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Langue and Parole of Investment Law

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Abstract
This article identifies the principal signs forming the language of investment law and arbitration, isolating for each of them its signifier and its signified in light of how such signs are used by arbitrators, practitioners and scholars. In light of this analysis, investment arbitration is assessed from a semiotic standpoint in order to verify whether it is possible, under this perspective, to consider international investment law as a multilateralised branch of international law, with a common language, customs and rules rightly referred to by international arbitral tribunals, or if the term "international investment law" is merely a conventional expression that simply groups together a plurality of micro-systems with no significant link among each other to justify the arbitrators' establishment of a de facto system of precedent and the constant reference to a non-existent body of international law rules on foreign investment.

Keywords Investment law · arbitration · Saussure · Interpretation · Precedent

1 Introduction

In spite of the nominal lack of hierarchy among sources, progressive codification has arguably led to the de facto primacy of treaties over customary international law.[1] International investment law, however, is a peculiar case even within the diverse group of fields of public international law. Rather than in one multilateral treaty on the protection of foreign investment in host states, or a "constitutional"

[1] On the significance of codification in contemporary public international law see F. Bordin, "Reflections of Customary International Law: the Authority of Codification Conventions and ILC Draft Articles in International Law", 63(3) *International and Comparative Law Quarterly* 535 (2015), at 536–540; A. Migliazza, F. Pocar, P. Lamberti Zanardi, P. Ziccardi (eds.), "Le droit international à l'heure de sa codification, études en l'honneur de Roberto Ago/Il diritto internationale al tempo della sua codificazione/International Law at the Time of its Codification, Essays in Honour of Roberto Ago", Giuffré (1987).

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convention upon which a body of substantive treaties is later built,[2] the international law of foreign investment is to be found across 2221 bilateral investment treaties (hereinafter referred to as "BITs") and 354 treaties with investment provisions currently in force.[3] It is therefore questionable whether there even is such a thing as "international investment law", in light of the fact that not only the field prominently lacks a multilateral treaty, but it is also doubtful whether there are any rules of customary international law on investment protection: on the one hand, the number of treaties in force to regulate the matter leads to consider that, rather than "international investment law", what is actually in place is a number of bilateral and small multilateral systems based on each of the afore-mentioned treaties in force—to the point that, should one wish to refer to international investment law as one, they may have to do so in terms of "regime" rather than "system"[4]; on the other hand, it is very hard to make the argument for the existence of customary international law in matters of foreign investment. Scholars have attempted to do so with great difficulty[5] and always recognising the inner paradox of talking about customary international law in a field so heavily permeated by treaties.[6]

Should one wish, however, to consider international investment law as a single and coherent field–or "system", or "regime", depending on one's standpoint—an argument may be made that the thousands of treaties currently in force share more or less the same language (or, at least, very similar wording) and structures; that applies to both the short and deliberately vague pre-2004 BITs as well as the longer, more detailed new BITs and free trade agreements loosely based, at least in principle, on the 2004 US Model BIT.[7] Critics of investment arbitration lament the lack of consistency in the investment arbitral regime that, in turn, would affect the coherent development of international investment law; it is, however, a minority part of

[2] The most prominent example of "constitutional" convention is the United Nations Convention on the Law of the Sea, 1833 UNTS 3; 21 *International Legal Materials* 1261 (1982); described by Tommy T. B. Koh, President of the Third United Nations Conference on the Law of the Sea, as 'a constitution for the oceans' (www.un.org/depts/los/convention_agreements/texts/koh_english.pdf, accessed on 2 November 2018).

[3] Data retrieved from the UNCTAD International Investment Agreements Navigator (http://investmentpolicyhub.unctad.org/IIA, accessed 21 November 2022).

[4] J. Bonnitcha, L. Poulsen, M. Waibel, *The Political Economy of the Investment Treaty Regime*, Oxford University Press (2017), at 7 and 59–65.

[5] C. McLachlan, "Is There an Evolving Customary International Law on Investment?", 31(2) *ICSID Review—FILJ* 257 (2016); P. Dumberry, "Statements as Evidence of State Practice for Custom Creation in International Investment Law", 10(1) *World Arbitration and Mediation Review* 1 (2016); *id.*, "The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law", 33(3) *Journal of International Arbitration* 269 (2016); *id.*, "The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States' Foreign Investment Laws", 2 *McGill Journal of Dispute Resolution* 66 (2015).

[6] J. D'Aspremont, "International Customary Investment Law: Story of a Paradox", in T. Gazzini, E. de Brabandere (eds.), *International Investment Law: the Sources of Rights and Obligations*, Martinus Nijhoff (2012), at 5.

[7] Available at https://www.state.gov/documents/organization/117601.pdf (last visited 18 March 2022).

the scholarship,[8] the arguments of which—although worth exploring—are not supported by sufficient hard data. In fact, it is arguable that consistency is not one of the most pressing problems of investment arbitration: arbitral tribunals rely profoundly on decisions of earlier tribunals rather than the mere text of the BIT in force between the investor's home state and the host state, to the point of having created a de facto system of precedent that has significantly contributed to shaping the set of principles and rules commonly referred to as international investment law.[9] In other words, should consistency being even a goal, it could be contended that a mechanism to achieve it, however imperfect, is already in place in the de facto doctrine of precedent in investment arbitration. Furthermore (and this may be the most convincing argument), a number of actors in the field—including the host states—as well critics of investment arbitration, *believe* that there is such a thing as international investment law—and behave accordingly: where there is no hard law to support a position, there is usually the belief that an underlying legal principle exists.[10]

The a four mentioned de facto system of precedent makes investment law a field of law the development of which has largely been in the hands of arbitrators and, to a certain extent, scholars (categories that frequently overlap), notwithstanding the enormous number of treaties in force.[11] A *prima facie* look at what constitutes international investment law would lead to using terms and expressions from international treaties. However, should one try and explain the actual content of such terms and expressions, it would be virtually impossible to do so without referring to the arbitral case-law, the ICSID Commentary[12] or the relevant scholarly contributions. From a strictly formalistic perspective, one may find considering international investment law as a lone-standing field of international law not entirely convincing, because of the lack of a solid legal basis to support many of the assumptions routinely made with regard to the nature and content of rules of international investment

[8] See a.o. D. Howard, "Creating Consistency through a World Investment Court", 41(1) *Fordham International Law Journal* 1 (2017); H. Mann, "Transparency and Consistency in International Investment Law: can the Problems be fixed by Tinkering?", in K. Sauvant, M. Chiswick-Patterson, *Appeals Mechanism in International Investment Disputes*, Oxford University Press (2008).

