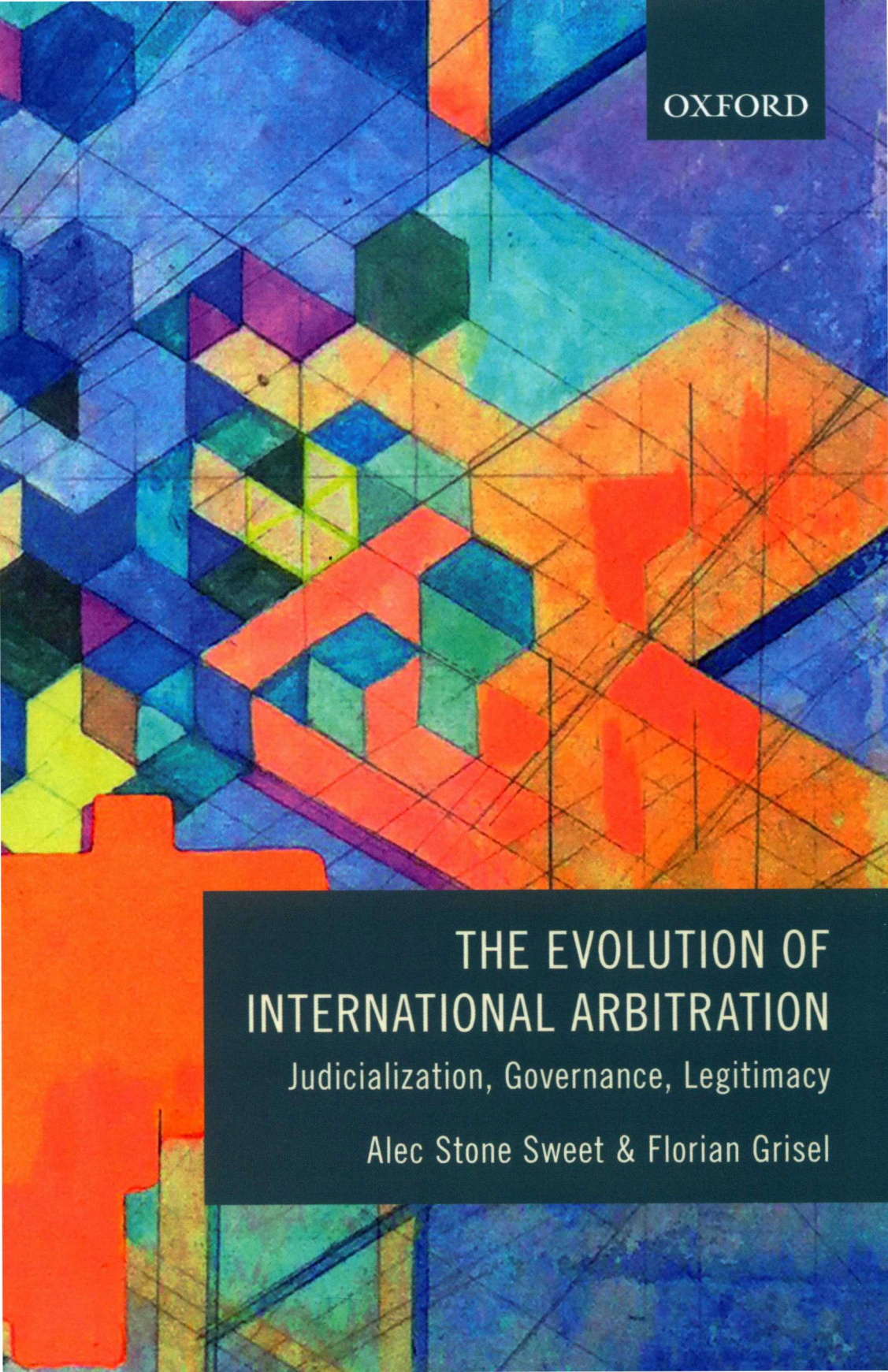




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THE EVOLUTION OF INTERNATIONAL ARBITRATION

Judicialization, Governance, Legitimacy

Alec Stone Sweet & Florian Grisel

The development of international arbitration as an autonomous legal order comprises one of the most remarkable stories of institution building at the global level over the past century. Today, transnational firms and states settle their most important commercial and investment disputes not in courts, but in arbitral centres, a tightly networked set of organizations that compete with one another for docket, resources, and influence.

