

Editorial

Coherence and Doctrinal Dispersal in Investment Law: Same Parties, Same Claims, a Parallel Universe?

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Abstract

This editorial addresses the doctrinal and structural tensions affecting international investment arbitration, with a focus on the notion of res judicata and the fundamental question of whether this area of law constitutes a 'system' or merely mimics the characteristics of one. Drawing on the controversial case of Frenkel v. Croatia, in which the tribunal invoked res judicata in a context marked by the ambiguity of the legal identity of the claimants, the editorial reflects on the precariousness of the concepts of finality, identity and justice in the absence of a hierarchy of legal authority. On this basis, the contributions contained in the current issue of the International Investment Law Journal are analysed, which convergently shed light on the dilemmas of systemic regime coherence: estoppel and legitimate expectations (Zia Akhtar), climate policy protection and legal solidarity (Federica Cristani), comparative national regimes in Romania and Slovakia (Tiberiu Paveleşcu; Tomáš Peráček & Michal Kašššaj) and the contested example given by Tanzania (Julius Clement Mashamba). Each contribution highlights a dimension of what we mean by systemic fragmentation, but also the potential for crystallising common principles. The editorial argues that only critical and comparative reflection can transform the aspiration of a system into a normative reality.

Keywords: international investments, investor protection, UNCITRAL, res judicata, legal identity, investment arbitration, estoppel, legitimate expectations.

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1. Introduction

The International Investment Law Journal is an international, peer-reviewed and open access platform dedicated to doctrinal exchanges in the field of investment law. Published biannually (February and July), its guaranteed peer review ensures the

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scholarly quality and practical relevance of the content, especially for the community interested in international investment agreements and their impact on sustainable development and global regulation, as the journal's official website states. The July 2025 issue marks a significant milestone, as it is the tenth issue published — corresponding to Volume 5, Issue 2 — and stands as a landmark moment in the publication's ongoing evolution.

Now, at the editorial review clock, we can say that reaching 10 issues reflects the journal's stability and maturity. Volumes 5 (February and July 2025) allocate space to current doctrinal disputes — from *res judicata* to the impact of climate policies, from national regulatory norms to cases of regained sovereignty (e.g. Tanzania). The theme of the editorial returns diplomatically among doctrinal coherence vs. dispersion, system vs. appearance, in the background of the 10th volume. The editorial is rooted in the history of the journal, marking a point of reflection since 5 years after its appearance. The journal is in the midst of a period of redefinition from consolidation to maturation. Accordingly, Volume 5, Issue 2 (July 2025) should not be regarded as merely another instalment, as it has been rather conceived as an opportunity to reflect on and take stock of the evolving paradigms in international investment law, affirming our journal's role as a vital landmark in the global debate.

2. On Finality, Justice and the Frenkel Paradox

The recent judgments in *Frenkel v. Croatia*³ have already begun to reverberate beyond the framework of the tribunal that issued them. Not only because the claimant-appointed arbitrator vehemently disagreed, but mainly because the case brings to the surface a fundamental dilemma at the level of ideas: the elusive and uncertain doctrine of *res judicata* in investment arbitration. The issue is not new, but its recent form is even more troubling. What is at stake? Nothing less than the meaning of finality in a mechanism that, perhaps paradoxically, or perhaps not quite, promises both justice and procedural closure, for investors and states.

In *Frenkel*, the dismissal was based neither on the merits nor on lack of direct jurisdiction, but on the fact that another tribunal, previously seized a similar claim brought by an entity possibly controlled by the same claimant (in a different legal form), had declined to rule. To invoke *res judicata* in such a situation is somewhat disconcerting. Legal tradition requires that an earlier judgement must have been given by a competent court, which has judged the merits and given a final decision. But what if the previous court never went into the merits of the case? Or what if the identity of the parties remains in a metaphysical twilight zone, oscillating between economic continuity and legal fiction? The tribunal faced a question that appears to belong to literature as it does to law: when are two entities 'the same'? Is the investor under a new corporate form 'the same' as the old one? What does repetition mean in a system with no central authority to say 'enough'? *Res judicata* is supposed to be a beehive of certainty and fairness, but in investment arbitration, where there is no supreme court, hierarchies of precedent or unified procedural codes, the doctrine is in danger of remaining a mere semblance. The central question (what, in fact, is *res judicata* in investment arbitration?) remains, and is

