxford University Press 2009) 249, 257–61.

¹³¹ Cf Arato (n 128) 372 ff; James Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 *Arb Int’l* 351, 360–1; Anthea Roberts, ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56(2) *Harvard International Law Journal* 353.

¹³² See e.g. *United Parcel Service of America v Canada*, NAFTA/UNCITRAL, Award on Jurisdiction (22 November 2002) para 97; *Occidental v Ecuador*, UNCITRAL, Award (1 July 2004) para 192.

parties, and often prioritizing contractual obligations and similar arrangements between investors and states over public concerns. For a long time, this perspective has co-existed with public international law approaches to IIL rather peacefully, not least because private law analogies themselves have, for a long time, heavily influenced public international law.¹³³

More recently, the private law frame has been challenged by public law approaches to IIL. Proponents of this frame underscore the functional equivalence of IIL and domestic public law, namely its capacity to enshrine the rights of private actors and thereby restrict government action. They also draw analogies between investment treaty arbitration and the adjudication of public law disputes in domestic administrative or constitutional courts.¹³⁴ Public law approaches likewise tend to emphasize the function of investment treaty arbitration to not only settle individual disputes, but also exercise governance functions for investor-state relations more generally. In their analysis of IIL they often focus on public policy concerns and tensions with competing public interests and rely on forms of public law reasoning, such as proportionality analysis or theories of deference, that are used to resolve tensions between competing concerns in other contexts of public law adjudication, both in domestic and international settings.¹³⁵

Public law approaches come in two forms. The first approaches IIL from a domestic law perspective and stresses the tensions IIL creates with domestic public law values, many of which are usually enshrined at the domestic constitutional level, such as the principle of democracy, the concept of the rule of law, or the protection of human rights.¹³⁶ These approaches often stress the primacy of domestic public law values and are generally critical of IIL. The second type of public law approach takes an international public law perspective and understands IIL as a ‘new form of global public law’.¹³⁷ Proponents of this perspective often draw on theoretical conceptualizations of international law as Global Administrative Law (GAL),¹³⁸ Global Constitutional Law (GCL),¹³⁹ or as a form of International Public

¹³³ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927).

¹³⁴ Foundational on this approach *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL/NAFTA, Arbitral Award (26 January 2006), Separate Opinion by Thomas Wälde, paras 12–13. See also Gus Van Harten and Martin Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17(1) *European Journal of International Law* 121, 145–8; Stephan W Schill, ‘International Investment Law and Comparative Public Law – An Introduction’ in Schill (n 97) 3.

¹³⁵ Benedict Kingsbury and Stephan W Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality’ in Schill (n 97) 75.

¹³⁶ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007); Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press 2013); see also Schneiderman (n 97).

¹³⁷ Montt (n 76) 5.

¹³⁸ *Ibid*, 293 (utilizing GAL approaches to understand FET provisions); on GAL generally, see Benedict Kingsbury, Niko Krisch and Richard Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

¹³⁹ Montt (n 76) 231–52; Karsten Nowrot and Emily Sipiorski, ‘Competing Narratives of Global (De-)Constitutionalization in International Investment Law: Identifying Narrators and the Stories They

Authority.¹⁴⁰ Their outlook on IIL is at times equally critical, but they tend to stress the need for infusing the substance and procedure of IIL with principles of public law that are recognized both at the domestic level and in international institutional law. They connect to the public international law frame in that they recognize the legal basis of IIL in international law, but reject the conceptualization of relationships between states and foreign investors through private law analogies.

The different approaches presented embed IIL in conceptually and epistemically different discourses and traditions. The connected framing impacts the sources and literature proponents of the respective approach draw upon and therefore also affects the way legal methodologies are brought to bear to answer legal research questions in IIL.

2. Doctrinal Approaches

The majority of IIL scholarship answers research questions in IIL through recourse to doctrinal analysis. This refers to the methodology traditionally linked to juridical thinking. It focuses on the understanding of the meaning and normative content of individual legal rules and principles, expounding the relationship between different rules and principles, aiming to develop a coherent system of rules and principles, and developing rationales that explain the internal functioning of the law.¹⁴¹ To a great extent it involves what can be referred to as ‘black letter law analysis’. In addition, doctrinal approaches often involve hermeneutical analysis, that is, theories and methods of interpretation,¹⁴² and the use of comparative law.