In this book, Alec Stone Sweet and Florian Grisel show that international arbitration has undergone a self-sustaining process of institutional evolution that has steadily enhanced arbitral authority. This judicialization process was sustained by the explosion of trade and investment, which generated a steady stream of high stakes disputes, and the efforts of elite arbitrators and the major centres to construct arbitration as a viable substitute for litigation in domestic courts. For their part, state officials (as legislators and treaty makers), and national judges (as enforcers of arbitral awards), have not just adapted to the expansion of arbitration; they have heavily invested in it, extending the arbitral order's reach and effectiveness. Arbitration's very success has, nonetheless, raised serious questions about its legitimacy as a mode of transnational governance.

The book provides a clear causal theory of judicialization, original data collection and analysis, and a broad, relatively non-technical overview of the evolution of the arbitral order. Each chapter compares international commercial and investor-state arbitration, across clearly specified measures of judicialization and governance. Topics include: the evolution of procedures; the development of precedent and the demand for appeal; balancing in the public interest; legitimacy debates, and proposals for systemic reform. This book is a timely assessment of how arbitration has risen to become a key component of international economic law and why its future is far from settled.

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DISPUTES

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ALEC STONE SWEET

and

FLORIAN GRISEL

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THE EVOLUTION
OF INTERNATIONAL ARBITRATION

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Florian Grisel

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Judicialization and Arbitral Governance

This book focuses on the evolution of arbitral governance in the realms of transnational commerce and investment. The development of international arbitration as an autonomous legal order—connected to, but meaningfully autonomous from, state systems—comprises one of the most remarkable stories of institution building at the global level over the past century.¹ Efforts by representatives of transnational business to make arbitration a viable alternative to adjudication in national courts began in earnest in the 1920s, accelerated after the Second World War, and then came to full fruition with the explosive increase in global trade and investment since the 1980s. The result has been the steady development of a network of arbitral centres that compete with each other for docket, resources, and influence. The powerbrokers in the system are private actors. Large, multinational law firms are now heavily invested in arbitration practice, and their lawyers argue before tribunals staffed by a relatively small group of peers, specialists, and legal academics. Legal elites also manage the major international arbitration centres [IACs], in tandem with representatives of transnational business. Although the structure of authority in the field is non-hierarchical and pluralistic, the regime has gradually acquired the properties of a stable legal system.

In the world of transnational commerce, the community has sought and secured a ‘global freedom of contract’,² wherein private parties enjoy rights to choose their own law of contract, to contract out of national courts, and to select their own arbitrators and procedures. By the end of the twentieth century, as Juenger puts it, ‘the tendency to keep transnational commercial disputes out of the courts, and thereby beyond the reach of local laws, is nearly universal’.³ In 1999, Berger reported that more than 90 per cent of transnational commercial contracts of significance

¹ Yves Dezalay and Bryant G Garth, *Dealing in Virtue—International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, Chicago 1996) [‘Dezalay and Garth’]; Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press, Oxford 2013) [‘Karton’]; Walter Mattli and Thomas Dietz, *International Arbitration and Global Governance* (Oxford University Press, Oxford 2014); Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, Oxford 2013) [‘Paulsson’].

² See Chapter 2. Martin Shapiro and Alec Stone Sweet, ‘Judges and Company’ in Martin Shapiro and Stone Sweet (eds), *On Law, Politics, and Judicialization* (Oxford University Press, Oxford 2002) [‘Shapiro and Stone Sweet’] Chapter 5.

³ Friedrich Juenger, ‘The Lex Mercatoria and the Conflict of Laws’ in T E Carbonneau (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (Juris, Huntington 1998) 266.

contained an arbitration clause;⁴ in 2015, in the most authoritative survey of corporate counsel and the transnational bar, more than 90 per cent of respondents selected international arbitration as their preferred mode of dispute resolution, while only 2 per cent of respondents preferred litigation in national courts.⁵ Traders value arbitration for its political neutrality, confidentiality, specialized expertise, and flexibility. In conjunction with arbitrators, the parties themselves help to determine the complexity, cost, and speed of the proceedings. They also have an abundant choice of fora. Over the past century, the number of established IACs has risen from 10 (in 1910) to more than 200 today (Chapter 2). The most important centre is the Paris-based International Chamber of Commerce [ICC]. Established in 1923, the ICC International Court of Arbitration⁶ has registered more than 20,000 disputes, 17,000 of which since 1980.⁷ A 2014 assessment of ‘trends in arbitration’ reports that twelve of the most important houses now process more than 3,000 new claims annually, worth more than \$1.7 trillion.⁸

