

A PROPOSAL FOR A NEW NORMATIVE APPROACH TO INVESTMENT ARBITRATION AND THE NATIONAL RULE OF LAW

Abstract

Transnational visions of how rule of law and good governance should look like on the national plane are a development of last couple of decades. This article argues that international investment arbitration has been in effect utilized as a tool for promoting such visions, despite their controversial practical record so far. In order to capitalize on the potential that investment arbitration does possess, the proposal is made for a normative turn that would encompass focusing on promoting rule of national law as opposed to the rule of investment law.

Keywords: *international investment law, international investment arbitration, rule of law*

1. Introduction

As has been increasingly argued in doctrine, the exercise conducted by the international investment tribunals in a predominant number of instances is akin to a judicial review of host State behaviour. However, the benchmarks used for this review are often the result of questionably creative (at best) interpretation of international law, a system of law which was in essence never geared towards providing rules for such a delicate exercise outside of the relatively crude and uncertain category of international minimum standard of treatment.

While with the overall context taken into account, one could expect far more restraint and ‘judicial modesty’ from investment arbitrators, practice did not show this to be the case. Interpretation of BITs as largely insulated from the broader framework of host State legal obligations entrenches the expectations from these States to essentially uphold, if necessary, the rule of investment law over rule of law in the domestic

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context - something particularly contentious with the regime origin in mind.

Imposition of new, interpretation-created rules largely resembles imposing a unified, globalized vision of good governance and rule of law on a very disparate set of States. Similar exercises have been criticised in other contexts (UN, WB) as both misguided and eventually unsuccessful. There is no particular reason why one-size-fits-all approach would fare any better in the sphere of investment protection. Efforts are thus be put in a different direction to the one primarily seeking elusive *jurisprudence constante* on substantive issues.

In order to propose a basis for a different course of action, this article will first explain the controversies surrounding the promotion of the rule of law on an international/transnational plane, (part 2) before delving into an elaboration of a normative turn that is more in line with the investment law origins and potentials in part 3. Finally, key concepts of such a turn - reasonable fulfillment of obligations, deference, the need for additional guidance, the crucial role of argumentative weight (as well as a cautionary caveat) are described in part 4.

2. A different view of rule of law and good governance - equality of State visions

Promotion of the rule of law and good governance among developing countries has become one of the primary goals of numerous international organizations. The extent of this phenomenon lead authors to express that '[...] the concept of good governance has moved to the centre of international aid and poverty reduction policies.'² Not surprisingly, there has been a corresponding increase in academic interest in the topic.³

Importantly, the origin of the good governance concept coincides with the Washington Consensus and the IIA boom of the 1990's.⁴ Not unexpectedly, the IIAs and promotion of 'good governance' thus exhibit a strong link. According to Dolzer and Schreuer, investment treaties provide for external constraints and disciplines which foster and reinforce values *similar to the principles of good governance* with its emphasis on domestic institutions and policies.⁵

² R.Dolzer, C. Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012,) 25.

³ A.D Mitchell, E.Sheargold, T.Voon, "Good Governance Obligations in International Economic Law: A Comparative Analysis of Trade and Investment" (2015) 16 *Journal of World Investment and Trade* (forthcoming), available at: <http://ssrn.com/abstract=2616566>, 2.

⁴ R.Dolzer, C. Schreuer (n 1) 25; W.M.Reisman, RD Sloane, "Indirect Expropriation and its Valuation in the BIT Generation" (2004) 74 *BYBIL* 115, 117.

⁵ R.Dolzer, C. Schreuer (n 1) 25 (emphasis added).

The idea has found reputable proponents in the IIL sphere. In an oft-cited separate opinion in *International Thunderbird Gaming*, late Thomas Wälde expressed the view that '[a]buse of governmental powers is not an issue in commercial arbitration, but it is at the core of the *good-governance standards embodied in investment protection treaties*.'⁶ In the very same opinion, Wälde advocates an award that would have a 'good-governance signal' as its ultimate goal, essentially a guidance for Mexico to observe in the future.⁷ Another analysis concludes that standards emerging from investment jurisprudence are 'not as different from standards that contemporary administrative law has been trying to enforce in the last quarter of century in the domestic sphere'⁸ and yet another sees BITs as consciously approximating the legal, administrative and regulatory framework in capital-importing states.⁹ There is, thus, a considerable degree of trust that is put into IIA provisions as good governance enhancers.

It is, however, important to assess what is actually embodied in IIAs in terms of prescribing good governance.

The first, and rather often voiced objection, relates to the vagueness of most common substantive standards found in IIAs. There is no need to reiterate the point in too much detail - it is highly questionable how the formulations of such high levels of abstraction found especially in older IIAs (but not quite eradicated in newer ones)¹⁰ can serve as meaningful practical guidance to host States.¹¹ These standards do not go beyond the level of higher order principles, appealingly formulated but of dubious practical value. Regarding the conclusion of IIAs, no State would have a principled reason to object to treating foreign investors (or pretty much anyone else for that matter) fairly, equitably, without discrimination or arbitrariness. Yet, the question of what this actually means in practice nevertheless remains. The existing body of jurisprudence has failed to clarify this, particularly regarding the FET standard.¹²

⁶ *International Thunderbird Gaming Corporation v. The United Mexican States* (Separate Opinion of Thomas Wälde of 1 December 2005), <http://www.italaw.com/sites/default/files/case-documents/ita0432.pdf>, accessed 14 August 2015, 13 (emphasis added).

