Valentina Vadi

Investor-State Dispute Settlement as Global Constitutional Adjudication?

Forthcoming in: S. Schill, C. Tams and R. Hoffmann (eds.) International Investment Law and Constitutional Law (Cheltenham: EE 2019).

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Valentina Vadi[1]

Abstract

Can investment treaty arbitral tribunals be considered to be global constitutional courts? This chapter aims to address this question and proceeds as follows: After briefly describing the main features of investor–state arbitration and the key challenges it is facing, the chapter investigates whether arbitral tribunals are or can be analogised to global constitutional courts. It then examines the interplay between arbitral tribunals and domestic courts. The chapter concludes that public law thinking can offer useful conceptual tools for reflecting on investor–state arbitration and that the interaction between constitutional courts and arbitral tribunals can be a fertile one. However, investor–state arbitration should not be considered as a form of global constitutional adjudication.

Introduction

Investor–state arbitration has moved 'from a matter of peripheral academic interest to a matter of vital international concern'.[2] Since the 1980s, investor–state arbitration has become a standard feature in international investment treaties for the settlement of disputes that arise between a foreign investor and the host state.[3] Under this mechanism, foreign investors may bring claims against the host state before international arbitral tribunals. This differs from the traditional paradigm of states as the only subjects of international law and the only actors able to raise international claims against other states in legal proceedings.[4] Investors are usually not required to completely exhaust local remedies. The internationalisation of investment disputes is seen as an important valve for guaranteeing a neutral forum and depoliticising investment disputes.[5]

The increasing number of investment disputes—and the high-profile status of several of them—has caused investor–state arbitration to attract the sustained interest of policy makers, scholars and the public at large. The number of investment treaty arbitrations continues to rise, reaching a total of 767 publicly known cases by the end of 2016.[6] Investor–state arbitration is a truly global phenomenon: 124 different states were

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[2] S.D. Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 *Harvard ILJ* 435–89, 435.

[3] D. Sedlak, 'ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?' (2004) 23 *Penn State International LR* 147–71.

[4] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009) 44–5.

[5] I.F.I. Shihata, 'Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1 *ICSID Review–FILJ* 1–25.

[6] UNCTAD, *World Investment Report 2017* (Geneva: UN 2017).

sued via investor–state arbitration between 1990 and 2014,[7] and 'investors from over 70 countries have filed investment arbitrations representing increasingly diversified industries'.[8] Arbitral tribunals have reviewed state conduct in key sectors including, but not limited to, water services, cultural heritage, environmental protection and public health.[9] Consequently, many recent arbitral awards have determined the boundary between two conflicting values: the legitimate need for state regulation in the pursuit of the public interest on the one hand, and the protection of private interests from state interference on the other. With awards that have reached as high as $50 billion,[10] the field has attracted the increasing attention of states, investors and the media, as well as the public at large.

Despite its growing prominence, investment treaty law and arbitration is facing a 'legitimacy crisis.'[11] Concerns have arisen regarding the magnitude of decision-making power allocated to investment treaty tribunals.[12] Some scholars contend that investor–state arbitration lacks democratic input.[13] Others lament that investor–state arbitration operates as a self-contained regime, privileging the interests of foreign investors while demonstrating a 'structural disregard' for those of 'less powerful groups, and of vulnerable individuals'.[14] There is uncertainty over the relevance of norms external to investment law, such as human rights law, within investment treaty arbitration.[15] The debate has focused not so much on the question of whether arbitral tribunals limit state sovereignty—at the end of the day, this is what international tribunals do—but 'over the extent' to which arbitral tribunals delimit a state's sovereignty and affect its ability to regulate.[16] An additional concern relates to the possibility that international investment law and arbitration can even prevent regulation in key areas (the so-called regulatory chill).[17] Developing countries have deemed investment treaty arbitration to be politically biased against them.[18] In parallel, emerging economies and industrialised countries alike have also expressed concerns about this mechanism, albeit for different reasons.[19]

In response to growing debate over investor–state arbitration, states have increasingly felt the need to protect their regulatory space and to limit arbitral discretion. While a few developing countries have withdrawn from the ICSID system,[20] other

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[7] R. Wellhausen, 'Recent Trends in Investor–State Dispute Settlement' (2016) 7 JIDS 117–35, 126.

[8] C. Dupont and T. Schultz, 'Towards a New Heuristic Model: Investment Arbitration as a Political System' (2016) 7 JIDS 3–30, 22.

[9] See e.g. A.M. Daza-Clark, *International Investment Law and Water Resources Management* (Brill 2016); V. Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014); J.E. Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012); V. Vadi, *Public Health in International Investment Law and Arbitration* (Routledge 2012).

[10] See e.g. *Yukos Universal Ltd (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA227, Final Award, 18 July 2014, para. 1827.

[11] S.D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham LR* 1521–625.

[12] See generally M. Waibel, A. Kaushal, K.-H.L. Chung and C. Balchin (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010).

[13] B. Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 *Vanderbilt Journal of Transnational Law* 775–832.

[14] R.B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 AJIL 211–70, 211, 221.

[15] B. Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 ICLQ 573–96. See also C. Tams and R. Hoffmann (eds.) *Investment Law and Its Others* (Nomos: 2012).

[16] E. Guntrip, 'Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law' (2016) 65 ICLQ 829–57, 829–30.

[17] G. Van Harten and D.N. Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (2016) 7 JIDS 92–116.

[18] A. Shalakany, 'Arbitration and The Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism' (2000) 41 *Harvard ILJ* 419–68.

[19] K. Miles, 'Investor–State Dispute Settlement: Conflict, Convergence and Future Directions' *European Yearbook of International Economic Law* (2016) 273–308.

[20] See S. Ripinsky, 'Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve', *ITN*, 13 April 2012 (noting that Bolivia, Ecuador and Venezuela have withdrawn from the ICSID Convention).

countries have moved away from the Energy Charter Treaty, terminated existing international investment agreements (IIAs),[21] or omitted investor–state arbitration from the provisions of their treaties. Brazil has never ratified the ICSID Convention, nor has it ratified any treaty that provides for investor–state arbitration.[22] Rather, its investment facilitation agreements feature an investment ombudsman, mediation, and state–state remedies as an alternative to investment treaty arbitration. Finally, several states are revising their model BITs to reduce the level of protection provided by the treaty and expand the scope of exception clauses.[23] South Africa, India and Indonesia even 'have announced that they will not conclude any more investment treaties'.[24] States have also shown growing reluctance to comply with orders and awards of investment tribunals.[25]

The ongoing debate concerning the legitimacy of the international investment regime highlights the need for some rethinking or reform of the system. Such debate has both evolutionary and revolutionary potential.[26] On the one hand, evolutionary approaches assume that the international investment regime is experiencing growth pains, but many legitimacy concerns 'can be resolved over time'.[27] Evolutionary approaches do not accept all of the criticisms 'as the gospel',[28] but attempt to distinguish the positive elements of the system from those that may have proven problematic in practice. They envisage a recalibration of the system through treaty drafting and treaty interpretation.[29]

On the other hand, revolutionary approaches criticise the overall structure of the international investment regime as deeply flawed and call for major reforms.[30] Revolutionary approaches either demand major reforms or adopt an iconoclastic stance. Proposed major reforms include introducing an appeals body to review arbitral awards and creating a permanent World Investment Court.[31] The European Union and the United Nations Commission on International Trade Law (UNCITRAL) have endorsed some of these proposals.[32] The most extreme proposals call for eliminating investor–State arbitration entirely[33] and thus returning to diplomatic protection,[34] state-to-state dispute

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[21] T. Voon and A.D. Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) 31 *ICSID Review* 413–33.