There would have been no boom in international commercial arbitration [ICA] had the community failed to resolve a crucial problem: how to enforce its awards. Because arbitrators are unable to compel compliance with judgments as national judges do—through commands backed by coercive state authority—the question of how to guarantee the ‘finality’, that is, the enforceability of awards has been a permanent preoccupation. The solution involved harnessing state power. Under its own initiative, the ICC drafted what became the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁹ and ICC associates closely supervised the process that led to its entry into force.¹⁰ The New York Convention, now ratified by 155 states,¹¹ made national courts the public guarantors of private arbitral authority. Its provisions oblige national courts to ‘recognize’ the validity of arbitral agreements (the binding nature of arbitration clauses and agreements), and to enforce tribunal awards, subject to exceptions of ‘inarbitrability’ and ‘public policy’. Beginning in the 1960s, judges and legislators in the

⁴ Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer, The Hague 1999) [‘Berger’] 111.

⁵ White & Case and Queen Mary, University of London, ‘2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’, <<http://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations>> accessed 26 January 2016.

⁶ The ICC International Court of Arbitration does not produce arbitral awards, but rather administers the resolution of disputes by ICC tribunals in accordance with the ICC Rules of Arbitration (see Chapters 2 and 3).

⁷ We report data on the activities of major IACs in Chapter 2.

⁸ Mark Bezan, James Nicholson, and Howard Rosen, ‘Trends in International Arbitration: A New World Order’ (*FTI Consulting*, February 2015) <<http://www.fticonsulting.com/insights/fti-journal/trends-in-international-arbitration>> accessed 26 January 2016.

⁹ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (more commonly known as the New York Convention) was signed on 10 June 1958 (and entered into force on 7 June 1959).

¹⁰ Chapter 2.

¹¹ United Nations Commission on International Trade Law, ‘Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (New York, 1958) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 26 January 2016.

major states of the trading world have steadily narrowed these exceptions, in ways that have reduced the judicial review of awards to virtually nil. They had at least three good reasons to do so. First, traders strongly prefer arbitration, and states depend on transnational commerce for their economic well-being.¹² Second, in the context of overloaded court systems, arbitration has the advantage of draining off complex litigation for which many (generalist) national judges are ill prepared. Third, as arbitration has proved its worth, the ‘competition for the “business” of ... international arbitration’ has intensified among states in the major trading zones.¹³ Making national law more hospitable to arbitration is essential to attracting this business.¹⁴

The scope and importance of arbitration has also exploded in the world of foreign direct investment. The vast bulk of investor-state arbitration [ISA] takes place within a legal framework instantiated by a web of international investment agreements, the vast majority of which signed since 1990. As of the end of 2015, there were 3,304 such agreements: 2,946 bilateral investment treaties [BITs], ratified by some 150 different states; and 358 other arrangements, principally multilateral, economic agreements that contain investment provisions.¹⁵ Through 2015, the number of known ISA cases reached 696, the majority brought since 2008.¹⁶ Most cases fall under jurisdiction conferred on arbitrators by BITs; and most BITs provide for ISA under the auspices of the World Bank’s International Centre for Settlement of Investment Disputes [ICSID]. BITs resemble one another in function and form (though important provisions may vary). Their purpose is twofold. First, they encourage investment by reducing its risk, typically precluding expropriation without adequate compensation, and requiring ‘equitable’ and non-discriminatory treatment, and other protections. Second, they remove disputes between the foreign investor and the host state from the diplomatic arena and domestic national courts, channelling them into arbitration. In the archetypal case, the investor initiates ISA in order to obtain compensation for an alleged breach of a BIT’s protections by the host state. If the tribunal concludes that the state did violate the treaty, then it assesses and awards damages.

The stakes of arbitration are enormous and growing. In 2013, a survey of the leading law firms in the field reported information on 109 active ICA cases

¹² Between 1980 and 2010, the annual value of global trade has risen by more than 600 per cent, while the global GDP has risen only by about 300 per cent.

