INTER-CIVILIZATIONAL APPROACHES TO INVESTOR-STATE DISPUTE SETTLEMENT

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ABSTRACT

After having described the main features of investor-state arbitration and the key challenges it is facing, this Article investigates whether arbitral tribunals can be analogised to global constitutional courts, or whether they are analogous to other international tribunals. It then examines the promises and pitfalls of constitutional theories of investor-state arbitration. This Article argues that investor-state arbitration is not a form of global constitutional adjudication, as arbitral tribunals are not akin to constitutional courts, and for the time being maintain structural and functional differences from the latter. In other words, arbitral tribunals currently lack constitutional density. This does not necessarily mean that they cannot acquire such density; they certainly can, should states desire them to. Constitutional theory can offer useful conceptual tools to reflect on investor-state arbitration, and the dialogue between constitutional courts and arbitral tribunals can be a fertile one. Nonetheless, this Article highlights the importance of methodological pluralism and of an inter-civilizational approach to address the current challenges

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investor-state arbitration is facing. Under international law, countries are delimited by borders and remain the subjects of this field of law. Nonetheless, this Article proposes the use of a broader notion, that of civilization, to indicate a community of language, culture, and worldview. Some countries are multicultural in that their history has involved the encounter of different cultures and civilizations. Adopting an inter-civilizational or inter-cultural approach entails acknowledging the cultural (and constitutional) diversity of countries and applying international law in a manner that is sensitive to the cultural differences and constitutional preferences of given countries. Adopting such an approach entails a historical, anthropological, and principally legal understanding that different cultures may prioritize different values and that international law is a composite system that can applied in a manner that is respectful of cultural differences. Recent developments seem to suggest that, at least in some regional contexts, there are ongoing attempts to fine-tune investment treaties to the needs of different cultures and humanise the settlement of investment disputes.

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I. INTRODUCTION

Investor-state arbitration has moved "from a matter of peripheral academic interest to a matter of vital international concern."[1] 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 a host state.[2] Under this mechanism, foreign investors may bring claims against the host state before international arbitral tribunals, typically without exhausting local remedies. This differs from the traditional paradigm representing states as the only subjects of international law and, as such, the only actors able to raise international claims against other states in legal proceedings.[3] The internationalization of investment disputes is seen as an important valve for guaranteeing a neutral forum and depoliticising investment disputes.[4]

The increasing number of investment disputes—as well as the high-profile status of several cases—has caused investor-state arbitration to attract the sustained interest of policymakers, scholars, and the public at large. The number of investment treaty arbitrations continues to rise, reaching an estimated 1,000 cases by the end of 2019.[5] Investor-state arbitration is a truly global phenomenon: investors from over seventy countries have sued 124 different states via investor-state arbitration between 1990 and

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[1] Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 435 (2009).

[2] David R. Sedlak, *ICSID's Resurgence in International Investment Arbitration: Can the Momentum Hold?*, 23 PENN STATE INT'L L. REV. 147, 148 (2004).

[3] ANDREW NEWCOMBE & LUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 44-45 (2009).

[4] Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV.—FOREIGN INV. L.J. 1, 12 (1986). *But see* M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 81-83 (2015) (discussing whether the neutrality of the arbitration system is a carefully cultivated myth). For an examination of the limits and potential of depoliticization in global governance, see ANTI-POLITICS, DEPOLITICIZATION, AND GOVERNANCE ch. 1 (Paul Fawcett, Matthew Flinders, Colin Hay & Matthew Wood eds., 2017).

[5] U.N. Conference on Trade and Development, *World Investment Report 2019*: *Special Economic Zones*, 102, U.N. Doc. UNCTAD/WIR/2019, https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf [https://perma.cc/3Q6H-J4GV].

2014.[6] Arbitral tribunals have reviewed state conduct in key sectors including, but not limited to: water services, cultural heritage, environmental protection, and public health.[7] 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 USD,[8] the field has attracted increased attention from states, investors, and the media, as well as the public at large.

Despite its growing prominence, investment treaty law and arbitration are facing a "legitimacy crisis."[9] Concerns have arisen regarding the magnitude of decision-making power allocated to investment treaty tribunals.[10] Some scholars contend that investor-state arbitration lacks democratic input.[11] 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."[12] There is uncertainty over the relevance of norms external to investment law, such as human rights law, within

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[6] Rachel L. Wellhausen, *Recent Trends in Investor-State Dispute Settlement*, 7 J. INT'L DISP. SETTLEMENT 117, 126 (2016); Cédric Dupont & Thomas Schultz, *Towards a New Heuristic Model: Investment Arbitration as a Political System*, 7 J. INT'L DISP. SETTLEMENT 3, 22 (2016).

[7] *See, e.g.*, ANA MARIA DAZA-CLARK, INTERNATIONAL INVESTMENT LAW AND WATER RESOURCES MANAGEMENT: AN APPRAISAL OF INDIRECT EXPROPRIATION (2017); VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2014); JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (2012); VALENTINA VADI, PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2013).

[8] *See, e.g.*, Yukos Universal Ltd. (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, Final Award, ¶ 1827 (July 18, 2014).

[9] Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

[10] *See* The Backlash Against Investment Arbitration: Perceptions and Reality (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds., 2010).

[11] Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit*, 41 VAND. J. TRANSNAT'L L. 775 (2008).

[12] Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AM. J. INT'L L. 211, 211 (2014).

investment treaty arbitration.[13] The debate has focused not so much on the question of whether arbitral tribunals review the exercise of state sovereignty—at the end of the day, that is what international tribunals do—but over the extent to which they exercise such review, thus potentially constraining states' ability to regulate.[14] The conclusion of a treaty is not "an abandonment of sovereignty";[15] therefore, legitimate concerns may arise if the review of state conduct by arbitral tribunals is perceived as going too far. 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").[16] Moreover, developing countries have deemed investment treaty arbitration to be politically biased against them.[17] In parallel, emerging economies and industrialised countries alike have also expressed concerns about this mechanism, albeit for different reasons.[18]

In response to the 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 International Centre for Settlement of Investment Disputes ("ICSID") system,[19] other

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[13] Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573 (2011); *see also* INTERNATIONAL INVESTMENT LAW AND ITS OTHERS (Rainer Hoffmann & Christian J. Tams eds., 2012) (discussing the interplay between international investment law and other fields of law).

[14] Edward Guntrip, *Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law*, 65 INT'L & COMP. L.Q. 829, 830 (2016).

[15] Case of the SS "Wimbledon" (U.K. v. Ger.), Judgment, 1923 P.C.I.J. Rep. (Ser. A) No. 1, at 25 (Aug. 17) ("The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty . . . . But the right of entering into international engagements is an attribute of State sovereignty.").

[16] Gus Van Harten & Dayna Nadine Scott, Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada, 7 J. INT'L DISP. SETTLEMENT 92, 92 (2016).

[17] Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 420 (2000).

[18] Kate Miles, *Investor–State Dispute Settlement: Conflict, Convergence and Future Directions*, 7 EUR. Y.B. INT'L ECON. L. 273, 292 (2016).

[19] *See* Sergey Ripinsky, *Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve*, INV. TREATY NEWS (Apr. 13, 2012), https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-

countries have moved away from the Energy Charter Treaty,[20] terminated existing international investment agreements ("IIAs"),[21] or omitted investor-state arbitration from their treaties. For example, 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.[23] Finally, several states are revising their model bilateral investment treaties ("BITs") to reduce the level of investor protection provided by the treaty and expand the scope of exception clauses.[24] South Africa even "announced that it w[ould] not conclude any more investment treaties."[25] States have also shown growing reluctance to comply with orders and awards of investment tribunals.[26]

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.[27] On the one hand,

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it-does-and-does-not-achieve/ [https://perma.cc/9HYM-RZYA] (noting that Bolivia, Ecuador and Venezuela have withdrawn from the ICSID Convention).

[20] Tania Voon & Andrew D. Mitchell, Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law, 31 ICSID REV.—FOREIGN INV. L.J. 413, 416 (2016).

[21] *Id.* at 414.

[22] Jean Kalicki & Suzana Medeiros, *Investment Arbitration in Brazil: Revisiting Brazil's Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration*, 24 ARB. INT'L 423, 424 (2008).

[23] Geraldo Vidigal & Beatriz Stevens, *Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?*, 19 J. WORLD INV. & TRADE 475, 488-512 (2018).

[24] *See, e.g.*, NETHERLANDS DRAFT MODEL BIT, https://iaa-network.com/wp-content/uploads/2018/07/Netherlands-Model-BIT-Draft.pdf [https://perma.cc/QP98-3VJA]; MODEL TEXT FOR THE INDIAN BILATERAL INVESTMENT TREATY, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [https://perma.cc/CV5Z-55BJ].

[25] SORNARAJAH, *supra* note 4, at 5 n.17.

[26] Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 64 (2011).

[27] Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 46 GEO. J. INT'L L. 363, 369 (2015).

evolutionary approaches assume that the international investment regime is experiencing growth pains, but many legitimacy concerns "can be resolved over time."[28] Evolutionary approaches do not accept all of the criticisms, but attempt to distinguish the positive elements of the system from those that may have proven to be problematic in practice.[29] They envisage a recalibration of the system through treaty drafting and treaty interpretation.[30]

On the other hand, revolutionary approaches criticize the overall structure of the international investment regime as being deeply flawed and call for major reforms.[31] Proposed major reforms include introducing an appeals body to review arbitral awards or creating a permanent World Investment Court.[32] While the European Union ("EU") has endorsed some of these proposals, the United Nations Commission on International Trade Law ("UNCITRAL") has provided a platform for negotiation.[33] Some proposals even call for eliminating investor-state arbitration,[34] returning to diplomatic

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[28] *Id*.

[29] *See* Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 698 (2014).

[30] *See, e.g.*, Stephan W. Schill & Vladislav Djanic, *Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law*, 33 ICSID REV.—FOREIGN INV. L. J. 29 (2018) (suggesting, *inter alia*, treaty reform to bring international investment law better in line with human rights).

[31] Behn, *supra* note 27.

[32] Schill, *supra* note 26, at 68.

[33] *See* U.N. Comm. on International Trade Law [UNCITRAL], *Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat*, U.N. Doc. A/CN.9/WG.III/WP.149 (Sept. 5, 2018), http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/149_main_paper_7_September_DRAFT.pdf [https://perma.cc/U5H6-LJV3]; Submission of the European Union and its Member States to UNCITRAL Working Group III, *Establishing a Standing Mechanism for the Settlement of International Investment Disputes* (Jan. 18, 2019), http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf [https://perma.cc/RU5U-PCSC]; GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, CIDS - GENEVA CTR. FOR INT'L DISP. SETTLEMENT, THE COMPOSITION OF A MULTILATERAL INVESTMENT COURT AND OF AN APPEAL MECHANISM FOR INVESTMENT AWARDS (2017), https://lk-k.com/wp-content/uploads/2017/11/CIDS_Supplemental_Report.pdf [https://perma.cc/Q8XV-UB9C].

[34] *See* Mattias Kumm, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, EUR. SOC'Y INT'L L. REFLECTIONS, May 25, 2015, at 1.

protection,[35] state-to-state dispute resolution, and/or domestic dispute resolution.[36] In *Achmea*, the Court of Justice of the European Union ("CJEU") invalidated the arbitration clause in a BIT between EU members as incompatible with EU law, leaving only domestic dispute resolution mechanisms for settling intra-EU investment disputes. Therefore, the CJEU seems to prefer the domestic dispute resolution of intra-EU investment disputes.[37] Although the ruling is not binding on arbitral tribunals—under international law, the ruling of an international tribunal is not binding on other international tribunals established under different treaties—it is binding on EU Member States.[38] Therefore, it is "likely to have far-reaching consequences for investor-state disputes under the . . . intra-EU BITs currently in force."[39]

To address the legitimacy crisis of investment treaty arbitration, several scholars have investigated the roles that constitutional theory can play in investment arbitration and have advocated for its use to address the challenges the field is facing.[40] Arbitral tribunals

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[35] M. Sornarajah, *Starting Anew in International Investment Law,* COLUM. FDI PERSP., July 16, 2012, at 1, https://academiccommons.columbia.edu/doi/10.7916/D8057Q6S [https://perma.cc/8XS6-DT9K].

[36] *See* Jason Webb Yackee, *Do We Really Need BITs? Toward a Return to Contract in International Investment Law,* 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 121, 125 (2008).

[37] Case C-284/16, Slovak Republic v. Achmea BV, ECLI:EU:C:2018:158, Judgment (Mar. 6, 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).

[38] Vattenfall AB v. Federal Republic of Germany (II), ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue (Aug. 31, 2018).

[39] Clément Fouchard & Marc Krestin, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, KLUWER ARBITRATION BLOG (Mar. 7, 2018), http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ [https://perma.cc/2AAM-2AWT].