³ Ahron G. Frenkel v. Republic of Croatia, ICSID Case No. ARB/20/49 (initiated 2020; award issued Jan. 29, 2025).

symptomatic of another difficulty: the vision of arbitration as a bespoke, almost artisanal mode of justice, however, has in recent decades come under increasing strain. As the number of arbitrations has grown, so too has the infrastructure around them - rules, practices, strategies, procedural manoeuvres. What once was a space governed more by discretion than prescription, more by shared professional ethos than rigid formalism, now appears increasingly codified. The procedural playbook is thicker, and the room for informal wisdom, or indeed any meaningful deviation from the adversarial model, is narrower. It is tempting to call this phenomenon the “judicialisation” of arbitration - an apparently descriptive term, evoking a shift from arbitration as a flexible alternative to litigation, to arbitration as its mirror image, dressed in arbitral costume but choreographed with the habits and instincts of courtroom combat. There is, though, something misleading, perhaps even ironic, in this terminology. The invocation of judicialisation presupposes the emergence of something like judicial coherence: a shared procedural framework, a culture of precedent or at least of principled consistency, and a hierarchy, however informal, that permits correction, consolidation, or doctrinal stability. None of these elements are entirely present in ICSID arbitration: each tribunal is autonomous, each award formally detached from the gravitational pull of others, and the ICSID Secretariat itself exercises little, if any, substantive oversight. The consequence is not judicialisation in any meaningful sense, but something more like the ritual mimicry of judicial form without its structural constraints. And herein lies a paradox: as parties and counsel become more procedurally sophisticated - indeed, more tactically procedural - the proceedings they inhabit grow more fragmented, not less. Arguments over document production, evidentiary thresholds, the admissibility of challenges, or the legitimacy of arbitrators have become not merely ancillary to the merits, but, in some cases, dispositive of them. It is not that the parties have grown more quarrelsome (though that too may be true) but that the procedural architecture has become an object of contestation in itself, not merely a vehicle to a decision but a terrain where advantage is sought and, at times, justice distorted.

2. Doctrines Between Universes: Estoppel, Legitimate Expectations and Fairness

Zia Akhtar’s contribution analyses the doctrines of *proprietary estoppel* and *legitimate expectations*, two concepts which, although originating in common law, have found echoes in international arbitration. They protect reasonable expectations in that they prohibit a state or party from reneging on a clear promise made and accepted by the other party, and from changing its behaviour accordingly. In the investment context, the doctrine of legitimate expectations is today a fundamental element of the ‘fair and equitable treatment’ (FET) standard. Estoppel and *res judicata* are conceptual mirrors, so that the former protects promises against unilateral change; the latter, the stability of judicial judgements. Both seek to prevent inconsistency and arbitrary treatment. Akhtar argues that these are not parochial doctrines, but are, in fact, expressions of a transnational ethos of good faith, which should be respected in international legal regimes. Yet their application remains inconsistent and we have seen some courts accept them and others ignore them. Without a coherent legal regime, the doctrines of fairness will in time be seen as mere fictions invoked, selectively of course. The contribution draws attention to the need for principled perspectives if these concepts are to truly

contribute to a genuine legal order, not just some kind of simulacrum of it.⁴ Doctrines such as estoppel and legitimate expectations are often treated as peripheral embellishments to reasoning, but they are in fact its moral architecture. Their function is not merely to constrain power but to express a deeper principle that law must treat people as equals in a community of mutual respect. When states or tribunals invoke these doctrines inconsistently, they reduce fairness to a rhetorical device rather than a guiding ideal. A coherent legal order requires more than procedural regularity: it demands fidelity to principle. Without it, there is a risk of mistaking the performance of legality for legality itself, and justice becomes a contingent gesture, not a right.

