WHAT INTERNATIONAL INVESTMENT LAW AND LATIN AMERICA CAN AND SHOULD DEMAND FROM EACH OTHER. UPDATING THE BELLO/CALVO DOCTRINE IN THE BIT GENERATION

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> I have asked how we can overcome the governance dilemma on a global scale. That is, how can we gain benefits from institutions without becoming their victims? How can we help design institutions for a partially globalized world that performs valuable functions while respecting democratic values? And how can we foster beliefs that maintain benign institutions?. . . As students of political philosophy, our objective should be to help our students, colleagues, and the broader public understand both the necessity for governance in a partially globalized world and the principles that would make such governance legitimate. . . If global institutions are designed well, they will promote human welfare. But if we bungle the job, the results could be disastrous.
>
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[1] Robert O. Keohane, *Governance in a Partially Globalized World. Presidential Address, American Political Science Association, 2000*, 95 AM. POL. SCI. REV. 1, 11-12 (2001).

INTRODUCTION: INTERNATIONAL LAW AS GLOBAL GOVERNANCE

To talk about the "BIT generation"[2] today in Latin America is not easy. The somewhat traumatic experience of Argentina with investment arbitration, plus the shift to the left of several countries, makes it very difficult to try to see the big picture of present international investment law. Yet the BIT generation is a global phenomenon that goes beyond Latin America. Therefore, as I will try to show in this paper, developing countries in general and Latin America in particular face the challenge to think about the BIT generation in terms of global governance and global constitutional and administrative law, and to assess whether or not this new structural pillar of the world order is advancing essential goals such as economic development, the rule of law, and, more generally, personal autonomy and welfare.

If we take a look from five thousand feet high, one thing appears very clear: BITs' architecture and main dimensions are no exception among other institutional arrangements established at the supranational plane after the end of the Cold War. In fact, the BIT generation forms part of a new era of globalization and global law that is characterized by the remarkable expansion of supranational governance mechanisms.[3]

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[2] The term was coined by Michael Reisman & Robert D. Sloan, *Indirect Takings and its Valuation in the BIT Generation*, 74 BRIT. YEAR. INT'L L. 115 (2003).

[3] *See* Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 144-45 nn.1-5 (2001) ("The number of [lawmaking and dispute settlement] institutions operating outside the confines of national borders have become more numerous and heterogeneous in the last decades of the twentieth century. Indeed, their growth appears exponentially."). *See also*, Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1495 (2006), and David Held, *The Transformation of Political Community: Rethinking Democracy in the Context of Globalization*, in DEMOCRACY'S EDGE 84, 84 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

This comes at little surprise: the degree of interdependence that exists in the modern world demands effective supranational governance mechanisms.[4]

By definition, supranational governance mechanisms suppose the delegation of powers and functions by the state.[5] Those delegations, severely erode traditional concepts of sovereignty,[6] democratic self-determination[7] and state (quasi) monopoly over law. Globalization, as Ladeur points out, "is based on exchange processes which, more or less, bypass both the state and the traditional international character of the world economy in the past."[8] Hartley similarly remarks that globalization, as a process, "takes

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[4] *See e.g.* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 489-90 (2001) ("The solutions of vital problems, such as national security, protection of basic human rights, international trade and economic development, the surge of migration, environmental protection, and cross-border criminality, has moved beyond the reach of individual states and has called for institutionalized commitment and cooperation on global and regional levels."); Esty, *supra* note 3, 1493 ("The interdependence of our globalized world has become painfully evident in recent years. National governments alone cannot address a range of critical issues, including terrorism, trade liberalization, economic integration, infectious diseases, and worldwide environmental issues such as climate change."), and *id.* at 1500. *See also*, Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193, 194-95 (2003).

[5] *See* Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 261, 302 (2003) ("Powers are increasingly shifted from the national level to international and supranational governance structures."). *See also*, DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY (Thomas M. Franck ed., 2000).

[6] *See e.g.* ANN-MARIE SLAUGHTER, A NEW WORLD ORDER 266-67 (2004) ("Theorists, pundits, and policymakers all recognize that traditional conceptions of sovereignty are inadequate to capture the complexity of contemporary international relations. The result is seemingly endless debate about the changing nature of sovereignty: what does it mean? Does it still exist? Is it useful?"). *See also,* Karl-Heinz Ladeur, *Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 89, 110 (Karl-Heinz Ladeur ed., 2004), Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 843 (2003), Harold H. Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2631 (1997), and John J. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 786 (2003).

[7] *See* Stein, *supra* note 4, 490 ("Internationalization almost invariably means a loss of democracy.") (citations omitted). *See also*, Thomas M. Franck, *Can the United States Delegate Aspect of Sovereignty to International Regimes*, in DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY 1, 2-3 (Thomas Franck ed., 2000).