[40] Laurence Boisson de Chazournes & Brian McGarry, *What Roles Can Constitutional Law Play in Investment Arbitration?*, 15 J. WORLD INV. & TRADE 862 (2014) (examining the role played by constitutional law in investment arbitration); INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Stephan W. Schill ed., 2010) (adopting an international public law approach); Ernst-Ulrich Petersmann, *International Rule of Law and Constitutional Justice in International Investment Law and Arbitration,* 16 IND. J. GLOB. LEGAL STUD. 513 (2009); Peter-Tobias Stoll & Till Patrick Holterhus, *The 'Generalization' of International Investment Law in*

interpret, develop, and shape international investment law. Although they are not lawmakers in theory, they play an important role in the development of international investment law in practice.[41] Because the investment regime "is largely concerned with the treatment of investors, and hence the relationship between individual actors and the state," investor-state arbitration has been analogised to constitutional adjudication.[42] The thrust of constitutional adjudication is to protect individual entitlements and liberties, and lead governments to comply with the constitution. As is known, demand for constitutional adjudication arose mainly after the end of WWII in order to subordinate politics to the rule of law and to prevent totalitarianism. Within international investment arbitration, constitutional law thinking can empower foreign companies and individuals against abusive state behavior. This Article investigates the question of whether international investment tribunals play the role of global constitutional courts, or whether they are analogous to other international tribunals such as the International Court of Justice ("ICJ"). It also scrutinizes the promises and pitfalls of the application of constitutional theory to investor-state arbitration. It then considers methodological pluralism and inter-civilizational approaches as suitable complementary tools of investigation.

The argument presented in this Article is three-fold. First is the contention that arbitral tribunals cannot be considered global constitutional courts for the time being. They lack certain key structural and functional features that would render them akin to global constitutional courts. Second, this does not mean that constitutional theory is irrelevant to investor-state arbitration or international law adjudication more generally. On the contrary, there may be successful examples of cross-pollination of concepts from the domestic to the international sphere and vice versa. The

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Constitutional Perspective, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 339, 344 (Steffen Hindelang & Markus Krajewski eds., 2016) (arguing that a "constitutionalist perspective, with all caution, is . . . a viable tool for analysis of international investment law").

41 DOLORES BENTOLILA, ARBITRATORS AS LAWMAKERS (2017).

42 UNCITRAL, *Possible Reform of Investor–State Dispute Settlement (ISDS): Submission from the European Union*, ¶ 3, U.N. Doc A/CN.9/WG.III/WP.145 (Dec. 12, 2017).

argument is that the dialogue and interaction between investor-state arbitration and constitutional courts can be a fertile one. Moreover, the fact that arbitral tribunals are not akin to global constitutional courts does not mean that they may not acquire constitutional density—that is, a different quasi-constitutional structure, mission, and mandate in the future, provided that the international community confer them such power. Third, it is suggested that methodological pluralism and inter-civilizational approaches can offer promising research paths to investigate investor-state arbitration. Recent developments seem to suggest that, at least in some regional contexts, there are ongoing attempts to fine-tune investment treaties to the needs of different states and humanise the settlement of investment disputes.

This Article proceeds as follows: after having described the main features of investor-state arbitration and the key challenges it is facing, this Article investigates whether arbitral tribunals can be analogised to global constitutional courts. It then examines the promises and pitfalls of constitutional theories of investor-state arbitration. This Article argues that investor-state arbitration is not a form of global constitutional adjudication as arbitral tribunals are not akin to constitutional courts, and for the time being maintain structural and functional differences from the latter. Arbitral tribunals currently lack constitutional density. This does not necessarily mean that they cannot acquire such density; they certainly can, should states desire them to. Constitutional theory can offer useful conceptual tools to reflect on investor-state arbitration and the dialogue between constitutional courts and arbitral tribunals can be a fertile one. Nonetheless, this Article highlights the importance of methodological pluralism and of an inter-civilizational approach to address the current challenges investor-state arbitration is facing.

II. ARE ARBITRAL TRIBUNALS GLOBAL CONSTITUTIONAL COURTS?

This Part briefly examines the nature of constitutional adjudication and the global constitutionalist project and addresses the question of whether arbitral tribunals can be considered global constitutional courts. Far from being a purely theoretical debate,

this investigation can potentially affect the international investment regime as a whole. In order to properly address the question as to whether arbitral tribunals can be considered global constitutional courts, the section briefly describes the notion of constitutional law and adjudication as well as global constitutionalism. It then discusses the promises and pitfalls of this theory. It then concludes that despite their functional analogies, arbitral tribunals are not global constitutional courts.

a. The Constitutionalist Project

Can international law be perceived as the constitution of the international community? Can international investment law be perceived as a part of the overall global constitution—a certain diffuse constitution in which different regimes enforce distinct constitutional norms and values embedded in international law—by protecting foreign investors and their investments? Can investor-state arbitration then be perceived as a type of constitutional adjudication? In order to address these questions, this Section briefly defines constitutional law and adjudication and illuminates the principal tenets of global constitutionalism.

Constitutional law expresses the highest law of the land. It 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.[43] The basic idea underpinning constitutional law is that the constitution establishes a higher or supreme law.[44] Whether codified or uncodified,[45]

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[43] *See* SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 4 (1999).

[44] Günther Frankenberg, *Comparative Constitutional Law, in* CAMBRIDGE COMPANION TO COMPARATIVE CONSTITUTIONAL LAW 171 (Mauro Bussani & Ugo Mattei eds., 2012).

[45] Ernest A. Young, *The Constitution Outside the Constitution,* 117 YALE L.J. 408 (2007).

constitutional law is a higher law governing the exercise of public powers.[46]

Constitutional courts play a vital role in enforcing constitutional law, aiming to constitute a fundamental bulwark against grave infringements of fundamental rights granted in the constitution, and to enforce constitutional law *vis-à-vis* government.[47] Constitutional adjudication is a mechanism for resolving disputes in the field of constitutional law, ensuring the rule of law, and has been characterised as "the soul" of the constitution.[48] While constitutional courts were somewhat rare before the end of World War II, they have now become a common feature of contemporary Western democracies.

Global constitutionalism is a conceptual movement or doctrinal project—some contend a phenomenon—that conceives constitutional law as a field of knowledge that transcends the dichotomy between the national and the international. Developed in Germany, constitutionalist thought has spread to Europe and other countries since the aftermath of WWII. Constitutionalists conceptualize current developments in international law as evidence of ongoing constitutionalisation or propose the "constitutionalisation" of a number of different areas of international law. They argue that the constitutionalisation of different areas of law—ranging from public international law[49] to

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[46] GORDON, *supra* note 43, at 4.

[47] Doreen Lustig & J. H. H. Weiler, *Judicial Review in the Contemporary World – Retrospective and Prospective,* 16 INT'L J. CONST. L. 315 (2018).

[48] CivA CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) PD 221 (1995) (Isr.).

[49] JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009) (examining the questions as to whether and, if so, to what extent the international legal system has constitutional features); Bardo Fassbender, *The Meaning of International Constitutional Law, in* TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS 307 (Nickolaos K. Tsagourias ed., 2007) (suggesting, *inter alia*, that the Charter of the United Nations can be considered the constitution of the international community); TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005) (arguing that constitutional perspectives in international legal discourse contribute to protecting human welfare).

international economic law[50] and EU law[51]—promotes their humanisation, suggests the idea of a scale of higher values and thus potentially contributes to the legitimacy of these systems.[52]

Constitutionalists transpose constitutional law themes onto the international plane. They argue that constitutional law and international law are analogous. They also note that treaty-based organisations are more than just interstate agreements among members; they are also institutions of global governance. According to the constitutionalists, international law norms play the role that constitutional principles play in the domestic sphere. International institutions have the power to set norms that are either binding or difficult to disregard for many states. In parallel, international courts play the role that constitutional courts play within state members. Accordingly, international law, institutions, and courts should respect constitutional values. Constitutionalists aim to "subject the exercise of all types of public power . . . to the discipline of constitutional procedures and norms."[53] They also recommend the use of classic tools of constitutional adjudication, such as proportionality, in international adjudication.[54]

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50 Peter-Tobias Stoll, *Constitutional Perspectives on International Economic Law, in* REFLECTIONS ON THE CONSTITUTIONALISATION OF INTERNATIONAL ECONOMIC LAW 201, 212 (Ernst-Ulrich Petersmann et al. eds., 2014) (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* DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM (2005).

51 *See* J. H. H. WEILER, *Fin-de-Siècle Europe: Do the New Clothes Have an Emperor?, in* THE CONSTITUTION OF EUROPE: 'DO THE NEW CLOTHES HAVE AN EMPEROR?' AND OTHER ESSAYS ON EUROPEAN INTEGRATION 238 (1999) (elaborating the notion of European constitutionalism as a process restraining the power of nation states and promoting peaceful and prosperous relations); *see also* Christiaan Timmermans, *The Constitutionalization of the European Union*, 21 Y.B. EUR. L. 1, 2 (2002) (considering the development of the EU legal order as "a striking example of . . . constitutionalization"); THOMAS CHRISTIANSEN & CHRISTINE REH, CONSTITUTIONALIZING THE EUROPEAN UNION 2 (2009) (suggesting that "the [EU] has been constitutionalized by way of informal incrementalism.").

52 *See* Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis,* 15 EUR. J. INT'L L. 907, 909 (2004) (suggesting that "the legitimacy of international law ought to be assessed using a richer *constitutionalist* framework.").

53 Martin Loughlin, *What Is Constitutionalisation?, in* THE TWILIGHT OF CONSTITUTIONALISM? 47, 47 (Petra Dobner & Martin Loughlin eds., 2010).

54 *Id.* at 62.

For some constitutionalists, international investment law and arbitration are undergoing the process of constitutionalisation. In fact, because many investment treaties overlap or converge to a significant extent, for some scholars, this convergence can also lead to the constitutionalisation of the field. In parallel, although there is no binding precedent in international law, the possible coalescence of arbitral jurisprudence can prompt the emergence of a sort of constitutional field, where the economic interests of investors are balanced with the various interests of states.[55]

b. Challenges in Theory

This Section discusses three main critiques of global constitutionalism that are based on its alleged failure to adequately address: (1) the dynamic between identity and cultural diversity; (2) legal pluralism; and (3) democratic concerns. First, global constitutionalists commonly rely on comparisons between the constitutional laws and policies of Western democracies. Global constitutionalism has focused "primarily on Europe and the United States."[56] Critics fear that constitutionalism may impede the development of a multi-civilization vision of international law, and thus may be dangerous in normative terms because it may have "a uni-civilizational, notably European, bias built into it."[57] For instance, the development of judicial review has been contested in Asia.[58] Moreover, as civilizations have influenced each other and

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[55] *See* Peter Behrens, *Towards the Constitutionalization of International Investment Protection*, 45 ARCHIV DES VÖLKERRECHTS 153, 154 (2007).

[56] *See* Vidya Kumar, *Towards a Constitutionalism of the Wretched: Global Constitutionalism, International Law and the Global South*, VÖLKERRECHTSBLOG (July 27, 2017), https://voelkerrechtsblog.org/towards-a-constitutionalism-of-the-wretched [https://perma.cc/N3ZX-ZXS5].

[57] Anne Peters, *The Constitutionalization of International Law: Conclusions*, EJIL: TALK! (July 28, 2010), https://www.ejiltalk.org/the-constitutionalization-of-international-law-conclusions [https://perma.cc/P4SZ-PDPG].

[58] *See* Wen-Chen Chang, *Asian Exceptionalism? Reflections on "Judicial Review in the Contemporary World": Afterword to the Foreword by Doreen Lustig and J. H. H. Weiler*, 17 INT'L J. CONST. L. 31, 39 (2019); Albert H.Y. Chen, *The Achievement of Constitutionalism in Asia: Moving Beyond 'Constitutions without Constitutionalism,' in* CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY 1, 16 (Albert H. Y. Chen ed., 2014).

have transformed themselves through these mutual influences, an international (in the sense of inter-civilizational and intercultural) perspective of international law, seems preferable. Such a perspective considers not only economic factors, but also addresses political, social, cultural, religious, and historical factors as well.[59] As a Western doctrine of German origins, constitutionalism may be perceived as a tool to perpetuate the protection of Western, individual values to the detriment of other more communitarian values coming from different regions and from different civilizations.[60] The "grand narrative" of constitutionalism risks obscuring awareness of the "diverse and rich" "empirical world" and the cultural diversity of the international community expressing different sensibilities, values, and worldviews.[61] Very few constitutionalist studies discuss the legal systems and experiences of the Global South.[62]

Second, arbitral tribunals can serve as a bulwark against corruption, arbitrariness, and bias, and can ultimately protect foreign investments that have clear analogies with property rights. Nonetheless, given the almost monothematic nature of investment treaties, if an excessive emphasis is put on the protection of property, this may quell other non-economic and communitarian interests that may be legitimately pursued by the state in the exercise

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[59] *See* Onuma Yasuaki, *An Intercivilizational Perspective on International Law*, *in* ALBERICO GENTILI: L'ORDINE INTERNAZIONALE IN UN MONDO A PIÙ CIVILTÀ: ATTI DEL CONVEGNO DECIMA GIORNATA GENTILIANA 65 (Centro Internazionale di Studi Gentiliani ed., 2004) [hereinafter Yasuaki 2004]; ONUMA YASUAKI, INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD 19 (2017) [hereinafter YASUAKI 2017] (describing this as a "perspective from which people see, sense, (re)cognize, interpret, assess, and seek to propose solutions for the ideas, activities, phenomena and problems transcending national boundaries by adopting a cognitive and evaluative framework based on the recognition of the plurality of civilizations and cultures that have long existed throughout human history").

[60] *See* Ming-Sung Kuo, *Taming Governance with Legality? Critical Reflections Upon Global Administrative Law as Small-C Global Constitutionalism,* 44 N.Y.U. J. INT'L L. & POL. 55, 101 (2011) (detailing the legitimacy of global governance); Julio Ríos-Figueroa, *Judicial Review and Democratic Resilience: Afterword to the Foreword by Doreen Lustig and J. H. H. Weiler,* 17 INT'L J. CONST. L. 17, 18-19 (2019) (detailing the contrast of values imposed by international courts).