⁷ *International Thunderbird Gaming - Separate Opinion* (n 5), 125.

⁸ H.P.Loose, "Administrative law and international law: the encounter of an odd couple" in P.H.F.Bekker, R. Dolzer, M.Waibel (eds), *Making Transnational Law Work in the Global Economy - Essays in Honour of Detlev Vagts* (CUP 2010) 404-405.

⁹ W.M.Reisman, RD Sloane (n 3) 118.

¹⁰ A.D Mitchell, E.Sheargold, T.Voon, (n 2) 5-7.

¹¹ See also S.Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart 2012) 147.

¹² A.D Mitchell, E.Sheargold, T.Voon, (n 2) 19.

It is commonly argued that this situation was planned, and that essentially it could hardly have been avoided.¹³ The indeterminacy of these standards is, the narrative proceeds, supplemented by their fleshing out in arbitral practice, accompanied by periodic enhancements of IIAs being concluded. The legitimacy issues caused by this incremental development through a self-generating are considerable, but will not be revisited here. However, further implications stemming from this view that are relevant for the suggested normative turn will be elaborated upon.

What seems to be an often unspoken assumption behind the view of IIL as a rule of law generator is that there is some uniform standard of good governance and rule of law that is to be equally applied to all States participating in the IIL. The underlying core premise is rather similar to the idea that good governance can be 'introduced' to developing countries from the outside as a 'finished product' or simple transplant. However, increasing literature as well show the numerous failings of the idea that idea of the 'rule of law' and/or 'good governance' can be transplanted without due regard to the national context or provide the expected developmental outcomes.¹⁴

Stephen Humphreys in his thorough analysis concludes that the transnationally imposed rule of law policy actually facilitated resource transfers, minimisation of labour costs and reduction of tax revenues, contributing to precariousness of host States instead of eliminating it.¹⁵ What is constructed in such endeavours is a vision of law and its institutions without regard to historical, local, cultural or social peculiarities - an 'easy universalism' that overlooks cultural specificity or historical cause.¹⁶ It is a centralised, globalised policy that assumes its own unproblematic transplantation that does not, however, materialise in practice.¹⁷

However, a further layer of contentiousness is added if the IIL regime is seen as one of the defining sources of uniform principles of good governance and rule of law. Even if one could perhaps accept, for discussion sake, that uniformity of these is possible, saying that IIL is to be its source raises new problems. ISDS has been in many ways rightfully described as problematic regarding, *inter alia*, the underlying ideas about

¹³ See, for example, A. Van Aaken, "International Investment Law between Commitment and Flexibility: A Contract Theory Analysis" (2009) 12 *J.Int'l Econ.L.* 507.

¹⁴ See, for example, the summary at L. Earle, Z. Scott, *Assessing the Evidence of the Impact of Governance on Development Outcomes and Poverty Reduction: Issues Paper* (University of Birmingham 2010) 4-5.

¹⁵ S. Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (CUP 2010), 219.

¹⁶ Humphreys (n 14) 220-221. See also T. Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie Endowment for International Peace 1999).

¹⁷ S. Humphreys (n 14) 223.

the rule of law displayed in the jurisprudence.¹⁸ These deficiencies have been attributed to the insufficient understanding of ISDS as a public order control and accountability mechanism by arbitrators and counsel alike.¹⁹

While there has not been much empirical investigation into the effect of IIL on the quality of the rule of law, what does exist does not seem particularly positive in this regard. According to the analysis by Ginsburg, IIAs actually have a minor *negative* effect on the rule of law in developing States. This is primarily because, at least in some circumstances, the avoidance of domestic judicial institutions removes the incentive on their side to improve.²⁰ Bearing in mind the dearth of empirical research, Bonnitca sets out reasonable tentative hypotheses regarding the relationship between the IIA provision interpretations and the improvement of domestic legal systems.²¹ To summarize, interpretations that impose liability when a measure does not comply with the requirements of the rule of law but do not impose liability when a measure does meet the requirements of the rule of law are more likely to create an incentive structure that encourages respect for the rule of law in host States.²²

While the hypotheses can be supported as reasonable, the question remains what are the requirements of the rule of law that need to be met? Which *law*? Who gets to prescribe these requirements? One potential answer is, again, that requirements are in the IIAs themselves. In that vein, some authors conclude that the pressure is put on the executive and legislature to conform administrative practice and legislative acts to IIA provisions.²³

It is highly contentious to use these provisions or their interpretations as reliable guidelines from both practical and legitimacy viewpoints. They are certainly insufficient as exclusive benchmarks to look up to. Essentially, the quest for rule of law and good governance benchmarks is put in hands of investment arbitrators that can and often do utilize the vagueness of substantive standards to promote particular visions of host State behaviour. These then can become entrenched through the widespread (albeit not formally recognized) use of investment awards as ‘precedents’. That is how, eventually, global

¹⁸ S.W Schill, “The Sixth Path: Reforming Investment Law from Within” (2014) 11 *Transnational Dispute Management*, 11 (hereinafter ‘The Sixth Path’).