[8] Ladeur, *supra* note 6, 5.

away from individual States the ability to control day-to-day activities within their territories. With globalization, a country is no longer 'an island into itself'."[9]

The erosion of venerable concepts such as sovereignty, democracy, accountability, and citizen participation in public affairs signifies a serious normative conundrum for the new post-Cold War international law.[10] If the state is constrained by these new rules and principles, this necessarily means that the domestic political process is equally limited. Von Bogdandy summarizes this situation by noting that "to the extent that national politics reflect democratic processes, globalization and democracy clash."[11]

In other words, supranational entities can impose regulatory solutions which supersede those that were adopted domestically in accordance with the preferences and values of the people.[12] In consequence, international law claims authority, and an authority superior to that of the state. But again, where lies the legitimacy of the policies and values that international law impose on domestic legal and political processes? Kumm provides an accurate summary of the authority/legitimacy problem of present international law, that deserves an extended quotation:

> In the 15 years following the end of the Cold War, developments in international law have brought serious legitimacy issues to the fore. The moment of triumph for the post-World War II model of liberal constitutional democracy at the end of the Cold War is increasingly feared to have been the prelude of its decline. This decline is linked to the emergence of the international legal order that increasingly serves — if not as an iron cage — certainly as a firmly structured normative web that

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[9] TREVOR C. HARTLEY, EUROPEAN UNION LAW IN A GLOBAL CONTEXT at xv (2004).

[10] Esty, *supra* note 3, 1515 notes how "many scholars thus see democratic foundations for the exercise of power as the sine qua non of legitimacy. To the extent that this is true, global governance is doomed to illegitimacy." *See also*, Martin Shapiro, *Administrative Law Unbounded: Reflection on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 374-75 (2001).

[11] Armin Von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT'L L. 885, 889 (2004).

[12] *See* Helfer, *supra* note 4, 197 ("Where treaty obligations are dynamic and evolve through institutional processes outside of any one state's control, compliance with those obligations may clash with domestic preferences and raise trenchant legitimacy concerns. The formal rules of state consent to treaties do little to ameliorate these concerns, suggesting the need for alternative sources of legitimacy to support adherence to international agreements and institutions.").

> makes an increasingly plausible claim to authority. It tends to exert influence on national politics and legal processes and often exerts pressure on nations not in compliance with its norms. Actors in constitutional democracies are increasingly engaging seriously with international law's claim to authority. What they find once they seriously engage in international law gives rise to concern. Citizens find themselves in a *double bind*: the meaning of participation in the democratic process on the domestic level is undermined as international law increasingly limits the realm in which national self-government can take place.[13]

In some cases, the new model of international law as global governance claims authority with mechanism as effective as direct effect and supremacy (the main example is, of course, European Union institutions, without entering into the debate of the nature of such legal order , i.e. supranational versus international). And it does so by borrowing power from whom used to monopolize it (or intend to): the state. In other words, the new international law "diminishes the authority and power of a state by restraining its internal decision-makers."[14] After all, that is the precise reason why international governance mechanisms were created in the first place.

This means that the impact of international law on domestic public law is not trivial: constitutional law (and administrative law too) "loses its claim to regulate comprehensively the exercise of public authority within the territorial limits of the state."[15] As Cottier & Hertig observe, "the Constitution itself can no longer pretend anymore to provide a comprehensive regulatory framework of the state on its own. . . [T]he national Constitution today and in the future is to be considered a 'partial constitution,' which is completed by the other levels of governance."[16]

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[13] Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 912-13 (2004).
[14] Tai Heng Cheng, *Power, Authority, and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 482 (2005).
[15] Christian Walter, *Constitutionalizing (Inter)national Governance—Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN Y.B. INT'L L. 170, 194 (2001).
[16] Cottier & Hertig, *supra* note 5, 303-04.

The consequence is that new global governance mechanisms are changing our views not only of international law, but also of domestic public law. Before, domestic public law used to be considered part of the *domaine reservé* of the state, and therefore, the exclusive province of government monopoly. Today, *domaine reservé*, both as a political and juridical concept, is over.

With this general background in mind, I plan to turn the attention now toward the BIT generation, and view it as one more manifestation of the general trend depicted. The challenge is then, precisely, to ask the normative questions of authority and legitimacy that commentators and scholars noted before in the precise context of foreign investment. For the purpose of focusing on this specific context, I will assume the model of international law as governance as a "given aspect" of the modern world, leaving it out of the discussion. Of course, this does not mean that it is not essentially problematic on a more general scale, but merely that I will not address those more general difficulties here.

As the title of this paper suggests, I am rephrasing those questions in the following, more concrete and restrictive terms: What can/should the BIT generation demand from Latin America and from developing countries more generally, and what can/should it not? What can/should Latin America demand from the BIT generation? And one extra question not included in the title: what challenges must Latin America self-impose as a consequence of being part of the BIT network?

In trying to answer these normative questions, I will rely on one of the main lessons of international law Latin America gave to the world in the 19th century: the Calvo Doctrine according to its original formulation. The Calvo Doctrine, posing that "equality is the maximum," is a political/juridical concept that has been deeply

misunderstood. Three key elements of this Doctrine always pass unnoticed. First, it was invented much earlier than the first writings of Carlos Calvo. Indeed, it appeared as early as 1832, in the first Latin American treatise of international law: Andrés Bello's *Derecho de Jentes*. That is, the doctrine is as old as the then new independent region.[17]

Second, the Doctrine was created as part of a framework designed to incentivate foreign investment in the region: foreign investors were offered and provided with full civil (non-political) legal equality, a revolutionary statement for those times and perhaps still for the present times.[18] The Doctrine was then the mere reverse side of that basic equality created to promote immigration and investment: if investors wanted that advantage, then they could not ask for more than equality, with the exception of situations of denial of justice.