[61] *See* Başak Çali, *On Einsteinian Waves, International Law and National Hats: Afterword to the Foreword by Doreen Lustig and J. H. H. Weiler*, 17 INT'L J. CONST. L. 24, 25 (2019).

[62] *But see* CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Daniel Bonilla Maldonado ed., 2013).

of its state sovereignty, or even in compliance with other non-economic international obligations. Because arbitrators must interpret and apply IIAs, which thus far have not presented a particularly comprehensive list of rights and obligations, critics contend that the constitutionalist reading of international investment law may be premature, as, at the moment, a truly "constitutional" multilateral investment treaty is lacking. A constitutional reading of international investment law may end up favouring foreign investors without adequate consideration of the communities that may be affected by a given investment, for instance, in the form of environmental damage or cultural destruction. In this regard, critics contend that such constitutionalist reading of international law "may be genuinely anti-pluralist" by promoting a strong emphasis on property rights *vis-à-vis* other non-economic interests and values, and an idea of balance that may be shared in some societies, but not necessarily in other polities.[63] Critics also highlight the political nature of constitutionalism, noting that it can potentially serve as a vehicle for dominant actors and the entrenchment of current economic ideologies.[64]

Third, not only does the purported universalism of constitutionalism betray an implicit cultural bias,[65] but it may also have "weak democratic credentials,"[66] evidenced by trying to enhance the effectiveness of given regimes without calling into question their histories, structures, values, and objectives.[67] From a historical perspective, the goal of early IIAs was to protect the economic interests of investors from industrialised countries while fostering the economic development of the host state. This historical

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[63] *See, e.g.*, Peters, *supra* note 57 (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").

[64] *See* JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF RULES 81 (2011) (noting popular criticism of constitutionalists as having "hegemonic overtones of their agenda purportedly dedicated to the promotion of global values.").

[65] Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006).

[66] Ríos-Figueroa, *supra* note 60, at 18.

[67] *See* Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7, 15 (2009).

background has shaped the terms of investment treaties.[68] Only recently, have some states recalibrated the texts of such treaties to include reference to fundamental policy interests and values. Most of these instruments include full protection and security, fair and equitable treatment, compensation in case of expropriation, and prohibition of performance requirements. Nonetheless, they remain laconic about important policy interests. From a structural perspective, Eyal Benvenisti has highlighted the democratic deficit of global governance. If constitutionalism aims to establish a culture of accountability of states, a culture of accountability of international institutions and international courts and tribunals must be developed, too.[69] Moreover, by assuming that international law possesses a degree of coherence which it does not, constitutionalism risks overlooking the dynamic, evolving, and pragmatic nature of international law. In this respect, it risks focusing on legal theory while neglecting the practice of international law.

Whether 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 constitutional law is generally to protect individuals against the excessive, arbitrary, or unfair exercise of public power, constitutional theory can perform a similar function at the supranational level.[70] Concerns have arisen that such a perspective can reinforce the rights of investors at the expense of the common good in investment treaty arbitration.[71] For some, there is a risk that IIAs "become a charter of rights for foreign investors, with

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[68] *See* Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime,* 50 HARV. INT'L L.J. 491, 492 (2009).

[69] EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 287 (2014).

[70] *See* Benedict Kingsbury, Nico Krisch, Richard B. Stewart & Jonathan B. Wiener, Foreword, *Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1, 5 (2005) ("Global Administrative Law . . . ensur[es] these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.").

[71] *See* Robert Howse & Kalypso Nicolaidis, *Legitimacy through "Higher Law"? Why Constitutionalizing the WTO is a Step Too Far*, *in* 4 THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO 307 (Thomas Cottier & Petros C. Mavroidis eds., 2003) (providing examples such as a "new binding, juridical rigorous dispute settlement mechanism, which provides for virtually automatic authorization of countermeasures in the case of non-compliance").

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."[72] For instance, Schneiderman has questioned whether foreign investors are "the privileged citizens of a new constitutional order."[73] He cautions that, while the use of constitutional principles in investment arbitration can symbolically suggest that investment tribunals are similar to national high courts, not only can IIAs jeopardise the inherent right of sovereign states to regulate, but investment arbitration can risk invoking constitutional principles for purposes that are at odds with their rationale.[74]

c. Challenges in Practice

After having examined the theoretical critiques of constitutionalist approaches to investor-state arbitration, one may wonder if similarities between constitutional adjudication and investor-state arbitration nonetheless exist in practice. Can investor-state arbitration be then perceived as a type of constitutional adjudication? At first glance, it seems obvious that investment tribunals do not qualify as global constitutional courts—if only because they are not courts and are not global because they are not based on a multilateral instrument. Upon further reflection, however, the possible existence of functional analogies between arbitral tribunals and constitutional courts requires some consideration. This Section is divided into three parts. Part i critically assesses the structural differences between investor-state arbitration and constitutional adjudication. Part ii scrutinizes the

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[72] *See* Howard 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 211, 212, UNCTAD/ITE/IIA/2003/4 (2003).

[73] *See* DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE 5 (2008).

[74] *See* David Schneiderman, *Investing in Democracy? Political Process and International Investment Law*, 60 U. TORONTO L.J. 909, 914 (2010) (noting that "[t]he tribunal [European Court of Human Rights] invoked reasons that, as in in national constitutional settings, tend to legitimate the power to negative governmental decision making").

alleged functional analogies. Part iii concludes that arbitral tribunals are not global constitutional courts.

i. Structural Analogies?

This Section examines the structural differences between investor-state adjudication and constitutional adjudication. From a structural perspective, arbitral tribunals are not courts. They are created on an ad hoc basis for resolving single 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. "[I]n the current system[,] the parties to the dispute play a significant role in the selection of the adjudicators."[77] The disputing parties' right to each appoint one of the arbitrators respectively is what distinguishes arbitration from litigation, and it has been a "historical keystone" of investment arbitration.[78]

Transparency and diversity are also additional structural features that differentiate investor-state arbitration from constitutional adjudication. While disputes adjudicated by constitutional courts generally attract public attention and constitutional judgments are generally public, the transparency of arbitral proceedings varies, depending on the choice of the parties and the applicable arbitral rules. Only recently have efforts been undertaken to make investor-state arbitration more transparent to the public.[79] Moreover, "diversity levels in international arbitration [are] somewhat lower than in several national court systems."[80] For

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[75] KAUFMANN-KOHLER & POTESTÀ, *supra* note 33, ¶¶ 6-7.

[76] *Id.* ¶ 7.

[77] *Id.* ¶ 5.

[78] V. V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator – From Miami to Geneva*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 127, 128 (David C. Caron et al. eds., 2015).

[79] *See, e.g.*, G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Dec. 10, 2014).

[80] Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann & Anne van Aaken, *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429, 430-31 (2015) (noting that investment treaty arbitration "experiences challenges related to gender, nationality, or age").

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."[81] 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.[82] Reportedly, "[w]hile 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."[83] Finally, the percentage of arbitrators "from indigenous or poor backgrounds, minority groups within their own countries, or having disability status appears virtually unquestioned and unknown."[84]

Debate continues as to whether a representativeness requirement should be applied to investment tribunals, appeal panels, and the envisaged multilateral investment court.[85] Three

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[81] *Id.* at 439.

[82] *Id.* at 457-58 n.77. While Asia contains the largest population of all continents (60.27%), Asian arbitrators were the second least represented (10%) of ICCA arbitrators. *Id.* Similarly, although Africa holds the second largest population of all continents (15.41%), Africa exhibited the lowest level of representation (0.4%) *Id. See also* Becky L. Jacobs, *A Perplexing Paradox: "De-Statification" of "Investor-State" Dispute Settlement?*, 30 EMORY INT'L L. REV. 17, 32 (2015) ("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." (citations omitted)); *see generally* WON L. KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION (2017) (discussing the composition and culture of arbitral tribunals).

[83] KAUFMANN-KOHLER & POTESTÀ, *supra* note 33, ¶ 63. 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." *Id.* According to the same study, the ECtHR (33%) and the ICC (39%) score better. *Id.*

[84] Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 VA. J. INT'L L. 339, 342 (2016).

[85] KAUFMANN-KOHLER & POTESTÀ, *supra* note 33, ¶ 34 (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 renders [sic] justice; and (iii) . . . should be endowed with strong guarantees of *independence* . . . for the concrete exercise of each member's adjudicatory functions").

fundamental factors require diversity in international courts. First, "geometries of exclusion" can affect the perception that arbitral tribunals constitute legitimate, impartial, and representative dispute settlement mechanisms.[86] How can they be legitimate, impartial, and representative by effectively excluding the voices of several constitutive parts of the international community?[87] Legitimacy entails that "those affected should be represented among decision-makers."[88] Additionally, diversity is key for the settlement of international disputes in a diverse world.[89] 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."[90] In fact, "behavioral 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."[91] Third, many states demand that international adjudicative bodies reflect broad geographical representation and several existing statutes of international courts explicitly refer to "equitable geographical representation" for the selection of adjudicators.[92] Some

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[86] Tayyab Mahmud, *Geography and International Law: Towards a Postcolonial Mapping*, 5 SANTA CLARA J. INT'L L. 525, 528 (2007).

[87] *See* Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 392 (1999) (comparing feminist methods to other methodologies of international law); *see also* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004) (focusing on selected historical aspects of international law).

[88] *See* Grossman *supra* note 84, at 345; Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GER. L.J. 1341, 1343 (2011) ("study[ing] how judicial lawmaking can be linked to the values, interests, and opinions of those whom it governs"); *see also* Gráinne de Búrca, *Developing Democracy beyond the State*, 46 COLUM J. TRANSNAT'L L. 221, 226-27 (2008) (arguing for "legitimate democracy-oriented governance processes beyond and between states.").

[89] KAUFMANN-KOHLER & POTESTÀ, *supra* note 33, ¶¶ 51-53.

[90] *Id.* ¶ 2.

[91] *Id.* ¶ 43.

[92] *See* United Nations Comm'n on Int'l Trade L., Working Grp. III (Inv.-State Dispute Settlement Reform) Thirty-Eighth Session, Possible Reform of Investor-State Dispute Settlement (ISDS): Selection and Appointment of ISDS Tribunal Members, ¶ 47, U.N. Doc. A/CN.9/WG.III/WP.169 (Oct. 14-18, 2019); *see, e.g.*, U.N. Charter art. 9 ("At every election, the electors shall bear in mind . . . that in the body

international law instruments require states to give due consideration to adequate gender representation in nomination processes of international judges. For instance, the International Criminal Court (ICC) is a gender-balanced court, and the very statute of the court demands gender balance.[93] Analogously, several regional instruments have undertaken significant steps towards gender balance.[94]

Therefore, from a structural perspective, there are several 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. Although assuming gender parity would mean that fifty percent of the judges are women, few countries have

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as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."); Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea art. 2, ¶ 2, Dec. 10, 1982, 1833 U.N.T.S. 561 ("In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.").

[93] *See, e.g.*, Rome Statute of the International Criminal Court art. 36, ¶ 8(a), Nov. 10, 1998, 2187 U.N.T.S. 90 ("The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for . . . [a] fair representation of female and male judges.").

[94] *See, e.g.*, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 12, ¶ 2, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III) ("Due consideration shall be given to adequate gender representation in the nomination process."). This Protocol was replaced by the Protocol on the Statute of the African Court of Justice and Human Rights on 1 July 2008; article 5(2) of the Annex of the new Protocol reads: "Each State Party may present up to two (2) candidates and shall take into account equitable gender representation in the nomination process." Protocol on the Statute of the African Court of Justice and Human Rights, art. 1, Annex, art. 5 ¶ 2, July 1, 2008, 48 I.L.M. 337. As of the date of publication, seven ut of eleven judges of the African Court on Human and Peoples' Rights are women. *Current Judges*, AFR. CT. ON HUM. & PEOPLES' RTS., https://www.african-court.org/wpafc/current-judges/ [https://perma.cc/ANF7-5ZU8]. In the European Continent, "the 2004 Resolution of the Council of Europe's parliamentary assembly . . . [required] gender balance on the list of candidates presented by states for the post of judge at the Court." Stéphanie Hennette Vauchez, *More Women – But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights*, 26 EUR. J. INT'L L. 195, 195 (2015).

actually achieved such a percentage for their highest courts.[95] Recent studies looking at women's representation in Supreme Courts across the world show that "71.8% of the average country's Supreme Court bench is made up of men and only 28.2% of judges are women,"[96] despite the fact that most states have "constitutional or codified laws pertaining to diversity."[97]

In conclusion, critics doubt the empirical reality of the constitutionalisation of international adjudication in general, and investor-state arbitration in particular, because "[c]onstraints such as the principle of separation of powers, checks and balances, and limits on the exercise of . . . power, which have long guaranteed 'democratic participation and human rights within states,' are non-existent at the global level."[98] Legal theorists point out that "an a priori, global . . . constitutional order . . . does not really exist[;] . . . adjudication does not . . . obey the logics of a (metaphysical) global system . . . , but should look instead to the potential *justice[]* . . . that belongs to [the facts of the case]."[99]

International law in general, and international investment law in particular, do not display centralized instruments and organs that are truly comparable to domestic ones. As Stephan Schill aptly pointed out, there are ongoing processes of *de facto* multilateralization of the investment treaty regime, including a convergence among different investment treaties and the gradual development of a *jurisprudence constante*.[100] However, for the time

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[95] *See* Beverley Baines, *Women Judges on Constitutional Courts: Why Not Nine Women?*, *in* CONSTITUTIONS AND GENDER 290 (Helen Irving ed., 2017) (considering the argument for nine women on the United States Supreme Court).