[22] J. Kalicki and S. Medeiros, 'Investment Arbitration in Brazil' (2008) 24 *Arbitration International* 423–45.

[23] C.M. Ryan, 'Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law' (2008) 29 *University of Pennsylvania JIL* 725–62, 761.

[24] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 1.

[25] Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach', 52 *Virginia JIL* (2011) 57, 64.

[26] Daniel Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration—Empirically Evaluating the State-of-the Art', *Georgetown JIL* 46 (2015) 363, 369.

[27] Ibid.

[28] Charles N. Brower and Sadie Blanchard, 'What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States', *Columbia Journal of Transnational Law* 52 (2014) 690, 698 (noting that 'many accept the criticism as the gospel').

[29] See e.g. Stephan W. Schill and Vladislav Djanic, *International Investment Law and Community Interests*, SIEL Working Paper No. 2016/01 (2016), 1–27, 4 (suggesting, *inter alia*, treaty reform to bring international investment law better in line with human rights).

[30] Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration', 369.

[31] Schill, 'Enhancing International Investment Law's Legitimacy', 168 (listing the various institutional reform proposals).

[32] See UNCITRAL, 'Possible Future Work in the Field of Dispute Settlement: Reforms of Investor–State Dispute Settlement (ISDS)', UN Doc A/CN.9/917, 20 April 2017. Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', Geneva Center for International Dispute Settlement Supplemental Report, 15 November 2017, 1–127 available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf (last visited 8 March 2018)(carrying out a comparative analysis of the composition of existing international adjudicatory bodies and in part also arbitral institutions, and seeks to chart the main options for the composition of a prospective multilateral investment court and Appel Mechanism).

[33] Mattias Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege', *ESIL Reflections* 4, 25 May 2015, 2 (arguing that 'the idea of investment arbitration as a

resolution and/or domestic dispute resolution.[35] The Court of Justice of the European Union (CJEU) seems to have endorsed the latter approach in its recent *Achmea* case, at least for the settlement of intra-EU investment disputes.[36] Although the ruling is not binding on arbitral tribunals, it is binding on Member States[37]. Therefore, it is 'likely to have far-reaching consequences for investor–state disputes under the … intra-EU BITs currently in force.'[38]

Among the various approaches to addressing the legitimacy crisis of investment treaty arbitration, several scholars have proposed the use of constitutional legal analysis to address the challenges the field is facing.[39] Arbitral tribunals exercise public authority by interpreting and shaping international investment law. Although they are not lawmakers in theory, they play an important role in the development of international investment law in practice.[40] This chapter investigates the question of whether, and if so to which extent, international investment tribunals play the role of global constitutional courts. It also reflects upon investor–state arbitration's interaction with constitutional courts.

The chapter proceeds as follows: After having described the main features of investor–state arbitration and the key challenges it is facing, the chapter investigates whether arbitral tribunals can be analogised to global constitutional courts. It then examines the interplay between arbitral tribunals and domestic courts. The chapter concludes that public law thinking can offer useful conceptual tools to reflect on investor–state arbitration and that the dialogue between constitutional courts and arbitral tribunals can be a fertile one. However, investor–state arbitration is not a form of global constitutional adjudication.

2. Are Arbitral Tribunals Global Constitutional Courts?

International investment arbitration oscillates between national and international law, and between private and public law, historically 'borrowing elements from different legal structures'.[41] Given its hybrid features, it has been analogised to different legal systems, including constitutional adjudication.[42] Far from being a purely theoretical debate, this is a battle for the soul of the mechanism that can potentially affect the international investment regime as a whole. This section examines whether arbitral tribunals can be considered as global constitutional courts. In order to address this question, the section considers the function and key structural features of arbitral tribunals. It then concludes that despite their

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field with its own separate dispute resolution infrastructure should be seen as a[] … transitional phenomenon . . . that deserves to wither away over time, rather than being reformed' at least among liberal constitutional democracies.)

[34] M. Sornarajah, 'Starting Anew in International Investment Law', *Columbia FDI Perspectives* no. 74, 16 July 2012.

[35] Jason Webb Yackee, 'Do We Really Need BITs? Toward a Return to Contract in International Investment Law', 3 *Asian J. WTO & Int'l Health & Policy* (2008) 121, 125 (arguing that BITs are unnecessary because states will treat investors fairly irrespective of such agreements).

[36] *Slovak Republic v. Achmea B.V.*, Case C-284/16, 6 March 2018 (holding that the arbitration clause contained in the Netherlands–Slovakia BIT has an adverse effect on the autonomy of EU law, and is therefore incompatible with EU law).

[37] *Vattenfall AB and others v. Federal Republic of Germany* (II), ICSID Case No. ARB/12/12, Decision on Jurisdiction, 31 August 2018.

[38] Clément Fouchard, 'The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!', *Kluwer Arbitration Blog*, 7 March 2018, 2.

[39] For a pivotal study, see Stephan W. Schill (ed.) *International Investment Law and Comparative Public Law* (OUP 2010).

[40] Dolores Bentolila, *Arbitrators as Lawmakers* (Boston/Leiden: Brill 2017).

[41] Puig, 'Recasting ICSID's Legitimacy Debate', 479.

[42] A. Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45.

functional analogies, arbitral tribunals should not be considered as global constitutional courts.

From a functional perspective, scholars have analogised investor–state arbitration to public law/constitutional law adjudication.[43] Constitutional law refers to a body of national law setting up fundamental norms and procedures of state governance and expressing the fundamental political, social, and cultural choices of a given polity. Not only does it govern the relationships between the judicial, legislative, and executive powers, but it also regulates the relationship between the state and the individual. In doing so, constitutional law delimits public powers and protects private rights.[44] The basic idea underpinning constitutional law is that the constitution establishes 'a higher or supreme law'.[45] Whether codified or uncodified,[46] constitutional law is a higher law governing the exercise of public powers.[47] 'Like constitutions', IIAs 'restrict state action'.[48] Like domestic courts, arbitral tribunals settle disputes arising from the exercise of public power.[49] Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation and the appropriate role of the state.[50] Such scrutiny of the exercise of public authority 'exhibits constitutional features'.[51] In addition, in settling investment disputes, arbitrators borrow key public law principles that guide the conduct of public administrations—such as reasonableness, procedural fairness, and efficiency—as useful parameters for evaluating the conduct of states and assessing their compliance with relevant investment treaties.[52] Investment arbitrations can and have touched upon key public interests. As a result, international investment arbitration can constrain the regulatory autonomy of the state.

However, international law also addresses the exercise of public power. Like other international law instruments, international investment agreements limit state sovereignty.[53] Like other international courts and tribunals, investment tribunals review state compliance with international law. Therefore, the question as to whether this in itself renders any particular field or institutions of international law as 'constitutional' remains an open question.

While 'constitutional systems … paradigmatically govern and unite all aspects of the common good within their territories and for all persons subject to their authority',[54] international investment law has a more 'monothematic nature', in that it focuses mainly 'on affording protection to foreign investments' and promoting the development of the host state.[55] IIAs often have concurring objectives, including those of promoting peaceful

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[43] See generally G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007)(comparing investor–state arbitration to public law adjudication for the purpose of critique); S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional Law and Administrative Law in the BIT Generation* (2009); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (CUP 2008).

[44] S. Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (Harvard UP 1999) 4.

[45] G. Frankenberg, 'Comparative Constitutional Law, in M. Bussani and U. Mattei (eds.) *Cambridge Companion to Comparative Constitutional Law* (CUP 2012) 171.

[46] E.A. Young, 'The Constitution Outside the Constitution' (2007) 117 *Yale LJ* 408–473.