And third, the Doctrine's creators and promoters were firm believers in property rights and economic liberalism; after all, both Bello and Calvo were men of their times. For this reason, and in order to avoid all the anti-investment ideological dimensions that

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[17] ANDRÉS BELLO, PRINCIPIOS DE DERECHO INTERNACIONAL 77 (2d ed. 1844, printing of 1847) ("Es obligación del soberano que les da acogida [a los extranjeros] atender á su seguridad, haciéndoles justicia en sus pleitos, y protegiéndolos aun contra los naturales, demasiado dispuestos á maltratarlos y vejarlos, particularmente en paises de atrasada civilizacion cultura. *El estranjero á su entrada contrae tácitamente la obligacion de sujetarse á las leyes y á la jurisdiccion local, y el Estado le ofrece de la misma manera la proteccion de la autoridad pública, depositada en los tribunales. Si estos contra derecho rehusasen oir sus quejas, ó le hiciesen una injusticia manifiesta, puede entónces interponer la autoridad de su propio soberano, para que solicite se le oiga en su juicio, ó se le indemnizen los perjuicios causados.* Los actos jurisdiccionales de una nacion sobre los estranjeros que en ella residen, deben se respetados de las otras naciones; porque al poner el pié en el territorio de un Estado estranjero, contraemos, segun se ha dicho, la obligacion de someternos á sus leyes, y por consiguiente á las reglas que tiene establecidas para la administracion de justicia. Pero el Estado contra tambien por su parte la obligacion de observarlas respecto del extranjero, y *en el caso de una palpable infraccion, el daño que se infiere á este, es un injuria contra la sociedad de que es miembro. Si el Estado instiga, aprueba ó tolera los actos de injusticia ó violencia de sus súbditos contra los estranjeros, los hace verdaderamente suyos, y se constituye responsable de ellos para con las otras naciones*.") (emphasis added).

[18] *See e.g.,* article 57 of the Chilean Code of 1854 also drafted by Andres Bello: "La ley no reconoce diferencias entre el chileno y el extranjero en cuanto a la adquisición y goce de los derechos civiles que regla este Código."

the 20th century added to the Calvo Doctrine —which today typically frightens foreign investors — I will call this original version the Bello/Calvo Doctrine.

Yet, at the same time, it should not be forgotten that the Doctrine was an answer to the concrete and specific 19th century enemies of diplomatic protection and gunboat diplomacy. The fact that those enemies do not exist anymore — at least not since the Porter Convention (1908) and the U.N. Charter (1945) — should not be an obstacle to conclude that the deep normative roots of the Doctrine are now more alive than ever: equality between nations, and equality between nationals and foreign investors. The point is, though, that the Doctrine needs updating.

Concretely, this paper explores how this old Latin American Doctrine can serve us to understand the "governance dilemma"[19] dimension of the BIT generation, that is, that "although institutions are essential for human life, they are also dangerous."[20] As the following pages will try to prove, the updated version of the Bello/Calvo Doctrine imposes two minimal conditions of legitimacy to the BIT generation. The first condition requires that the BIT jurisprudence resulting from the broad and open-ended BIT provisions crystallize into what I refer to as *BITs-as-developed countries-constitutional law-and-no-more*.

If BIT jurisprudence crystallizes in *the bad case* equilibrium, BITs will end up being a *gunboat-arbitration* in the same sense that protection of aliens abroad by their states was a *gunboat-diplomacy* during the 19th century. Indeed, there exists the danger that BIT jurisprudence ends up crystallizing the broad BIT principles into concrete rules

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[19] Keohane, *supra* note 1, 1.
[20] *Id.*

that protect property rights and economic freedoms to a much greater extent than what constitutional and supreme courts in the U.S. and Europe have traditionally done. If that is the case, equality between nations would be breached.

The second condition is that BIT law should not become a privilege law for foreigners, in which BITs are converted into "legal enclaves" or a privilege for aliens.[21] This second condition, of course, depends on developing countries' own will. If BITs really contain international minimum standards and not an unjustified commitment to the status quo, then those standards should necessarily be extended, sooner or later, to domestic investors. So, provided that the standards embodied in BITs go no further than those established in developed countries, there is no reason nor basis for not extending them to domestic players.

The idea today is not to level foreign investors down to the potentially precarious condition of national investors, but to demand reasonable principles of international investment law, and to then level national investors up to those standards. If Roth commented more than half a century ago that "South America was and remains the centre of the propaganda which maintains that the alien can have no different nor greater rights than the nationals,"[22] now we should say that "the national can have no different nor weaker rights than the alien," of course, provided that the international minimum standards are set at a reasonable level.

This paper proceeds as follows. Part I presents a general overview of the BIT generation phenomenon. Part II explores from a general perspective why we can affirm

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[21] The concept of BITs as "legal enclaves" was developed by Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World*, draft, available at www.unisi.it/lawandeconomics/stile2004/daniels.pdf (last visited Feb. 16, 2007).

[22] ANDRES H. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 69 (1949).

that the BIT generation constitutes an arrangement of global governance. Part III explains the impact of the BIT generation in terms of Global Constitutional Law and Global Administrative Law. Parts IV, V and VI intend to ask the normative questions presented above in this introduction. The conclusion summarizes the basic ideas of this paper, and presents a course of action for Latin America, as well as an assessment of the current state of affairs of the regional efforts to protect itself from potential abusive mechanisms of global governance.