[96] Oliver Martin, *Justice Can Only Be Done When We Have Equal Representation in the Judiciary*, KING'S COLL. LONDON (Aug. 29, 2019), https://www.kcl.ac.uk/news/justice-can-only-be-done-when-we-have-equal-representation-in-the-judiciary [https://perma.cc/T5NE-7QAH].

[97] Jacobs, *supra* note 82, at 38.

[98] ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING 69 (2016) (quoting BENVENISTI, *supra* note 69, at 17).

[99] Gianluigi Palombella, *Theory, Realities, and Promises of Inter-Legality: A Manifesto*, *in* THE CHALLENGE OF INTER-LEGALITY 363, 379 (Jan Klabbers & Gianluigi Palombella eds., 2019).

[100] *See* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, *supra* note 40.

being, there are more than 3,000 IIAs,[101] and arbitral tribunals are constituted only on an *ad hoc* basis.

ii. Functional Analogies?

From a functional perspective, some scholars have viewed international investment law as a part of the overall global constitution by protecting foreign investors and their investments, and they have analogised investor-state arbitration to public law/constitutional law adjudication.[102] "Like constitutions, [IIAs] restrict [s]tate action."[103] Like constitutional courts, arbitral tribunals settle disputes arising from the exercise of public power and constrain the sovereignty of states by setting out limits to their discretion.[104] 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.[105] Such scrutiny of the exercise of public authority displays "constitutional features."[106] In addition, in settling investment

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[101] *Investment Policy Hub*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements [https://perma.cc/3AVP-LCCW] (reporting that, as of April 26, 2021, there are 2852 bilateral investment treaties and 417 treaties with investment provisions).

[102] *See* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4 (Vaughan Lowe, ed., 2007) (comparing investor-state arbitration to public law adjudication for the purpose of critique); SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (2009) (discussing the global impact of bilateral investment treaties).

[103] STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 373 (2009).

[104] *See* Stephan W. Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT'L L. 401, 413 (2010) (identifying the strict "substantive and procedural law applicable in investment treaty arbitrations"); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 123 (2006) (demonstrating how investment treaty arbitration serves as a "regime as a means of reviewing and controlling the exercise of public authority by the state").

[105] *See* M. Sornarajah, *The Clash of Globalizations and the International Law on Foreign Investment*, CANADIAN FOREIGN POL'Y J., Mar. 14, 2011 at 1, 17.

[106] ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 93 (2012).

disputes, arbitrators often borrow key constitutional 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.[107] Investment arbitrations can (and have) touch(ed) upon key constitutional interests, dealing with questions relating to the protection of cultural heritage, public health, and other fundamental interests and values.[108]

However, the substance of investor-state arbitration differs from that of constitutional adjudication for multiple reasons. Investor-state arbitration is a creature of international law. Like other international law instruments, IIAs limit state sovereignty.[109] Like other international courts and tribunals, investment tribunals review state compliance with international law. Therefore, the question as to whether this, in and of itself, renders any particular field or institution of international law as "constitutional" remains an open one. Arguably, the fact that IIAs constrain regulatory autonomy cannot be determinative of the "constitutionalisation" of arbitral tribunals.

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 pact 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 cultures, traditions, and customs. In contrast, most IIAs are short instruments, which are sometimes negotiated by the executive power of given states,[110] but they are more often unilaterally drafted and imposed by

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107 *See* Van Harten & Loughlin, *supra* note 104, at 146 (exploring the standards of investment tribunals).

108 *See generally* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES (Freya Baetens ed., 2013) (discussing the interplay between international investment law and international law).

109 *See* Guntrip, *supra* note 14, at 829-30.

110 Mila Versteeg, *Understanding the Third Wave of Judicial Review: Afterword to the Foreword by Doreen Lustig and J. H. H. Weiler*, 17 INT'L J. CONST. L. 10, 14 (2019) ("[A] growing number of countries [including the European Union and the United States] require legislative approval of treaties prior to their ratification . . . thereby boosting the treaties' democratic credentials.").

powerful capital-exporting states as so-called "boilerplate treaties."[111] IIAs often have concurring objectives, including those of promoting peaceful 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 constitutions. Rather, they provide a recurring range of clauses concerning such topics as protection against unlawful expropriation, fair and equitable treatment, and non-discrimination. They usually say little about how to balance economic interests and non-economic values, including fundamental human rights. In other words, they do not provide a complete value system, at least for the time being. International investment law remains a specialised regime of international law. Only recently have some agreements included a range of policy concerns at length, even including reference to selected human rights, such as labour rights.[112]

While constitutional courts "paradigmatically govern and unite all aspects of the common good . . . for all persons subject to their authority,"[113] arbitral tribunals have a more "monothematic" jurisdiction, in that they focus mainly on settling disputes between the foreign investor and the host state, "affording protection to foreign investments" and promoting the (sustainable) development of the host state.[114] While constitutional courts have a broad jurisdiction and "the formal or effective power to coordinate various sectors into a single coherent fabric of law,"[115] arbitral tribunals have jurisdiction over investment-related disputes only.

While constitutional law is the product of a political context and expresses the political choices of a given state, investor-state arbitration aims to depoliticise disputes between foreign investors

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111 *See* JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 224-25 (2017).

112 *See generally* Andrew Newcombe, General Exceptions in International Agreements (2008), https://www.biicl.org/files/3866_andrew_newcombe.pdf [https://perma.cc/C85L-ZXXQ].

113 Paolo G. Carozza, *The Problematic Applicability of Subsidiarity to International Law and Institutions*, 61 AM. J. JURIS. 51, 59 (2016).

114 Federico Ortino, *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*, 30 LEIDEN J. INT'L L. 71, 91 (2017).

115 Carozza, *supra* note 113, at 59.

and host states.[116] It constitutes a rule-based dispute-settlement mechanism for resolving investment disputes that aims to shield such disputes from power politics and insulate them from the diplomatic relations between states.

In theory, the depoliticisation of investment disputes benefits foreign investors, the host state, and the home state.[117] First, foreign investors no longer depend on diplomatic protection to defend their interests against the host state.[118] Rather, they can bring claims directly against the host state and make strategic choices in the conduct of the proceedings. In this regard, investor-state arbitration can facilitate access to justice for foreign investors and provide a forum for the settlement of investment disputes.[119] Investor-state arbitration can be necessary to render meaningful the substantive investment treaty provisions.[120] Second, the depoliticisation of investment disputes can protect the host state by reducing the interference of the home country in the domestic affairs of the host state.[121] It can prevent or "limit unwelcome diplomatic, economic and perhaps military pressure from strong States whose nationals believe they have been injured."[122] Third, the depoliticisation of investment disputes can also protect the home state in that it no longer "ha[s]to become embroiled in investor-state disputes."[123]

In practice, whether arbitral tribunals have accomplished such depoliticisation or whether they have remained subject to some level of power politics remains open to debate. Nonetheless, unlike constitutional courts, arbitral tribunals have a limited mandate—

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116 *See* Sergio Puig, *No Right without a Remedy: Foundations of Investor-State Arbitration*, 35 U. PA. J. INT'L L. 829, 848 (2014).

117 *See* Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 389-90 (2015).

118 *See* Puig, *supra* note 116, at 844.

119 Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20 EUR. J. INT'L L. 729, 729 (2009).

120 *See* Thomas W. Wälde, *The "Umbrella" (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, TRANSNAT'L DISP. MGMT., Oct. 2014, at 1.

121 *See* Roberts, *supra* note 117, at 389-91.

122 Joost Pauwelyn, *At the Edge of Chaos?: Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29 ICSID REV.—FOREIGN INV. L.J. 372, 404 (2014).

123 Roberts, *supra* note 117, at 390.

that is, to arbitrate legal disputes arising directly out of a foreign investment.[124]

Moreover, while constitutions generally recognise a range of individual rights, the literature is divided on the question of whether IIAs recognise individual rights or whether they remain traditional state-to-state international instruments. In other words, to whom are investment treaty obligations owed? Do investors have rights under IIAs? If so, what is the nature of their entitlements? These questions remain unsettled.[125] For Anthea Roberts, "[i]nvestment treaties should be reconceptualized as triangular treaties, i.e., agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries."[126] Others point out that international treaties can confer individual rights and that "[i]nvestment treaties . . . adopt terminology consistent with the vesting of rights in foreign nationals and legal entities directly."[127] Some scholars have questioned whether IIAs that prescribe investor-state arbitration grant foreign investors truly substantive rights.[128] Rather, they argue that investors hold mere procedural rights.[129] The jurisprudence is divided. Some arbitral tribunals have held the view that IIAs create substantive inter-state obligations but do not provide individual substantive rights.[130] Other tribunals have come to opposite conclusions.[131]

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124 Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 25, Mar. 18, 1965, 575 U.N.T.S. 159.

125 *See* FILIP BALCERZAK, INVESTOR-STATE ARBITRATION AND HUMAN RIGHTS 237-38 (2017); *see also* Francisco González de Cossío, *Investment Protection Rights: Substantive or Procedural?*, 26 ICSID REV.—FOREIGN INV. L.J. 107, 122 (2011) ("not only can *reasonable* minds differ, but *brilliant* minds [sic] too").

126 Roberts, *supra* note 117, at 353.

127 Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151, 183 (2004).

128 *See* Caroline Foster, *A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law,'* 64 INT'L & COMP. L.Q. 461, 474-76 (2015).

129 *Id.* at 474-75.

130 *E.g.*, Archer Daniels Midland Co. v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, ¶ 157-58 (Nov. 21, 2007).

131 *See, e.g.*, Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 167 (Jan. 15, 2008) (finding that NAFTA confers substantive rights on investors).

Finally, even the remedies are different. "[C]onstitutional court[s] may have the power to strike down norms [they] deem[] unconstitutional—a power international investor-state arbitral tribunals lack. On the other hand, international investment law may allow investors to claim damages in circumstances where national law provides no remedy" due to the principle of the separation of powers.[132]

iii. Conclusions

In conclusion, despite functional analogies, arbitral tribunals are not global constitutional courts. Whether international law in general, and international investment law in particular,[133] have undergone processes of constitutionalisation remains an open question. It seems that both international investment law and investment treaty arbitration currently lack constitutional density. At the procedural level, as mentioned above, while there are some elements of functional analogy, there certainly is no equivalence between constitutional adjudication and investor-state arbitration for the time being. As previously illustrated, arbitral tribunals and constitutional courts have different structural and functional features.

With regard to the question of whether the system should be constitutionalized, there is a risk that arbitrators favour a Western type of "constitution" centered on property rights and procedural guarantees, entrench neoliberal policies, and prevent exploration of alternative relationships between states, foreign investors, and local communities. 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,[134] via the inclusion of non-

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132 Lorenzo Cotula, *Democracy and International Investment Law*, 30 LEIDEN J. INT'L L. 351, 359 (2017).

133 *See, e.g.*, Behrens, *supra* note 55 (arguing that there are elements of constitutionalisation in investor-state arbitration).

134 *See, e.g.*, Gus Van Harten, *The European Commission and UNCTAD Reform Agendas: Do They Ensure Independence, Openness, and Fairness in Investor-State Arbitration?*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 128 (Steffen Hindelang & Markus Krajewski eds., 2016).

economic considerations in the preambles and text of IIAs.[135] This would not necessarily be sufficient to turn IIAs into constitutional agreements, but it would certainly humanise them; and such humanisation seems to reflect a common objective of both international lawyers and constitutionalists, as well as industrialised and developing countries. For the reasons examined previously, and for the time being, investment treaty arbitration seems more similar to other international dispute settlement mechanisms than to constitutional adjudication.

III. ARE ARBITRAL TRIBUNALS ENGAGING IN A DIALOGUE WITH CONSTITUTIONAL COURTS?

After having clarified that arbitral tribunals are not constitutional courts and that they have different structural and substantive features, and having examined the pitfalls of a constitutionalist approach to international investment law and arbitration, it seems appropriate to investigate the promises of constitutional theory. Can constitutional theory remain useful in investigating international investment law and arbitration? In particular, this Part argues that not only is dialogue between arbitral tribunals and constitutional courts feasible, but it is also useful and desirable. Both constitutionalists and international lawyers 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, i.e., general principles of law, can have a domestic *gestalt*: principles of comparative constitutional law can be a source of

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135 *See* Stephan Schill, *Towards a Constitutional Law Framework for Investment Law Reform*, EJIL: TALK! (Jan. 5, 2015), https://www.ejiltalk.org/towards-a-constitutional-law-framework-for-investment-law-reform/ [https://perma.cc/XN7V-4UFP] ("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'").

international law.[136] 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. Therefore, it is argued in this section that fruitful dialogue can take place between constitutional adjudication and investor-state arbitration. After briefly examining the tenet of international law requiring states to comply with international law even if doing so were in conflict with constitutional law, the section examines the way constitutional theory can influence and has influenced areas of international investment law.

As mentioned, a traditional tenet of international law requires states to comply with international law, even if doing so would be in conflict with constitutional law.[137] It is also a "self-evident" principle in international law that states that have contracted valid international obligations are "bound to make in [their] legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken."[138] In some cases, international investment law has spurred domestic constitutional reform—for instance, requiring a stronger protection of property rights.[139]

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[136] *Id*. (suggesting that "[t]hese 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").

[137] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, ¶¶ 62-63 (Feb. 4) ("[A] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. . . . The application of the Danzig Constitution may . . . result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law. . . . However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.")

[138] Exchange of Greek and Turkish Populations, Greece v. Turkey, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, ¶ 52 (Feb. 21).