3. Protecting Climate Policies: Legal Solidarity in an Era of Fragmentation

Federica Cristani analyses one of the most acute situations generated by the conflict between investment protection and climate policies. While states are divesting from fossil fuels, investors (often financed by third parties) are challenging green transition measures, invoking bilateral investment treaties. In doing so, a mechanism designed to protect investment is sometimes used as a weapon against public environmental policy. Cristani proposes as an institutional solution the creation of the UNCITRAL Advisory Centre for Investment Law, which would provide legal support to states, especially developing ones⁵. We are discussing a legal solidarity mechanism inspired by the Geneva Centre for WTO Law with the aim of reducing the asymmetry of resources between investors and states, through advice, expertise and possibly representation.

The idea of solidarity reflects a harsh truth in that it brings to the centre stage the idea that investment arbitration is seen as a mechanism without a public backbone. In the absence of a supreme court or a prioritisation of general interests, solidarity between states appears to be the only realistic form of equilibrium. Perhaps in a philosophical sense, Cristani's proposal revalorises the concept of a 'global legal community', a network of cooperation in defence of common goods (such as the climate) that is situated outside the particular interests of investors. The legitimacy of a legal order rests not only on its rules, but on its moral integrity - its ability to justify coercion in the name of shared principles. When investment arbitration permits private actors to frustrate urgent public goals like climate transition, it exposes a deep structural

⁴ The discussion is particularly relevant for its topicality in modern literature. See Jeremy Webber, 'A Democracy-Friendly Theory of the Rule of Law,' *Hague Journal on the Rule of Law* 16 (2024): 339–374. <https://doi.org/10.1007/s40803-024-00240-5>; and Samuel Moyn, 'Reconstructing Critical Legal Studies,' *The Yale Law Journal* 134, no. 1 (October 2024): 77–126. https://www.yalelawjournal.org/pdf/134.1Moyn_k36xsc3n.pdf.

⁵ The study continues the scholars' proposals, updating this imperative. See Karl P. Sauvant, 'An Advisory Centre on International Investment Law: Key Features,' Academic Forum on ISDS Concept Paper 2019/14, September 10, 2019. Columbia Centre on Sustainable Investment. <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/KPS-ACIIL-Academic-Forum-Sept.-19-final-pdf.pdf>. Also see Ortino, Federico, Karl P. Sauvant, 'Extending International Legal Aid from Trade to Investment: An Advisory Centre on International Investment Law', *Global Trade and Customs Journal* 16, no. 10 (2021): 548–554; or Lorenzo Cotula, 'Treating Symptoms or Root Causes? The Draft Statute of an Advisory Centre on International Investment Dispute Resolution,' *Kluwer Arbitration Blog*, June 24, 2024. <https://arbitrationblog.kluwerarbitration.com/2024/06/24/treating-symptoms-or-root-causes-the-draft-statute-of-an-advisor-y-centre-on-international-investment-dispute-resolution/>.

asymmetry. Cristani's proposal gestures toward a corrective – or, better, an institutional expression of legal solidarity. Such a mechanism would offer support as well as affirming that law is a practice of principle, not of power. In this vision, a global legal community emerges as a necessary moral aspiration of international law.

4. Comparative National Perspectives: Investment, Regulation and Sovereignty

Tiberiu Pavelescu's contribution is valuable through a comparative analysis of the investment regime in the Romanian technology sector, while Tomáš Peráček and Michal Kaššaj assess the impact of legislative regulations on investors in the Slovak capital market. These two studies emphasise the critical relationship between investment attractiveness and the imperative of regulatory sovereignty.

Romania, as an EU member state, has implemented mechanisms to filter foreign direct investment (FDI) in sensitive areas, such as digital infrastructure, communications, and emerging technologies, through recent regulatory acts. Although the regime is cautious, it remains relatively open to investors. The duality of protection and openness is an interesting one and speaks to the balance that states seek between security and development.