Indeed, much of IIL research, which aims to discern the *lex lata*, can be qualified as black letter law analysis. Counter-intuitively to what its name suggests, this type of analysis does not limit itself to an analysis of the text of treaties, contracts, and case law, but often also entails a study of the law beyond the books, including non-written rules of customary international law on investment protection and general principles of law. Moreover, black letter law analysis often also analyses the way in which law is applied and understood in practice. In this respect, black letter law analysis is the technical study of positive IIL, as it is found in the primary sources of IIL, as well as in investor-state contracts. It addresses doctrinal questions relating to the ascertainment of the meaning of substantive rights and obligations in IIAs,¹⁴³ analyses the rules and practices governing the resolution of investor-

Tell’ (2017) 55 *Archiv des Völkerrechts* 265. For a discussion of GCL generally, see Jan Klabbers, Anne Peters and Geir Ulfstein, *Constitutionalization of International Law* (Oxford University Press 2009).

¹⁴⁰ Ingo Venzke, ‘Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication’ (2016) 17 *The Journal of World Investment & Trade* 377.

¹⁴¹ On legal methods of interpretation and ‘technical’ aspects of the law, see Alain Supiot, *Homo Juridicus – On the Anthropological Function of the Law* (Verso 2007) 114 ff; Martti Koskenniemi, ‘International Legal Theory and Doctrine’ in Wolfrum (n 32).

¹⁴² For a classical source on hermeneutics and the law, see Gregory Leyh (ed.), *Legal Hermeneutics: History, Theory, and Practice* (University of California Press 1992).

¹⁴³ See e.g. Salacuse (n 11).

state disputes and its impact on IIL,¹⁴⁴ and examines the manner in which states implement their foreign investment policies through international and domestic law.¹⁴⁵

Doctrinal analysis of IIL often makes use of hermeneutical analysis, that is, the generally accepted methods of interpretation,¹⁴⁶ in order to ascertain the meaning of provisions in IIAs or investment contracts.¹⁴⁷ However, it can equally involve structural analysis of the relationship between different rules and principles within IIL to rules and principles of general international law and other international legal regimes, or domestic law.¹⁴⁸ Subject matter-wise, doctrinal approaches are widely used to determine the content of core standards of treatment, such as FET, indirect expropriation, national treatment, or umbrella clauses,¹⁴⁹ to address the consequences of breaches of the standards of protection,¹⁵⁰ or to deal with questions of the jurisdiction and procedure applied in investment dispute settlement.¹⁵¹ In terms of their audience, doctrinal studies are primarily relevant for, and addressed to influence, the practice of IIL.

Another frequently used method in the doctrinal analysis of IIL consists of drawing on comparative law. Comparative law is a method through which legal concepts and institutional arrangements, or even the functioning of entire legal systems, are analysed across the boundaries of different domestic, international, or transnational jurisdictions.¹⁵² Instead of restricting doctrinal analysis to the positive law of one jurisdiction, the comparative method investigates similarities and differences of the content and functioning of the law across two or more jurisdictions.¹⁵³ Depending on its purpose, comparative law can take either a functional approach, which focuses on how law responds to social problems, or a cultural approach, which understands law as an expression of a specific legal culture (whether domestic, international or transnational).¹⁵⁴

¹⁴⁴ See e.g. McLachlan, Shore and Weiniger (n 14).

¹⁴⁵ See e.g. Surya P Subedi, *International Investment Law Reconciling Policy and Principle* (3rd edn, Hart Publishing 2016).

¹⁴⁶ See also Matthias Herdegen, 'Interpretation in International Law' in Wolfrum (n 32).

¹⁴⁷ See Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016) 64 ff. (demonstrating how methods of interpretation in public international law can be utilized in IIL, thereby offering an illuminating example of legal hermeneutics in IIL).

¹⁴⁸ See e.g. Kurtz (n 87); Hepburn (n 90).

¹⁴⁹ See the sources cited supra note 77. See also Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff 2011), and various contributions in Anselm K Sanders (ed.), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar 2014).

¹⁵⁰ See e.g. Marboe (n 78); Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (BIICL 2008).

¹⁵¹ See Baumgartner (n 71) 92 ff.