1. A General Overview of the BIT Generation

From 1959, when Germany and Pakistan concluded the first bilateral investment treaty,[23] to 2005, the number of BITs has grown globally to 2,495.[24] With the intention of increasing the inflow of foreign direct investment (FDI), developing countries have massively embarked on an ongoing project to conclude these treaties with developed countries, and also among themselves.[25] As a result, at the beginning of the 21st century, we are witnessing the development of a structural pillar of the new world order: the BIT generation.

Among developing countries, African and Southeast Asian nations were the first to begin signing BITs. They followed programs that were created and implemented at the

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[23] *See Treaty for Promotion and Protection of Investment*, Nov. 25, 1959, West Germany-Pakistan, 457 U.N.T.S. 23.

[24] *See* United Nations Conference on Trade and Development, World Investment Report 26 (2006). About 70% of them are currently active.

[25] *See* Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 Mich. J. Int'l L. 621 (1993) and Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 Int'l L. 655 (1990). *See also* a list of BITs in United Nations Conference on Trade and Development, Bilateral Investment Treaties in the Mid-1990s (1998). A more recent list, though incomplete, is available at the UNCTAD website http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited Dec. 13, 2005).

end of the 1950s by Western European countries, originally Germany and Switzerland. China and Eastern European nations followed during the 1980s. Latin American countries, by contrast, entered this picture somewhat later. With the exception of several early, atypical cases, they began to join the BIT system in 1987,[26] most joining after 1990.[27] By then, the phenomenon had become highly popular and accepted throughout the world. As a result, the BIT system grew from being a network of 265 treaties in mid-1987,[28] to 700 in 1994,[29] 1857 in 1999,[30] and finally, to the current size of nearly 2500 treaties by the end of 2005.

The BIT generation is a network of treaties that are very similar, though not identical.[31] These treaties regulate the admission, treatment and expropriation of foreign investment, as well as the settlement of disputes. The common legal architecture of BITs is straightforward. Host states commit themselves to providing a stable regulatory system aimed at the protection of investments, including in most cases the provision of "fair and equitable" treatment (F&ET), full protection and security, treatment no less

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[26] Only Bolivia, Jamaica and Uruguay began concluding BITs after 1987.

[27] The order of entrance into the system is the following: Argentina (1990), Venezuela (1990), Chile (1991), Perú (1991), Paraguay (1992), Cuba (1993), Ecuador (1993), Honduras (1993), Colombia (1994), Costa Rica (1994), El Salvador (1994), Nicaragua (1994), Mexico (1994), Guatemala (1996).

[28] *See* UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 6-7 (1988). At the time, according to the Centre, *id.* at 7, "the majority of developing countries which have signed bilateral investment treaties are to be found in Africa and South-East-Asia."

[29] *See* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES xii and 267-326 (1995).

[30] *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES 1959-1999 at 1 (2000) (available at http://www.unctad.org/en/docs/poiteiiad2.en.pdf, last visited Aug. 4, 2006).

[31] *See* DOLZER & STEVENS, *supra* note 29, xii. *See also*, Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties*, 18 N.Y. INT´L L. REV. 1, 8 (2005) ("The fundamental of BITs, including their objectives, format and broad underlying principles, have changed little over the years."); Vaughan Lowe, *Regulation or Expropriation*, 55 CURRENT LEGAL PROBS. 447, 451 (2002) ("BITs differ in their detail; but all provide broadly the same protection. The three main provisions have already been mentioned: the guarantees against unlawful expropriation, and the duties to treat investment fairly and equitably and to give them full security and protection.").

favorable than that provided to nationals (NT) or to third-state nationals (MFN), and no direct or indirect expropriation without proper compensation.

A quick comparison of all the treaties that form this pool reveals two characteristics which, though crucial for understanding the emergence of the BIT, have been somewhat overlooked by scholars and commentators. The first of these is that BITs are written using extremely broad, and open-ended concepts. BIT language, in other words, resembles Constitutional language, and it is no exaggeration to state that BITs represent actual Economic Constitutions for foreign investors doing business in countries that have adopted them. More importantly, not only do BITs contain specific "constitutional" provisions that favor foreign investors, but also give "original" "constitutional" jurisdiction to arbitral tribunals, thus replacing domestic courts. As is well known, this jurisdiction is "original," because investors do not have the burden to exhaust domestic legal remedies, as is the general rule in customary international law.

The second somewhat underreported feature of BITs is that they are all worded in more or less the same terms.[32] As one French commentator remarks, "whilst these treaties are signed during different periods of time and with different states, they remain similar in content. Numerous provisions of these treaties are identical. They use specific investment law vocabulary,"[33] citing notions such as "fair and equitable treatment," "expropriation," "measures tantamount to expropriation," "fork in the road," and

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[32] In 1987, Eileen Denza & Shelag Brooks, *Investment Protection Treaties: United Kingdom Experience*, 36 INT'L L. & COMP. L. Q. 908, 913 (1987) commented that "nearly 300 treaties now exist worldwide—broadly similar in character, content, and standards, although there are important national differences in emphasis and detail. The effect has been to create an infrastructure of agreements based on realistic accommodations rather than political rhetoric, and to provide important support for those standards of customary international law which had seemed to be slipping away."