[9] I. Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration", 51(2) *Columbia Journal of Transnational Law* 418 (2013) at 421; Z. Douglas, "Can a Doctrine of Precedent be justified in Investment Treaty Arbitration?", 25(1) *ICSID Review—FILJ* 104 (2010) at 106; J. Gill, "Is There a Special Role for Precedent in Investment Arbitration?", 25(1) *ICSID Review—FILJ* 87 (2010) at 88; L. Reed, "The "De Facto" Precedent Regime in Investment Arbitration: a Case for Proactive Case Management", 25(1) *ICSID Review—FILJ* 95 (2010) at 96; J. Paulsson, "The Role of Precedent in Investment Arbitration", in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: a Guide to the Key Issues*, Oxford University Press (2010), at 699.

[10] T. Meyer, T. Park, "Renegotiating International Investment Law", 21(3) *Journal of International Economic Law* 655 (2018) at 659; S. Schill, *The Multilateralization of International Investment Law*, Cambridge (2009), at 364.

[11] D. Schneiderman, "The Paranoid Style of Investment Lawyers and Arbitrators: Investment Law Norm Entrepreneurs and their Critics", in C. Leng Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah*, Cambridge University Press (2016), at 131; and generally W. Kidane, *The culture of international arbitration*, Oxford University Press (2017), Chapter 7.

[12] C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: a Commentary*, Cambridge University Press (2009).

law.[13] On the other hand, the vast number of bilateral and plurilateral treaties—as well as the arbitral decisions and awards that shaped, over the years, the accepted content of such treaties—all use more or less the same words, expressions, interpretative methods and prejudices.

The problem of the existence and content of international investment law could therefore be addressed from a different perspective. The arbitral tribunals' interpretative activity can be placed halfway through a spectrum, at one extreme of which is the mere decision-making upon the parties' submission, while at the other one lies a proper law-making activity. Were international investment law a self-contained, coherent unit, the task of the arbitral tribunals would be at the decision-making extreme of the spectrum; the vagueness of most BITs, paired with the lack of a general (customary or treaty-based) international law on foreign investment, often forces arbitrators to push their interpretive efforts to the other extreme (the law-making one) of such spectrum. Generally speaking, this latter situation would not be, by itself, problematic; however, it becomes so when one considers the aforementioned uncertainty about the nature and content of international investment law and the fact that the decisions and awards of investment arbitral tribunals, much like those of every international court and tribunal, create international obligations upon states—obligations that, in the case of investment arbitration, carry major significance from a financial perspective,[14] and often raise upsetting questions of state sovereignty.[15] What are these awards—and, therefore, the obligations they create—really based on? In this article I suggest looking at the work of investment arbitral tribunal as a process of giving meaning to written texts and principles included in treaties and, as it will be argued, field-specific customs. The working hypothesis of this article is that the content of international investment law represents a *sui generis* kind of international law, based on treaties but not systemically dependent on them, loosely resembling customary international law without fulfilling the criteria of state practice and *opinio iuris*, and ultimately identifiable with the language of investment arbitral tribunals. If this hypothesis is proven wrong, however, the consequence would be that the term "international investment law" is merely a conventional expression that simply groups together a plurality of micro-systems, with no significant link among each other that could justify the arbitrators' establishment of a de facto system of precedent and the constant reference to a non-existent body of international law rules on foreign investment.

This article is structured as follows: Sect. 2 provides a brief overview of the theoretical underpinning of this research, with particular focus on the definition of semiotic analysis that shall be employed in addressing investment arbitration from such perspective. Section 3 breaks down the main concepts of investment arbitration as

[13] See *infra* Sects. 4 and 5.

[14] See generally Z. Crespi Reghizzi, "Economic Crises and the Determination of Damages in Investment Disputes: which Lessons from the Argentina Awards?", 28(2) *Diritto del Commercio Internazionale* 437 (2014).

[15] G. Foster, "Striking a Balance Between Investor Protections and National Sovereignty: the Relevance of Local Remedies in Investment Treaty Arbitration", 49(2) *Columbia Journal of Transnational Law* 201 (2011); J. Karl, "International Investment Arbitration: a Threat to State Sovereignty?", in W.Shan, P. Simons, D. Singh (eds.), *Redefining Sovereignty in International Economic Law*, Hart (2008), at 225.

signifiers, attempting at better defining the signs that constitute the code of investment arbitration. Section 4, in turn, will define the signifieds of investment arbitration in light of the *parole*[16] of the mechanism—that is, the way the code is concretely used by arbitrators, lawyers and academics in the field. Section 5 will assess investment arbitration from a semiotics standpoint in light of the analysis conducted in the earlier sections of the article. Finally, Sect. 6 shall provide a few concluding remarks and cues for further research.

2 Preliminary Remarks on Methodology

Even by the standards of public international law, which includes sub-fields and branches that share little other than the fact that they all regulate relationships between states, investment law is a peculiar field characterised by its own expressions, terms and distinctive signs. The scholarship on investment law is rich of everlasting debates on problems of definition and interpretation raised by the many treaties on investment protection. These problems are arguably exacerbated by a dispute settlement mechanism, such as investment arbitration, that is characterised by a very limited jurisdiction (each tribunal only deals with one case, one investor and one state, with no *stare decisis* doctrine) and, at the same time, the goal of reaching field-wide interpretations and a de facto system of (persuasive) precedent.[17] In fact, both the scholarship and the arbitral practice of investment law are aimed at providing meaning to expressions that are at times ambiguously defined in legal instruments (*e.g.* "full protection and security"),[18] at times acquire a distinctive meaning compared to other fields (*e.g.* "most favoured nation treatment", hereinafter referred to as "MFN")[19] and, in certain cases, require interpretations that depart from the commonly used ones (*e.g.*, fittingly, the very definition of the term "investment", which will be discussed later in this article).[20]

[16] Ibid.

[17] See *supra* note 9.

[18] H. Zeitler, "Full Protection and Security", in S. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press (2010), at 183; C. Schreuer, "Full Protection and Security", 1(2) Journal of International Dispute Settlement 353 (2010).

[19] G. Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice", 22 *British Yearbook of International Law* 96 (1945); A. Ziegler, "Is the MFN Principle in International Investment Law ripe for Multilateralization or Codification?", in A. Bjorklund, A. Reinisch (eds.), *International Investment Law and Soft Law*, Elgar (2012), at 238; Z. Douglas, "The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails", 2(1) *Journal of International Dispute Settlement* 97 (2011).