¹⁵² Vadi (n 109) 20–1.

¹⁵³ Pierre Larouche, 'A Vision of Global Legal Scholarship' (2012) 17 *Tilburg Law Review* 206, 207–8; William Twining, 'Globalisation and Legal Scholarship' (2009) 4 *Tilburg Law Lectures Series, Montesquieu Seminars* (2009) 57.

¹⁵⁴ Vadi (n 109) 28 ff. On the 'functional method', see Ralf Michaels, 'The Functional Method of

In IIL, comparative legal analysis has been widely resorted to, including for example: to compare domestic laws regulating FDI;¹⁵⁵ to compare the different procedural frameworks for investment dispute settlement;¹⁵⁶ to compare standards of treatment in IIAs with analogous provisions in domestic law or other international legal regimes;¹⁵⁷ to compare what is protected as an investment under IIL and in other legal regimes;¹⁵⁸ and to compare ISDS with adjudication in other international courts and tribunals.¹⁵⁹ Similarly, arbitrators have resorted to comparative legal analysis in interpreting IIAs and resolving investor-state disputes.¹⁶⁰ Furthermore, comparative legal analysis is also an important tool for extracting and synthesizing general principles of law from various domestic legal systems and other international legal regimes.¹⁶¹ Comparative law, together with hermeneutics and structural-conceptual analysis, therefore forms an important part of the doctrinal method of answering research questions in IIL.

3. 'Law in Context'-Approaches

While the doctrinal method is one important methodological approach to research in IIL, legal research can also make use of non-doctrinal methods. We designate these here, admittedly in a rather lump-sum and undifferentiated fashion, as 'law in context'-approaches or 'law and ...'-approaches. Encompassing, for example, 'law and economics', 'law and sociology', or 'law and history', these approaches are characterized by an understanding of law as embedded in its social, political, economic, and historical context and by drawing on insights and methodological approaches from adjacent disciplines.¹⁶² This includes above all the numerous qualitative, quantitative, and mixed methods utilized in different social sciences.¹⁶³

Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press 2006) 339; on the cultural approach, see Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1, 9–13.

¹⁵⁵ See Shan (n 22).

¹⁵⁶ Yenkong Ngangjoh-Hodu and Collins C Ajibo, 'ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration' (2015) 6(2) *Journal of International Dispute Settlement* 308; see also the contributions in Bernardo M Cremades and Julian D M Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration* (Wolters Kluwer 2005).

¹⁵⁷ See e.g. the contributions in Sanders (n 149) and in Schill (n 97).

¹⁵⁸ See Ursula Kriebaum and Christoph Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law' in Stephan Breitenmoser et al. (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Nomos 2007) 743, 747 and 752.

¹⁵⁹ Kurtz (n 87).

¹⁶⁰ Vadi (n 109) 127.

¹⁶¹ Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 610; Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10 *The Journal of World Investment & Trade* 103; Stephan W Schill, 'General Principles of Law and International Investment Law' in Gazzini and De Brabandere (n 25) 133, 145–56.

¹⁶² See Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2016) 263–306.

¹⁶³ John W Creshwell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*

Four types of ‘law in context’-approaches with a certain prominence can be observed in IIL scholarship. First, ‘law and society’-approaches aim at understanding the interaction between IIL and various interest groups and epistemic communities,¹⁶⁴ as well as society at large.¹⁶⁵ This involves the analysis of how IIL shapes social relations, but also how society, or certain actors in it, shape IIL. In methodological terms, ‘law and society’-approaches utilize theories and (qualitative and quantitative) methods of social science to analyse IIL and ISDS. For instance, more theoretically oriented approaches of this kind focus on how the application of rational-formal rules of IIL by impartial adjudicators aims to resist the intrusion of values external to the law.¹⁶⁶ Similarly, theoretical ‘law and society’-approaches conceptualize ISDS as a social field and focus on how actors (such as arbitrators and arbitral institutions) affect the rituals and conventions of the group involved in investment dispute settlement (including how arbitral hearings and conferences are organized, or prizes awarded).¹⁶⁷ Alternatively, empirically oriented research has recourse, for example, to interviews or utilizes quantitative analysis of social networks to understand which actors shape dispute settlement and in which ways.¹⁶⁸

Second, ‘law and economics’-approaches examine the content and functioning of IIL through an analysis of the underlying economic structures and the incentives that they create for different actors.¹⁶⁹ While often focusing on efficiency in the application of IIL,¹⁷⁰ ‘law and economics’-approaches can equally be used to develop normative arguments about how IIL

(4th edn, Sage 2013) 105.