[33] Pierre Duprey, *Do Arbitral Awards Constitute Precedents? Should Commercial Arbitration Be Distinguished from Arbitration Based on Investment Treaties*, in TOWARDS A UNIFORM INTERNATIONAL ARBITRATION LAW? 251, 276 (Emmanuel Gaillard ed., 2005).

"umbrella clauses."[34] We have witnessed a legal *de facto standardization*, in which all countries have adopted more or less the same basic treaty. Indeed, as Douglas acutely points out, "the striking feature of this collection of model BITs is that their formal layout and substantive content are very similar, often practically identical, in spite of the different economic or cultural reality prevailing in the states in question."[35]

The combination of these two aspects signifies that BIT interpretation is giving rise to a genuine constitutional jurisprudence, by which I mean a process of judicial norm-creation that gives actual specific content to the overly general provisions of the treaties.[36] And from a mere descriptive perspective, we can thus see how, after the first arbitral award was rendered in 1990,[37] BIT case law has started to become its own distinct field of international law. This has resulted in "the establishment of a genuine arbitration case law specific to the field of investment."[38]

That this revolutionary addition to the new world order saw the light of day without the scrutiny of domestic constituencies in the developing world should not come as a surprise; after all, this is often the norm in international relations and foreign affairs.[39] In any case, the result is that developing countries are only now realizing the full import of what it means to be part of the BIT system. Finally, at a time when there is

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[34] *Id.* at 276.
[35] Zachary Douglas, *The Hybrid Foundation of Investment Treaty Arbitration*, 74 BRIT. Y. B. INT'L L. 151, 159 (2004).
[36] *See* Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade,* 12 EUR. J.INT'L L. 39, 46 (2001) ("generation of constitutional norms and structures by judicial interpretation.") and *Id.* at 47 ("constitutionalization as judicial norm-creation.").
[37] *See Asian Agric. Prod. Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3 (June 27, 1990).
[38] Duprey, *supra* note 33, 276-77.
[39] *See* Robert A. Dahl, *Can international organizations be democratic? A skeptic's view*, DEMOCRACY'S EDGES 19, 21 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (commenting on the lack of control by the general public in matters of foreign affairs).

no immediate exit from the network, people in developing countries are beginning to ask the two most obvious descriptive and normative questions: how did we end up (and even begin) being part of this network? And, is this legitimate and/or convenient for us?

2. THE BIT GENERATION AS A MECHANISM OF GLOBAL GOVERNANCE

Using European Union nomenclature, it is possible to say that a "negative integration" model has been a favorite strategy among possible global governance arrangements.[40] Instead of concluding detailed treaties or "dense" binding documents — which, together with other policy alternatives, presuppose less erosion for state sovereignty[41] — state negotiators have typically preferred to agree only on very general principles, leaving the task of concretizing them to the dispute settlement bodies created by those same general agreements.[42] In fact, this is, as Esty points out, one of the main forms of global policymaking:

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[40] *See* Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 632 (1999) ("From the national standpoint, these decision-makers often enjoy a significant degree of legal autonomy, in that no particular state is guaranteed a formal veto over their supranational policy choices. *In its most rudimentary form, this autonomous 'supranational normative power' tends to be adjudicative, as under the dispute settlement mechanism of the World Trade Organization (WTO).*") (emphasis added).

[41] Esty, *supra* note 3, 1497-98 provides a complete list of policy alternatives: "Supranational governance might therefore refer to any number of policymaking processes and institutions that help to manage international interdependence, including (1) negotiation by nation-states leading to a treaty; (2) dispute settlement within an international organization; (3) rulemaking by international bodies in support of treaty implementation; (4) development of government-backed codes of conduct, guidelines, and norms; (5) pre-negotiation agenda-setting and issue analysis in support of treatymaking; (5) (sic) technical standard-setting to facilitate trade; (6) networking and policy coordination by regulators; (7) structured public-private efforts at norm creation; (8) informal workshops at which policymakers, NGOs, business leaders, and academics exchange ideas; and (8) private sector policymaking activities."

[42] *See* Kumm, *supra* note 13, 914 ("Traditionally international legal obligations arose either because of specific treaty obligations assumed by states ratifying the treaty or as a matter of customary international law reflecting longstanding customary practice of states. Treaties today, though still binding only on those who ratify them, increasingly delegate powers to treaty-based bodies with a quasi-legislative or quasi-judicial character. Within their circumscribed subject-matter jurisdiction, these bodies are authorized under the treaty to develop and determine the specific content of the obligations that states are under."). *See more*

> International policymaking can be carried out through government-to-government negotiations and the contractual exchange of specific commitments in treaties. Alternatively, governments can coordinate policies by mutual recognition of each others' national rules. *But when nation-states agree not on specific substantive outcomes but rather on decision-processes, they create mechanisms of global policymaking or supranational governance*.[43]

Following Young, we can affirm that "we are, indeed, increasingly surrounded by supranational courts."[44] Or, with Helfer & Slaughter, to speak of a "renewed millennial faith in the ability of courts to hold states to their international obligations."[45] Yet, these new courts and tribunals fulfill a different function than that traditionally played by international bodies. They are doing what Alvarez refers as "adjudicative law-making."[46] International judicial law-making "results from, at least in part, the relative absence of precision in applicable law and from treaty-makers' tendency to use their dispute settlers to 'complete' their treaty contracts."[47]

The obvious problem with this model of global governance is that it converts judges into policymakers. Adjudication based on principles and not rules — i.e., adjudication in the absence of normative determinacy — "generates a second order social demand, this time for judicial discretion and governance."[48] Stone Sweet has remarked upon this point, noting that "[j]ust inevitably, judges who enforce such standards [balancing, proportionality, 'least-means' tests, and in general, incomplete or relational

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generally, Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 1 (2006).