¹³ Ulrich Drobnig, ‘Assessing Arbitral Autonomy in European Statutory Law’ in Thomas E Carbonneau (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (Juris, Huntington 1998) 196.

¹⁴ Michael Mustill, ‘The History of International Arbitration: A Sketch’ in *The Leading Arbitrator’s Guide to International Arbitration* (Juris, Huntington 2014) 30: ‘International Arbitration has thus become, not just part of the risk management of international business, but really big business in itself. This fact has at last dawned on those who make economic policy at the national level ... There is a fierce if genteel competition for this business ...’.

¹⁵ Chapter 2.

¹⁶ United Nations Conference on Trade and Development, ‘World Investment Report 2016’ <http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf> accessed 26 June 2016 [‘World Investment Report 2016’], 118.

in which at least \$500 million was ‘in controversy’, including fifty-eight cases in which claims totalled more than \$1 billion, and nine with claims over \$10 billion.¹⁷ In ISA, the survey found 165 active cases with claims totalling over \$100 million, forty-eight over \$1 billion, and seven over \$10 billion. In 2014, a tribunal ordered Russia to pay investors more than \$50 billion plus interests and costs in the so-called ‘Yukos’ arbitration, the highest compensation awarded in the history of litigation.¹⁸ The monetary value of claims and awards is just one measure of arbitration’s increasing significance. Major disputes often involve important issues of law and policy, and a mix of public and private interests that arbitrators, like the judges they have displaced, must consider when they take decisions.

This community—tribunals, the bar, and scholars in the field—once worked in relative obscurity. Today, states, international bodies, non-governmental organizations, and the media monitor awards and actively debate reform proposals. While few would deny that arbitrators help to govern international commerce and investment, there is a great deal of controversy about how they are, and should be, governing. In ICA, where the vast bulk of awards are covered by confidentiality rules, these controversies are most visible when it comes to the recognition and enforcement of arbitral awards in national courts. ‘Border skirmishes’¹⁹ between judges and arbitrators are as common as they are inevitable, given the growing complexity, significance, and adversarial nature of ICA. Although ISA is booming, some observers claim that the regime is in the throes of a legitimacy crisis.²⁰ Some states, claiming bias against capital-importing states, have refused to comply with decisions. Bolivia, Ecuador, and Venezuela have recently exited the regime altogether. Others, including Canada, India, the United States, and the European Union, have declared their interests in bolstering the status of public policy interests in new treaties.²¹

¹⁷ Michael Goldhaber, ‘Arbitration Scorecard 2013: Contract Disputes’ (*The American Lawyer*, 1 July 2013) <<http://www.americanlawyer.com/id=1202607030865/Arbitration-Scorecard-2013-Contract-Disputes?slreturn=20160103181849>> accessed 26 January 2016.

¹⁸ Efforts to annul and enforce the *Yukos* award are now underway. See Jarrod Hepburn, ‘Dutch Court Sets Aside US\$50 Billion Yukos Award, Criticising Tribunal for Accepting Provisional Application of Energy Charter Treaty to Russia’ (*Investment Arbitration Reporter*, 20 April 2016) <<https://www.iareporter.com/articles/dutch-court-sets-aside-us50-billion-yukos-award-criticising-tribunal-for-accepting-provisional-application-of-energy-charter-treaty-to-russia/>> accessed 24 June 2016.

¹⁹ S I Strong, ‘Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration’ (2012) 1 *Journal of Dispute Resolution* 1.

²⁰ The flow of scholarship on the ‘crisis’ in ISA appears to be continuous. See Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521; Charles N Brower and Stephan W Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2008–2009) 9 *Chicago Journal of International Law* 471; Leon Trakman, ‘The ICSID under Siege’ (2012) 45 *Cornell International Law Journal* 604; Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and the Transnational Institute, Brussels 2012); Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System’ (2012) 106 *American Journal of International Law* 1.

²¹ See Chapters 5 and 6 for analysis.