¹⁹ Schill ‘Sixth Path’ (n 17) 11.

²⁰ T.Ginsburg, “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance” (2005) 25 *International Review of Law and Economics* 107, 113 and 121. Similar concerns regarding rule of law transplants regard the subversion of the domestic legislative process, and its replacement with the elite agreement at transnational level. See S.Humphreys (n 14) 224.

²¹ J.Bonnitca, “Outline of a normative framework for evaluating interpretations of investment treaty protections” in C.Brown, K.Miles (eds), *Evolution in International Investment Law and Arbitration* (CUP 2012).

²² J.Bonnitca (n 20) 457.

²³ A.Kulick, *Global Public Interest in International Investment Law* (CUP 2012) 126-127.

uniform good governance standards can in practice become visions of a relatively small and rather homogenous group. The system of ISDS as it exists now makes this both possible and legal.

This possibility comes under vehement attack from certain commentators. For Sornarajah, ensuring good governance through IIAs very much resembles old ‘civilizing’ arguments of colonial times, with the use of the doctrine of the rule of law as perhaps the oldest of the justifications advanced for the absolute protection of foreign investment.²⁴ The newer version is couched as ‘stability of rules in business’ but nevertheless is a perversion of the original concept of the rule of law that was meant to protect the powerless mass of humanity against tyrants.²⁵ David Schneiderman warns that while a rules-based investment system might be a laudable objective, the risk exists to privilege market over all else, thus perilously subduing the ‘rule of law’ to the interests of a privileged few.²⁶ The established transnational investment regimes thus ‘pins’ the States down, freezes politics and cabins alternative futures.²⁷ Similarly to Sornarajah, he is of the opinion that the revival of rule of law rhetoric in contemporary times signals the revival of classical legal thought, now in the guise of neoliberalism.²⁸

While one can certainly disagree with harshness of such qualifications, or agree with them partially,²⁹ the underlying problem remains. Imposing a particular worldview as universal is bound to encounter resistance. And if the IIAs are recognized as problematic in that regard, it becomes necessary to look beyond them in ISDS. There does not seem to be much that can be said against the sovereign right of a State to choose a particular vision of good governance, one that theoretically and practically does not need to completely coincide with the vision that IIAs allegedly embody, and yet does not necessarily infringe fairness, equitableness, non-discrimination or non-arbitrariness. Simply put, there is nothing that makes ‘one right way’ necessary in this context. There is no need to make Xiaoping’s proverbial cat exclusively black or exclusively white.

3. A normative turn

The principled allowance for every State to make its own choice comes clearly through a number of international instruments. Article 1

²⁴ M. Sornarajah, “The Case Against a Regime on International Investment Law” in L.E. Trakman and N.W. Ranieri (eds), *Regionalism in International Investment Law* (OUP 2013) 488-489.

²⁵ M. Sornarajah, 492.

²⁶ D. Schneiderman, “Investment Rules and the New Constitutionalism” (2000) 25 *Law & Social Inquiry* 521, 523.

²⁷ D. Schneiderman, 523.

²⁸ D. Schneiderman, 529.

²⁹ See S. Humphreys (n 14) 223.

of the Charter of Economic Rights and Duties of States unequivocally confirms the sovereign and inalienable right of every State to choose its own economic, political, social and cultural system.³⁰ The UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States contains the same right.³¹ The general position is well summarized by Reisman:

A basic postulate of public international law is that every territorial community may organize itself as a State and, within certain basic limits prescribed by international law, organize its social and economic affairs in ways consistent with its own national values.³²

Legislative expression of variations in the law of different states that result from this value differences are thus internationally lawful and entitled to respect.³³ It should be noted that this also resonates well with the view of many economists, notably Dani Rodrik, that each country should be able to build its own path into development.³⁴

That being said, national idiosyncrasy regarding rule of law should not be overemphasized. Particular national vision of good governance cannot, of course, be seen as a *carte blanche* to impose unhindered *fiat* of the State under the guise of some national specificity. Such approach almost instinctively seems not only lopsided against foreign investors, but also equally damaging to the long-term interests of the host State.

After all, it is hardly debatable that basic precepts of rule of law and at least some precepts of what constitutes good governance can be agreed upon, even if in relatively broad strokes.³⁵ There simply does not exist 190 or more truly unique ways to provide good administration.³⁶

However, the fact is that each of the existing national ways is couched in an intermingled web of legal, political and cultural traditions, international obligations, political and policy priorities and particular administrative capacities. An approach to assessing host State behaviour towards foreign investor that disregards this, and does not recognize that there should be a ‘zone of legality’ of State behaviour as opposed to ‘one right way’ arguably both endangers long-term sustainability of ISDS and, importantly, fails to utilize the full potential of the system in promoting

³⁰ G.A. Res. 3281 (XXIX), U.N. Doc. A/RES/3281 (1974).

³¹ G.A. Res. 2625, U.N. Doc. A/8028 (1970).

³² W.M. Reisman, “The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold” (2000) *15 ICSID Review* 362, 366.

³³ W.M. Reisman, 367.

³⁴ D. Rodrik, “Growth Strategies” in P. Aghion, S.N. Durlauf (eds), *Handbook of Economic Growth* (Elsevier 2005).