[20] K. Nakajima, "Parallel Universes of Investment Protection?: A Divergent Finding on the Definition of Investment in the ICSID Arbitration on Greek Sovereign Debts", 15(3*) The Law and Practice of International Courts and Tribunals* 472 (2016); F. Montanaro, "Poštova Banka SA and Istrokapital SE v Hellenic Republic: Sovereign Bonds and the Puzzling Definition of "Investment" in International Investment Law", 30(3) *ICSID Review—FILJ* 549 (2015), at 556; A. Grabowski, "The Definition of Investment under the ICSID Convention: A Defense of Salini", 15(1) *Chicago Journal of International Law* 287 (2014); Vargiu P., "Beyond Hallmarks and Formal Requirements: a "Jurisprudence Constante" on the Notion of Investment in the ICSID Convention", 10(5) *Journal of World Investment and Trade* 753 (2009).

The characteristics of the international law on foreign investment, with particular reference to the relationship between often generic primary sources and sometimes over-specific secondary ones, suggest the submission of the problems raised by such relationship to a binary—or 'dyadic'—analysis.[21] The first stage of the analysis shall consist in the description the *langue* of investment arbitration, identified with the rules of the investment legal grammar that inform treaties and arbitral disputes. The inquiry shall be limited to the international law perspective: even though there certainly are aspects of disputes heard by investment arbitral tribunals that require the arbitrators to familiarise themselves with domestic laws of the host state, it is arguable that such aspects do not inform the development of the rules and principles of international investment law later tribunals can refer to. This stage of the investigation shall clarify the distinction between the *langue* of investment arbitration and its *parole* (the articulation in the form of message of the rules and principles forming the *langue*). The following step shall consist in the isolation of the signifiers of investment arbitration–that is, the forms taken by the signs forming the *langue*: as it will be seen in the next section of this article, an argument can be made that, in the context of investment law, the law-making process has often conceptualised certain terms as rules, allowing a two-way relationship between *langue* and signifiers. Finally, the inquiry will consider the relevant case-law to identify the relative signifieds for each of the recognised signifiers of international investment law.

A final remark is necessary to explain the choice of Saussurean semiotics as the particular lands under which investment law is observed in this article. There are two main reasons behind this choice. One is rather subjective, but it must nonetheless be put on the table for the benefit of the readership. One of the objectives of this article is to attempt launching a debate on the language used in investment law and arbitration, and on how language affects the law as well as the arbitral tribunal's decision-making–in turn significantly influencing, as stated beforehand, the livelihood of the peoples of host states as well as such states' legal, political, and economic strategies. Therefore, the choice of Saussure has the symbolic value of starting the debate by using the work of arguably the founder of the discipline. The second, and more objective, reason for choosing a Saussurean approach lies in how the dyadic approach he originally proposed fits the factual structure of investment law itself. It is well-known that Saussure's theory is focused on the system underlying language in contrast with the use of language. Saussure's theory of sign, in particular, is concerned on the internal structure of language and the activity of humans in structuring physical or intangible signs, and chief among them is the structure of linguistic signs in the linguistic system that allows them to communicate. According to Saussure's theory, language is not merely a descriptor of reality, but actually its founding block, as language gives meaning to things that exist in the material world as well as things who do not (or not yet).[22] In a nutshell, Saussure's theory is based on the dichotomy between the signifier (sign) and the signified (the interpretation of the sign). This dyadic system also applies to form and content, to langue and parole, to synchronic and diachronic. Such a dyadic approach is particularly apt to

[21] F. de Saussure, *Course in General Linguistics*, Duckworth (1983), at 67.

[22] D. Chandler, *Semiotics: The basics*, Routledge, 2002, at 28.

describe investment law and its life in investment arbitration. The work of arbitrators is, essentially, that of giving meaning to provisions the actual scope and purpose of which is often vague and intentionally general; and even though, in practice, the background and ideas of those sitting in arbitral tribunals are crucial in these interpretive processes, from a technical standpoint the identity of the individual arbitrator does not matter. The de facto system of precedent in force in investment arbitration allows tribunals to refer to the work of previous tribunals even though the latter decided upon disputes based on different treaties.

One might argue that investment law and arbitration may well be investigated under the lenses of the work of other semioticians. Indeed, other authors, especially Peirce, have instead focused on a three dimensional are triadic system, the components of which are the sign, the object, and the interpretant.[23] Whilst Peirce's sign is equivalent to Saussure's signifier, Saussure's signified is divided by Peirce in object and interpretant. Peirce's object refers to something that is exemplified by the sign, and is a concrete element; the interpretant is any meaning brought by the sign upon the object, it has an abstract nature, and does not exist in human perception.[24] However, a basic element of Peirce's theory is that everything that has the ability to represent interpretation and human thought could be a sign. Unlike Saussure, Peirce allows the possibility of signs being casual or unintentional, as long as it can be understood by human minds: so far as someone interpret something as a sign, that something is indeed a sign. Whilst this approach could lead to fascinating results if applied to any field of international law, casual elements are neither found in international treaties, nor in arbitral awards. One might argue that casual elements are in fact present, contrary to what most treaties regulating arbitral practice dictate, in arbitral awards. These, however, are to be considered anomalies, the inclusion of casual elements in arbitral awards would likely lead to an annulment under Article 52 (b) or (e) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter referred to as the "ICSID Convention"),[25] or being set aside under Article V(1)(c) of the New York Convention on the Recognition and Enforcement of Arbitral Awards in case of awards issued by arbitral tribunals outside of the ICSID system.[26]

For these reasons, this article addresses the question of the *langue* and *parole* of investment law from the perspective of Saussure's work, with the hope that it will lead to future research on the language of investment law from, among others, semiotic and linguistic perspectives.

[23] See generally C. Peirce, *Studies in Logic*, John Benjamins Publishing Company, 1983.

[24] The difficulty of defining Peirce's interpretant has been effectively described by R. Burch, "Charles Sanders Peirce", in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2022 Edition), at https://plato.stanford.edu/archives/sum2022/entries/peirce: 'What exactly Peirce means by the interpretant is difficult to pin down. It is something like a mind, a mental act, a mental state, or a feature or quality of mind; at all events the interpretant is something ineliminably mental.'.

[25] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965, 575 UNTS 159 (1965).

[26] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Series, vol. 330, p. 3.