[139] *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58; Juliana Gomez, Foreign Direct Investment in Colombia. Does the Colombian General Regime for Foreign Direct Investment Comply with the International Standards? 56 (Dec. 1, 2001) (L.L.M. Thesis, University of Georgia School of Law), https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1017&context=stu_llm [https://perma.cc/UQ9U-6H4W] (pointing out that in 1999, Article 58 of the Colombian Constitution was modified, repealing the provision that permitted the government to expropriate private property for equity reasons without compensation because expropriation without compensation discouraged prospective investors to invest in Colombia).

However, constitutional law principles can influence and have influenced areas of international investment law. The interaction between constitutional adjudication and investor-state arbitration has been particularly fruitful, and it is the focus of this section. Such interaction has occurred in five different ways: first, treaty-makers have deliberately borrowed given legal tools from constitutional jurisprudence, thus enabling arbitrators to use some constitutional language in interpreting treaty provisions; 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.[140] This Section briefly examines these various types of interaction between constitutional adjudication and investor-state arbitration, dividing these into three principal categories: (1) legal transplants and cross pollination; (2) general principles of law; and (3) reciprocal checks and balances.

a. Legal Transplants and Cross-Pollination

The first two types of interaction between constitutional adjudication and investor-state arbitration, legal transplants and cross-pollination, often take place hand in hand, as one type of interaction can anticipate the other. First, treaty-makers have transplanted constitutional ideas, not only as articulated in domestic constitutions, but also as developed by constitutional courts, into international investment treaties.[141] For instance, the provisions against indirect expropriation in a number of IIAs—most notably

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[140] *See infra* Section III.c.

[141] George A. Bermann, *Comparative Law and International Organizations*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 241, 249 (Mauro Bussani & Ugo Mattei eds., 2012) ("The treaty drafters [of the European Union] most certainly canvassed the domestic systems of both the member states and non-member states . . . in crafting a judicial architecture.").

the US Model BIT—derive from U.S. constitutional adjudication, specifically, the *Penn Central* test, articulated by the United States Supreme Court.[142] In parallel, as the 2012 U.S. Model BIT often serves as a template in investment treaty negotiations, the *Lex Americana* has become the gold standard in the field.[143] 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 United States Constitution.[144]

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.[145] When adjudicators face

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[142] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (laying out the general guidelines for determining whether a regulatory taking has occurred).

[143] José E. Alvarez, *Evolving BIT, in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 12 (Ian A. Laird, Todd Weiler & Nina P. Mocheva eds., 2010).

[144] Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 30 (2003) ("Despite claims that NAFTA simply 'exports' the U.S. takings standard, the tribunals' interpretations of the expropriation provision have exceeded the substantive scope of U.S. compensation requirements while removing procedural limitations typically imposed on domestic takings claims."); Gregory M. Starner, *Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property*, 33 L. & POL'Y INT'L BUS. 405, 436 (2002) ("The movement towards multilateral free trade regimes will test the international community's commitment to open markets and protecting foreign investment at the expense of state sovereignty."); *see generally* David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 U. TORONTO L.J. 499, 537 (1996) ("Just as trade experts should now become more familiar with American constitutional law principles, so will Canadian constitutionalists have to be equipped to understand the significant reshaping of our background rules which previously were the subject of Canadian constitutional text and convention.").

[145] *See, e.g.*, Grand River Enterprises Six Nations, Ltd. v. United States of America, ICSID Case No. UNCT/14/2, Award, ¶ 134 (Jan. 12, 2011) ("The Respondent cited in this regard multiple decisions by both U.S and Canadian courts holding that the Jay Treaty does not authorize indigenous persons' duty-free passage of commercial goods."); *Id.* ¶ 137 ("In the Tribunal's understanding, U.S. federal Indian law is a complex and not altogether consistent mixture of constitutional provisions, federal statutes, and judicial decisions by the U.S. Supreme Court and other courts. Determining the contents of that law, and its likely impact on particular types of state regulation, often calls for necessarily uncertain predictions of how future courts will apply past decisions involving

particularly difficult cases, resorting to other cases may provide them with useful examples, facilitate their reasoning, and strengthen their perceived legitimacy.[146] The influence of borrowing extends beyond the specific case, as it catalyses gravitation towards certain models that exert dominant influence.[147]

Constitutional ideas elaborated by constitutional courts, such as proportionality, reasonableness, and constitutional standards of review, have migrated from constitutional law to the regional and international sphere, allowing a dialogue between national constitutional courts, on the one hand, and supranational courts and tribunals, on the other.[148] Such dialogue has also given rise to a common lexicon, which nourishes the emergence of commonalities[149] and fosters the circular migration of constitutional ideas from constitutional courts to regional and international fora and then back to constitutional courts.[150]

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different settings and different types of state regulation."); Apotex Holdings Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Award, ¶ A.37 (Aug. 25, 2014) ("[W]ith the subsequent decision of the US Supreme Court in *BG Group*, the Claimants' concerns as to US law may now seem less well-founded, being based (as they then were) upon the decision of the DC Court of Appeals, since reversed by the US Supreme Court." (citation omitted)); Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 162 (July 8, 2016) (discussing the constitutionality of plain packaging before the Supreme Court of Justice of Uruguay).

146 *See* Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 J. INT'L DISP. SETTLEMENT 95, 116 (2012).

147 *See* Colin B. Picker, *International Investment Law: Some Legal Cultural Insights*, *in* REGIONALISM IN INTERNATIONAL INVESTMENT LAW 27, 40-42 (Leon E. Trakman & Nicola W. Ranieri eds., 2013) (noting the influence of international legal culture on the development of the norms of international investment law).

148 *See generally* VALENTINA VADI, PROPORTIONALITY, REASONABLENESS AND STANDARDS OF REVIEW IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2018) (examining the merits and pitfalls of arbitral tribunals' use of the concepts of proportionality and reasonableness to review the compatibility of a state's regulatory actions with its obligations under international investment law).

149 *See* David Feldman, *Modalities of Internationalisation in Constitutional Law*, 18 EUR. REV. PUB. L. 131 (2006).

150 Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 273 (2008) ("This article has argued that the aspiration to 'speak with one voice' is shared by a growing number of national courts across the globe. But, as opposed to what prevailed only a decade ago, these courts no longer wish to speak with the voice of their governments but, rather, to align their jurisprudence with that of other national courts.").

Yet, arbitrators often rely on national cases without providing an explanation of why they do so.[151] 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 qualitative models that are not necessarily the best, but rather those that are more familiar to the arbitrators.[152]

b. General Principles of Law

A third type of interaction between constitutional adjudication and investor-state arbitration can contribute to the emergence of general principles of law. In certain cases, constitutional ideas, as articulated by constitutional courts, can give rise to the coalescence of general principles of international law, thus contributing to the development of international law.

International adjudicators have an important role in the identification of general principles of law.[153] General principles of international law are defined as "a core of legal ideas which are common to all civilized legal systems,"[154] and they are a source of international law.[155] They express a belief in a common heritage of

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[151] VALENTINA VADI, ANALOGIES IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 164 (2016) ("In addition, arbitrators may not be given comprehensive evidence of national law, and this, in turn, may leave them likely to rely randomly on readily available cases. Even if inclusive evidence is presented, arbitrators are susceptible to cherry-picking, citing cases they are more familiar with and overlooking others.").

[152] Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law,* 53 AM. J. COMPAR. L. 125, 153 (2005) ("Despite the tremendous progress in the field over the last decade, *causal inference*—arguably, the ultimate goal of scientific inquiry, quantitative or qualitative, positivist or hermeneutical—remains largely beyond the purview of comparative constitutional law scholarship.").

[153] *See generally* LAURA PINESCHI, GENERAL PRINCIPLES OF LAW: THE ROLE OF THE JUDICIARY (2015) (examining the role played by domestic and international judges in developing legal systems through their interpretation and application of general principles of law).

[154] Rudolph B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations,* 51 AM. J. INT'L L. 734, 739 (1957).

[155] *See* Statute of the International Court of Justice, art. 38 §1(c), June 26, 1945, 59 Stat. 1055; *see also* ANDREA GATTINI, ATTILA TANZI & FILIPPO FONTANELLI, GENERAL

international law[156] or common law of humankind,[157] and they contribute to the evolution of international law as a unitary legal system. Often considered 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.

As is known, investment tribunals do interpret and apply treaties. Nonetheless, because the provisions of such treaties are often vague, and because of *non liquet* (that is, the arbitral duty to rend an award even when the applicable law does not govern a specific issue), arbitrators recur to customary law and general principles of law to fill legal gaps in the applicable law and reach a decision on a specific matter. For instance, in order to ascertain whether the duty to conduct an environmental impact assessment unduly affected investors' rights or, rather, constituted a legitimate exercise of state powers, the *Maffezini* tribunal acknowledged "the general principle that ignorance of the law is no defense."[158] After looking at whether other states also required such assessment, it concluded, referring to Sands' treatise on *General Principles of Environmental Law* that "the Environmental Impact Assessment procedure is fundamental for the adequate protection of the environment and the application of appropriate preventive

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PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION (2018) (addressing selected general principles of law and assessing their functions in investment arbitration); *see generally* BIN CHENG, GENERAL PRINCIPLES OF LAW, AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953); Tarcisio Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 J. WORLD INV. & TRADE 103, 103 (2009) ("It is undisputed that 'general principles have acquired a role in the shaping of rules in the area of foreign investment protection' and played 'a prominent role in arbitrations between States and foreign nationals.'" (quoting M. SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 94 (2d ed. 2004) & C. SHREUER, THE ICSID CONVENTION: A COMMENTARY 614 (2001))); Stephan W. Schill, *General Principles of Law and International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW. THE SOURCES OF RIGHTS AND OBLIGATIONS 133, 181 (Tarcisio Gazzini & Eric De Brabandere eds., 2012) ("Overall, general principles of public law thus appear as a potent source of international law that has transformative potential for adapting international investment law and the practice of investor-State arbitration without modifying substance or procedure of the existing international law framework.").

156 GIORGIO DEL VECCHIO, GENERAL PRINCIPLES OF LAW 11 (1958).

157 *See* Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 132 (2005) (reviewing the historical roots of international law and its impact on jurisprudential developments more generally).

158 Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Award, ¶ 70 (Nov. 13, 2000).

measures. This is true, not only under Spanish and [the then-European Economic Community ("EEC") law, which is now European Union] law, but also increasingly so under international law."[159] 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*");[160] or (2) principles recognised by the international community (transcending national law).[161] An example of a general principle of municipal origin is that of requiring reparation as a consequence of a wrongful act.[162] The concepts of state responsibility and reparation have their historical roots in the civil law doctrines of extra-contractual liability and the remedy of restoring an injured party to the situation which would have prevailed had no injury been sustained (*restitutio in integrum*). Of Roman law origins, such concepts entered into European civil codes and from there successfully migrated to the international plane in the early modern period.[163] Examples of general principles of international foundation include, for instance, the principle of non-intervention in national affairs.[164] The international community acknowledges both types of principles—irrespective of their legal origin—as binding.[165]

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159 *Id*. ¶ 67.

160 Schlesinger, *supra* note 154, at 742.

161 Christina Voigt, *The Role of General Principles in International Law and Their Relationship to Treaty Law*, 31 RETFÆRD ÅRGANG 3, 3, 7 (2008).

162 Factory at Chorzow (Ger. v Pol.), Claim for Indemnity, The Merits, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), http://www.worldcourts.com/pcij/eng/decisions/1928.09.13_chorzow1.htm [https://perma.cc/HN8L-636N]; Opinion in the Lusitania Cases (Ger. v. U.S.), 7 R.I.A.A. 32 (1923), https://legal.un.org/riaa/cases/vol_VII/32-44.pdf [https://perma.cc/SD88-46WX] (referring to common principles among different legal systems "that remedy must be commensurate with the injury received"); *see also* Factory at Chorzow (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, ¶ 55 (July 26), http://www.worldcourts.com/pcij/eng/decisions/1927.07.26_chorzow.htm [https://perma.cc/3EEP-2LKS] ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation . . . .").

163 *See generally* BORZU SABAHI, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE (2011) (tracing the historical origins of the concept of restitution and explaining how private law notions entered into international law).

164 Voigt, *supra* note 161, at 8.

165 *Id*.

The identification of the first type of general principles, those that 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); and (2) the comparison of the national legal systems (a horizontal process) to distil the essence of the legal concept.[166] In ascertaining general principles of law, what legal systems should be considered and how? As Fabián Raimondo argues, "[i]f 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."[167]

As mentioned, international adjudicators have an important role in the identification of general principles of law. This is of particular relevance to investment arbitration because general principles can fill the gap left open by short and vague investment treaties. Moreover, if the protection of given non-economic interests—for instance, cultural heritage—were proven to be a general principle of international law, there would not be an obstacle for the adjudicators to interpret investment treaty provisions in light of the existence of these principles.

The international judge should avoid a mechanical transposition of concepts from national law into international proceedings.[168] 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 international law.[169] The Annulment Committee annulled the award, holding that the Arbitral Tribunal had failed to apply the proper law and based its decision "more on a sort of general equity than on positive law."[170] The adoption of "a narrow inquiry, which at best attaches special weight and at worst confines the scope of the

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166 FABIÁN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 1 (2008).

167 *Id*. at 4.

168 Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgement, ¶ 178 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998).