[47] Gordon, *Controlling the State*, 4.

[48] S.W. Schill, *The Multilateralization of International Investment Law* (CUP 2009) 373.

[49] Stephan Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator', 23 *Leiden Journal of International Law* (2010) 401, 413; G. Van Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121, 123.

[50] M. Sornarajah, 'The Clash of Globalizations and the International Law on Foreign Investment' (2003) 12 *Canadian Foreign Policy* 17.

[51] A. Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 93.

[52] Van Harten and Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', 146.

[53] Guntrip, 'Self-determination and Foreign Direct Investment', 829–30.

[54] P.G. Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions' (2016) 61 *American Journal of Jurisprudence* 51–67, 59.

[55] F. Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case against Strict Proportionality Balancing' (2017) 30 *Leiden JIL* 71–91, 91.

and prosperous relations among nations, protecting foreign investments, and promoting the (sustainable) development of the host state. Yet, they do not provide the adjudicator with a complete value system as do constitutional law instruments. International investment law remains a specialised regime of international law. While constitutional courts have functional authority over nearly all types of human activity and have 'the formal or effective power to coordinate various sectors into a single coherent fabric of law',[56] arbitral tribunals have jurisdiction over investment disputes only.

While public law is the product of a political context, and expresses the political choices of a given state, investor–state arbitration depoliticises disputes between foreign investors and the host states.[57] It constitutes a rule-based dispute-settlement mechanism for resolving investment disputes[58] that shields such disputes from power politics[59] and insulates them from the diplomatic relations between states.[60] The depoliticisation of investment disputes benefits: foreign investors, the host state, and the home state.[61] First, foreign investors no longer depend on diplomatic protection to defend their interests against the host state.[62] Rather, they can bring claims directly and make strategic choices in the conduct of the proceedings.[63] In this regard, investor–state arbitration can facilitate access to justice for foreign investors[64] and provides a neutral forum for the settlement of investment disputes.[65] Investor–state arbitration can be necessary to render meaningful the substantive investment treaty provisions.[66] Second, the depoliticisation of investment disputes protects the host state by reducing the interference of the home country in the domestic affairs of the host state.[67] It prevents or 'limit[s] unwelcome diplomatic, economic and perhaps military pressure from strong states whose nationals believe they have been injured'.[68] Third, the depoliticisation of investment disputes also protects the home state in that it no longer has 'to become embroiled in investor–state disputes'.[69]

Moreover, the nature of the investors' rights guaranteed in international investment agreements remains unsettled.[70] Some scholars have questioned whether IIAs that prescribe investor–state arbitration grant foreign investors truly substantive rights.[71] Rather, they argue that investors hold mere procedural rights instead.[72] The jurisprudence is divided. Some tribunals have held the view that IIAs create substantive inter-state

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[56] Carozza, 'The Problematic Applicability of Subsidiarity to International Law and Institutions', 59.
[57] S. Puig, 'No Right without a Remedy: Foundations of Investor–State Arbitration' (2013–2014) 35 *University of Pennsylvania JIL* 829–61, 848.
[58] Ibid.
[59] Ibid. 853.
[60] S. Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda' (2013) 36 *Fordham ILJ* 465–504, 485–7.
[61] A. Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 *Harvard ILJ* 353–417, 390.
[62] Puig, 'No Right without a Remedy', 844.
[63] Puig, 'Recasting ICSID's Legitimacy Debate', 485.
[64] F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 EJIL 729–47.
[65] Puig, 'No Right without a Remedy', 846.
[66] T. Wälde, 'The "Umbrella" (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration' (2004) 1 TDM 1–13.
[67] Roberts, 'Triangular Treaties', 389–90.
[68] J. Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System' (2014) 29 *ICSID Review* 372–418, 404.
[69] Roberts, 'Triangular Treaties', 390.
[70] See Filip Balcerzak, *Investor–State Arbitration and Human Rights* (Leiden/Boston: Brill 2017) 237–238; Francisco González de Cossío, 'Investment Protection Rights: Substantive or Procedural?', *ICSID Review—Foreign Investment LJ* (2011) 107–122, 122 (noting that 'not only can reasonable minds differ, but brilliant minds too'.)
[71] Caroline Foster, 'A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law', ICLQ 64 (2015) 461–485.
[72] Id.

obligations but do not provide individual substantive rights.[73] Other tribunals have come to opposite conclusions.[74]

From a structural perspective, investor–state tribunals are created on a case-by-case (*ad hoc*) basis for resolving given disputes under different arbitral rules.[75] Such tribunals 'do not pre-exist the dispute submitted to them and disband once they have issued their decision.'[76] Arbitrators do not have permanent tenure. In the current system, 'the parties to the dispute play a significant role in the selection of the adjudicators.'[77] The disputing party's right to appoint one of the arbitrators is what distinguishes arbitration from litigation, and it has been a 'historical keystone' of investment arbitration.[78] The transparency of the proceedings varies, depending on the choice of the parties and the applicable arbitral rules. Moreover, 'diversity levels in international arbitration [are] somewhat lower than in several national courts systems'.[79] For instance, according to a study, 'research from 252 [investment treaty arbitration] awards rendered by January 2012 identified a pool of 247 different arbitrators wherein 80.6% were from OECD states and 3.6% were women'.[80] Given that 'Asia has the largest population in the world and Africa has the second largest', certainly the composition of arbitral tribunals is not demographically representative.[81] 'While women make up almost half of the world's population, they continue to be severely under-represented on international courts and tribunals, including on arbitral tribunals.'[82] Finally, the percentage of arbitrators 'from indigenous or poor backgrounds, minority groups within their own countries or having disability status appears to be relatively unquestioned and unknown'.[83]

Debate continues as to whether a representativeness requirement should be applied to investment tribunals, appeal panels and the envisaged multilateral investment court.[84]

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[73] *Archer Daniels Midland and Tate & Lyle Ingredients Americas v Mexico*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007.

[74] *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008 (finding that the NAFTA confers substantive rights on investors).

[75] Kaufmann-Kohler and Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', 10.

[76] Id.

[77] Id. 9.

[78] Van Vechten Veeder, 'The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – From Miami to Geneva', in David D. Caron, Stephan W. Schill, Abby Cohen Smutny, Epaminontas E. Triantafilou (eds.), *Practising Virtue: Inside International Arbitration* (Oxford: OUP 2015) 128–149.

[79] S.D. Franck, J. Freda, K. Lavin, T. Lehmann and A. Van Aaken, 'The Diversity Challenge: Exploring the Invisible College of International Arbitration', *Columbia Journal of Transnational Law* 53 (2015) 429, 430–1 (noting that investment treaty arbitration 'experiences challenges related to gender, nationality or age').

[80] Id. 439.

[81] Id. 455 (noting, at 457–8, that '[a]lthough highest in world population (60.27%) Asian arbitrators were the second least represented (10%) of ICCA arbitrators … Meanwhile, despite Africa's second highest population (15.41%) … Africa exhibited the lowest level of representation (0.4%.'); see also Becky L. Jacobs, 'A Perplexing Paradox: De-Statification of Investor-State Dispute Settlement', 30 *Emory Int'l L. Rev.* (2015) 17, 32 (noting that 'Using 2014 ICSID data as a sample, seventy percent of ICSID arbitrators are from Western Europe and North America; a mere two percent are from Sub-Saharan Africa. Compare that with the claims data: one percent of ICSID cases involved Western European states as host state defendants, yet more than sixteen percent of all ICSID cases involved African State respondents.') See generally Won L. Kidane, *The Culture of International Arbitration* (CUP 2017).