¹⁶⁴ Ralf Michaels, ‘Roles and Role Perceptions of International Arbitrators’ in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014) 47 (analysing the role of arbitrators within their ‘epistemic community’ as experts).

¹⁶⁵ See also Moshe Hirsch, ‘The Sociology of International Investment Law’ in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 143; Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013); Emanuel Gaillard, ‘Sociology of International Arbitration’ in David Caron et al. (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 187; Giorgio Sacerdoti, ‘From Law Professor to International Adjudicator – The WTO Appellate Body and ICSID Arbitration Compared: A Personal Account’ in Caron et al., *ibid.*, 204; Donald F Donavan, ‘The Advocate in the Transnational Justice System’ in Caron et al., *ibid.*, 215.

¹⁶⁶ David Schneiderman, ‘International Investment Law as Formally Rational Law: A Weberian Analysis’ in Moshe Hirsch and Andrew Lang (eds), *Research Handbook on The Sociology of International Law* (Edward Elgar 2018).

¹⁶⁷ Gaillard (n 165) 195–9.

¹⁶⁸ Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25(2) *European Journal of International Law* 387 (quantitative approach and social network analysis); cf Dezalay and Garth (n 68) (interviews); see also Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press 2013) (‘grounded theory’ method, data-collection and interviews) 24–38.

¹⁶⁹ For different ‘law and economics’-approaches to IIL, see e.g. Bonnitcha (n 95103) 52 ff (normative ‘law and economics’-approach on substantive standards of investment protection); Montt (n 76) 83 ff (a descriptive ‘law and economics’-approach explaining the proliferation of BITs).

¹⁷⁰ Anne van Aaken, ‘International Investment Law between Commitment and Flexibility: A Contract Theory Analysis’ (2009) 12 *Journal of International Economic Law* 507.

should be applied or how it should be reformed.¹⁷¹ Equally, it can be used, for example, to understand state behaviour in the conclusion of IIAs,¹⁷² and in complying, including over-complying, with them,¹⁷³ or to analyse decision-making of arbitrators in light of economic incentives.¹⁷⁴ ‘Law and economics’-approaches use a variety of different models, ranging from rational choice theory to behavioural economics.¹⁷⁵ More empirically oriented ‘law and economics’-research draws on statistical data in order to understand and evaluate IIL and its impact on society, and to make proposals for its reform.¹⁷⁶

Third, ‘law and politics’-approaches explore the relationship between IIL and the underlying political discourses and processes. They tackle, for example, the study of the main factors driving investment policy-making in developed and developing countries, such as the interest in the promotion of business interests, the attraction of FDI, the de-politicization of investment disputes, or the creation of friendly international relations.¹⁷⁷ Other ‘law and politics’-scholarship addresses the impact of IIL on political structures, analysing for example the implications of the internationalization of property rights,¹⁷⁸ or the emergence of IIL as a transnational governance regime.¹⁷⁹ ‘Law and politics’-approaches also investigate how political processes affect IIL and ISDS, for example when analysing democratic participation in investment policy-making.¹⁸⁰ Similarly, they may examine the role of political ideology and policy preferences of arbitrators in investment dispute settlement.¹⁸¹ ‘Law and politics’-

¹⁷¹ Bonnitcha (n 95).

¹⁷² Poulsen (n 66) 25 ff; Andrew T Guzman, ‘Explaining the Popularity of Bilateral Investment Treaties’ in Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 73.

¹⁷³ For a discussion of so-called ‘regulatory chill’, see Kyla Tienhaara, ‘Regulatory Chill and the Threat of Arbitration: A View from Political Science’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 606.

¹⁷⁴ Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50(1) *Osgoode Hall Law Journal* 211; Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration’ (2016) 53(2) *Osgoode Hall Law Journal* 540.

¹⁷⁵ Guzman (n 172); Poulsen (n 66).

¹⁷⁶ Bonnitcha (n 95) 278–9.

¹⁷⁷ Bonnitcha et al. (n 65) 181 ff.