³⁵ See, for example, the United Nations position at <http://www.un.org/en/globalissues/governance/>, November 7, 2015.

³⁶ For what is at least formally a shared view of the EU and a number of African states, see Articles 9(3) and 9(4) of the Cotonou Agreement.

and securing rule of law in host States. As Montt notes, ‘[...]BITs require from states the creation, implementation and proper management of functional domestic regulatory systems. They can therefore act as rule-of-law-enhancers, a desirable outcome.’³⁷ As a matter of fact, this rule of law enhancement is sometimes seen as the key legitimacy-inducing justification and virtue of the ISDS in general.³⁸

There is thus a good reason to normatively expand the horizons of ISDS beyond the relatively narrow drive to contribute to FDI increase. The IIA preambles have consistently been used to identify the object and purpose of these agreements.³⁹ While they have been controversially used to focus solely on investor protection and investor-favourable interpretations,⁴⁰ there is definitely a scope for a more holistic view.

As recently argued by Kleinheisterkamp, the object and purpose of BITs cannot be simplistically reduced to enhanced protection of foreign investments only.⁴¹ The *telos* of IIAs remains the increase of social welfare in general, with privileges granted to foreign investors remaining merely one of the tools in that regard and not becoming the end in itself.⁴² The ultimate goal should remain the establishment of an essentially fair investment environment that recognizes the legitimate sphere of operation of the host State apart and beyond the rights of foreign investor.⁴³

Goals of IIAs can and should be interpreted more broadly as not only allowing, but encouraging holistic and comprehensive promotion of the (national, as opposed to rather elusive ‘transnational’) rule of law and good governance in State parties. As both older⁴⁴ and more recent⁴⁵ studies tend to show, it is the rule of law that is actually the most appealing factor to foreign investors (considerably more than just concluding BITs) and it is submitted that the most reliable way to secure it is to promote it under

³⁷ Mont (n 10) 76.

³⁸ Schill ‘Sixth Path’ (n 17) 9.

³⁹ R.Dolzer, C. Schreuer, (n 1) 29.

⁴⁰ See, for example, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Decision on Objections to Jurisdiction of 29 September 2004)116 and *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 (Award of 12 October 2005) 52. See also R.Dolzer, C. Schreuer, (n 1) 190-191.

⁴¹ J.Kleinheisterkamp, ‘Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions’ (2015) 78 *MLR* 793, 807.

⁴² J.Kleinheisterkamp (n 40) 811. This is also of broader relevance for stemming the general trend of deployment of the rule of law internationally which is characterized by privileging market solutions over other possible articulations of the public good. See S.Humphreys (n 14) 225.

⁴³ J.Kleinheisterkamp (n 40) 811; See also C.McLachlan, L.Shore, M.Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 21.

⁴⁴ S.W.Schill, ‘Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law’ in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 176.

⁴⁵ British Institute of International and Comparative Law/Hogan Lovells, *Risk and Return: Foreign Direct Investment and the Rule of Law* (BIICL 2015) 56.

the terms that the host State chose for itself and not through a process of top-down imposition.

Such a nationally oriented approach adds further legitimizing strength to capacious powers held by investment tribunals as it can directly benefit domestic citizens and business entities as well, and in particular avoid creation of foreign investment protection ‘bubbles’. Investment tribunals have the powers and enforcement mechanisms that many other international legal regimes cannot match, and deal with business operations that have been described as ‘the most important international transactions of the modern world’.⁴⁶ Tribunals thus have the power and leverage to make States take careful attention of their ‘good governance signals’ and enhance their rule of law accordingly. But wielding of this power should conform to a set of different principles than often encountered in current practice.

Bearing in mind exceptions that will be discussed further below, the argument submitted is that host States largely have in place legal frameworks that, if completely and thoroughly obeyed, would provide for the level of good governance and rule of law that no investor (or citizen, for that matter) would find nearly sufficient as to warrant international liability of the State. The ‘law on the books’, *if approached as a whole*, is generally not the problematic issue. Its application in practice can be, and relatively often is.

But this does not warrant imposition of new, particularistic law of protection of foreign investors that is often created in a process that is suspiciously similar to pulling rules out of thin air. Such processes run a high risk of breeding resentment and resistance in host State, squandering an excellent available mechanism for promotion of the rule of law and eventually damaging the long-term interests of foreign investors. States can and should be forced (where justified) to obey the rules that they chose for themselves, and to make their ‘law in books’ a properly applied law in practice. A proposed way to achieve this will be the topic of the remainder of this article.

4. The key guiding principles and a caveat

4.1. Reasonable fulfillment of obligations

Generally speaking, and subject to certain exceptions (primarily individual representations and assurances given to particular investors), the first guiding normative principle should be that IIA provisions and

⁴⁶ F.O. Vicuña, “Of Contracts and Treaties in the Global Market”(2004) 8 *Max Planck UNYB* 341, 348.

their interpretations should not demand more from a host State than to reasonably secure for foreign investors a legal and administrative surrounding that does not (in its content and operation) contravene its own national and international legal obligations *assessed in their entirety*. More succinctly, while one can extrapolate from IIAs a demand for a sufficiently proper functioning of the existing national legal system (within reasonable, adequately assessed bounds), there should be no demand for a perfect functioning of a hypothetical perfect national legal system. This is all the more relevant if the definition of this perfection is to be found in the risky and changing eye of the arbitral beholder.