[82] Kaufmann-Kohler and Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', 37 (noting that in 2015 'women amounted to 20% on the ICJ, 5% for ITLOS (with only one female judge out of 21), 14% of the WTO AB (with only one female member out of 7) and 18% on the CJEU.' According to the same study, the ECtHR (33%) and the ICC (39%) score better).

[83] Nienke Grossmann, 'Shattering the Glass Ceiling in International Adjudication', 56 *Virginia Journal of International Law* 339 (2016) 344.

[84] Kaufmann-Kohler and Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', 3 (noting that appeal panels and the multilateral investment court 'should be comprised of competent members, having the expertise and experience to discharge their functions; (ii) … should reflect high standards of diversity, representative of those for whom these bodies

Two fundamental factors require diversity in international courts. First, legitimacy entails that 'those affected should be represented among decision-makers.'[85] Diversity is key for the settlement of international disputes 'in a diverse world.'[86] Second, far from being a merely technical question, the composition of arbitral tribunals can have 'a direct impact on the quality of the decision-makers and, hence, on the quality of international justice.'[87] In fact, 'behavioural studies suggest that a group of people of different ethnicities, gender and social backgrounds integrates diverse viewpoints in its reasoning and decision-making, and thus produces better quality decisions by reason of diversity alone.'[88]

Therefore, from a structural perspective, there are striking differences between arbitral tribunals and constitutional courts. Constitutional judges generally hold tenure, and their appointment follows detailed constitutional procedures. The composition of the courts tends to consider some sort of geographical, ethnic and gender representation, even though 'assuming gender parity means that 50 per cent of judges must be women, few countries have actually achieved it for their highest judicial bodies'.[89] Most states have 'constitutional or statutory laws pertaining to diversity'.[90] While constitutional decisions are generally available to the public, only recently have efforts been undertaken to make investor–state arbitration more transparent to the public.

Do these differences necessarily mean that investor–state arbitration cannot be seen as a constitutional court mechanism? Might it not be seen as a *functional* equivalent regardless of structural and procedural differences? One could argue that structural and procedural features are not necessary for a review to be considered constitutional in nature; rather, it is the substance of adjudication that is relevant. In this regard, investor–state arbitration could be considered as analogous to a public law review mechanism. Like constitutional courts, arbitral tribunals constrain the sovereignty of states by setting out limits to their *fiat*.

However, even the substance of investor–state arbitration differs from that of constitutional adjudication. Constitutions are comprehensive instruments that encapsulate the fundamental political choices of a given community. They are the outcome of decades (if not centuries) of historical, political, and social struggles. They embody a compact among citizens, and necessarily include a balance among different interests. Comparative constitutional studies show that states balance similar interests in different ways, based on different culture, traditions, and customs. In contrast, IIAs are short instruments sometimes negotiated by the executive power of given states, but more often unilaterally drafted and imposed by powerful capital-exporting states.

IIAs often provide a range of clauses concerning such topics as protection against unlawful expropriation, fair and equitable treatment, and non-discrimination, but they usually say little to nothing about how to balance economic interests and fundamental human rights. In other words, they do not provide a complete value system.

Can arbitral tribunals, then, be perceived as components of the overall global constitution—a certain diffuse constitutionalism in which different regimes enforce distinct

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renders justice; and (iii) … should be endowed with strong guarantees of independence … for the concrete exercise of each member's adjudicatory functions.)

[85] Grossmann, 'Shattering the Glass Ceiling in International Adjudication', 348. See also Gráinne De Búrca, 'Developing Democracy beyond the State', 46 *Columbia Journal of Transnational Law* (2008) 221, 226–27; Armin von Bogdandy and Ingo Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking', 12 *German L.J.* (2011) 1341, 1343.

[86] Kaufmann-Kohler and Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', 31.

[87] Id. 9.

[88] Id. 27.

[89] Beverley Baines, 'Women Judges and Constitutional Courts: Why Not Nine Women?' in Helen Irving (ed.) *Constitutions and Gender* (Cheltenham: EE forthcoming 2017) available at https://ssrn.com/abstract=2840297, 2.

[90] Jacobs, 'A Perplexing Paradox', 38.

constitutional norms and values embedded in international law—by protecting foreign investors and their investments? Skilled arbitrators could and should complete their system of values by using the Vienna Convention on the Law of Treaties (VCLT)[91] to consider IIAs within the broader system of international law. In fact, customary norms of treaty interpretation, as restated by the VCLT, require that in interpreting and applying IIAs, arbitral tribunals also take into account other norms of public international law that are applicable between the parties. Such systematic interpretation could provide scope for balancing economic and non-economic concerns. Nonetheless, the actual practice of tribunals on this issue remains contradictory. Various tribunals have approached the VCLT in different ways, either ignoring it or interpreting it in an expansive or restrictive way. Unlike constitutional judges, who must be familiar with the entire constitutional compact, arbitrators may not be familiar with the entire system of international law. There is a risk that they favour a type of 'constitution' centred on property rights and procedural guarantees, entrench neoliberal policies, and prevent exploration of 'alternative relationships between politics and markets'.[92]

Therefore, other analogies are also proposed.[93] Several international law scholars prefer to analogise investment treaty arbitration to other international dispute settlement mechanisms.[94] Like other international law instruments, IIAs constrain state sovereignty.[95] Under international law, 'states may not override their international obligations by contrary national law'.[96] Arbitral tribunals review state action in the light of international investment treaty provisions. Like other international courts and tribunals, arbitral tribunals interpret and apply international law, thus contributing to the development of the latter.[97] International investment law is part of international law and cannot undermine the aims and objectives of the latter. Customary norms of treaty interpretation, as restated by VCLT, require arbitrators to take into account other applicable international law instruments when interpreting IIAs, even though, as mentioned, the systematic interpretation of investment treaties have not been univocal.

Whether international law in general, and international investment law in particular, have undergone processes of constitutionalisation remains an open question. Constitutionalism is a conceptual movement or doctrinal project—some contend a phenomenon—that conceives public law as a field of knowledge that transcends the dichotomy between the national and the international. Constitutionalists propose the 'constitutionalisation' of a number of different areas of law, with an aim of 'subjecting the exercise of all types of public power ... to the discipline of constitutional procedures and

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[91] Vienna Convention on the Law of Treaties, in force 23 May 1969, 1155 UNTS 331.

[92] See Paine's chapter in this volume.

[93] Roberts, 'Clash of Paradigms', 46.

[94] See, *ex multis*, James Crawford, 'International Protection of Foreign Direct Investment: Between Clinical Isolation and Systematic Integration', in R. Hofmann and C.J. Tams (eds.), *International Investment Law and General International Law—from Clinical Isolation to Systemic Integration?* (Nomos 2011) 17–28; José E. Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law 2011); Freya Baetens (ed.) *Investment Law Within International Law — Integrationist Perspectives* (Cambridge: CUP 2013); Eric De Brabandere, *Investment Treaty Arbitration as Public International Law—Procedural Aspects and Implications* (Cambridge: CUP 2014) (arguing that investment treaty arbitration is a public international law dispute settlement method concerning the international legal obligations of the States, and deriving its validity from an international law instrument); Foster, 'A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law' 461–485; V. Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge: CUP 2016).

[95] Brower & Blanchard, 'What's in a Meme?', 720 (noting that 'the voluntary acceptance of binding international obligations that constrain domestic actors is a basic principle of international law.')

[96] Id. 721. VCLT, Article 27.