¹⁷⁸ Vandeveldt (n 11) 75–120 (arguing that BITs characterize the internationalization of property rights protection and that they promote a liberal investment regime and the rule of law); Tienhaara (n 173) 606 (arguing for a notion of ‘regulatory chill’ informed by political science).

¹⁷⁹ Benedict Kingsbury and Stephan W Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law’ (2009) 14 *International Congress and Convention Association (ICCA) Series* 5; cf Gus Van Harten, ‘Private Authority and Transnational Governance: The Contours of the International System of Investor Protection’ (2005) 12(4) *Review of International Political Economy* 600.

¹⁸⁰ Tim Wood, ‘Political Risk or Political Right? Reconciling the International Legal Norms of Investment Protection and Political Participation’ (2015) 30(3) *ICSID Review* 665 (emphasizing the democratic deficit in IIL and ISDS and arguing for ‘systemic integration’ to ensure greater political participation).

¹⁸¹ Catherine Rogers, ‘The Politics of International Investment Arbitrators’ (2013) 12 *Santa Clara International Law Review* 223.

approaches often employ methods used in political science to analyse IIL and ISDS. These include the use of political theory,¹⁸² including theories of neoliberalism and deliberative democracy,¹⁸³ as well as more pragmatic approaches that rely on quantitative and qualitative methods of political science research in order to answer specific questions in IIL, for example concerning the desirability of ISDS between democratic countries.¹⁸⁴

Finally, ‘law and history’-approaches analyse IIL from a historical perspective and by recourse to historical methods.¹⁸⁵ This can include an analysis of the role of history and historical argument in the development of IIL,¹⁸⁶ the relevance of historical facts for the interpretation of rules and principles of IIL,¹⁸⁷ the historical roles of institutions as well as that of states in the development of the field,¹⁸⁸ and the use of history as a tool of critique and source of reform of IIL.¹⁸⁹ In terms of methodology, ‘law and history’-approaches use a variety of different methodologies and approaches. Relying both on secondary, but above all on primary sources gathered through archival research, they may focus, inter alia, on macro- or micro-histories, the analysis of treaty-making or dispute settlement, or the development of conceptual histories or histories of fact.

4. Empirical Legal Studies

In addition to ‘law in context’-approaches, a particularly important strand in the use of non-doctrinal methods in IIL is reflected by empirical legal studies (ELS).¹⁹⁰ While sociological and economic approaches often also involve empirical methods, ELS emphasize the collection, analysis and interpretation of data, either through qualitative or quantitative means (such as interviews, surveys, or analysis of statistical data), as its methodological approach in order to investigate and answer a variety of empirical research questions in IIL. ELS approaches have been used, amongst others, to get a clearer idea of who is involved in arbitration as counsel and arbitrator, how and by whom arbitrators are appointed,¹⁹¹ what

¹⁸² Bonnitcha et al. (n 65) (relying upon empirical evidence in the discussion of advantages and economic impact of FDI in relation to BITs).

¹⁸³ Schneiderman (n 97) 223–37.

¹⁸⁴ Armand de Mestral (ed.), *Second Thoughts – Investor State Arbitration between Developed Democracies* (Centre for International Governance Innovation 2017).

¹⁸⁵ For a general discussion, see Stephan W Schill, Christian J Tams and Rainer Hofmann (eds), *International Investment Law and History* (Edward Elgar 2018).

¹⁸⁶ Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2011).

¹⁸⁷ Paparinskis (n 76); Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Martinus Nijhoff 2013).

¹⁸⁸ Antonio R Parra, *The History of ICSID* (Oxford University Press 2012); Vandeveldel, *First Bilateral Investment Treaties* (n 35).

¹⁸⁹ Miles (n 114) 17 ff.

¹⁹⁰ For an argument about the efficacy of using empirical methodologies to understand IIL and ISDS, see Susan D Franck, ‘Empiricism and International Law: Insights for Investment Treaty Dispute Resolution’ (2008) 48 *Virginia Journal of International Law* 767.