The key right that foreign investors do have is the possibility to use the powerful mechanism of ISDS to make sure that State will uphold its own legal framework. This can be supplemented by a number of substantive international law rules and principles that can with certainty be established in this subject matter, and that are applicable through the provisions on applicable law specifically, and international character of ISDS and IIAs more broadly. But there is little to no justification for using the label of ‘international law’ as to fill IIA provisions with content that results in foreign investors essentially being granted the right to their own parallel legal system in a host State.

The norms found in IIAs, despite different efforts to establish their independent, homogenous substantive content, are still in essence devoid of clear prescriptions. They are, it is submitted, more aptly observed as a form of meta-norms, the gates through which it is possible to invoke a whole array of principles and rules appropriate to the particular legal situation at hand. Instituting a sufficiently rigorous manner for this invocation lies at the core of the proposed approach.

These efforts, it should be clear, are not completely novel. They draw upon existing contributions in literature aimed in this direction. Perhaps most prominently, Stephan Schill has called for a new methodology for ‘normative grounding’ of substantive standards of international law.⁴⁷ Decision-making of investment arbitrators should be adapted to respond to legitimacy debates and the expectations of all stakeholders. In the light of unlikely wholesale institutional reform and a large number of ‘old generation’ BITs this adaptation seems as a necessary complement, if not an outright alternative.⁴⁸ The proposals set out are further contribution in an attempt to concretize the content of this new ‘normative grounding’.

Structuring the way in which broad IIA standards are used to fully assess the fulfillment of the rule of law in each case opens the path for enhancing the dialogue between investment tribunals themselves, as well as

⁴⁷ Schill ‘Sixth Path’ (n 17) 3.

⁴⁸ Schill ‘Sixth Path’ (n 17) 4.

tribunals and host States, on different and more productive grounds. Instead of insisting on and hoping for clarification of substantive norms, the dialogue is to focus on refining the method of securing and promoting the national rule of law as the true FDI attraction point. The goal can and should be the promotion of the rule of *law* and not the rule of *investment law*.

4.2. Deference

Secondly, and as a corollary, the investment tribunals should demonstrate the higher level of awareness about their position and realize the necessity of a considerable (but not limitless) deference towards the actions of a host State. This view draws heavily upon the (comparatively common) use of deference employed by courts and tribunals when engaging in judicial review of acts of other organs, in particular when a degree of discretion is involved. Especially in the issues of judicial review (or similar processes) beyond the state, the sensitivity to the question of what level within multilevel governance is most suitable for making a particular decision assumes critical importance.⁴⁹

A good parallel in that regard can again be taken with the WTO dispute settlement. In face of considerable criticism that it should not become a mechanism for global entrenchment of a single form of state-market relations and allowed levels of regulatory interventions,⁵⁰ the WTO Appellate Body took on itself to create a new approach to reviewing domestic regulation. The aim was to avoid the intrusiveness of the neoliberal-era jurisprudence and leave the legitimate ‘political’ sphere intact in States.⁵¹ While Andrew Lang expresses reasonable skepticism that preserving national ‘autonomy’ is possible when States are already heavily constrained by other forms of international economic law, the appealing aspects of a new approach remain worthy of attention. The modesty, cautiousness and working from a position of profound awareness of the limited present legitimacy of WTO among public constituencies should enjoy principled support.⁵² As summarized by Howse and Nicolaidis, ‘there needs to be *prima facie* recognition of outcomes from more democratically legitimate political and regulatory institutions’.⁵³

The parallels should not end there. Other transnational regimes with unquestionably stronger institutional background (such as the EU or ECtHR) are often very reticent when it comes to imposing the

⁴⁹ A.von Staden, “The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review” (2012) 10 I-CON 1023, 1034.

⁵⁰ A.Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (OUP 2011) 343.

⁵¹ A.Lang (n 49) 316.

⁵² A.Lang (n 49) 344-46.

⁵³ As referenced in Montt (n 10) 347.

requirement of introducing new procedures into national law through judicial activism. The definite new trend in the CJEU jurisprudence of review is the adoption of so called ‘process review’ aimed at assessing if existing procedures were followed, as opposed to suggesting new ones.⁵⁴ Taking the example of ECtHR, relatively recent developments such as the 2012 Brighton declaration of all member states clearly reinforced the need for a margin of appreciation and the use of ECHR as a last resort after careful analysis of national laws and procedures.⁵⁵ Even for an institution with definite strong standing such as ICJ, it has been said that so much still ‘depends almost entirely upon moral suasion-the exercise of even the most responsible and restrained judicial discretion requires a very delicate touch’.⁵⁶

This is not to say that deferential approaches are uncritically accepted. As recently argued by Eirik Bjorge, in the context of recent ICJ jurisprudence, ‘[t]o international law [...] the slightly tired idea of the margin of appreciation is decidedly old hat. International law has been there, it has done that.’⁵⁷ Briefly, the main concern exhibited is that the granting of a margin of appreciation to one state may effectively give to that state a free rein vis-à-vis another state, thus undermining other State sovereignty.⁵⁸ However, while such an approach can be understood and supported in the context of inter-state relations, it does not bear direct relevance to the unique context of investor-State relations. It can only perhaps illustrate the level to which IIL adds to fragmentation of general international law and exhibits the needs for different reasoning.