3 Identifying Langue and Parole of Investment Arbitration

The signs, words and expression forming the *langue* of investment arbitration are to be found in the international legal instruments containing the rules to be applied by international arbitral tribunals, namely BITs and other international treaties containing provisions on investment regulation, and the afore-mentioned ICSID Convention. The UNCITRAL Rules on International Commercial Arbitration,[27] as well as any other institutional or ad hoc set of rules that may be used by parties to an investment arbitral dispute, are to be excluded on the basis that such rules do not affect in any sense the development of investment law: even though a number of arbitration clauses in BITs and other instruments provide for the possibility of ad hoc arbitration and/or mechanisms other than the ICSID,[28] purely procedural rules do not form part of the code of investment arbitration as they are of no relevance to the analysis of substantive investment law in the context of investment arbitration. The ICSID Convention, notwithstanding its nature as a dispute settlement treaty with no provisions on substantive law, represents an exception to this principle since its interpretation, as it will be shown in the next section of this article, has had relevant consequences from the perspective of the development of investment law.

The *langue* of investment arbitration can be defined, in simple terms, as the code that arbitrators, lawyers and scholars need to know in pursuance of answering the questions posed by parties to investment disputes, and in order to actively contributing to the development of the field by providing an informed commentary to those answers. More in detail, the code describes a mechanism for the settlement of disputes arising out of investments by a national of one state in the territory of another state, provided that between the two states there is an agreement in force referring such disputes to an arbitral mechanism (whether institutional or ad hoc). The mechanism works through the establishment of a panel of decision-makers (the arbitral tribunal), to which the parties to the dispute confer the power to carry a number of procedural or substantive (although a few of such powers may spread across both categories) tasks. Such tasks must be carried out according to the specific rules applicable to the dispute, to be identified among those included in the international agreement(s) in force between the state of the investor and the host state, the applicable rules of customary international law and the relevant provisions of the domestic law of the host state. The arbitral tribunal must decide on their own jurisdiction, verifying that it has been constituted in accordance with the content of the arbitration clause in the BIT, and that the dispute before them arises out of an arbitrable investment.[29] Depending on what claims are brought by the investor, the tribunal must decide on one or more of these questions: whether the investment was

[27] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (last visited 18 March 2022).

[28] Most commonly the Permanent Court of Arbitration, which to date has decided on 136 investment cases, and the Stockholm Chamber of Commerce, that has decided on 47 investment cases (data retrieved on 18 March 2022 from the UNCTAD Investment Dispute Settlement Navigator (http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution).

[29] See *supra* note 28, and *infra* Sects. 4 and 5., for a discussion and bibliographic references on the definition of "investment".

appropriately protected by the host state; whether the investor was treated in a fair and equitable manner and in accordance with the minimum standard of treatment by the host state; whether the investor was treated not less favourably than the investors of third states, nor less favourably than the local investors, unless exceptions had been agreed between the host state and the state of nationality of the investor; whether the investor was denied the right to free transfers and returns as provided for by the applicable investment agreement; whether any act by the state, the consequence of which resulted in the taking of foreign property, had been conducted in accordance with the relevant provisions of treaty law and customary international law concerning expropriation.[30] Any claim, as previously mentioned, must be decided by the tribunal in accordance with the applicable law. The law, in turn, must be interpreted according to the ordinary interpretive codes—that is, the Vienna Convention on the Law of Treaties for the rules of international law[31] and the relevant hermeneutical principles of the relevant domestic law. The code is made of signs which, in the context of investment agreements, case-law and scholarly contributions, are characterised by such a level of recurrence that oftentimes they coincide with the relative signifier. The *parole* of investment arbitration, unlike the *langue*, cannot be described a priori because of its nature of speech. In spite of the obvious tautological risk, the *parole* of investment arbitration can be identified, primarily, with investment arbitration itself (or, more correctly, with the use of the *langue* in arbitral proceedings) along with the addition of the scholarship on investment arbitration. In light of the role of academic writing in the development of investment law—evidence of which can be effortlessly found rightly in the significant reliance of arbitral tribunals on the writings of investment lawyers alongside the afore-mentioned de facto precedent[32]—it is arguable that the *parole* of investment arbitration is nothing but the expression of the *langue* in the case-law and the commentary that arises from such case-law; and it is there, in the jurisprudence and its scholarly offspring, that the meaning given to the signs composing the *langue* and forming its *parole* are to be found.

4 Signifiers and Signifieds of Investment Arbitration

The analysis carried out in this article, for reasons of space and argument, only considers agreements, arbitral awards and scholarship in English. Similar considerations could be made for agreements, arbitral awards and scholarship in French and Spanish respectively (the other official languages of the ICSID Convention, seldom used in the case-law but frequently employed alternatives for investment agreements). However, as it has been pointed out in the literature, there is no full equivalence

[30] For a brief overview of the claims that can be possibly brought forward by investors in an investment arbitral dispute see R. Dolzer, C. Schreuer, *Principles of International Investment Law,* Oxford University Press (2012).

[31] M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press (2013), at 111.

[32] See *supra* note 9.

between the English, French and Spanish texts of the ICSID Convention, and a few instances in the case-law show that, in spite of Article 33 of the Vienna Convention on the Law of Treaties,[33] drafting investment agreements in multiple official languages may lead to different interpretations of provisions the translations of which were originally meant to be equivalent.[34] It could be argued that these differences constitute evidence of the arbitrariness of signs and the lack of substantive link between a sign and its signified; they could, furthermore, prove the impossibility to conceive a universal *langue* of investment arbitration, should the relevance of the signifier be as such as to affect both the signified and the construction of the code. These questions, however, would have to be the subject of a different (further) study. Limiting the analysis, as previously stated, to texts drafted in English, is it in fact possible to identify the main signs forming the *langue* and describe the relationship between each signifier and its signified(s):

Signifier	Signified
Dispute	Disagreement between a foreign investor and the host state, arising out of an act/omission by the host state that is considered as a breach of the applicable law by the investor but as compliant with their international/domestic law obligations by the state
Arbitration	Mechanism for the settlement of disputes arising out of an investment between an investor and a host state, based on the arbitration clause included in the relevant BIT and conducted under the ICSID framework, any arbitral institution listed in the arbitration clause or managed by the parties on an ad hoc basis
Jurisdiction	Power of the arbitral tribunal to decide on the claims brought before them by the investor, to be decided by the arbitral tribunal itself on the basis of the arbitration clause in the BIT and the instruments containing the parties' consent
Investment	The economic activity carried out by the investor in the host state, generally considered as being constituted of (1) a regular flow of money or assets; (2) a certain duration; (3) an element of risk; and (4) a contribution to the economic development of the host state[a]
Full protection and security	Due diligence in ensuring the investment's physical security and protecting the investor against violence directed at persons and property stemming from State organs or private parties[b]

[33] Vienna Convention on the Law of Treaties, Article 33 (Interpretation of treaties authenticated in two or more languages): '(1) When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. (2) A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree. (3) The terms of the treaty are presumed to have the same meaning in each authentic text. (4) Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'.