¹⁹¹ Puig (n 168).

factors and biases influence arbitrator decision-making,¹⁹² what sources arbitrators use in their reasoning,¹⁹³ or what the content of IIAs as a whole looks like, including how standards of treatment are formulated.¹⁹⁴

In addressing these questions, some studies have recourse to social network analysis,¹⁹⁵ others code arbitrator profiles and arbitral decisions in order to assess linkages between certain parameters, such as whether arbitrators' nationality has an impact on their decision-making,¹⁹⁶ and yet others conduct surveys amongst arbitration practitioners and arbitrators.¹⁹⁷ More recently, ELS approaches in IIL took a turn toward computational analysis of large amounts of data.¹⁹⁸ Such data-driven research exhibits three main differences from doctrinal work, as well as from other, earlier forms of ELS. First, computational methods call for narrowing down research questions to facilitate empirically testable hypotheses; they prioritize data over 'theory'. Second, instead of looking at subsamples, such as Model BITs, computational methods have an ambition to look into all available data, for example all IIAs concluded by a certain country, or all IIAs concluded by any country. And third, computational methods shift the focus from reading and counting by individual researchers to the use of technology for the purpose of analysing texts as data.¹⁹⁹ Computational text-as-data analysis, for example, has been used to assess the consistency of IIA content and its change over time.²⁰⁰

V. CONCLUSION

The analysis of legal aspects of FDI has led to a veritable boom in scholarship and indeed the emergence of a separate legal discipline at the intersection of international and national, public and private law. This chapter has started out by suggesting that, in order to grasp the

¹⁹² Susan D Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86 North Carolina Law Review 1; Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf (finding a strong correlation between the leading arbitrator's policy preferences and the proceeding's outcome).

¹⁹³ Ole K Fauchald, 'Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19(2) European Journal of International Law 301.

¹⁹⁴ For an interactive web-based tool that treats text as data and relies on state-of-the-art technology to allow users to assess similarities and differences between investment agreements, see <http://mappinginvestmenttreaties.com>.

¹⁹⁵ Puig (n 168).

¹⁹⁶ Susan D Franck et al., 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 Columbia Journal of Transnational Law 429.

¹⁹⁷ Susan D Franck et al., 'Inside the Arbitrator's Mind' (2017) 66 Emory Law Journal 1115.

¹⁹⁸ See e.g. Alec Stone Sweet, Michael Yunsuck Chung, and Adam Saltzman, 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration' (2017) 8(4) Journal of International Dispute Settlement 579; Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 European Journal of International Law 551.

¹⁹⁹ Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, 'The Data-Driven Future of International Economic Law' (2017) 20 Journal of International Economic Law 217, 220–3

²⁰⁰ See Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements' (2016) 19 Journal of International Economic Law 561.

field's multiple facets comprehensively from a legal perspective, the law relating to FDI has to be understood as a transnational legal order, in which actors within and beyond the nation-state contribute through a variety of interactions to shaping the legal norms governing international investment relations. This notwithstanding, the bulk of legal analysis and scholarship in the field deals with the narrower area of IIL. In this respect, this chapter has presented an overview of the types of legal research questions generally asked and the theoretical approaches and methods used in order to gain a better understanding of the substantive and procedural law in place, its legitimacy and reform, its theory, and its historic, economic, political, and social context.²⁰¹

While the boom in the analysis of the legal aspects of FDI holds great potential for the field as a scholarly and disciplinary enterprise, investment law scholarship, as any new or emerging field of knowledge, also faces a number of challenges. First, the transnational character of the law relating to FDI presents a challenge for expertise in different areas of law. It requires researchers to have a solid grasp on a variety of legal disciplines that all come together in the field, including public international law, private international law, the law relating to international arbitration, administrative and constitutional law, as well as comparative legal analysis. To the extent the necessary breadth of legal expertise is missing, cutting-edge research in investment law faces considerable hurdles. A further challenge comes from the divide between theory and practice, which equally makes it difficult for many researchers to develop relevant or practically feasible research projects and questions.

Second, while having a positive effect in terms of the diversification and enrichment of the debate, the multiplicity of epistemic communities (and the variety of theoretical and methodological approaches they use) entails challenges as well. What is particularly problematic is that legal discourses on investment law are frequently significantly sealed off from each other, not only along the lines of national legal communities, but also often in respect of specific global epistemic communities. This is the case not only from an internal perspective, that is, among the relatively close-knit community of those who define themselves as 'international investment lawyers' and often do not interact with lawyers from other international legal fields, whether they are 'human rights lawyers', 'environmental lawyers', or 'trade lawyers'. It equally holds true in relation to those epistemic communities that increasingly engage with IIL from an external perspective, in particular critical legal theorists or scholars in the areas of human rights and international environmental law.