This rather breathless synopsis highlights important aspects of the current state of international arbitration, as well as outcomes that will help to determine the future. But it is not the end of the story. Indeed, international arbitration is now at a crucial point in its development, poised between conflicting conceptions of its nature, purpose, and legitimacy. Consider the types of questions that those who use, manage, and study the system are now intensively debating. Are arbitrators merely the ‘agents’ of the disputing parties? Or are they also meant to serve the interests of a wider, transnational community, even of the international economic order more broadly? To what extent do important, prior awards constitute a case law, having persuasive, precedential value when relevant to current disputes? Should the major centres, such as the ICC and ICSID, supervise proceedings, and review the content of awards? Would the creation of arbitral appellate bodies, proposed in the name of enhancing legal certainty and bolstering systemic coherence, undermine flexibility and efficiency? To what extent do arbitrators take authoritative decisions that impinge upon public policy and interests, and thereby constrain state officials? Has state ‘sovereignty’—its regulatory prerogatives—been redefined, in the interest of promoting global commerce and investment?

Such questions concern the scope of arbitral *governance*. In this book, we conceive of governance in a generic sense, as the process through which the institutions that govern activity in any domain—for present purposes, (a) relevant state law as well as (b) arbitral rules, procedures, and jurisprudence that apply to transnational contracting, exchange, and investment—are adapted, on an ongoing basis, to changing circumstances. Our central thesis is that international arbitration has undergone a self-sustaining process of endogenous institutional evolution—which we call ‘judicialization’—a process that has steadily enhanced governance capacities over the past century. In this chapter, we present the theory of judicialization²² in an abstract and deductive form, elucidating specific mechanisms of institutional change, and then discussing how it applies to arbitration. These theoretical materials guided our empirical research, the results of which are reported in subsequent chapters.

The main features of the project deserve emphasis upfront. First, the book provides a macro-institutional account of the systemic evolution of international arbitration. We do not elaborate a distinctive normative theory of arbitration. One can read this book through normative lenses; readers may celebrate or deplore the judicialization of arbitration, for example. Instead, we survey and assess these controversies with reference to our findings, primarily in the final chapter. More generally, we explicitly adopt an ‘external’ perspective to our topic. Insiders—overlapping groups of arbitrators, counsel to the parties, and specialist law professors—have long dominated the literature in this field. In recent years, new styles of research have emerged, wherein legal scholars leverage theoretical materials and modes

²² Alec Stone Sweet, ‘Judicialization and the Construction of Governance’ (1999) 31 *Comparative Political Studies* 147 [‘Stone Sweet’]; Alec Stone Sweet and Florian Grisel, ‘L’arbitrage international: du contrat dyadique au système normatif’ (2009) 52 *Archives de philosophie du droit* 75.

of analysis developed outside the study of arbitration to describe and assess how the system operates.²³ In this new wave, scholars routinely lament the paucity of explanatory empirical analyses of arbitral behaviour, which is, in fact, striking. The book, we hope, will contribute to filling this void.

Second, one standard account of the development of arbitration stresses the virtues of freedom of contract, including the contracting parties' rights to choose their own contract law, as well as arbitration. The political economy version of the argument lays emphasis on how these virtues reduce the costs of trade and investment, notably by resolving commitment problems, while enabling actors to escape the biases and inefficiencies that afflict many national court systems.²⁴ We embrace the basics of this account (Chapters 2 and 6). ICA's socio-political legitimacy is firmly rooted in party autonomy and freedom of contract, and ISA's legitimacy is anchored in inter-state contracting. Nonetheless, few if any arbitrators today are exclusively creatures of contract, if by that we mean their purpose is strictly limited to the resolution of discreet disputes between two parties. Rather, many are devoted to building the systemic coherence and authority of the arbitral order itself, which, in turn, enables them to govern in the name of a larger, transnational community (Chapters 4 and 5). As judicialization has proceeded, we will show, the regime has developed forms of hierarchy that enable it to impose its politico-legal choices on the parties (Chapter 3).

Third, we detect an emerging consensus on the view that ICA and ISA are developing quite differently, in effect, as separate regimes.²⁵ In contrast, we do not make a sharp analytical distinction between ICA and ISA; we see many of the differences between them as a matter of degree, not kind, which we exploit for comparative purposes. In certain respects, the judicialization of ISA has gone faster and further than in ICA. The reason is that some of the mechanisms of judicialization operate more robustly in ISA, not because they do not operate in ICA. In ISA, for example, virtually all final awards on liability are published, whereas in ICA the vast bulk of awards remain secret. This difference has consequences for the development of precedent-based argumentation and lawmaking (Chapter 4), public

²³ Following Dezalay and Garth (n 1) and including Karton (n 1), Susan D Franck, 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (2011) 51(4) *Virginia Journal of International Law* 825; Susan D Franck, 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes' (2014) 55(1) *Virginia Journal of International Law* 13; Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford 2010) [Schill (ed)]; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 *Osgoode Hall Law Journal* 211.