[34] V. Safran, "The "Kilic" and "Sehil" Decisions: resolving the Meaning of Dispute Resolution Provisions in Treaties written in Multiple Languages", 18(5) *International Arbitration Law Review* 105 (2015).

Signifier	Signified
Fair and equitable treatment	Just, even-handed, unbiased, legitimate treatment, assessed weighing the investor's legitimate and reasonable expectations and the host State's legitimate regulatory interests[c]
Minimum standard of treatment	Protection of the investment from discrimination, denial of justice, lack of due diligence or due process, and arbitrariness[d]
Most favoured nation treatment	Obligation upon contracting parties to treat each other's investors, in like circumstances, no less favourably than investors of any non-party[e]
National treatment	Obligation upon contracting parties to treat each other's investors, in like circumstances, no less favourably than its own investors[f]
Transfers	Free transfers of investment and returns: host state's obligation to permit the payment, conversion and repatriation of the funds that relate to an investment[g]
Expropriation	Any measure adopted by the host state having the effect of directly or indirectly taking foreign property related to an investment; the measure is not legal under international law if arbitrary, discriminatory, in violation of due process and not followed by the payment of prompt, adequate and effective compensation[h]
Exceptions	Treaty- or customary international law-based exceptions to the obligation of compliance with otherwise applicable provisions on investment protection by the state[i]

[a]Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision of Jurisdiction, 31 July 2001, paras 50–57. See also *supra* note 28

[b]C. Schreuer, *supra* note 26 at 354

[c]Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award of 17 March 2006, paras. 297, 306. See also J. Stone, "Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment", 25(1) *Leiden Journal of International Law* 77 (2012), at 81; R. Dolzer, C. Schreuer, *supra* note 40 at 133–48.

[d]T. Weiler, "An Historic Analysis of the Function of the Minimum Standard of Treatment in International Investment Law", in T. Weiler, F. Baetens, *New Directions in International Economic Law: in memoriam Thomas Wälde*, Martinus Nijhoff (2011), at 335; P. Foy, R. Deane (eds.), "Foreign investment protection under investment treaties: recent developments under Chapter 11 of the North American Free Trade Agreement", 16(2) *ICSID Review—FILJ* 299 (2001)

[e]C. Titi, "Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law" 33(5) *Journal of International Arbitration* 425 (206) at 428

[f]See generally C. Verrill, "The National Treatment Obligation: Jurisprudential Uncertainty concerning a Cornerstone of Investment Protection in Bilateral Investment Treaties", in I. Laird, T. Weiler (eds.), *Investment Treaty Arbitration and International Law*, JurisNet (2012), at 1

[g]UNCTAD Series on issues in international investment agreements, Transfer of Funds, 2000, at 5. See also R. Dolzer, C. Schreuer, *supra* note 40 at 212

[h]ee generally Vargiu P., "Environmental Expropriation in International Investment Law", in T. Treves, F. Seatzu, S. Trevisanut (eds.), *Foreign Investment, International Law and Common Concerns*, Routledge (2014) at 213.

[i]C. Binder, "Necessity Exceptions, the Argentine Crisis and Legitimacy Concerns: Or the Benefits of a Public International Law Approach to Investment Arbitration", in T. Treves, F. Seatzu, S. Trevisanut, *supra* note 50 at 71

The signifieds in the table above are intended to act as generally encompassing definitions for the respective signifiers in the left column. One may object that, in light of the extensive case-law interpreting an already considerable body of treaties,

the definitions provided do not convey the complexity of a number of those signifiers as defined in the case-law and analysed in the scholarship. However, had the aim of this research been indeed to describe the complexity and the diversity of the interpretation of relatively similar provisions from a number of different treaties, the methodology implemented would have rather been empirical, and the table above would have included definitions at the same time more sophisticated and necessarily biased: investment law, as stated beforehand, is not a coherent system based on one treaty and one standing dispute settlement body, but rather a regime featuring a plurality of treaties on roughly the same object, and a plurality of arbitral tribunals hearing disputes based, each time, on only one of those treaties. A traditional empirical study would have led not only to the consideration of every single decision taken by investment arbitral tribunal, but also to the identification of main trends, minority positions, and—to avoid a rather pointless compilation of jurisprudential interpretations—a necessary judgment on the value, in light of the letter of the applicable laws, of such interpretations.

Instead, the signifieds above have thus been compiled considering the fact that each of them is not supposed to represent only a sufficiently general definition to cover, *in abstracto*, any interpretation ever provided by arbitral tribunals and scholars: they are, in fact, descriptions of signifiers that, in the investment arbitral regime, are little more than umbrella-notions under which it is necessary to fit a plurality of provisions and principles, similar in scope but almost never identical. This approach has therefore led to some outcomes worth discussing. By way of example, the relationships between three of the signifiers above with their respective signifieds shall be addressed; more or less similar considerations, however, could be made for any of the signifiers of investment arbitration.

4.1 The Definition of "Investment"

The signified relative to the signifier "investment" is 'generally considered as being constituted of' the four elements commonly referred to in the case-law as the *Salini* criteria. Such identification in this study is not to be intended as an endorsement of such approach, the drawbacks of which have been partially identified by the scholarship[35] and shall be addressed in the next section of this article, but merely as the acknowledgment of the meaning commonly understood by actors in the investment arbitral regime for the term "investment".

Dolzer and Schreuer identify two conceptual approaches to defining the term "investment": one based on the definitions contained in BITs and other investment law instruments, and one centred on the understanding of the term in the economic literature.[36] The case-law suggests that the difference in theoretical foundations is to be solved in favour of the latter, as the definition of investment, since the decision

[35] See L. Burger, "The Trouble with Salini (Criticism of and Alternatives to the Famous Test)", 31(3) *ASA Bulletin* 521 (2013); M. Valdez Garcia, "The Path towards Defining Investment in ICSID Investor-State Arbitrations: The Open-Ended Approach", 18(1) *Pepperdine Dispute Resolution Law Journal* 27 (2018).