[43] Esty, *supra* note 3, 1499 (emphasis added).

[44]Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1146 (2005) 1146.

[45] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 387 (1997).

[46] JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW MAKERS 531 ss (2005).

[47] *Id.* at 523-4. Alvarez, *id.* at 426, also adds that "the level of judicial discretion is all the greater within the context of the rudimentary international legal system as even its most sophisticated and evolved treaty regimes, such as WTO's covered agreements, are replete with substantive and procedural lacunae that adjudicators need to fill, at least if they wish to avoid finding of non-justiciability or *non-liquet.*"

[48] ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 10 (2004).

"contracts"] behave as relatively pure policymakers, in that they use their discretion to evaluate and control the law-making of others."[49] From an international law perspective, Kumm has also observed that "though states have consented to the treaty as a framework for dealing with a specific range of issues, once they have signed on, the specific-rights and obligations are determined without their consent by these treaty-based bodies."[50]

There are several reasons explaining why countries have been following this "negative integration" model of governance. Trachtman provides a convincing explanation, wherein incomplete treaties permit either "(i) to agree to disagree for the moment in order to avoid the political price that may arise from immediate hard decisions or (ii) to cloak the hard decisions in the false inevitability of judicial interpretation."[51] In fact, by cloaking decisions in this inevitability, states borrow from the rule of law legitimacy. As Stein reminds us, "adjudication procedures have formed the vanguard in the path toward closer integration, offering legitimacy as an aspect of the rule of law."[52]

The important point to remark in this section is that BITs perfectly exemplify the "negative integration" model of global governance. Indeed, there are at least three basic characteristics that render the BIT structure a "laboratory" case of global governance. First, the dispute settlement mechanism created by these treaties — BIT tribunals — does not form part of any government or supranational authority; these tribunals constitute a

[49] *Id.* at 119.
[50] Kumm, *supra* note 13, 914.
[51] Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L. J. 333, 351 (1999). *See also*, ALVAREZ, *supra* note 46, 472-3.
[52] Stein, *supra* note 4, 530.

decentralized institutional arrangement that lacks roots in any particular state.[53] Second, the tribunals' institutional nature is more private than public: international commercial arbitration is, indeed, a typically private means of dispute settlement.[54] Third, and most important, BIT tribunals perform "adjudicative law-making" — they have the mission of interpreting and applying highly open-ended and legally indeterminate norms, such as those contained in BITs.

The latter point deserves closer attention. From a substantive perspective, BITs' main provisions — which are, in my opinion, the expropriation and fair and equitable treatment (F&ET) clauses — are little more than general references to customary and general international law (CIL/GIL, already open-ended concepts). Indeed, the concept of "expropriation" is not even defined in BITs, and the interpreter must have recourse to CIL/GIL. The same can be said of the F&ET clause, whose content refers to international minimum standards (IMS), and therefore, to CIL/GIL (though subject to debate).

In other words, from a substantive perspective, BITs do not provide higher standards than those of CIL/GIL. If investors are not satisfied by these standards, they can always demand concession contracts or investments agreements where host states

[53] Strictly speaking, this assertion is only completely true in the case of investment arbitration conducted in accordance with the ICSID Convention, the only international commercial arbitration system that is fully de-nationalized.

[54] This brings to mind Sassen's comments of globalization and privatization. *See* Saskia Sassen, *De-Nationalized State Agendas end Privatized Norm-Making*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 51, 63 (Karl-Heinz Ladeur ed., 2004) ("Economic globalization has been accompanied by the creation of new legal regimes and legal practices and the expansion and renovation of some older forms that bypass national legal systems. This is evident in the rising importance of international commercial arbitration. . . The emerging privatized institutional framework to govern the global economy has possibly major implications for the exclusive authority of the modern national state over its territory, that is, its exclusive territoriality.").

accept more demanding obligations.[55] After all, as Reisman & Arsanjani point out, BIT principles are mere "indulgences."[56] We should not forget those standards were drafted by the end of the 1950s and early 1960s.[57]

So, BITs' broad and open-texture standards should not be, as such, the object of concern. BIT standards are all quite reasonable on their face, and cannot be considered a threat to developing countries' sovereignty and democratic self-determination. Can someone honestly disagree with a principle requiring to treat people in a fair and equitable way? Or with a principle such as expropriation with compensation that has Medieval roots in the Spanish legal tradition?[58]

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[55] Indeed, in BIT litigation one can classify two different types of cases: those in which the investor has received specific commitments from the state, usually in the form of concession contracts or investment agreements; and, those in which there are no such commitments or where the commitments are incomplete, and where, as a consequence, the foreign investor's welfare is left to the vagaries of "pure regulatory" contexts (as typically occurs with national investors). Undoubtedly, it will always be easier to find breaches of international law in both domestic lawmaking and adjudication that violates specific commitments. Instead, I am exclusively interested here in this second group, the source of most "hard cases" in BIT litigation.

[56] Michael Reisman & Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in International Disputes*, 19 ICSID REV. — FOREIGN INV. L. J. 328, 343 (2004).