²⁴ Alec Stone Sweet, 'Islands of Transnational Governance' in Martin Shapiro and Alec Stone Sweet (eds), *On Law, Politics, and Judicialization* (Oxford University Press, Oxford 2002) Chapter 2.

²⁵ See Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2012) 106 *American Journal of International Law* 1; Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121 ['Van Harten and Loughlin']; Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1.

accountability (Chapter 5), and debates concerning the legitimacy of arbitral governance (Chapter 6).

The chapter proceeds as follows. Part I considers the book's themes in light of the scholarship that we engage. In part II, we present the theory of judicialization. To the extent that judicialization proceeds, the theory holds, dispute resolvers will act as agents of a larger community, not merely of two disputants, and will accrete capacity to govern. Part III considers judicialization in light of delegation (also known as Principal-Agent) theory, developing three distinct models of governance: (A) *the contractual*; (B) *the judicial*; and (C) *the pluralist-constitutional*. These models now compete for dominance, while resting on rather different foundations of legitimacy. As an empirical matter, with the movement from model A to B, or from model B to C, tribunals accumulate obligations to a wider community of stakeholders. We conclude with an overview of the book.

I. Orientations

The aim of the book is not to refute or debunk other approaches to international arbitration, or to champion our own. Instead, we seek to build constructively on existing scholarship, including traditional doctrinal commentary on specific awards,²⁶ the reflections of elite arbitrators and IAC officials,²⁷ and empirically based, critical reconstructions of the regime.²⁸ Here, we briefly discuss strains of scholarship that intersect with our basic orientations,²⁹ noting the handful of important monographs on the evolution of international arbitration that have been published to date.

Institutions and Change

This book builds on social science approaches to institution-building that coalesced in the 1990s as the 'new institutionalism'.³⁰ These approaches focus on the role of institutions, understood as norms (principles, standards, rules, procedures, and cultural dispositions) that constrain choices, fix roles and duties, enable the exercise of 'legitimate' authority, and organize the evolution of social systems in

²⁶ All of the major IACs edit specialized journals that publish such work.

²⁷ Lawrence Newman and Richard Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd edn, Juris, Huntington 2014); William Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (2nd edn, Oxford University Press, Oxford 2012); Paulsson (n 1).

²⁸ Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (2nd edn, Kluwer, Alphen aan den Rijn 2010) ['Berger 2010']; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, Oxford 2007) ['Van Harten'].

²⁹ We reference more specialized literatures in subsequent chapters.

³⁰ For a synthetic overview, see Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44 *Political Studies* 936. See also Walter W Powell and Paul DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (University of Chicago Press, Chicago 1991) ['Powell and DiMaggio']; and Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge University Press, Cambridge 1990) ['North'].

path-dependent ways. The theoretical frameworks presented in parts II and III distil and integrate the main insights of this literature.

In sociological terms, the unit of analysis at the core of our project is a ‘field’.³¹ For our purposes, a field is an arena of activity that is created when actors operating in what had been previously separate and autonomous domains of action begin to orient their activities to one another. A new field is consolidated as these domains become embedded in one another, at which point domain autonomy becomes merely relative, in the sense that actors are no longer able to realize their goals successfully without reference to field-level ‘institutions’ (as just defined). The construction of new social fields, of course, needs actors—the builders of new institutions, and the agents of change. So-called ‘skilled social actors’³² are adept at building linkages between existing domains, and across pre-existing organizational ideologies and world views. Where they are successful, they fashion new templates for action that become normalized as best practice standards. In international law and politics, European integration is one of the best documented examples of the emergence and consolidation of new fields,³³ as are the effects of incorporating the European Convention on Human Rights into national legal orders.³⁴