Third, the law relating to FDI, perhaps more than other fields of international law, is intertwined with politics and ideological underpinnings. The political differences between, and within, developed and developing countries have not only characterized much of the historical struggle in IIL; they continue to impact the preferences about the level of investment protection, the amount of legal restraint on state authority, and the underlying

²⁰¹ While attempting to present a typology of research questions, theoretical frameworks, and methods used, this typology is neither exhaustive nor does it preclude alternative ways of giving structure to the increasingly diverse legal approaches to IIL.

theories on the appropriate relations between states, investors and civil society in global markets and global society. Political and ideological differences also affect the choice of legal research questions, the theoretical framework used, and the methodologies applied, so much that certain debates in the field resemble religious controversies more than legal ones. None of this is as such problematic, as long as legal researchers are forthright about their underlying assumptions and do not claim to be value-neutral. Laying underlying political and ideological assumptions open is important for discipline-internal debates (for example to understand that certain seemingly legal differences are political in nature), but also to be aware of the boundaries between legal and non-legal arguments and research. Finally, clearly marking the boundaries between the legal and the political is important for outside audiences, including the general public, in order for them to be able to understand the state of the art of legal (as compared to non-legal) arguments in the field.

All of these challenges notwithstanding, and despite the proliferation of scholarship in the field, legal research in IIL still holds a lot of untapped potential – in respect of legal research questions, theoretical approaches, and methodologies. As for untapped research questions, while the international law relating to FDI is already well-covered, examples of little charted territory include the analysis of domestic perspectives on FDI regulation, including the analysis of functional parallels to IIL, the analysis of the constitutionality of IIL, the law and practice on contracting with foreigners, or the domestic effect and implementation, in courts and executive decision-making, of IIL. Similarly, many actors and regional approaches are still under-researched. While investment law and policy of the EU, as well as of other major actors, such as the United States, Germany or China, are well-covered in the literature, the role of other states, even those who have concluded a large number of investment treaties, such as Egypt, the Netherlands, or Switzerland, is relatively little addressed. Similarly, Asian, African or Middle Eastern countries and regional organizations are rarely in the focus of analysis. The same holds true for newer regime interactions, such as the interrelations of IIL with the climate change regime, the law of the sea, or space law. Likewise, historical research into IIL is still underdeveloped, but arguably holds great potential.

Similarly, the theoretical framing of investment law does not need to be limited to the frames discussed above. Instead, there is a great variety of theoretical approaches that have thus far not been used to analyse investment law. For example, natural law approaches have been explored as little as the perspectives that Islamic jurisprudence, Buddhist theory, feminist approaches, Marxist analysis, or queer or race theory would take on investment law.²⁰² Yet, there is no reason why any of these frames, or indeed others not mentioned, could not also have the potential for fruitful use in respect of analysing investment law.

²⁰² Some of these examples may sound somewhat removed from practical or theoretical relevance. But see for an example to bring the analysis of FDI together with seemingly unrelated issue areas, Dara P Brown, 'LGBT Rights Are Human Rights: Conditioning Foreign Direct Investment on Domestic Policy Reform' (2017) 50 *Cornell International Law Journal* 611.

Last but not least, the law relating to FDI is not only an area for analysis for those interested in contributing to a better understanding of FDI regulation and investment law as such. On the contrary, investment law as a legal phenomenon that has only recently emerged in reaction to the demands of increasingly global markets and growing foreign investment flows, and that makes use of the institutional structures created by states under international law, is also an area of law and governance that can form the object of analysis for researchers that are interested in questions that are not specific to investment law, but that relate to questions of law and globalization, to transnational law-making, the functioning of international dispute settlement, or the role of experts in transnational legal regimes, to name but a few examples. In this context, the law relating to FDI can arguably provide a case study to answer research questions that are not about investment law in the first place. Having a basic understanding of the functioning and structure of investment law as a starting point for legal research in the field is therefore important not only for investment law-specific research and scholarship, but may equally provide a reference area for fruitful analysis for other fields of legal, or even non-legal research.