As aptly formulated by Sureda:

Restraint would seem the wiser choice for *ad hoc* tribunals of limited jurisdiction. Avoidance of unnecessary pronouncements on contentious issues would help reduce the perception of a ruptured international investment legal regime and the resulting uncertainty. An international adjudicator deals with a dispute with the objective of contributing to the pacification and normalization of relations between the parties; its decision should not be counterproductive and exacerbate the differences.⁵⁹

⁵⁴ D.Chalmers, G. Davies, G.Monti, *European Union Law: Text and Materials* (3rd edn, CUP 2014) 922-925. See also K. Lenaerts, “The European Court of Justice and Process-Oriented Review” (2012) 31 Yearbook of European Law 3, 3-4 and, for example, the judgment in *Unibet* (C-432/05) as a good example to what lengths the Court is ready to go to accommodate existing national procedures as compliant with the Treaties.

⁵⁵ The Declaration is available at

http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

⁵⁶ C.A. Ford, “Judicial Discretion in International Jurisprudence: Article 38(I)(C) and “General Principles of Law”” (1994) 5 *Duke Journal of Comparative & International Law* 35, 79-80.

⁵⁷ E.Bjorge, “Been There, Done That: The Margin of Appreciation and International Law” (2015) 4 *CJICL* 181, 181.

⁵⁸ E.Bjorge (n 56) 190.

⁵⁹ A.R. Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (CUP 2012) 19.

And yet, empirical research tends to confirm that investment tribunals show little if any restraint when assessing host State behaviour.⁶⁰ The starting presumptions should not be that a strict or *de novo* review should be conducted in every case.⁶¹ If nothing else, a degree of mutual trust and comity should be presumed to exist among the parties to the IIA. There are indications that this idea is slowly gaining ground in practice and doctrine, yet a uniform approach that would be desirable still seems far off. The guiding light in search for it should be deference and respect towards governments, or what has been called a ‘jurisprudence of modesty’.⁶²

4.3. The need for additional guidance

Thirdly, it should be recognized that assessing a complete legal framework and maintaining an attitude of deference cannot on provide all the answers. The rules and/or principles can conflict, or simply strive toward different goals. Relevant provisions can leave ample discretion to a national decision-maker, the exercise of which still needs to be examined by the tribunal with some boundaries in mind lest the *fiat* of the State be reinstated as supreme. Different values and priorities still might need to be ranked, even if deference is in place.

It has been correctly observed, in a different but equally relevant context, that ‘[t]o ban non-liquet [...] was to institutionalize the need for judicial discretion’.⁶³ Yet, the legal reasoning in situations of ample discretion needs to be supplemented by additional and innovative tools. Normatively, it is exactly in situations like this that the ‘know it when I see it’ approach to the existence of an IIA breach, sometimes even celebrated in awards,⁶⁴ is most harmful to the legitimacy of the ISDS decisions. Likewise, it is exactly then that an excellent opportunity is lost to persuasively identify, explain, and potentially suggest remedy to deficiencies in national good governance and the rule of law.

The proposal put forward is to utilize two distinct categories of such tools, which provide grounds for further research. One is the recourse to what shall be further called *corrective factors* - an instructive list of

⁶⁰ See in general G. Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (OUP 2013).

⁶¹ See also for support and discussion Y. Shany, “Toward a General Margin of Appreciation Doctrine in International Law?” (2005) 16 *EJIL* 907, 909-910.

⁶² See Montt (n 10) 22. See also N. Mahmood, “Democratizing Investment Laws: Ensuring ‘Minimum Standards’ for Host States” (2013) 14 *Journal of World Investment and Trade* 79, 103.

⁶³ C.A. Ford (n 55) 60.

⁶⁴ See B. Kingsbury and S.W. Schill, “Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest - the Concept of Proportionality” in S.W. Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 77-78.

factors/questions that can contribute to reaching a normatively more acceptable outcome in situations where a decision can go either way.

The second is the recourse to *comparative standards* - examples of comparative law and policy in situations comparable to the one at hand. It is this recourse that can further ground the deliberations and decision of the tribunal in terms of normative acceptability and away from vagaries of subjectivity. It is also the power of potentially consistent comparative *opinio* on a particular issue that can effectively contribute to the enhancement of national law and policy, a process for which the investment award can serve as a conduit. Conversely, the analysis of the comparative landscape can indicate that a particular State behaviour is within the bounds of an established 'zone of legality', which can be a determining factor in evaluating the existence of a breach.

4.4. The crucial role of argumentative weight

Finally, what the application of these principles is meant to ultimately achieve is the existence of a strong *argumentative weight* of a particular investment tribunal award. Argumentative weight is aimed at enhancing the acceptability of the decision to both the investor and the host State, and thereby contributing to the elimination of the delegitimizing image of ISDS as a biased, subjectivity-driven method of dispute resolution.

It is worth explaining the use of the term argumentative (or persuasive) *weight*. It is chosen over perhaps more common 'authority' as to signify the character of many investment awards which have considerable *legal* (especially bearing in mind the ICSID regime of enforcement and annulment), *political* (the possibility to cause inter-state friction) and *economic* weight (as they can sometimes amount to large parts of national budgets). The *argumentative* weight needs to serve as a counterweight of sorts - if the award is to enjoy such power, its reasoning and approach must be of such strength to truly justify it.