We do not claim that institutionalist and field-theoretic theory offers the best way to conceptualize the evolutionary dynamics of international arbitration, and we recognize that some legal scholars will see no need for theory developed outside of legal studies. We introduce these ideas because they provide a generic and coherent approach to institutional change. The ambition of this book is to describe, explain, and assess the development of arbitral order as a legal system, and arbitration as a system of transnational governance. To do so, we focused on the consolidation of institutions that have enabled arbitration to develop as a legal system and, hence, to defend its own claims of autonomy and legitimacy. Today, the arbitral regime remains decentralized—there is no sovereign legislator or dispute resolver in the regime—although the elites who run the system are tightly networked in a stable, competitive, market-based field. We then tracked the development of the interface—a transnational, legal field—between the arbitral system and domestic law and courts, under the 1958 New York Convention. This legal field regularly generates what sociologists call ‘institutional isomorphism’,³⁵ dynamics that produce doctrinal convergence across jurisdiction boundaries (Chapters 2, 4, and 5). Arbitrators incorporate general principles of law (most importantly, including due process norms), found in national systems, both to build their own effectiveness

³¹ Neil Fligstein and Doug McAdam, *A Theory of Fields* (Oxford University Press, Oxford 2012).

³² Neil Fligstein, ‘Social Skill and the Theory of Fields’ (2001) 19 *Sociological Theory* 105.

³³ Neil Fligstein and Alec Stone Sweet, ‘Constructing Markets and Politics: An Institutional Account of European Integration’ (2002) 107 *American Journal of Sociology* 1206 [‘Fligstein and Stone Sweet’].

³⁴ Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the European Convention on Human Rights on National Legal Systems* (Oxford University Press, Oxford 2009).

³⁵ The classic account is Paul DiMaggio and Walter W Powell, ‘The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields’ (1983) 48 *American Sociological Review* 147.

and to secure enforcement of their awards. And lawmakers and judges of the most powerful states in the major trading zones adapted to the rise of arbitration by adopting, gradually and at times only grudgingly, its core doctrines.

Agency and Ideology

The construction of new fields depends on agency, that is, on the activities of skilled actors who possess or accumulate the power to induce institutional transformation. The most important book on the evolution of international arbitration as a field remains Dezalay and Garth's *Dealing in Virtue* (1996), a field-theoretic study that highlights struggles for influence among elites within the regime itself.³⁶ The authors argued that the regime underwent a fundamental change in the 1980s, when litigation-savvy lawyers trained in the techniques of American adversarialism replaced the 'Grand Old Men', mostly of Europe, who relied on their status, charisma, and academic credentials to create the ICC and then to dominate the regime. *Dealing in Virtue* is the first social science study of the professional backgrounds and socialization of the actors that run the system. In a more recent book, Karton identifies and evaluates *The Culture of International Arbitration* (2013),³⁷ on the basis of extensive interviews with arbitrators, and analysis of their awards. Arbitrators, he finds, share powerful ideological commitments to an expansive notion of party autonomy, and to flexible modes of legal interpretation and dispute resolution that they create and curate, as transnational contract law. We address some of these authors' specific arguments in chapters to come. More generally, what we find important is their treatment of the evolution of arbitration as a macro-institutional phenomenon of broad socio-legal significance.

The Status and Autonomy of the Arbitral Order

The most venerable vein of scholarship on the evolution of arbitration is philosophical inquiry into the status of the regime as an autonomous legal system, as such.³⁸ In the 1960s, a first wave of scholars, the most important of whom were also leading arbitrators, began to formalize the dogmatic foundations of the arbitral order's autonomy claims. These theorists, including Goldman³⁹ and David,⁴⁰ emphasized

³⁶ Dezalay and Garth (n 1). The content and outcomes of these struggles, Dezalay and Garth emphasize, were partly determined by major shifts in geopolitics and the global economy.

³⁷ Karton (n 1).

³⁸ See, generally, Florian Grisel, *L'arbitrage international ou le droit contre l'ordre juridique* (LGDJ, Paris 2011).

³⁹ Berthold Goldman, 'Frontières du droit et "lex mercatoria"' (1964) 9 Archives de philosophie du droit 177; Berthold Goldman, 'Le droit applicable selon la Convention de la B.I.R.D. du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats' in *Investissements étrangers et arbitrage entre Etats et personnes privées: la convention B.I.R.D. du 18 mars 1965* (Pédone, Paris 1969); Berthold Goldman, 'La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives' (1979) *Journal du Droit International* 475.

⁴⁰ René David, 'Arbitrage et droit comparé' (1959) 11 Revue internationale de droit comparé 5; René David, 'Arbitrage du XIXe et arbitrage du XXe siècle' in *Mélanges offerts à René Savatier* (Dalloz, Paris 1965).