[97] Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 EJIL 73–91; Karen J. Alter, *The New Terrain of International Law: Court, Politics, Rights* (Princeton University Press 2014) 5.

norms'.[98] They argue that the constitutionalisation of different areas of law— ranging from public international law[99] to international economic law[100] and EU law[101]—promotes their humanisation, suggests the idea of a scale of higher values and thus potentially contributes to the legitimacy of these systems.[102]

Yet, critics doubt the empirical reality of the phenomenon called constitutionalisation, question the analytic value of constitutionalism as an academic approach, and fear that the discourse is dangerous in normative terms.[103] As to the empirical reality of the constitutionalisation of ISDS, while at least one scholar has argued that there are elements of the constitutionalisation of investor–state arbitration,[104] it seems that both international investment law and investment treaty arbitration currently lack constitutional density. As mentioned, while there are some elements for functional analogy, there certainly is no identity or equivalence between constitutional adjudication and investor–state arbitration for the time being. Currently, there is neither a quasi-constitutional multilateral investment treaty nor a quasi-constitutional permanent tribunal to interpret and apply such an instrument. However, this may change in the near future. As Schill aptly pointed out, there are ongoing processes of *de facto* multilateralisation of the investment treaty regime, including a convergence among different investment treaties and the gradual development of a *jurisprudence constante*.[105] However, for the time being, there are more than 3,000 international investment agreements, and arbitral tribunals are constituted only on an *ad hoc* basis. One may question whether international law in general, and international investment law in particular, do or should display instruments and organs truly comparable to domestic ones.

In particular, critics contend that 'the constitutionalist reading of international law may be genuinely anti-pluralist. It may have a uni-civilizational, notably European, bias

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[98] M. Loughlin, 'What is Constitutionalization?', in P. Dobner and M. Loughlin (eds.) *The Twilight of Constitutionalism?* (OUP 2010) 47–69, 47.

[99] J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (OUP 2009) (examining the questions as to whether and, if so, to what extent the international legal system has constitutional features comparable to what we find in national law); B. Fassbender, 'The Meaning of International Constitutional Law' in N. Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (CUP 2007) (suggesting that the Charter of the United Nations can be considered the constitution of the international community); R. St. John MacDonald and D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff 2005)(arguing that constitutional perspectives in international legal discourse would contribute to protecting human welfare).

[100] P.-T. Stoll, 'Constitutional Perspectives on International Economic Law', in M. Cremona et al. (eds.) *Reflections on the Constitutionalisation of International Economic Law* (Brill 2014) 201–213, 212 (suggesting that 'a constitutionalist view is essential in the era of globalization where the growing interdependence and the emergence of effective international regimes put into question the sovereign powers of states'). See also D.Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (OUP 2005).

[101] See J.H.H. Weiler, *'Fin-de-siecle* Europe: Do the New Clothes have an Emperor?' in J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (CUP 1999) 238 (elaborating the notion of European constitutionalism as a process restraining the power of nation states and promoting peaceful and prosperous relations through human rights and the rule of law); C. Timmermans, 'The Constitutionalization of the European Union' (2002) 21 *Yearbook of European Law* 1–11, 2 (considering the development of the EU legal order as 'a striking example of … constitutionalization'); T. Christiansen and C. Reh, *Constitutionalizing the European Union* (Palgrave Macmillan 2009) 2 (suggesting that 'the EU has been constitutionalized by way of informal incrementalism.')

[102] See M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907–931, 909 (suggesting that 'the legitimacy of international law ought to be assessed using a richer constitutionalist framework.')

[103] For a discussion of these concerns and counterarguments, see Anne Peters, 'Conclusions', in Klabbers, Peters, and Ulfstein (eds.) *The Constitutionalization of International Law*, chapter 7.

[104] See P. Behrens, 'Towards the Constitutionalization of International Investment Protection' (2007) 45 *Archiv des Völkerrechts* 153–179, 154 (suggesting that there are elements for the constitutionalization of international investment law).

[105] Stephan W. Schill, S.W. *The Multilateralization of International Investment Law* (Cambridge: CUP, 2009).

built into it'.[106] Critics also highlight the political nature of constitutionalism,[107] noting that it can potentially serve as a vehicle for dominant actors and the entrenchment of current economic ideologies.[108] Is it desirable for states to empower foreign investors 'constitutionally'? Could such empowerment ever be reversible? Is the prism of constitutionalism the best way to analyse this topic, or are there alternative, better ways to view investor–state arbitration?

Whether such constitutionalisation is desirable also remains an open question. The interplay between international investment law and constitutionalism is more ambiguous than it may seem at first glance. As the function of public law is generally to protect individuals against the excessive, arbitrary or unfair exercise of public power, public law thinking can perform a similar function at the supranational level.[109] Concerns have arisen that such a perspective can reinforce the rights of investors at the expense of the common good in investment treaty arbitration.[110] For some, there is a risk that IIAs 'become a charter of rights for foreign investors, with no concomitant responsibilities or liabilities, no direct legal links to promoting development objectives, and no protection for public welfare in the face of environmentally or socially destabilising foreign investment'.[111] For instance, Schneiderman has questioned whether foreign investors are 'the privileged citizens of a new constitutional order'.[112] He cautions that while the use of constitutional principles in investment arbitration can symbolically suggest that investment tribunals are similar to national high courts,[113] not only can IIAs jeopardise the 'constitutional' right of sovereign states to regulate, but investment arbitration can risk invoking constitutional principles for purposes that are at odds with their rationale.[114]

Finally, a purely domestic public law approach risks blurring the distinction between international and constitutional law, thus interpreting the former through the lens of the latter, while a traditional tenet of international law requires states to comply with international law even if doing so was in conflict with national law, including constitutional law.[115] As aptly noted by Schill, in the global arena, 'constitutional analysis cannot draw on specific national constitutional understandings.'[116]

Yet, there are areas of convergence between constitutionalists and international lawyers. Both sets of scholars argue for a humanisation of international investment law and support some reforms of the system. Both sets of scholars suggest that arbitrators should consider non-economic values in the settlement of investment disputes. At least one of the sources of international law, general principles of law, can have a domestic *gestalt*: principles

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[106] Anne Peters, 'The Constitutionalization of International Law: Conclusions', *EJIL: Talk!* 28 July 2010 (rebutting this criticism, arguing that 'while constitutionalist thought has in historic terms been developed in Europe, it is a reaction to the … experience of domination by humans over other humans'.)

[107] Id. (noting that 'constitutionalism is also a political, not simply an apolitical, project.')

[108] Jean D'Aspremont, *Formalism and the Sources of International Law* (Oxford: OUP 2011) 81 (reporting criticism about the 'hegemonic overtones' of the constitutionalist agenda.)

[109] Benedict Kingsbury, et al. 'Global Governance as Administration: National and Transnational Approaches to Global Administrative Law', *Law and Contemporary Problems* 68, 1–13, 5.

[110] For an analogous argument with regard to WTO law, see R. Howse and K. Nicolaidis, 'Legitimacy Through "'Higher Law"'? Why Constitutionalizing the WTO is a Step Too Far', in T. Cottier and P.C. Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press 2003) 307–348.

[111] H. Mann, 'The Right of States to Regulate and International Investment Law: A Comment', in UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives* (UN 2003) 212–23.

[112] D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Premise* (OUP 2008) 5.

[113] D. Schneiderman, 'Investing in Democracy? Political Process and International Investment Law' (2010) 60 *University of Toronto LJ* 909–940, 914

[114] Id. 927.

[115] PCIJ, *Treatment of Polish Nationals and other Persons of Polish origin or Speech in the Danzig Territory*, Advisory Opinion, 4 February 1932, 6 ILR (1931–1932) 209.