In the light of relative absence of legal obligations on the type, amount and persuasiveness of reasoning in investment awards (apart from a most general requirement for them to be reasoned),⁶⁵ a normative obligation should be put in place for extensive and rigorous reasoning and justification of adopted solutions within, again, the context of the complete legal framework. Such reasoning, arguably, plays an immensely important role in securing a truly acceptable outcome for both parties.

⁶⁵ Most importantly in ICSID Convention, Art. 48 (3), but other relevant arbitration rules have a similar (and similarly cursory) requirement. See also, for example, UNCITRAL Arbitration Rules 2010, Art. 34 (3), SCC Rules 2010, Art. 36 (1) and ICC Rules 2012, Art. 31 (2).

In a nutshell, it should elucidate to either or both of the parties what, where and when went wrong - for the losing host State what was its failing to respect its own complete legal framework and for the losing investor what were its own shortcomings in terms of, e.g., its lacking due diligence or failure to conform to national law. Concentrating again on the host State, this analysis can actually meaningfully contribute to improvement of its overall legal, business and administrative environment. Concrete engagement with a host State's legal framework and rigorous argumentation on what principles/rules were breached and why was this the case to an extent sufficient extent to engage responsibility can have true persuasive and instructive value for a particular State in avoiding such occurrences in the future.

Emphasis on argumentative weight is meant to break the often-observed circle of awards referring to previous awards up to a progenitor in which a rule was developed out of 'common sense' or simple arbitral creativity. The importance of persuasiveness and reasoning is well captured by Sureda in the context of IIAs and their standards. As he observes, '[t]he choice of the standard with the largest measure of discretion implies a proportionate effort to justify it, if the exercise of the discretion is to remain legitimate.'⁶⁶ Arbitrators as legal decision-makers must retain awareness of their role, the existence of their discretion and the need to formulate a purpose behind a legal norm created through judicial discretion.⁶⁷ Arguably, the duty of awareness and provision of justification cannot rest exclusively or even largely on reliance on quasi-precedents or essayistic reasoning adopted in numerous awards.

Regarding the weakness of persuasion that can come from IIL 'precedents' a clear and astute analysis is offered by Orakhelashvili.⁶⁸ According to him:

In a legal order whose rules are created by inter-state agreement, judicial law-making and precedential force of awards is conceptually impossible.[...] The reference to previous decisions confers to them the conclusive relevance and legitimacy that is not inferable from any source of international law and goes against the absence of precedent in the international legal system. Such reference in particular involves the argument that the relevant interpretative argument is correct because the particular judicial decision suggest it; it involves no substantive explanation as to the merits of that interpretative argument, nor addresses the need of ascertaining as to whether this is exactly what the parties have

⁶⁶ A.R. Sureda (n 58) 140.

⁶⁷ A. Barak, *Judicial Discretion* (Yale University Press 1989) 146-147. See also Ford (n 55) 53.

⁶⁸ A.Orakhelashvili, "Principles of Treaty Interpretation in the NAFTA Arbitral Award on Canadian Cattlemen" (2009) 26 *Journal of International Arbitration*, 159.

intended.[...] Consequently, the use in the award of previous decisions as an interpretative factor has no conceptual and legal justification [...].⁶⁹

Hope in the strength of reasoning in IIL awards is also often frustrated. Based on empirical research conducted by Tony Cole, tribunals generally adopt more norm-generating than persuasiveness oriented approach, with low citation rates and tribunals usually expressing and opinion without providing supporting citation to authoritative instruments.⁷⁰ The predominant citations remain reserved for ILC writings and a small number of academic texts (with Christoph Schreuer's ICSID Convention commentary as absolutely dominant).⁷¹

Even more worryingly, awards often include extended passages of analytic discussion, but this discussion is rarely supported by more than an occasional citation of a non-State-generated writing. It is common for multiple pages of discussion to be offered without the tribunal ever considering even a single argument advanced in an academic or institutional writing.⁷² Cole's conclusion on the issue is sound and worthy of support - award must be drafted so to explain clearly and compellingly why the tribunal reached the conclusions that it did, showing the necessary research to reach an informed decision on the law and defensible reasons for adopting the understandings of the law upon which they have relied.⁷³

The direct relevance of acceptability of decisions for long term legitimacy and stability is confirmed yet again by a recourse to comparable transnational regimes. An excellent insight regarding ECtHR is offered by Carozza.⁷⁴ For a long period the ECtHR had to seek its legitimacy through the acceptance of its judgments in internal legal orders of States.⁷⁵ Seeking to ground its decisions in the actual practice of Member States helped it establish and maintain political legitimacy and ensure the viability of the system, in face of risks that States could abandon the system in protest over Court's intrusion into national 'political morality'.⁷⁶ More recently, similar arguments have been raised regarding the need of the CJEU to show due deference to decisions of national courts in questions of identifying national identity in accordance with Art 4(2) of the Lisbon Treaty. According to von Bogdandy and Schill,

⁶⁹ A.Orakhelashvili (n 67) 168-169.