[57] This observation may surprise some readers. They may legitimately ask, then, what is the purpose of having BITs and studying them in so much detail, if they simply repeat the principles and rules of CIL? This question indicates the lack of awareness among commentators, and even BIT tribunals, regarding BITs' most powerful and remarkable tool: investor-state arbitration without exhaustion of legal remedies. As Thomas W. Wälde, *The Umbrella Clause in Investment Arbitration. A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INV. & TRADE 183, 190 (2005) remarks, "it is the ability to access a tribunal outside the sway of the host State which is the principle advantage of a modern investment treaty. This advantage is much more significant than the applicability to the dispute of substantive international law rules."

[58] Indeed, the rule of expropriation appears in *Las Siete Partidas* (1256-1265). *See* Partida 2ª, Tit. I, Ley II, in 2 LOS CÓDIGOS ESPAÑOLES CONCORDADOS Y ANOTADOS 320 (1848): "Otrosi dezimos, que quando el Empedrador quisiesse tomar heredamiento, o alguna otra cosa a algunos para si, o para darla a otro; como quier que el sea Señor de todos los del Imperio, para ampararlos de fuerza, e para mantenerlos en Justicia, con todo esso non puede el tomar a ninguno de lo suyo sin su plazer, si non fiziesse tal cosa, porque lo deuiesse perder segund ley. E si por auentura gelo oviesse a tomar por razon que el que el Emperador oviesse menester de fazer alguna cosa en ello, que se tornasse a pro comunal de la tierra, tenudo es por derecho de le dar ante buen cambio, que va a tanto a mas, de guisa que el fin que pagado a bien vista de omes buenos." *See also*, Partida 3ª, Tit. XVIII, Ley XXXI in 3 LOS CÓDIGOS ESPAÑOLES CONCORDADOS Y ANOTADOS 200 (1848).

However, there is no doubt that sources of concern remain. But we have to be more precise: it is BITs as a mechanism of global governance — i.e., arbitral tribunal giving concrete application to those principles — which continues to threat developing countries' sovereignty and democratic self-determination (and developed countries too, as for example occurs with the U.S. in NAFTA Chapter 11 arbitration). It is not BITs' text *per se*, but rather unrestraint arbitrators who should worry us.

The problem is that when states ratified treaties with such reasonable, though loose, open-ended standards such as expropriations and fair and equitable treatment, they entered into a "regulatory policy." I am following here the model that Aranson, Gellhorn, & Robinson propose to explain open delegations of power from Congress to the Executive (a somewhat similar phenomenon). According to these authors, "Legislators will accept risks over the range of possibilities, preferring the gamble implicit in delegated legislative authority — the regulatory lottery — to the equivalent *ex ante* regulatory certainty."[59]

During the liberal 1990s, governments preferred to enter into the BIT lottery rather than preserve the status quo of the lack of credibility of domestic legal systems and the lack of enforceable remedies in international law. The uncertainty of the outcome can be simplified by two different scenarios, represented by the two alternative crystallizations of BIT jurisprudence: on the one hand, *the good case* or *BITs-as-developed countries-constitutional law-and-no-more*, where BIT jurisprudence recognizes standards of protection of investments no higher than those that state courts in

[59] Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 61 (1982).

developed countries apply to their own nationals; and on the other hand, *the bad case* or *BITs-as-gunboat-arbitration*, where jurisprudence converts BITs into a form of insurance for foreign investors.

Though I will comment on the benefits and risks inherent in this gamble later in this paper, I want to mention one general benefit that is common to all successful mechanisms of global governance (including human rights institutions): the addition of a new layer of check and balances to the exercise of power.[60] As Esty observes, "by promoting careful consideration of policy choices, providing a mechanism for benchmarking national policy results, and forcing decision-makers to justify their actions, a functional global governance structure adds depth to the system of check and balances, thereby limiting national governmental mistakes and improving social welfare."[61]

Indeed, imposing appropriate standards of global governance top-down from the international level may be an efficient means of bypassing local elites and special interests groups, whose abuse of power is greatly responsible for the weak institutional foundations in developing countries. After all, this is one of the most attractive features of global governance: the stabilizing presence of an additional institutional layer that limits the political effectiveness of *factions*.

[60] *See* Kumm, *supra* note 13, 919 ("International law *contributes to the check and balances of a constitutional system*, complementing domestic separation of powers and federalism as another means of achieving this.").
[61] *See* Esty, *supra* note 3, 1502.

3. GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION

a) Understanding State Responsibility through the Lenses of Corrective and Distributive Justice

BITs and their system of dispute resolution constitute not only a mechanism of global governance, but also one that is producing a new global constitutional and administrative law (GLC & GAL). This new Global Public Law complements and even corrects (in a descriptive sense) domestic public law. The balance/tension of property rights and the public interest, a key dimension of both constitutional and administrative law, is now present at the global plane.