[116] Stephan W. Schill, 'Towards a Constitutional Law Framework for Investment Law Reform', *EJIL: Talk!* 5 January 2015.

of comparative constitutional law can be a source of international law.[117] This is the point where constitutionalists and international lawyers converge to such a significant extent as to make the boundaries between the fields almost indistinguishable. This is the point where fruitful dialogue can take place.

In conclusion, despite functional analogies, arbitral tribunals are not global constitutional courts. Whether or not the constitutionalisation of international law in general and international investment law in particular has already taken place remains subject to debate. However, the fact that international investment law lacks constitutional density does not mean that it cannot acquire this trait in the future through treaty making[118] via the inclusion of non-economic considerations in the preambles and text of international investment agreements.[119] Non-economic concerns are already within the grasp of arbitrators *de lege lata* (even without *de lege ferenda* improvements)—provided that arbitrators are willing to apply the VCLT to the full extent. Future reforms of the international investment regime in general and the eventual creation of a World Investment Court in particular may lead to some fundamental changes in the system.

3. Are Arbitral Tribunals Engaging in a Dialogue with Constitutional Courts?

A dialogue between arbitral tribunals and domestic courts is not only feasible, but also useful or desirable. Constitutional law principles can (and have) influence(d) areas of international investment law. This has occurred in five different ways: First, treaty-makers have deliberately borrowed given legal tools from constitutional systems. Second, arbitral tribunals have referred to the decisions of constitutional courts. Third, constitutional principles can become general principles of international law or even customary international law under certain circumstances. Fourth, arbitral tribunals also adjudicate on the compliance of constitutional law with international investment law. Finally, domestic courts have also challenged the authority of arbitral tribunals by adjudicating on the constitutionality of IIAs, and this has given rise to ongoing power struggles.[120] This section briefly examines some key aspects of these various layers of interaction.

First, treaty-makers have transplanted constitutional ideas into international investment treaties.[121] For instance, the provisions against indirect expropriation in a number of IIAs—most notably the U.S. Model BIT—derive from U.S. constitutional law, specifically, the *Penn Central* test, articulated by the U.S. Supreme Court.[122] In parallel, as the 2012 U.S. Model BIT is often used as a template by a number of countries in their investment treaty

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[117] Id. (suggesting that '[s]uch principles 'could be used not only to provide a more balanced interpretation of investment treaties . . . , but also to structure a global investment law reform agenda.')

[118] See e.g. Gus Van Harten, 'The EC and UNCTAD Reform Agendas: Do They Ensure Independence, Openness, and Fairness in Investor-State Arbitration', in Steffen Hindelang and Markus Krajewski (eds) *Shifting Paradigms in International Investment Law More Balanced, Less Isolated, Increasingly Diversified* (Cambridge: CUP 2016) chapter 6.

[119] Schill, 'Towards a Constitutional Law Framework for Investment Law Reform', (noting that a constitutional 'perspective is mandated for the European Union (EU) by Article 21 TEU which requires the EU's external action to be guided by its own constitutional principles, namely 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.')

[120] See e.g. the recent *Achmea* case, and the pending preliminary ruling on Belgium's recent questions regarding the compatibility with EU law of the Investment Court System, as provided for in CETA. See Sergio Puig, 'Investor–State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga', *Mexican Law Review* 5 (2013) 199–243.

[121] G.A. Bermann, 'Comparative Law and International Organizations', in M. Bussani and U. Mattei (eds.) *The Cambridge Companion to Comparative Law* (CUP 2012) 241, 249.

[122] *Penn Central Transportation Co. v New York City*, 438 US 104, 124 (1978).

negotiations, the *lex Americana* has become the gold standard in the field.[123] This process has not been uncontroversial or uncontested. Some commentators have argued that the extensive protection granted to investors' rights amounts to an extraterritorial application of the Fifth Amendment of the U.S. Constitution.[124] International investment law has not only borrowed concepts from constitutional traditions, but has also required some countries to change their constitutions to make domestic law compatible with their international investment obligations.

Second, arbitral tribunals have relied on the jurisprudence of constitutional courts for functional reasons, such as understanding the meaning of treaty provisions, identifying general principles of law, and filling a gap in a particular law. When adjudicators face particularly difficult cases, resorting to other cases may provide them with useful examples, facilitate their reasoning, and strengthen their perceived legitimacy.[125] The influence of borrowing extends beyond the specific case,[126] as it catalyses gravitation towards certain models that exert dominant influence. The migration of constitutional ideas from constitutional law to the regional and international sphere allows a dialogue between national constitutional courts on the one hand and supranational courts and tribunals on the other. Such dialogue has also given rise to a common lexicon, which nourishes the emergence of commonalities[127] and fosters the circular migration of constitutional ideas from constitutional courts to regional and international fora and then back to constitutional courts.[128]

Yet, arbitrators often rely on national cases without providing an explanation of why they do so. If arbitrators rely on domestic cases, there is a risk that they 'cherry-pick' the cases that they are more familiar with, namely those of the legal systems with which they are acquainted. This possible selection bias increases the risks of importing not necessarily the best qualitative models, but those that are more familiar to the arbitrators.[129]

Third, in certain cases, the migration of constitutional ideas can also give rise to the coalescence of general principles of international law, thus contributing to the development of international law. Therefore, the migration of constitutional ideas can contribute to building a systematic body of legal principles common to all jurisdictions. Defined as 'a core of legal ideas which are common to all legal systems',[130] general principles of law are a source of international law.[131] They express a 'belief in a "common heritage" of international law',[132] or common law of mankind,[133] and contribute to the doctrinaire

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[123] J.E. Alvarez, 'The Evolving BIT', in I.A. Laird and T. Weiler (eds), *Investment Treaty Arbitration and International Law* (Juris 2010) 12–13.

[124] D. Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism comes to Canada' (1996) 46 *University of Toronto LJ* 499; G.M. Starner, 'Note, Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property' (2002) 33 *Law & Policy International Business* 405; V. Bean and J.C. Beauvais, 'The Global Fifth Amendment? NAFTA's Investment Protection and the Misguided Quest for an International Regulatory Takings Doctrine' (2003) 78 *NYULR* 30.

[125] E.M. Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2012) 3 JIDS 95, 116.

[126] See C. Picker, 'International Investment Law: Some Legal Cultural Insights', in L. Trakman and N. Ranieri (eds.), *Regionalism in International Investment Law* (OUP 2013) 27–58.

[127] See, *e.g.*, D. Feldman, 'Modalities of Internationalisation in Constitutional Law' (2006) 18 *European Review of Public Law* 131–158.

[128] E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 AJIL 241.

[129] R. Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 AJCL 125.

[130] R.B. Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51 AJIL 734–753, 739.

[131] Statute of the International Court of Justice, annexed to the Charter of the United Nations, 26 June 1945, in force 24 October 1946, 1 UNTS XVI, Article 38. *See generally* B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953). See also Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment', *Journal of World Investment and Trade* 10 (2009) 103;

[132] G. Del Vecchio, *Sui principi generali del diritto* (Giuffré 1958) 11.