169 Klöckner v. Cameroon, ICSID Case No. ARB/81/2, Award (Oct. 21, 1983).

170 *Klöckner v. Cameroon: Decision of the Ad Hoc Committee*, 1 ICSID REV.—FOREIGN INV. L.J. 89, 114, 139 (1986) (noting that "[the Tribunal's] reasoning [is] limited to postulating and not demonstrating the existence of a principle").

review to a single, specific legal system"[171] 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."[172] They risk "elevating legal rules and concepts with which individual judges are familiar . . . to the level of universal truths."[173] Although *Klöckner* did not involve constitutional law, it illustrates analogous risks and opportunities for the migration of constitutional principles to the international level. If given principles were shared by the international community, there would not be an obstacle to their consideration by arbitral tribunals.

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. Constitutions are domestic constructs and reflect the economic, social, and cultural choices of domestic constituencies. Attempts to universalize the constitutional 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 . . . industrialized countries and their economic actors."[174]

However, if a truly pluralist approach is adopted, then general principles can emerge, and have emerged, requiring the protection of interests, which are common to humankind. Any legal framework, including constitutional law, is "the product of a political context."[175] Therefore, the migration of constitutional ideas

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171 Aldo Zammit Borda, *Comparative Law and Ad Hoc Tribunals: The Dangers of a Narrow Inquiry*, 40 INT'L J. LEGAL INFO. 22, 35 (2012).

172 *Id*. at 36 (quoting Rosemary Byrne, *The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice*, 24 Conn. J. Int'l L. 243, 252 (2005)).

173 Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L L. 949, 965 (2011).

174 Francesca Spagnuolo, *Diversity and Pluralism in Earth System Governance: Contemplating the Role for Global Administrative Law*, 70 ECOLOGICAL ECON. 1875, 1875 (2011).

175 Christoph Möllers, *Ten Years of Global Administrative Law*, 13 INT'L J. CONST. L. 469, 471 (2015).

should not rely on methodological nationalism;[176] rather, it "should draw, as far as possible, on cross-cultural principles."[177] The comparative legal analysis to detect general principles of law must be extensive and representative, albeit not necessarily uniform or universal.[178]

c. Reciprocal Checks and Balances

Finally, constitutional adjudication and investor-state arbitration can exercise certain reciprocal checks and balances. On the one hand, arbitral tribunals can adjudicate on the compliance of the decisions of given constitutional courts and other domestic courts with international investment law.[179] Arbitrators may be required to assess the compatibility of the decisions of given domestic courts with the host state's commitments under the applicable IIA.[180] Domestic court decisions are among the acts that can cause a dispute and/or breach of international law,[181] thus

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176 Sabino Cassese, *Global Administrative Law: The State of the Art*, 13 INT'L J. CONST. L. 465, 467 (2015) (stating that "it is not possible to rely on methodological nationalism").

177 Spagnuolo, *supra* note 174.

178 Borda, *supra* note 171, at 28.

179 Mavluda Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, 61 INT'L & COMPAR. L.Q. 223, 223 (2012).

180 *See, e.g.*, Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 213 (Nov. 30, 2017), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf [https://perma.cc/K8QT-U4ME].

181 German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, ¶ 52 (May 25), http://www.worldcourts.com/pcij/eng/decisions/1926.05.25_silesia.htm [https://perma.cc/H7KF-ERNY] ("From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.").

determining state responsibility, e.g., ascertaining whether the host state acted in an arbitrary or discriminatory way.[182]

Arbitral tribunals may also 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.[183] 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. Vice versa, the constitutionality of a given measure does not shield a governmental measure from review but can matter in the decision-making process of the arbitral tribunal. There may be cases in which constitutional decisions on a given point of law may change, and therefore it may be difficult to assess their impact on the final award.[184] In certain cases, arbitral tribunals may also be asked to apply norms of constitutional law, if the parties to the dispute selected domestic law as the applicable law.[185]

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[182] Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 205 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf [https://perma.cc/X8G5-XCYH].

[183] Saipem S.P.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award, ¶ 90 (June 30, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0734.pdf [https://perma.cc/Y37Q-EVKE].

[184] Funnekotter v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award, ¶ 29 (Apr. 22, 2009), https://jusmundi.com/en/document/decision/pdf/en-bernardus-henricus-funnekotter-and-others-v-republic-of-zimbabwe-award-wednesday-22nd-april-2009 [https://perma.cc/VG8R-LBXB] (finding by the Supreme Court of Zimbabwe that the Fast Track Programme could not be considered as meeting the requirement of the Constitution and "that the farm invasions are, have been and continue to be unlawful"); *Id*. ¶33 (noting that "the Zimbabwe Supreme Court, whose composition had been changed, . . . held that the Land Reform Programme was constitutional and found that there was no breach of the rule of law concerning actions taken on farms"); *Id*. ¶ 107 (deciding that "the Tribunal concludes that Zimbabwe breached its obligation under Article 6(c) of the BIT to pay just compensation to the Claimants").

[185] S. Am. Silver Ltd. (Berm.) v. Bol., PCA Case No 2013-15, Award, ¶ 199 (Nov. 22, 2018), https://pcacases.com/web/sendAttach/2536 [https://perma.cc/U89D-DAP3] ("In order to guarantee the protection of the Indigenous Communities, the Tribunal must construe the Treaty in accordance with five Bolivian laws and international law instruments: (i) the 1969 American Convention on Human Rights; 248 (ii) the 1994 Inter-American Convention on the

On the other hand, domestic and regional courts have also challenged the authority of arbitral tribunals by adjudicating on the constitutionality of IIAs and/or their dispute settlement mechanisms, and this has given rise to ongoing power struggles.[186] This move is part of a general wave of judicial review in which national courts have increasingly scrutinized the constitutionality of international law and re-asserted the primacy of the constitution over international law.[187] For instance, in *Hupacasath v. Canada*, the Federal Court of Canada dismissed the claim that aboriginal people should be consulted before the ratification of a BIT with China.[188] Whereas the Hupacasath alleged that the ratification of such an agreement could adversely affect their rights, the Court held that impacts that could result from the ratification were speculative.[189] Nonetheless, the decision has been subject to criticism, as scholars have pointed out that risks to indigenous peoples' land rights and cultural traditions are far from being hypothetical.[190] Certainly, an increasing number of investor-state arbitrations have focused on the interplay between constitutional and other domestic law provisions on indigenous peoples' rights and international investment law.[191]

Prevention, Punishment and Eradication of Violence against Women; (iii) ILO Convention No. 169; (iv) the 2007 United Nations Declaration on the Rights of Indigenous Peoples, and (v) the Political Constitution of the Plurinational State of Bolivia.").

186 For earlier examples, see Sergio Puig, *Investor–State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga*, 5 MEX. L. REV. 199, 222-33 (2013).

187 Versteeg, *supra* note 110, at 12 (noting that "the vast majority of countries adopted constitutional safeguards to ensure the primacy of the domestic constitution").

188 Agreement for the Promotion and Reciprocal Protection of Investments, Can.-China, Sept. 9, 2012, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fipa-apie/index.aspx?lang=eng [https://perma.cc/8SBL-5JWZ].

189 Hupacasath First Nation v. Minister of Foreign Affs. Can. and the Att'y Gen. of Can., [2013] F.C. 900, ¶ 79 (Can.).

190 Kathryn Tucker, *Reconciling Aboriginal Rights with International Trade Agreements:* Hupacasath First Nation v. Canada, 9 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 109, 127 (2013).

191 Valentina Vadi, *Heritage, Power, and Destiny: The Protection of Indigenous Heritage in International Investment Law and Arbitration*, 50 GEO. WASH. INT'L L. REV. 725, 741 (2018).

Some awards have also touched upon the state's duty to consult indigenous peoples in matters that can affect them.[192]

Analogously, in 2017, Belgium requested the CJEU ascertain the compatibility of the Investment Court System provided in the context of the Comprehensive Economic and Trade Agreement between the European Union and Canada with EU law, including the Charter of Fundamental Rights of the European Union.[193] The CJEU concluded in *Opinion 1/17* that this mechanism for the settlement of investor-state disputes is compatible with the EU treaties and the Charter of Fundamental Rights.[194]

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[192] *See* Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 228 (Nov. 30, 2017) (stating that "[t]he Aymara population demanded repeal of Supreme Decree 083, application and respect for the right of prior consultation, and suspension of all mining concessions in southern Puno."); *Id*. ¶ 236 (holding by the Tribunal that "[e]ven if *Amici's* description of events was accurate, it implicates conduct of Respondent and not of Claimant. According to *Amici*, it was Respondent's grant of a large number of mining concessions in the territories of the indigenous communities that triggered an anti-mining sentiment in the population of Puno . . . . If Respondent was required but failed to consult with local communities before granting rights over their lands . . . then any resulting fallout from this lack of communication and transparency falls on Respondent, not Claimant."); *Id.* ¶ 262 ("The State's responsibility extends to ensuring that the affected communities are in fact consulted by private companies . . . ."). *But see* Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, ¶ 6 (Sept. 12, 2017) (arguing that the investor failed to obtain the social license to operate and thus contributed to the collapse of the project); Grand River Enterprises Six Nations, Ltd. v. United States of America, ICSID No. Arb/10/5, ¶ 182 (Jan. 12, 2011) ("[T]he Claimants contended that Article 1105 [of the North America Free Trade Agreement] obliged the Respondent to take 'pro-active steps to consult with indigenous investors prior to imposing a measure that will impact upon them or their community.'"); *Id*. ¶ 210 (holding by the Tribunal "[i]t may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them"); *Id.* ¶ 211 (stating that "[i]n any event, any obligations requiring consultation run between the state and indigenous peoples as such, that is, as collectivities bound in community").

[193] Comprehensive Economic and Trade Agreement, Can.-E.U., Oct. 30, 2016, 2017 O.J. (L11) 23, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114(01)&from=EN [https://perma.cc/XW6V-NBQY].

[194] Case C-1/17, ECLI:EU:C:2019:341, ¶ 106 (Apr. 30, 2019).

By contrast, the CJEU recently ruled in *Achmea* that investor-state arbitration in intra-EU BITs was incompatible with EU law.[195] 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 from, or is incompatible with, the constitutional heritage of EU law.[196] Because the ruling is binding on Member States, it will likely affect 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.[197] In conclusion, whereas the *Achmea* decision highlights the ongoing constitutionalisation of EU law in general, and intra-EU investment law in particular, it does not necessarily confirm the constitutionalisation of international investment law as a whole.

IV. METHODOLOGICAL PLURALISM AND INTER-CIVILIZATIONAL APPROACHES TO INVESTOR-STATE ARBITRATION

After having examined the promises and pitfalls of the application of constitutionalist theory to investor-state arbitration, this Section contends that other theories or methods can help examine, and eventually suggest reforms for, international investment law and arbitration. The argument focuses on the existence of a plurality of different methods and approaches, and in this respect, provides a brief overview of inter-civilizational approaches as a particularly promising path.

Methodological pluralism is not only the current state of the art, but also a promising endeavour, as international law scholars may adopt different methods depending on the given object of inquiry. Methodological pluralism is based on the belief that no research

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[195] *See generally* Case C-284/16, Slovak Republic v. Achmea BV, ECLI:EU:C:2018:158 (Mar. 6, 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).

[196] *Id.*

[197] Vattenfall AB v. Federal Republic of Germany (II), ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶ 85 (Aug. 31, 2018).

method is inherently superior to any other. Not only does a plurality of methods align with the international community's value of cultural diversity, but it is also best suited to address the complexity of international law. This is not to say that anything goes. Rather, the adoption of multiple perspectives and "different ways of seeing international law" on given topics are not only plausible, but are desirable depending on the research aim and objective.[198] Methodological pluralism acknowledges the existence of different methods, their distinct usefulness, and their complementarity.

For instance, methodological statism—the traditional focus of international lawyers on states as the principal actors of international law—can be complemented by methodological individualism, that is, a commitment to studying the making, interpretation, implementation, and development of international law by ordinary, individual people.[199] Analogously, while the macro-history of international investment law seeks out large and long-term trends in the field, looking at multiple events and concepts over the course of centuries, the micro-histories of international investment law typically reduce the scale of analysis[200] by focusing on specific events, legal items or individuals.[201]

A discrete set of methodologies exists in international law.[202] Because of space limits and the allocated topic of discussion, this

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198 BIANCHI, *supra* note 98, at 225.

199 Tamar Megiddo, *Methodological Individualism*, 60 HARV. INT'L L.J. 219, 219-20 (2019).

200 For more on the history of international investment law, see generally INTERNATIONAL INVESTMENT LAW AND HISTORY (Stephan W. Schill, Christian J. Tams & Rainer Hofmann eds. 2018); ANTONIO R. PARRA, THE HISTORY OF ICSID (2012); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL (2013); FERNAND BRAUDEL, THE WHEELS OF COMMERCE: CIVILIZATION AND CAPITALISM 15TH–18TH CENTURY (1982); CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (1985); Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005); Janet McLean, *The Transnational Corporation in History: Lessons for Today?*, 79 IND. L.J. 363 (2004).

201 Valentina Vadi, *Perspective and Scale in the Architecture of International Legal History*, 30 EUR. J. INT'L L. 53 (2019); Valentina Vadi, *The Power of Scale: International Law and Microhistories*, 46 DENV. J. INT'L L. & POL'Y 315 (2018).