[36] R. Dolzer, C. Schreuer, *supra* note 40 at 61.

in *Fedax v. Venezuela*, seems to be oriented towards requiring any relevant activity to involve a regular flow of money or assets, a certain duration, an element of risk and a contribution to the economic development of the host state.[37] These four criteria were in practice formalised in the afore-mentioned *Salini* case[38] and, conveniently referred to as "*Salini* criteria", have become the standard definition of the term "investment" in cases heard by tribunals established within the context of the ICSID–all in spite of the lack of an definition of investment in the ICSID Convention.[39] The normalisation of the *Salini* criteria is as such as to make the sporadic cases that depart from the orthodoxy noteworthy; it is to be noted, however, that such departures mainly underscore the fact that there is no legal basis for the consideration of the *Salini* criteria as formal requirements and they should in fact be treated as indicators of the presence of an investment at the basis of the dispute (thus requiring a qualitative, rather than quantitative, exercise by arbitrators)[40]; infrequent, and one may say rather exceptional, are the instances in which a tribunal completely disregards the *Salini* criteria in favour of a different approach to the interpretation of the term "investment".[41]

By itself, this would not be sufficient to identify the signified of "investment" with the *Salini* criteria: one may indeed argue that even an established and consistent interpretation of a term within the context of a specific instrument would, at the very best, consolidate such interpretation without affecting the commonly perceived meaning of such term in a broader context. However, it is worth remarking that the *Salini* criteria have in fact become the standard not only to verify whether a tribunal has jurisdiction under Article 25 ICSID, but also in most cases outside of the ICSID framework. As argued by the arbitral tribunal in *Romak v. Uzbekistan*, the term "investment", even when used in a BIT, 'has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk.'[42] The *Romak* tribunal contended, in other words, that the term "investment" has an ordinary meaning under international law—and that such ordinary meaning

[37] Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, para. 43.

[38] *Supra* note 43.

[39] Article 25 ICSID states indeed that '[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may with- draw its consent unilaterally.'.

[40] A line of reasoning introduced by Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 323 ff., and Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, paras. 72–73 in particular.

[41] See *e.g.* Abaclat v. Argentina, Decision on Jurisdiction, 4 August 2011, paras. 364–365.

[42] Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, Award of 26 November 2009, para. 207. See also J. Burda, "A New Step towards a Single and Common Definition of an Investment?: Comments on the Romak versus Uzbekistan Decision", 11(6) *Journal of World Investment and Trade* 1085 (2010).

is constituted by the *Salini* criteria.[43] Such a position had been confirmed, although not as explicitly, by a number of tribunals established prior to the *Romak* one.[44] The *rationale* of the *Romak* tribunal can be summarised in that, given the fact that the ordinary meaning of the term "investment" in the context of international investment law is that explained by the *Salini* criteria, it would be 'unreasonable' to link the meaning of the term to whether the case is heard by an ICSID or an ad hoc tribunal.[45] The *Romak* tribunal only referred residually to the letter of the applicable law (in this particular case the BIT in force between Switzerland and Uzbekistan). The core of the analysis carried out in *Romak* is thus fully based on the *parole* of investment arbitration rather than its *langue*. It can be thus concluded that, for terms lacking a treaty-based definition such as "investment", the users of investment arbitration have filled the legislative vacuum by means of referring to what most people understands the term to mean—an process not remarkably exceptional in normal interactions between speakers of the same language within a community, but that could (or perhaps should) raise questions on a regime the legitimacy of which is substantially based on the meaning of that specific term.

4.2 The Meaning of "Most Favoured Nation" Treatment

A second noteworthy example of the issues that arise out of attempting to define the *parole* of investment arbitration is the signified of "Most Favoured Nation" treatment (MFN). A traditional feature of investment treaties,[46] the MFN is a standard that has historically been under the constant scrutiny of the scholarship due to the uncertainty in the case-law with regard to its scope of application.[47] Not only the question of whether an MFN provision could be used to import dispute settlement clauses from one treaty to another has not yet reached a widely accepted answer almost twenty years after the *Maffezini* decision started the debate[48]: the discussion has now also been significantly widened to include questions on whether MFN clauses can always allow the extension of the application of substantive standards of treatment included in treaties between the host state and third states. It has indeed been argued that most tribunals have traditionally interpreted MFN clauses relying on presumptions rather than the letter of the law, thus ignoring cases in which attempts to use MFN clauses to import substantive standards were to be rejected[49]; a position, however, rejected by influential scholars, on the basis that MFN clauses

[43] Ibid., paras. 195–196.

[44] Ibid., paras. 198–204.

[45] Ibid., para. 194.

[46] G. Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice", 22 *British Yearbook of International Law* 96 (1945), at 97.

[47] See *supra* note 27.

[48] Emilio Agustin Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction of 25 January 2000, paras. 43–64.

[49] See a.o. S. Batifort, J.B. Heath, "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization", 111(4) *American Journal of International Law* 873 (2017).

are 'multilateralization devices cast in bilateral form that prevent the states granting MFN treatment from shielding more favorable [sic] bilateral bargains contained in international treaties with third states from multilateralization.'[50] It can be observed that, in the case of the MFN standard, an apparently defined signified (obligation to treat one state's investors, in like circumstances, no less favourably than investors of any other state) does not actually amount to clarity with regard to the actual meaning of the term. "MFN" is one of the basic signifiers of the language of investment law, and virtually every user of such language agrees on the signified above. Nevertheless, the case-law and the scholarship underscore the existence of an animated debate on the actual purpose and scope of the standard. Such discrepancies seem to unveil the fact that, among the meanings given to the term in the context of investment law, some are symptomatic of too broad an interpretation compared to how "MFN" should actually be understood. This is not an uncommon situation in everyday language, but the consequences of such misunderstandings are far more problematic in a context, such as investment arbitration, in which the intended meaning of a word can radically change the scope and purpose of a legal obligation. For instance, in an ordinary conversation between two individuals it is not uncommon that a term like "travesty" is often used in conversation as a synonym of "tragedy" instead of its actual meaning of "parody", and very few people dare to use the word "terrific" in its original meaning to indicate something causing dismay or fear.[51] This is not a problem, as far as conversations are concerned, insofar as the participants to the conversation share the same language (or at least enough of such language to understand each other); it is at least questionable, however, that a system such as investment arbitration—in which obligations are created and earlier decisions are used as terms of reference—accepts the possibility that such obligations may be created on the basis of wrongly understood terms of references.