The Slovak study draws attention to the side effects of financial market regulation. When the state restricts the activity of securities traders, the effects on investors (especially foreign investors) generate as a domino effect unrealised expectations or even international disputes⁶. The issue is one of 'reasonable expectations' versus 'regulatory law'. Peráček and Kaššaj invite reflection: can the investment system be a corrective of regulatory excesses? Or will it always remain a reactive, limited by the absence of a uniform rule? Law's authority lies in its ability to balance freedom and authority through principle. The dialectic between investor expectations and regulatory sovereignty reflects deeper questions about the role of law in a pluralistic world. When states pursue development and security, they inevitably reshape the expectations of market actors. Justice, however, demands that these shifts not be arbitrary. If investment law is to be more than a reactive system, it must integrate a theory of fairness that respects both regulatory autonomy and the moral claims of reliance. Without such a framework, stability remains contingent, not principled.

5. The Tanzania Test: When the State Leaves the Game

Julius Clement Mashamba analyses a radical case being Tanzania, which amended its legislation to exclude international arbitration from natural resource disputes. Laws passed in 2017–2018 (including the *Permanent Sovereignty Act*) prohibit foreign jurisdiction, requiring settlement exclusively in Tanzanian courts or arbitration

⁶ The study aligns with pertinent observations such as Carolina Moecklecke, Calvin Thrall, Rachel L. Wellhausen, 'Global Value Chains as a Constraint on Sovereignty: Evidence from Investor-State Dispute Settlement', *International Studies Quarterly*, Volume 67, Issue 1, March 2023, sqad007, <https://doi.org/10.1093/isq/sqad007>. Here, the authors emphasise that regulatory decisions can be perceived as exogenous shocks by foreign investors, generating ripple (cascading) effects in investment chains, particularly in financially regulated sectors. Effects of this kind contribute to the initiation of ISDS proceedings when governments restrict market access or traders' activity.

centres. Tanzania has denounced bilateral treaties and banned ISDS clauses in public contracts, reminiscent of the termination of bilateral investment treaties between EU member states.⁷

The position expresses a radical break from the traditional system, being a return to national legal sovereignty, but accompanied by high risks for investment appetite. For Tanzania, however, the cost seems acceptable in that decision-making autonomy prevails over access to foreign capital. The study problematises the idea that investment arbitration is a universal ‘system’. If a state can unilaterally opt out of it, is it a system or just a convention between the parties, revocable if necessary? The choice to reject international arbitration in favour of national jurisdiction challenges the assumption that investment law constitutes a universal legal order. If participation is revocable at will, what remains is not a system of law but a set of contingent bargains. This move by Tanzania, however, is strongly principled, asserting that legal authority flows from democratic sovereignty, not contractual orthodoxy. Beneath this lies a more pressing inquiry on whether a legal framework can claim universality without recognising the equal voice of those it seeks to bind. A truly global system must accommodate dissent, not merely punish it through market withdrawal.

6. Conclusion: System or Systemic Illusion?

The articles in this issue paint a difficult picture that investment arbitration aspires to systemic coherence, but is affected by centrifugal forces. We have a ‘*jurisprudence constante*’ in the making (although so many years have passed since the first state v. investor arbitration⁸), tribunals that are being cited, a doctrine that is stabilising, but also a deficiency given, perhaps, by the lack of central authority, normative pluralism, the possibility of unilateral withdrawal anytime and anyhow.

Out of this friction between aspiration and reality arises a very interesting question: are we in a real system or in an ‘apparent universe’ that mimics order but operates by exception? The contributions in this volume suggest that the answer is not a binary one. Perhaps we are in a process of systemisation in which doctrines such as *res judicata*, estoppel, legitimate expectations or legal solidarity are becoming cornerstones. What is missing is an institutional infrastructure to turn aspiration into reality, so necessary for an effective legal regime. But it is precisely the critical, comparative and comprehensive reflection on these issues, as the studies in this issue do, that is the necessary step towards building a more coherent regime. Of course, the system does not yet exist, but the question of whether it does, and the multiple answers we are generating, are signs that it is being built.

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