[133] J. Waldron, 'Foreign Law and the Modern Jus Gentium' (2005) 119 *Harvard LR* 129, 132.

construction of international law as a unitary legal system. Often considered as a dormant source of international law, general principles of law can revive and govern a certain issue if treaty law and customary law do not govern such an issue. What is the *gestalt* of general principles of law? General principles of law can indicate: (1) principles that are common to diverse legal systems (thus 'having their roots in a local or national *Volkgeist*')[134] or (2) principles recognised by the international community (transcending national law).[135] An example of a general principle of municipal origin is that of requiring reparation as a consequence of a wrongful act. Examples of general principles of international foundation include, for instance, the principle of non-intervention in national affairs.[136] The international community acknowledges both types of principles—irrespective of their legal origin—as binding.[137]

The identification of the first type of general principles, those which are common to diverse legal systems, entails two processes: (1) the abstraction of the norm from national constitutions, legislations and judicial decisions (a vertical process); (2) the comparison of the national legal systems (a horizontal process) to distil the essence of the legal concept.[138] In ascertaining general principles of law, what legal systems should be considered and how? As Raimondo argues, 'If a legal principle derived from national legal systems is going to be part of international law, then that legal principle should arguably be more universally recognized'.[139]

The international judge should avoid a mechanical transposition of concepts from national law into international proceedings.[140] For instance, in *Klöckner* v. *Cameroon*, although the applicable law was Cameroonian, the Arbitral Tribunal based its decision on the 'basic principle' of 'loyalty' in contractual relations, borrowing it from French civil law and noting (without reference) that it also belonged to both English law and international law.[141] The Annulment Committee annulled the award, holding that the Arbitral Tribunal had failed to apply the proper law and had based its decision 'more on a sort of general equity than on positive law'.[142] The adoption of 'a narrow inquiry, which at best attaches special weight and at worst confines the scope of the review to a single, specific legal system'[143] for the determination of general principles of law can lead to the perception that international adjudicators 'interpret legal norms through the lexicons of their respective traditions'.[144] They risk 'elevating municipal concepts with which they are familiar to the level of 'universal truths'.[145] If general principles are derived from a limited set of Western countries, questions arise as to whether this constitutes a form of 'legal imperialism', understood as the grafting onto the global level of hegemonic Western values rather than an expression of democratic global governance. Any legal framework, including public law, is 'the product of a political context'.[146] Constitutions are domestic constructs and reflect

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134 Schlesinger, 'Research on the General Principles of Law Recognized by Civilized Nations', 742.
135 C. Voigt, 'The Role of General Principles in International Law and Their Relationship to Treaty Law' (2008) 31 *Retfærd Årgang* 3–25, 3 and 7.
136 Id. 8.
137 Id.
138 F. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (OUP 2008) 1.
139 Id. 4.
140 ICTY, *Furundzija*, Judgment, 10 December 1998, para. 178.
141 *Klöckner* v. *Cameroon*, Award, 21 October 1983, 2 *ICSID Reports* 59–61.
142 *Klöckner* v. *Cameroon*, Decision on Annulment, 16 May 1986, 1 *ICSID Reports* 515 (noting that '[The Tribunal's] reasoning [is] limited to postulating and not demonstrating the existence of a principle …').
143 A. Zammit Borda 'Comparative Law and Ad Hoc Tribunals: The Dangers of a Narrow Inquiry' (2012) 40 *International Journal of Legal Information* 22–38, 36.
144 Id. (internal citation omitted).
145 Jaye Ellis, 'General Principles and Comparative Law', European Journal of International Law 22 (2011) 949, 965.
146 Christoph Möllers, 'Ten Years of Global Administrative Law', *International Journal of Constitutional Law* 13 (2015) 469–472, 471.

the economic, social and cultural choices of domestic constituencies. Attempts to export the administrative law peculiarities of 'a certain type of western, liberal model of the state (and its capitalist model of development) … could be perceived, in developing countries as an instrument to reproduce the dominant position of advanced industrialised countries and their economic actors'.[147] Therefore, the migration of constitutional ideas should not rely on methodological nationalism;[148] rather, it 'should draw, as far as possible, on cross-cultural principles.'[149] The comparative legal analysis to detect general principles of law must be extensive and representative, albeit not necessarily uniform or universal.[150]

Fourth, arbitrators may be required to assess the compatibility of the decisions of given domestic courts with the host state commitments under the applicable BIT, or may refer to the jurisprudence of domestic courts to validate their assessment of the illegitimacy of the host state's behaviour vis-à-vis the foreign investor. While the unconstitutionality of a given regulatory measure does not necessarily entail a breach of an investment treaty provision, it can be a powerful indicator that there was a breach of the rule of law and of investment treaty provisions, such as the fair and equitable treatment provision. In certain cases, arbitral tribunals may also be asked to apply norms of constitutional law. The constitutions of individual host states that are subject to a claim should be taken seriously into account as facts when determining state responsibility, e.g., ascertaining whether the host state acted in an arbitrary or discriminatory way.

Finally, domestic courts have also challenged the authority of arbitral tribunals by adjudicating on the constitutionality of IIAs. This has given rise to ongoing power struggles. For instance, the CJEU recently ruled that investor–state arbitration in intra-EU BITs was incompatible with EU law. In fact, whereas arbitral tribunals interpret or apply EU law, they cannot refer questions of EU law to the CJEU for guidance. Therefore, there is a risk that they will interpret and apply EU law in a way that diverges or is incompatible with the constitutional *acquis* of EU law.[151] Because the ruling is binding on Member States, it will likely impact the intra-EU investment regime. Nonetheless, given the fact that the ruling is not binding on arbitral tribunals, its impact on international investment law remains uncertain.[152] In conclusion, whereas the *Achmea* decision highlights the ongoing constitutionalization of EU law in general and intra-EU investment law in particular, it does not necessarily confirm the constitutionalization of international investment law as a whole.

4. Critical Assessment

International and constitutional law approaches to investor–state arbitration are neither radically incompatible universes, nor Russian dolls, which nest simply and harmoniously one within the other. Rather, each perspective contributes to destabilising the other by obliging it to reconsider the implicit assumptions on which it rests. At the same time, they can also improve each other.

Due to globalisation processes, 'the state has lost its exclusive power to regulate matters that lie within the traditional realm of administrative law'.[153] Local administrators

[147] Francesca Spagnuolo, 'Diversity and Pluralism in Earth System Governance: Contemplating the Role for Global Administrative Law', *Ecological Economics* 70 (2011), 1875–1881, 1875.
[148] Sabino Cassese, 'Global Administrative Law: The State of the Art', *International Journal of Constitutional Law* 13 (2015) 465, 467 (stating that 'it is not possible to rely on methodological nationalism.')
[149] Spagnuolo, 'Diversity and Pluralism in Earth System Governance'.
[150] Zammit Borda, 'Comparative Law and Ad Hoc Tribunals', 28.
[151] *Slovak Republic v. Achmea B.V.*, Case C-284/16, 6 March 2018.
[152] *Vattenfall AB and others v. Federal Republic of Germany* (II), ICSID Case No. ARB/12/12, Decision on Jurisdiction, 31 August 2018.
[153] Daphne Barak-Erez and Oren Perez, 'Whose Administrative Law is it Anyway? How Global Norms Reshape the Administrative State', *Cornell International Law Journal* 46 (2013–2014) 455, 460.

can no longer limit themselves to the knowledge of domestic law, but must instead be familiar with a broader set of legal frameworks. International law poses vertical constraints on the state's right to regulate by 'introducing global interests into the decision-making processes of domestic authorities.'[154] International law also 'bring[s] about change in domestic governance institutions and practices.'[155] Adherence to these international regimes 'adds[s] a circuit of "external accountability," forcing domestic authorities to consider the interests of the wider global constituency who is affected by their decisions.'[156] The internationalisation of public law makes public law less provincial, attuning it to norms and values shared by the international community. The internationalisation of public law can protect individuals against arbitrary exercises of power by domestic authorities and promote local responsiveness to the public interest. Therefore, the internationalisation of public law has the potential to humanise public law by improving its efficiency, effectiveness, and—ideally—its responsiveness to human needs, and by challenging public law to find new ways to protect individuals against abuses of power.