202 Annie-Marie Slaughter & Steven R. Ratner, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999); Jutta Brunnée

Part is clearly not exhaustive but suggests possible promising paths for future investigation of international law in general, and in international investment law in particular. These alternative approaches offer different views and perspectives of international law. They can help international lawyers to build different theoretical maps of international law in general, and international investment law in particular. International lawyers, administrative law scholars, critical legal scholars, socio-legal scholars, and even political theorists have contributed some important insights to the field.[203] Similarly, the history and theory of international law has also been enriched by TWAILers.[204] Human rights scholars' investigations on economic, social, and cultural rights can also shed light on the interplay between the protection of human rights and the promotion of foreign investments.[205] This is not to say that international investment law should be the exclusive preserve of any of these approaches. Rather, the study of the field is open to inter-disciplinary and multi-disciplinary perspectives, and the adoption of diverse perspectives and approaches can only facilitate the understanding of its multifaceted complexity. The plurality of analytical frameworks may help address the problems that a purely

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& Stephen J. Toope, *Constructivisim and International Law*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 119 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000); Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 L. & POL. AFR., ASIA & LAT. AM. 195, 195-99 (2012); ANGHIE, *supra* note 87.

[203] *See, e.g.*, Amanda Perry-Kessaris, *What Does it Mean to Take a Socio-Legal Approach to International Economic Law?*, *in* SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT 3, 3-8 (Amanda Perry-Kessaris ed., 2013); Celine Tan, *Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP 147 (Stephen W. Schill, Christian J. Tams & Rainer Hofmann eds., 2015).

[204] *See, e.g.*, B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, *in* THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 47 (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., 2003).

[205] *See, e.g.*, Hans Morten Haugen, *Trade and Investment Agreements: What Role for Economic, Social and Cultural Rights in International Economic Law?*, *in* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES 227 (Eibe Riedel, Gilles Giacca & Christophe Golay eds., 2014).

constitutionalist approach cannot address, or that the latter only helps to address in a limited fashion.

Among the many ways to investigate and study international law, an inter-civilizational or intercultural perspective of the field seems promising. Such approach is based on the recognition of the plurality of civilizations and cultures that have long existed throughout history.[206] It requires international lawyers to be sensitive to different values and concerns of different cultures "both within a civilization (intra-civilization diversity)" and among civilizations "(inter-civilizational cultures)."[207] In other words, if international law constitutes the law governing different civilizations and cultures, it should "listen to the voices of them all" and "be able to include different voices."[208] Civilizations should dialogue with one another. An inter-civilization approach to international law highlights the plurality of the cultures that compose it[209] and "calls for international law to embrace its universal potential" by becoming a bridge among different communities.[210]

Such an approach can be well suited to examine international investment law, a field in which a great variety of interactions between different regimes systematically occur and that is characterized by legal pluralism. Some scholars pragmatically argue that the twenty-first century will be multi-centric and multi-civilizational, and that international law should evolve accordingly. Nonetheless, a multi-civilizational approach can benefit all concerned. The regulation of economic activities is not only necessary but also desirable.[211] In fact, a "distinct awareness" has emerged that "states' regulatory capacity must regain legitimacy as

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206 YASUAKI 2017, *supra* note 59.

207 *Id.* at 19 n.14.

208 Ming Li, *The Transcivilizational Perspective: A Legitimate and Feasible Approach to International Law*, 9 ASIAN J. INT'L L. 165, 166 (2019).

209 Yasuaki 2004, *supra* note 59; YASUAKI 2017, *supra* note 59.

210 Bruno Simma & Daniel Litwin, *International Law in a Transcivilizational World: An Intimate Account of International Law*, JAPANESE Y.B. INT'L L. (forthcoming) (on file with author).

211 YASUAKI 2017, *supra* note 59, at 485.

an instrument for . . . promoting the general interest."[212] Many states—in both industrialised and developing countries—have gradually recalibrated their IIAs inserting reference to their fundamental interests and values, as well as their inherent right to regulate.[213] These concerns may vary depending on the needs and priorities of specific countries. For instance, Canada has traditionally inserted a cultural exception in its treaties and provisions protecting its indigenous peoples.[214] The United States, Canada, and Mexico have expressly recognised "their inherent right to regulate and . . . protect legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals" in the preamble of the United States-Mexico-Canada Free Trade Agreement ("USMCA") that replaced the North American Free Trade Agreement.[215]

An inter-civilizational approach can be particularly well suited to examine international investment arbitration. As Won Kidane has highlighted, "[f]ew, if any, legal processes regularly bring together multiple legal cultures into one room as much as international arbitration does."[216] In this regard, the gradual opening of investor-state arbitration to experts from all around the globe could strengthen perceptions of its demographic representativeness. Such opening can also foster the public perception of investor-state arbitration's capability to settle disputes in an independent and impartial way. For instance, based on the estimates by the World Bank for 2017, women account for 49.6% of the world's population. It would be fair to expect a similar percentage of women with respect to the total number of

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212 Hélène Ruiz Fabri, *Regulating Trade, Investment and Money, in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 352, 361 (James Crawford & Martti Koskenniemi eds., 2012).

213 *See generally* José E. Alvarez, *The Return of the State,* 20 MINN. J. INT'L L. 223 (2011) (discussing different international investment agreements that have incorporated the rights of nations).

214 Vadi, *supra* note 191, at 775.

215 Agreement Between the United States of America, the United Mexican States, and Canada Pmbl., Dec. 10, 2019 [hereinafter USMCA], https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/00_Preamble.pdf [https://perma.cc/NDT7-72KM].

216 WON L. KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION 3 (2017); *see also* Tom Ginsberg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335 (2003).

appointments.[217] In the same fashion, it would be fair to expect in arbitrations dealing with given countries, that at least one arbitrator be designated from the same continent and/or region as such given country. In disputes dealing with investments in indigenous peoples' lands, it would be fair to have at least one arbitrator of the same culturally distinct group. In this regard, the United Nations Permanent Forum on Indigenous Issues ("UNPFII")—the UN's central coordinating body for matters relating to the concerns and rights of the world's indigenous peoples—could provide expert opinions and keep a list of experts on indigenous rights.

An inter-civilizational approach can also address particular realities of local communities.[218] Different sectors of society—including women,[219] local communities,[220] and minorities—influence, benefit from, and are affected by, foreign investments in different ways. An inter-civilizational approach would consider the impact of a given decision on local communities.[221] Under this perspective, arbitral tribunals should:

> [M]ake the most of the different normative perspectives that converge into the subject under debate . . . . Contrary

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[217] *Data, Population, Female (% of Total Population)*, WORLD BANK, https://data.worldbank.org/indicator/sp.pop.totl.fe.zs [https://perma.cc/AJ8T-7353].

[218] Ibironke T. Odumosu, *The Law and Politics of Engaging Resistance in Investment Dispute Settlement*, 26 PENN STATE INT'L L. REV. 251 (2007) (discussing arbitral tribunals' reluctance to consider communities' perspectives); Valentina Vadi, *Local Communities, Cultural Heritage and International Economic Law, in* LOCAL ENGAGEMENT WITH INTERNATIONAL ECONOMIC LAW AND HUMAN RIGHTS 150 (Ljilijana Biukovic & Pitman B. Potter eds., 2017).

[219] *See generally* Rachel J Anderson, *Environment, Foreign Investment and Gender*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 441 (Kate Miles ed., 2019) (discussing the intersection of international law and foreign investment through a gender-lenses analysis and research and identifying potential issues).

[220] *See generally* LJILJANA BIUKOVIC & PITMAN POTTER, LOCAL ENGAGEMENT WITH INTERNATIONAL ECONOMIC LAW AND HUMAN RIGHTS (2017) (providing analysis on global regulation and organizations on domestic laws and communities).

[221] Hélène Tigroudja, *Elimination de la pauvreté, droits de l'homme et développement durable*, *in* ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT FROM RIO TO RIO +*20*, at 161 (Malgosia Fitzmaurice, Sandrine Maljean-Dubois & Stefania Negri eds., 2014) (stressing the need of mainstreaming gender, poverty and environmental justice in developmental policies); MARGOT SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW (2007).

> to the pursuit of [an abstract] ideal of justice that would correspond . . . to an enlightened constitutional architecture of the world . . . the quest for justice . . . would better avail of 'critical scrutiny from the perspective of others.'[222]

The recent *Álvarez y Marín Corporación S.A. v. República de Panamá* can provide a useful example of how an inter-civilizational perspective can work in the practice of investor-state arbitration.[223] In 2015, a Costa Rican company and several Dutch investors, all shareholders of an ecotourism project called Cañaveral in Bocas del Toro, Panama, filed a claim against Panama at the ICSID.[224] The investors contested decisions made by the Panamanian National Land Management Agency about whether the claimants' property was located within the protected area inhabited by the Ngöbe Buglé indigenous peoples in Western Panama.[225] The Ngöbe land originally extended from the Pacific Ocean to the Caribbean Sea and the tribes have traditionally relied on subsistence activities such as farming, fishing, and hunting.[226] Today, they mostly live in the Comarca Ngöbe-Buglé, which is an area specifically designated to protect the cultural heritage and the political autonomy of these indigenous communities.[227] The 1997 law establishing the Comarca Ngöbe-Buglé recognised the right of indigenous persons to collective ownership of land and prohibited private property within these zones, as well as granting indigenous tribes a certain degree of

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[222] Palombella, *supra* note 99, at 383 (quoting AMARTYA SEN, THE IDEA OF JUSTICE 197 (2009)).

[223] Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14, Award (Oct. 12, 2018).

[224] Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14, Request for Arbitration (Apr. 20, 2015).

[225] *See* Clovis Trevino, *Panama Faces New ICSID Arbitration Over Thwarted Hotel Tourism Development*, INV. ARB. REP. (Apr. 24, 2015), https://www-iareporter-com.pennlaw.idm.oclc.org/articles/panama-faces-new-icsid-arbitration-over-thwarted-hotel-tourism-development/ [https://perma.cc/FL3M-8L9R].

[226] Cindy Campbell, "*Give Them a Dam Break!" Protecting the Ngäbe Buglé Community of Panama with Clean Development Mechanism Safeguards to Promote Culturally Sensitive Development*, 2 AM. INDIAN L.J. 547, 547 (2014).

[227] Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14, Reasoning of the Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), ¶ 22 (Apr. 4, 2016); Álvarez y Marín Corporación S.A., ICSID Case No. ARB/15/14, Award, ¶ 206 (Oct. 12, 2018).

autonomy.[228] In the region, only land that has been privately-held before 1997 can be sold to private parties, and Comarca's authorities retain a right of preferential acquisition of any privately-owned land for sale.[229] Human rights scholars have interpreted this and similar laws to constitute "one of the foremost achievements in terms of the protection of indigenous rights in the world."[230]

The investment at the heart of the dispute included "farm properties situated along the Panamanian coast, which the investors planned to develop as an eco-tourist project."[231] The investors bought these properties, supposedly belonging to the Comarca, from an intermediary who bought such properties and resold them to the investors.[232] Because the press questioned the legitimacy of the acquisition, the National Authority for Lands Administration "issued a report that officially located two of the claimants' properties outside this special zone."[233] However, the report ostensibly "provoked a wave of indignation among the indigenous population"[234] and "this led to the invasion of these properties by

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[228] Kuna Indigenous People of Madungandi v. Panama, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284, ¶ 59 (Oct. 14, 2014); *Álvarez y Marín Corporación S.A.*, ICSID Case No. ARB/15/14, Award, ¶ 208 (Oct. 12, 2018).

[229] Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14, Award, ¶ 208 (Oct. 12, 2018).

[230] James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *The Status of Indigenous Peoples' Rights in Panama*, ¶ 13, U.N. Doc. A/HRC/27/52/Add.1 (July 3, 2014).

[231] Zoe Williams, *Arbitrators in Panama Eco-Tourism BIT Dispute Weigh in With Ruling on Preliminary Objections*, INV. ARB. REP. (Apr. 13, 2016), https://www-iareporter-com.pennlaw.idm.oclc.org/articles/arbitrators-in-panama-eco-tourism-bit-dispute-weigh-in-with-ruling-on-preliminary-objections/ [https://perma.cc/24A4-CYWL].

[232] Damien Charlotin & Facundo Perez Aznar, *In Previously-Unseen Alvarez y Marin v. Panama Award, Reasons Are Revealed for Why a Majority Declined to Take Jurisdiction Over Investment in Indigenous Territory – And Why Grigera Naon Dissented*, INV. ARB. REP. (Mar. 13, 2019), https://www-iareporter-com.pennlaw.idm.oclc.org/articles/in-previously-unseen-alvarez-y-marin-v-panama-award-reasons-are-revealed-for-why-a-majority-declined-to-take-jurisdiction-over-investment-in-indigenous-territory-and-why-grigera-naon-dissented/ [https://perma.cc/F4NW-QQEP].

[233] Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14, Reasoning of the Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) (Spanish), ¶ 26 (Apr. 4, 2016).

[234] Charlotin & Perez Aznar, *supra* note 232.

indigenous groups."[235] The claimants alleged that Panama's treatment of their investment constituted an indirect expropriation and a breach of the fair and equitable treatment as well as the full protection and security standards.[236] Panama denied having violated the treaties and raised several jurisdictional objections, arguing mainly that the investments had been unlawfully acquired.[237]

The arbitral tribunal declined jurisdiction over the case on the basis of the investors' lack of compliance with domestic law.[238] Although neither of the two treaties invoked by the investors contained an express requirement of legality, the tribunal held that a legality requirement should be deemed implicit in all investment treaties, so that only investments acquired legally could benefit from a treaty's protection.[239] The tribunal noted that the law establishing the Comarca and the Panamanian Constitution aimed at protecting indigenous peoples' cultural, economic, and social well-being.[240] It also considered the commonality of land as a fundamental condition for the survival and continuity of the ethnic identity of indigenous peoples.[241] While fully applying the applicable law, and thus remaining within its own jurisdiction, the tribunal acknowledged the plurality of existing cultures within Panama.