The uncertainty surrounding the signified of MFN underscores the distance between the *langue* and the *parole* of investment arbitration: while the sign "MFN" is undisputedly part of the *langue*, and the signified of such sign can easily be described as "the obligation upon contracting parties to treat each other's investors, in like circumstances, no less favourably than investors of any non-party", the various iterations of the sign in the *parole* of investment arbitration show at the same time the limitations of certain signifiers in absence of a less-than-precise signified.

4.3 The Question of Transfers of Funds

Similar considerations, although for different reasons, may be made with regard to the issue of transfer of funds. Provisions on transfers of profits and returns are not uncommon in investment treaties—in fact, they are included in virtually any

[50] S. Schill, "MFN Clauses as Bilateral Commitments to Multilateralism: a Reply to Simon Batifort and J. Benton Heath", 111(4) *American Journal of International Law* 914 (2017) at 916.

[51] This and other more interesting examples of misuses of words in English language can be found in P. Brians, *Common Errors in English Usage*, William, James & Co. (2013).

international agreement on investment.[52] However, the language of these provision and their scope of application may differ considerably from treaty to treaty. Whilst most agreements address the right for the investor to move funds out of the host state as well as into it, there still are a number of treaties in force that only cover transfers of funds from the host state outwards. In any event, absolute rights for the investor to make transfers are extremely rare in the investment treaty scenario, as limitations are often placed according to the domestic laws of the host state or with reference to specific types of transfers.[53] Notwithstanding the frequency of provisions on transfer of funds in treaties and the variety of linguistic formulas adopted by the drafters of such treaties, the arbitral case-law is remarkably silent on the issue: claims on transfers of funds have been raised only 30 times, and have been decided by arbitral tribunals in merely 4 cases—all of which dealing with the application of the treaty provision rather than its interpretation.[54] As in the case of the MFN, therefore, the signified of "free transfers of investment and returns" remains relatively vague, being an indicator of a number of different concrete situations. The *parole* of investment arbitration, in this case, is yet to be spoken widely.

5 Unveiling International Investment Law from the Parole of Investment Arbitration

International investment law, as stated beforehand, is a *sui generis* branch of international law: *in lieu* of one or very few multilateral agreements and a robust body of customary international law, the international law of foreign investment is constituted by the whole body of BITs and other international agreements containing provisions on investment protection. The common features of these treaties are routinely, and impliedly, referred to by arbitral tribunals and scholars as a sort of general international investment law. The language used by investment arbitral tribunals, and the reference by such tribunals to earlier cases as evidence of the content of the rules of investment law, seems consistent with the peculiar aspects of this form of international law. A semiotic analysis of investment law, however, raises significant objections against the correctness of such a view. It is true that the signs of investment arbitration, which are as arbitrary as those of any other language, are widely accepted and generally used by all state and non-state actors in the field. The signifiers of the investment arbitral code are also common to all the actors. Whilst different treati4es confer broader or narrower scopes of application to provisions dealing with the same subject matters, the signifiers remain virtually the same across the vast range of treaties currently in force. Provisions on the definition of investment call the

[52] C. Schreuer, "Investments, International Protection", *Max Planck Encyclopaedia of Public International Law*, Oxford University Press (2013), at 80.

[53] Ibid.

[54] Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I), PCA Case No. 2008–13, Award of 7 December 2012; Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award of 28 July 2015; Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/13/11, Award of 25 July 2017; Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award of 22 August 2017.

activity in question "investment"; provisions introducing MFN and National Treatment standards use the signifiers "most favoured nation treatment" and "national treatment"; even the international minimum standard, the content of continues to stimulate scholarly debate, is referred to as "international minimum standard" every time it is brought in the text of a treaty.[55]

The analysis of the signifieds, however, raises more challenging questions. In the previous sections of this article it has been shown how the signifieds of the most commonly used signs in investment arbitration can be identified, with relative ease, in the case-law and the scholarly contributions in the field. However, this process of identification only allows for the signified to be defined in extremely general terms—including for those signifiers—such as *e.g.* "investment"—for which there is one, however debatable, generally accepted signified. This severely weakens the conception of investment arbitration as a system based not only on a single, uniform and defined *langue*, but also with a consistent *parole*. The code is undeniably complex: current differences affecting the interpretation of the same concepts are too severe to identify the signifieds of the main signs as binding rules of international law. One may argue that the presence of different signifieds does not necessarily undermine the coherence of a system of rules: in the English language, for instance, the signifier "nail" may be linked to the signified "hard part of a finger or toe" or to "sharp metal piece used in construction to be pounded in"; the signifier "bolt" may refer to signifieds such as "crossbow missile", "wood or metal rod", "lengthy roll of wallpaper", or "moving rapidly and suddenly". It is questionable, however, whether the same flexibility should be allowed to investment arbitration in giving meaning to the signs of its *langue*. Indeed, a fundamental distinction arises from to the comparison between the code of investment law and that of the English language. The signifier "bolt", on the one hand, may have more than a signified, and in a specific context one may argue that an object that looks like a rod is not actually a bolt because it's not a wood or metal rod, but there is no need to investigate on the definition of "bolt". The investment arbitral case-law, on the other hand, is certainly not devoid of instances in which the investigation addresses the question of the actual definition of "investment", before even inquiring on whether the activity out of which the dispute arose falls within such definition. Similarly, the debate on the MFN standard is still too lively to identify a uniformly accepted definition of its exact scope of application[56]; and questions of this sort affect most, if not all, of investment law's signifieds. One may provokingly argue that the content of the rules of investment law seems to vary depending on whoever interprets them at a particular moment, with significant consequences in terms of international obligations if it is an arbitral tribunal that is called to carry such interpretation out. This would

[55] B. Legum, "The International Minimum Standard of Treatment and Human Rights: A Pedigree in the Rule of Law", 1 *European Investment Law and Arbitration Review* 274 (2016); M. Carfagnini, "Too Low a Threshold: Bilcon v Canada and the International Minimum Standard of Treatment", 53 *Canadian Yearbook of International Law* 244 (2016); J. Sharpe, "The Minimum Standard of Treatment, Glamis Gold, and Neer's Enduring Influence: Glamis v. US, UNCITRAL", in M. Kinnear, G. Fischer, J. Mínguez Almeida, L. Torres, M. Uran-Bidegain, *Building International Investment Law*, Kluwer (2016), at 269.