In parallel, public law thinking can contribute to the progress of international law. It provides 'a discrete set of lenses through which to understand reality and a distinct toolkit with which to dissect such reality.'[157] It allows scholars and practitioners to look at international law with fresh eyes and identify patterns and structures in the chaotic development of international law. As Weiler points out, public law thinking has 'introduced a methodology with which to discuss, critique and … reform' the operation of international organisations.[158] Not only has it provided international lawyers with new methods of enquiry for examining their field, but it can also offer some 'heretical' thinking that might eventually lead to a change in international law.[159] Public law thinking can help scholars 'to better understand the functions' and limits of international organisations and adjudicators.[160] It offers scholars and practitioners a singular way of 'mapping the global disorder of normative orders'.[161] It is a theoretical tool to examine the phenomenon of the 'glocalisation' of law[162] that is, the relevance and belonging of given phenomena to both global and local legal spheres.[163]

In international investment law, public law analysis has spurred a ground-breaking debate on the nature of international investment law and arbitration. It has also brought attention to general principles of law as an important source of international law and a way to humanise international (investment) law. It certainly has contributed to the mosaic of existing methods in investigating international law.

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[154] Stefano Battini, 'The Procedural Side of Legal Globalization: The Case of the World Heritage Convention', 9 *International Journal of Constitutional Law* (2011) 340, 343.

[155] Mavluda Sattorova, International Investment Treaties and the Promise of Good Governance: Norm and Institutional Design, Internalisation, and Domestic Rule-Making (European Society of International Law, 10th Anniversary Conference, Vienna, Conference Paper No. 11/2014, 2014), at 3 available at http://ssrn.com/abstract=2546404.

[156] Battini, 'The Procedural Side of Legal Globalization', 364.

[157] Joseph H.H. Weiler, 'GAL at a Crossroads: Preface to the Symposium', *International Journal of Constitutional Law* 13 (2015) 463–464, 463.

[158] Weiler, 'GAL at a Crossroads', 463.

[159] Christian J. Tams, 'A Clever and Dangerous Move – or: a Roman Court goes Lutheran', 12 May 2017, https://verfassungsblog.de/a-clever-and-dangerous-move-or-a-roman-court-goes-lutheran/ (last visited on 20 February 2018) (noting that 'The constitutional override … has an almost Lutheran directness to it ('Here I stand, I can do no other') that one does not usually associate with Rome' and pointing out that 'the Constitutional Court opened up a new line of argument.')

[160] Casini, 'Beyond Drip-painting?' 477.

[161] Neil Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', *International Journal of Constitutional Law* 6 (2008) 373–396.

[162] See Gunther Teubner, '"Global Bukowina": Legal Pluralism in the World Society', in Gunther Teubner (ed.), *Global Law without a State* (Aldershot: Dartmouth, 1994) 3, (defining 'glocalisation' as the parallel coexistence of the local and the global level of governance in the globalization dynamics).

[163] Rostam Neuwirth, 'Governing Glocalisation: "Mind the Change" or "Change the Mind"?', *Hokkaido Journal of New Global Law and Policy* 12 (2011) 215–255.

This is not to say that public law thinking constitutes the best theoretical framework for investigating international law.[164] Rather, public law thinking presents both opportunities and dangers. Public law thinking can constitute one of the available methods or hermeneutic devices to investigate international law.[165] It can open new fields of academic enquiry, 'alter our intellectual landscape in some quite decisive ways'[166] and nurture healthy academic debates. However, it is neither the sole nor necessarily the best method for studying international phenomena.

Like any other method, public law thinking also presents pitfalls. Constitutional ideas vary from jurisdiction to jurisdiction, reflecting the preferences of society—for example, regarding the allocation of power between the different branches of government. Because investment treaty arbitration is a creature of international law, it would be problematic to automatically transpose the experience of any particular jurisdiction on the international level. For instance, some scholars question whether constitutional ideas can migrate successfully from a given constitutional experience to the international plane,[167] contending that constitutional ideas cannot be separated from the constitutional culture in which they are rooted. By adopting exogenous elements, arbitrators risk making or transforming the law rather than interpreting or applying it. Only insofar as a discrete number of constitutional experiences constitute evidence of state practice or general principles of law can they assume relevance in the context of supranational adjudication.

Sovereignty concerns, critics contend, also matter; arbitrators should not impose 'foreign moods, fads, or fashions' on their audiences, as this would go beyond their mandate, transform them into lawmakers and undermine their legitimacy.[168] In investment treaty arbitration, reference to the constitutional experience of a country other than the host state would seem out of place.[169] Moreover, such judicial borrowing can alter the text of the applicable IIA. Some scholars also argue that public law thinking risks presenting a Western bias.[170] For instance, Kate Miles argues that 'the current framing of investor–state arbitration as the embodiment of good governance and the rule of law is representative solely of the perspective of political and private elites.'[171] Despite the popularity of domestic law analogies among international law scholars, these cannot be derived from a limited number of countries. If analogies are derived only from a limited number of Western states, then there is a risk of hegemonic bias.

Conclusions

[164] But see Lorenzo Casini, 'Beyond Drip-painting? Ten Years of GAL and the Emergence of a Global Administration', *International Journal of Constitutional Law* 13 (2015) 473–477, 475.

[165] Anne Peters, 'The Merits of Global Constitutionalism', *Indiana Journal of Global Legal Studies* 16 (2009) 397–411, 397.

[166] Susan Marks, 'Naming Global Administrative Law', *New York University Journal of International Law and Politics* 37 (2005), 995–1001, 1001.

[167] P. Zumbansen, 'Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance' (2012) Osgoode Hall Law School, Research Paper No. 1/2012, 16 (wondering whether constitutional ideas can be 'conceived in near to complete isolation of the historical-intellectual contexts in which the very concepts . . . ha[d] their origin' and pinpointing the need to 'understand the potential of bringing the hidden histories of a particular legal field to light as they feed into the conceptualization on a world scale').

[168] *Lawrence v Texas*, 123 S.Ct. 2472, 2495 (2003) (Scalia, J., dissenting); *Foster v. Florida*, 123 S.Ct. 470, 470–71 (2002) (Thomas, J., concurring).

[169] A given constitutional practice may be relevant not only when the applicable law is a national law; national law may be a *qualitatively different fact* from other facts in the case, and command special attention and relevance. For instance, some arbitral tribunals have referred to proportionality because proportionality was embedded in the national law that was applicable to the given dispute. See generally, Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017).

[170] Kate Miles, *The Origins of International Investment Law: Empire, Environment and Safeguarding Capital* (2013) 335 (suggesting that good governance can be a patronizing concept).

[171] Id.

Despite functional analogies, arbitral tribunals are not global constitutional courts. Whether the constitutionalisation of international law in general and international investment law in particular has taken place remains subject to debate. Yet, the fact that international (investment) law still lacks constitutional density does not mean that it cannot acquire it in the future through treaty making or jurisprudential developments.

For the time being, public law thinking provides a useful toolkit for approaching the increasingly complex subject of international investment law. It can illuminate some of international investment law's idiosyncrasies and stimulate fruitful academic debate. However, like any other method, unavoidably, public law thinking also presents pitfalls. The comparative legal analysis used to detect general principles of law must be extensive and representative, albeit not necessarily uniform or universal. Attempts to export the administrative law peculiarities of a limited number of liberal states could be perceived as an imperialist project. While public law thinking constitutes a useful approach to studying international law, it does not constitute the sole or necessarily the best method for doing so. Rather, this chapter suggests, international law requires 'epistemological pluralism', that is, different methods of enquiry. Only the juxtaposition of different methods and approaches can help scholars and practitioners to decipher the complexity of international law.