⁷⁰ T.Cole, *The Structure of Investment Arbitration* (Routledge 2013) 52.

⁷¹ T.Cole (n 69) 52-53.

⁷² T.Cole (n 69) 59.

⁷³ T.Cole (n 69) 61.

⁷⁴ P.G.Carozza, "Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights" (1998) 73 *Notre Dame Law Review* 1217.

⁷⁵ P.G.Carozza (n 73) 1227-1228.

⁷⁶ P.G.Carozza (n 73) 1227-1228.

If the ECJ does not adopt the position expressed by the domestic constitutional court, it will itself need to *provide convincing reasons to the European public at large* why the duty to respect national identity, contrary to the position of a domestic constitutional court, does not allow the Member State in question to derogate from its obligation to implement EU law.⁷⁷

If the ISDS is to achieve its full potential as a rule-of-law enhancer and long-term FDI magnet at the national level, the persuasiveness of awards needs to be oriented towards the parties in a particular dispute and not with one eye looking at the next case or appointment. Arguably, what needs to be found convincing for the next case is the rigour and thoroughness with which the tribunal applied the proposed normative approach, and not the invention of a new substantive rule under the aegis of IIA standards.

4.5. A caveat

It seems highly unlikely that a degree of uncertainty, the element of subjectivity or arbitrators' own imprint can be eliminated from ISDS,⁷⁸ as it can hardly be eliminated from other forms of dispute settlement. Even a relatively stringent following of the proposed approach in many instances may leave room for a degree of discretion that remains in place even if corrective factors and comparative insights are taken into account. So does the possibility of decisions that can be labeled as controversial or even as 'egregious failures'.⁷⁹ Dispute settlers as ideally objective, impassionate and omniscient *bouches de la loi* will remain an unattainable ideal.

But this does not prevent striving towards a model that brings in clarity of approach, rigorousness of analysis and tends to adequately limit (but not eliminate) the relevance of the human factor. The disproportionate importance of the tribunal composition is something that has been noted in the context of the ISDS. It is exactly the situation that decisions can be accurately estimated in advance based on the arbitrators, that is arguably pernicious to the ISDS foundations and that can and should be tackled.⁸⁰

A new normative approach, or to be more exact its wider acceptance, can provide a common ground on which a level of arbitrator-

⁷⁷ A.von Bogdandy, S.W. Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty"(2011) 48 *CMLR* 1417, 1451 (emphasis added).

⁷⁸ See Schill 'Sixth Path' (n 17) 4-5 ('[...]no matter how precise applicable standards are drafted, the adjudicatory process as such necessarily involves a considerable degree of discretion. [...]Refining substantive treaty standards, in other words, will only go so far in reducing arbitrator discretion; it can never exclude it completely.')

⁷⁹ F.Ortino, "Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures" (2012) 3 *J. Int. Disp.Settlement*, 31.

⁸⁰ As Shultz aptly points out, any system heavily based on human factor fails as a rule of law. See T.Schultz, *Transnational Legality: Stateless Law and International Arbitration* (OUP 2014), 175.

neutral consistency can be built. The aim should always remain to avoid sacrificing the uniqueness of individual disputes on the altar of elusive substantive consistency of decisions.

5. Conclusion

Both in order to strengthen the legitimacy foundations of IIL and properly fulfill their legal mandate, ISDS tribunals should utilize their power and discretion to become a tool for promoting the rule of law and good governance at the national level. This should be done, to the extent possible, in accordance with the host State's own vision of these concepts as opposed to elusive and controversial 'transnational' benchmarks in this field.

But, equally crucially, fuller engagement with domestic law and domestic rule of law in the Fullerian sense is not only legally mandated but is also normatively warranted to provide a source of legitimization for the broad powers investment tribunals exercise. The sheer potential of ISDS awards to cripple national budgets with a single decision cannot be justified by recourse to (empirically largely unproven) contribution to attracting foreign direct investment flows. If anything, it is the very existence and cultivation of rule of law that has been empirically proven to be a magnet for attracting investment. Mere conclusion of BITs has yet to clearly show such effect.

Such a normative approach can provide a form of counter-weight to concerns arising out of the peculiar and arguably controversial way in which IIL became a form of a transnational governance mechanism, as well as from its increasing norm generation. In this way, it can also both draw on experiences from other existing and emerging transnational regimes, and become a source of inspiration for them.

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**PREDLOG NOVOG NORMATIVNOG PRISTUPA
INVESTICIONOJ ARBITRAŽI I NACIONALNOJ VLADAVINI
PRAVA**

Rezime

Transnacionalne vizije o tome kako bi vladavina prava i dobro upravljanje trebalo da izgledaju na nacionalnom nivou su proizvod poslednjih nekoliko decenija. U ovom radu se iznosi teza da je međunarodna investiciona arbitraža efektivno korišćena kao jedno od oruđa za promovisanje takvih vizija, uprkos njihovim dosadašnjim kontroverznim praktičnim rezultatima. Kako bi se iskoristili objektivno postojeći potencijali investicione arbitraže, u radu se predlaže normativni zaokret koji bi obuhvatao usredsređivanje na promovisanje vladavine nacionalnog prava, a ne vladavine investicionog prava.

Ključne reči: međunarodno investiciono pravo, međunarodna investiciona arbitraža, vladavina prava