An inter-civilization perspective acknowledges "the pluralist structure of international law."[242] Arbitral tribunals do not need to become constitutional courts to adjudicate investment disputes;

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235 Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14, Reasoning of the Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) (Spanish), ¶ 27 (Apr. 4, 2016).

236 *Id*. ¶ 28.

237 *Id*. ¶ 28.

238 Álvarez y Marín Corporación S.A. v. Republic of Panama, ICSID Case No. ARB/15/14, Award, ¶ 296 (Oct. 12, 2018) ("The Court has decided that investments in which the investor, when making them, has committed in a serious breach of national law, do not deserve international law protection.").

239 *Id*. ¶ 118 (noting that "the requirement of legality, although not explicitly stated in the Treaties, is an implicit part of the concept of protected investment").

240 *Id*. ¶ 318-19 (referring to Article 127 of the Panamanian Constitution).

241 *Id*. ¶ 327 (describing that "communal lands are considered a fundamental component to the survival and continuation of the ethnic identity of indigenous people").

242 NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010).

traditional tools of treaty interpretation enable them to reach fair decisions based on the applicable law and within the jurisdictional mandate of the tribunals. Arbitral tribunals have interpretive tools to address human rights and *jus cogens* issues without overstepping their jurisdiction.[243]

De lege lata, skilled arbitrators could and should complete their system of values by referring to Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT")[244] 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 considering non-economic concerns in the settlement of investment disputes.[245] The admissibility of counterclaims brought by host states has also contributed to recalibrating some recent investor-state arbitration.

De lege ferenda, international investment law is undergoing a phase of reforms; such reforms will gradually introduce a much-needed consideration of non-economic concerns in the text of investment treaties. It is too early to say whether these substantive reforms contribute to the much-needed humanisation of the field. The European Commission is engaged in multilateral discussions to establish a Multilateral Investment Court.[246] If this approach is successful, a multilateral court could arguably promote the consideration of human rights and cultural diversity; however, it is too early to tell.

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243 Eric De Brabandere, *Human Rights and International Investment Law, in* RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 183 (Markus Krajewski & Rhea Tamara Hoffmann eds., 2019); Valentina Vadi, *Jus Cogens in International Investment Law and Arbitration,* 46 NETH. Y.B. INT'L L. 357 (2015).

244 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331.

245 Nonetheless, the actual practice of tribunals on this issue remains contradictory. Various tribunals have approached Article 31(3)(c) of the VCLT in different ways, either ignoring it or interpreting it in an expansive or restrictive way. In fact, the VCLT principles hardly ever lead to obvious outcomes, but merely describe the structure of an interpretive argumentation.

246 Cecilia Malmström, European Comm'r for Trade, Speech at the Belgian Ministry of Foreign Affairs: A Multilateral Investment Court: A Contribution to the Conversation about Reform of Investment Dispute Settlement (Nov. 22, 2018), https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf [https://perma.cc/NMU7-A9Q2].

In conclusion, investor-state arbitration constitutes a form of international adjudication. Non-economic concerns are already within the grasp of arbitrators *de lege lata*, despite the call for *de lege ferenda* improvements. If the domestic law is the applicable law, then certainly arbitrators can consider local concerns. Due to international human rights law, international law also enables arbitrators to consider the inherent rights of indigenous peoples and local communities. In fact, human rights are rights inherent to all human beings.[247] If arbitrators are willing to fully apply Article 31(3)(c) of the VCLT, then the consideration of relevant non-economic concerns would already be within their grasp. The force of systemic interpretation should not be overstated though. Future reforms of the international investment regime in general, and the eventual creation of a Multilateral Investment Court in particular, may lead to some fundamental changes in the system and hopefully increase its humanisation, thus making it work for the common good.

V. CRITICAL ASSESSMENT

This Article has examined whether arbitral tribunals can be considered to be global constitutional courts and addressed the merits and pitfalls of constitutionalist approaches to the role that this dispute settlement mechanism plays in international relations. In particular, it has stressed that structural and functional differences exist between arbitral tribunals and constitutional courts. Therefore,

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[247] G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). The Declaration was approved by 143 nations, but was opposed by the United States, Canada, New Zealand and Australia. However, these four nations subsequently endorsed the Declaration. *See* Antonietta Di Blase & Valentina Vadi, *Introducing the Inherent Rights of Indigenous Peoples*, *in* THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW 19, 19-20 (Antonietta Di Blase & Valentina Vadi eds., 2020). Drafted with the active participation of indigenous representatives, the Declaration constitutes the outcome of two decades of preparatory work. *See id.* at 20. While this landmark instrument is currently not binding, this may change in the future to the extent that its provisions reflect customary international law. *See id. Compare* G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) pmbl., para. 7, *with* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), pmbl.

investor state dispute settlement (ISDS) should not be seen as analogous to global constitutional adjudication, but as a type of international adjudication.

Nonetheless, constitutional theory remains useful because a fruitful dialogue exists between arbitral tribunals and constitutional courts. Not only can dialogue between constitutional courts and arbitral tribunals promote the humanisation of international investment law, but it can also foster state compliance with international law and enhance the perceived legitimacy of international investment law and arbitration. For instance, the convergence between the substantive decisions of constitutional courts and arbitral tribunals concerning the legitimacy of tobacco control measures indicates that non-economic concerns have an important role to play, not only in constitutional adjudication, but also in international adjudication.[248] This convergence can contribute to highlight the human dimension of international investment law, the idea that like other branches of law, such as constitutional law, it is functional to human well-being, the respect of human dignity, and the pursuit of the common good.[249]

International and constitutionalist 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, international and constitutionalist approaches can also improve one another by engaging in a fruitful dialogue, acknowledging common ground (namely, the objective of humanizing international investment law) and making it more permeable to non-economic interests and values.

International law poses vertical constraints on the state's right to regulate by introducing "global interests into the decision-making processes of domestic authorities."[250] Adherence to these

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[248] Valentina S. Vadi, *Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law,* 48 STAN. J. INT'L. L. 93 (2012).

[249] Ursula Kriebaum, *Human Rights and International Investment Law, in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND INVESTMENT 13 (Yannick Radi ed., 2018).

[250] Stefano Battini, *The Procedural Side of Legal Globalization: The Case of the World Heritage Convention,* 9 INT'L. J. CONST. L. 340, 343 (2011).

international regimes "add[s] a circuit of 'external accountability,' forcing domestic authorities to consider the interests of the wider global constituency affected by their decisions."[251] International law requires states to attune their legal systems to norms and values shared by the international community. It can protect individuals against arbitrary exercises of power by domestic authorities. Therefore, it can 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, constitutionalist perspectives can contribute to the progress of international law. They provide "a discrete set of lenses with which to understand reality and a distinct toolkit with which to dissect such reality."[252] They allow scholars and practitioners to look at international law with fresh eyes and identify patterns and structures in the chaotic development of international law. As Joseph Weiler points out, constitutional theory has "introduced a methodology with which to discuss, critique and . . . reform" the operation of international organisations.[253] Not only has it provided international lawyers with new methods of enquiry for examining their field, but it can also offer some thinking that might eventually lead to a change in international law.[254] Constitutional theory can help scholars "to better understand the[] functions" and limits of international organisations and adjudicators.[255] It offers scholars and practitioners a singular way of "mapping the global disorder of normative orders."[256] It is a theoretical tool to examine the

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251 *Id.* at 364.

252 J. H. H. Weiler, *GAL at a Crossroads: Preface to the Symposium,* 13 INT'L. J. CONST. L. 463, 463 (2015).

253 *Id.*

254 Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening), Judgment, 2012 I.C.J. Rep. 99; Corte Costituzionale (Corte Cost.) (Constitutional Court), 22 October 2014, n. 238 (It.) https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf [https://perma.cc/9K5R-ZN9D].

255 Lorenzo Casini, *Beyond Drip-Painting? Ten Years of GAL and the Emergence of a Global Administration,* 13 INT'L. J. CONST. L. 473, 477 (2015).

256 Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders,* 6 INT'L. J. CONST. L. 373, 373 (2008).

phenomenon of the "glocalization" of law.[257] Glocalization refers to the interrelatedness between, and co-presence of, the global and the local, the universal and the particular, heterogeneity and homogeneity, integration and dispersion.[258] It describes "the tempering effects of local conditions on global pressures."[259] The glocalization of law indicates the relevance and belonging of a given phenomenon to both global and local legal spheres.[260]

In international investment law, constitutional theory 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. Constitutional approaches certainly have contributed to the mosaic of existing methods in investigating international law.

This is not to say, however, that constitutional theory constitutes the best theoretical framework for investigating international law.[261] Rather, constitutional approaches present both opportunities and dangers. They can constitute one of the available methods or hermeneutic devices to investigate international law.[262] In addition, they can "alter our intellectual landscape in some quite decisive ways" and nurture healthy academic debates.[263] However, constitutional approaches are neither the sole, nor necessarily the

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257 *See* Gunther Teubner, *'Global Bukowina': Legal Pluralism in the World Society, in* GLOBAL LAW WITHOUT A STATE 3, 3 (Gunther Teubner ed., 1997) (noting the parallel coexistence of the local and the global level of governance in the globalization dynamics).

258 *See generally* Rostam Neuwirth, *Glocalisation: Time-Space and Homogeneity-Heterogeneity*, *in* GLOBAL MODERNITIES 25 (Mike Fatherstone et al. eds., 1995); Natalie Zernon Davies, *Decentering History: Local Stories and Cultural Crossings in a Global World*, 50 HIST. & THEORY 188 (2011).

259 Susan S. Silbey, *Globalization*, *in* CAMBRIDGE DICTIONARY OF SOCIOLOGY 245, 246 (2006).

260 Rostam Neuwirth, *Governing Glocalisation: "Mind the Change" or "Change the Mind"?*, 12 HOKKAIDO J. NEW GLOB. L. & POL'Y 215 (2011) (describing the innovations that are leading to the acceleration of change in global and local governance).

261 *But see* Casini, *supra* note 255, at 475.

262 Anne Peters, *The Merits of Global Constitutionalism,* 16 IND. J. GLOB. LEGAL STUD. 397 (2009).

263 Susan Marks, *Naming Global Administrative Law,* 37 N.Y.U. J. INT'L. L. & POL. 995, 1001 (2005) (noting that GAL can "alter our intellectual landscape in some quite decisive ways").

best method for studying international phenomena, including in the field of international investment relations.

Like any other method, constitutional theory 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 universalize 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, contending that constitutional ideas are linked to the constitutional culture in which they are rooted.[264] Critics contend that sovereignty concerns 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.[265] In investment treaty arbitration, reference to the constitutional experience of a country other than the host state would seem out of place.[266] Moreover, such judicial borrowing can alter the text of the applicable IIA.

This Article suggested possible complementary and/or alternative approaches to constitutional theory to investigate ISDS; while the overview given above is certainly not normative, it aims at opening a dialogue, and illuminating promising paths for future research. In particular, this Article highlights that international law requires "epistemological pluralism," that is, different methods of enquiry. Far from suggesting a single method as the best way forward, this Article argues that international law is particularly

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[264] *See, e.g.*, PEER ZUMBANSEN, TRANSNATIONAL COMPARISONS: THEORY AND PRACTICE OF COMPARATIVE LAW AS A CRITIQUE OF GLOBAL GOVERNANCE (2014).

[265] Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)) (stating that societal change and advancement of human rights is imposing morals on others).

[266] 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* JARROD HEPBURN, DOMESTIC LAW IN INTERNATIONAL INVESTMENT ARBITRATION (2017).

suitable to a plurality of methods, including inter-civilizational approaches, and can (and has) been studied by adopting different methods and perspectives. Therefore, only a kaleidoscopic juxtaposition of different methods and approaches can help scholars and practitioners to decipher the complexity of international investment law. In conclusion, the adoption of a more varied toolkit for investigating international investment arbitration can only benefit the field.

V. CONCLUSION

Despite functional analogies, arbitral tribunals are not global constitutional courts for both structural and functional reasons. 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—that is, the quintessential features that characterize constitutional systems—does not mean that it cannot acquire such features in the future through treaty making or jurisprudential developments.

For the time being, constitutional theory provides a useful toolkit for approaching the increasingly complex subject of international investment law. It can shed some light on certain idiosyncrasies of international investment law and arbitration and stimulate fruitful academic debate. However, like any other method, unavoidably, it 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 constitutional law peculiarities of a limited number of liberal states could be perceived as an imperialist project. While constitutional theory constitutes a useful approach to studying international law, and can promote cross-fertilization, some checks and balances and, in some cases, even the humanisation of international adjudication, it does not constitute the sole or necessarily best method for doing so.

Rather, it has been suggested in this Article that international law requires epistemological pluralism, that is, different methods of enquiry. An inter-civilizational perspective is particularly suitable to investor-state arbitration that, by definition, involves parties from

different regions of the world. An inter-civilizational approach that is sensitive to different values and concerns of different civilizations can be better suited to examine ISDS, in which a great variety of interactions between different regimes and civilizations systematically occurs. Such perspective can also help propose meaningful and viable reforms of investor-state arbitration. Civilizations should dialogue with one another; an inter-civilizational approach to international investment law highlights the plurality of the cultures that compose it, and can only foster just, peaceful, and prosperous relations among nations. This approach can also address the particular realities of local communities and empower the marginalized. In conclusion, arbitral tribunals should better reflect the rich cultural diversity of the world and take into account the perspectives of the different cultures and civilizations involved in a given arbitration. A truly international, intercultural and inter-civilizational perspective acknowledges the pluralist foundations of international law.