[56] See *supra* notes 63 and 64.

probably be an overstatement, as the consistency of the signifiers suggests a certain degree of internal coherence. Nevertheless, it is hardly questionable that the case-law of investment arbitral tribunals does not display investment law as a coherent unit. Could it all depend on how one looks at the relevance of the signifieds? It may indeed be possible to claim that the fluctuation of the meaning of the signs in investment arbitration is due to the inherent general character of international law, the interpretation of which is subject to hermeneutic canons less stringent than those of domestic legal systems, and different interpretations of similar provisions are acceptable as long as they are consistent with the criteria set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. From this perspective, one may indeed argue, as Schill does, that investment law is composed of multilateral structures 'built over the past decades through treaty-making and dispute settlement, and which are currently being reformed in newer treaties.'[57] However, this position is not entirely convincing as it requires to assume that there are, in fact, multilateral structures and concerted treaty-making policies underlying international investment law, that justify 'the use of multilateral approaches to treaty interpretation by arbitral tribunals, including through the widespread use of arbitral precedent even across treaties.'[58] I would rather argue that arbitral tribunals adopt quasi-multilateral approaches to treaty interpretation, and use arbitral precedent across treaties, to build these multilateral structures that not only do not actually exist (as proven by the lack of a substantive multilateral convention on investment regulation) but are also not necessarily desirable, as shown by the fact that the 'newer treaties' Schill refers to—reforming such multilateral structures—remain, in fact, negotiated and drafted on a bilateral or at best regional basis.[59]

There is certainly a variety of undisputedly common elements to all investment agreements. These shared elements, however, are common words/signs, but their meaning/signified can go from slightly to radically different based on reasons that are sometimes objective (different treaties and contexts) and sometimes purely subjective (the arbitrator, or arbitrators, interpreting them). The common elements of investment agreements, therefore, are not enough to correctly describe investment law in terms of system. In light of the discrepancies addressed in the previous and the current section of this article, I would argue that the multiplication of agreements falling within the broad definition of "investment law" may only entail being a common label to a number of micro-systems. Said shared elements are, however, enough to argue that there is such thing as an investment treaty regime, the core components of which are investment treaties, arbitration rules and arbitral institutions, and

[57] Schill, *supra* note 67 at 917.

[58] Id. at 934.

[59] See *e.g.* the EU-Singapore Investment Protection Agreement (signed on 19 October 2018); the Indonesia-Singapore BIT (11 October 2018); the EU-Japan Economic Partnership Agreement (10 July 2018); the Brazil—Suriname BIT (2 May 2018); the Republic of Korea—Republics of Central America FTA between Costa Rica, El Salvador, Honduras, Korea, Republic of, Nicaragua, Panama (21 February 2018); and the quasi-exception of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam, signed on 8 March 2018.

the decisions of investment arbitral tribunals.[60] One cannot underestimate the role played by investment arbitral tribunals in trying to keep the regime as coherent as possible by treating earlier decisions as de facto precedent, and treat the various definitions in BITs and other investment agreements as the rules of a multilateral body of international investment law. It is, however, a *fictio iuridica*. The work of arbitral tribunals simply represents the *parole* of investment arbitration. The *langue* consists solely of the universally accepted signs of investment law. Once the law enters the investment arbitral arena—where the investment legal language is actually spoken—the signifiers are clear, but the signifieds are merely general statements, and are given further meaning solely on a subjective, case-by-case basis.

6 Concluding Remarks

I am not unaware of the inherent risks carried by a semiotic analysis of investment law and arbitration from a methodological standpoint. Some of such risks relate to the possible drawbacks of conducting such an analysis without the evidence that a twin empirical study would bring. It may certainly be argued that a study on the language used across an enormous number of international legal instruments would be better served by the adoption of an empirical approach. Indeed, an empirical study on the content of such treaties would highlight common tendencies and give an overview of what is commonly considered international investment law. However, it can also be argued that such an approach would present two significant flaws: *i)* it would help identifying neither the signifiers, as an empirical study would not focus on them, nor the *langue*—since an empirical approach studying the treaties would have to separate the langue from the parole (that is, the scholarship and the arbitral case-law), carrying thus the risk of becoming a self-referential exercise. The result of such research would be to simply identify the international law of foreign investment with what is contained in the international legal instruments regulating foreign investment and applied by investment arbitral tribunals, and it would result in the identifications of as many micro-systems as there are treaties in force—without adding much to the debate on the actual nature of international investment law. An approach such as that adopted in this article entails instead defining the *langue* of investment arbitration first, and describe the signifiers and the signified of each identified sign afterwards. It is therefore neither necessary to look at all the treaties in force, nor it would be sufficient to do so: it is rather more appropriate, and interesting, to look at the signs used in the generality of treaties and cross-examine them against those used in the case-law and the scholarship.

There is, however, a third, more subtle danger in carrying a study that looks at the use of a technical language to assess the very existence of the system that such language aims at describing: the question of the appropriateness of addressing from a very theoretical standpoint a branch of the law the progress of which has been

[60] J. Bonnitcha, L. Poulsen, M. Waibel, *supra* note 4, at 7; see also S. Schill, *The Multilateralization of International Investment Law*, Cambridge (2009), at 364; J. Salacuse, "The Emerging Global Regime for Investment", 52(2) *Harvard Journal of International Law* 27 (2010).

largely driven by practitioners; and, one may add with a pinch of controversy, a branch of public international law the consistent development of which is affected by the increasing number of commercial lawyers sitting in arbitral tribunals.[61] In other words, embarking in such an analysis of investment law and arbitration requires the researcher to ask the proverbial *cui prodest* before setting the scene for their study. However, the very much lively debate on the multilateral nature of the investment treaty regime is made not only more interesting, but also more thorough and influential by interactions of scholars from very different backgrounds. Investment law, in spite of the imposing presence of the term "law", is a discipline placed at a critical juncture of law, economics, political science and—because of the significance of interpretive exercises—linguistics. It is thus appropriate to address the issues raised in the debate from a different perspective, namely one that considers the social significance of the language adopted and used by the interpreters of said law—and that is the reason why Saussure's semiotic theory has been used in this analysis. Further research, perhaps under the principles of different semiotic schools, shall hopefully solidify these findings, refine its edges—or possibly offer a completely different perspective on the multilateral character of international investment law.

[61] See generally S. Fietta, "Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?", 29(2) *Arbitration International* 188 (2013); P. Pazartis, *Reconceptualising the rule of law in global governance, resources, investment and trade*, Hart, 2016; D. Bentolila, *Arbitrators as lawmakers: the creation of general rules trough consistent decision making in international commercial and investment arbitration*, Kluwer Law International (2017).