In the pursuing the public interest, the Regulatory State in which we live today — and which BIT tribunals control — has the constitutional power, recognized by international law, to harm citizens and investors while in pursuit of public interest. Moreover, it has the constitutional duty, also recognized by international law, to allocate burdens and rewards across society in its permanent quest for the public interest. As a result, in Craig's words, "legislation is constantly passed which is explicitly or implicitly aimed at benefiting one section of the population at the expense of another. It is a matter of conscious legislative policy."[62]

Because "under certain conditions, administrative decisions can legally encroach on citizens' rights,"[63] then, as Caranta notes, "*harm alone cannot therefore be sufficient*

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[62] Paul P. Craig, *Compensation in Public Law*, 96 LAW QUARTERLY REVIEW 413, 450 (1980).
[63] Roberto Caranta, *Public Law Illegality and Governmental Liability*, in TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE 272 (Duncan Fairgrieve ed., Et. Al, 2002) (emphasis added).

to establish liability."[64] We need much more than a demonstration of economic damages in order to demand that the government pay compensation. It is worth noting here that not even the normative argument of efficiency leads to the conclusion that the citizen or investor must be always indemnified. As Rose-Ackerman remarks, "an economic analysis of takings law does not imply that everyone harmed by government actions should be compensated. Such a conclusion would only result from a strong normative commitment to the status quo distribution of property rights."[65]

That all new legislation and regulation does not have to be a Pareto-superior movement is an inherent characteristic of all collective decision-making mechanisms different from the unanimity rule. As we know, democratic constitutions design the collective choice functioning of Congresses according to versions more or less close to the majority rule. Under those arrangements, majorities are allowed to adopt regulations that may be favorable to themselves, even in the event that the costs of those decisions are imposed on defeated minorities. This point was first stressed by Buchanan & Tullock:

> To our knowledge little or nothing has been said about the *external* costs imposed on the individual by *collective* action. Yet the existence of such external costs is inherent in the operation of any collective decision-making rule other than that of unanimity. Indeed, the essence of the collective-choice process under majority voting rules is the fact that the minority of voters are forced to accede to actions which they cannot prevent and for which they cannot claim compensation for damages resulting.[66]

If all those who are impaired by regulatory changes had the right to maintain the status quo or to be compensated according to the amount of harm suffered, then that requirement would be equivalent to affirming that Constitutions had established the

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[64] *Id.*

[65] Susan Rose-Ackerman, *Regulatory Takings: Policy Analysis and Democratic Principles*, in TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE 25 (Nicholas Mercuro ed.,1992).

[66] JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 89-90 (1965) (emphasis on the original).

unanimity rule, or supermajorities close to it (depending on the methods adopted for calculating damages) as the basic voting rule.[67]

Hence, the question posed by Judge Higgins in 1983 — then a "somewhat newer theme"[68] — now appears to be an essential and unavoidable part of the puzzle that the BIT generation faces: "do interventions by the State that leave title untouched in the hands of plaintiff, but nonetheless occasion him loss, give rise to a right of compensation?"[69] At the end of the day, to decide whether states will pay compensation, BIT tribunals must resolve — as do their domestic constitutional and administrative law colleagues — the dilemma which Ackerman presents so accurately in the following terms:

> Our legal problem arises at the point where capitalist economy and activist state collide. No longer a night-watchman, the state surveys the outcome of market processes and finds them wanting. Armed with a prodigious array of legal tools, it sets about improving upon the invisible hand — taxing here, subsidizing there, regulating everywhere. The result of all this motion may well be something that clearly redounds to the public good — a cleaner environment, a safer workplace, a decent home. Nonetheless, these welfare gains can rarely be purchased without social cost — though many may gain, some will lose as a result of the new governmental initiative. And it is the fate of those called upon to sacrifice for the public good that will concern us in this essay: When may they justly demand that the state compensate them for the financial sacrifices they are called upon to make?[70]

From a comparative perspective, it is possible to observe that, in all major legal systems, state responsibility comprises two different areas: state liability in torts and

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[67] *See Id.* at 91 ("The unanimity test is, in fact, identical to the compensation test if compensation is interpreted as that payment, negative or positive, which is required to secure agreement.") *See also*, Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1708 (1988) ("the United States Constitution, in permitting policies to be adopted by majority votes in representative assemblies and approved by the President, did not contemplate that all statutes would meet with unanimous approval. Some people would suffer losses while others benefited".)

[68] *See* Rosalyn Higgins, *The Taking of Property by the State. Decent Developments in International Law*, en ACADÉMIE DE DROIT INTERNATIONAL, 176 RECUEIL DES COURS 259, 269 (1982-III).

[69] *Id.*

[70] BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 1 (1977). This question is posed by Jeremy Paul, *The Hidden Structure of Takings Law*, 64 SOUTHERN CALIFORNIA LAW REVIEW 1393, 1406 (1991) in the following terms: "When do individual contribution to collective welfare cease to be a proper price of communal citizenship and become an unfair sacrifice of the few to the many?"

expropriations. Together, they are what the Germans referred to as *staatliche Ersatzleistungen* or "public indemnifications."[71] In the first case, fault and negligence, including illegality and arbitrariness, are the bases for the machine's operation; in the second case, the "essence" or core of property rights, equality and hardship (sacrifice).

Harlow refers to the first group as *liability* and the second as *compensation*.[72] The first is ruled mainly by principles of corrective justice. As a general matter, this version of justice centers the attention on the direct and immediate relation between two parties. Weinrib summarized it in the following terms:

> [Corrective justice] focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party and therefore must be shifted back to its rightful owner. Corrective justice embraces quantitative equality in two ways. First, because one party has what belongs to the other party, the actor's gain is equal to the victim's loss. Second, what the parties would have held had the wrong not occurred provides the baseline from which the gain and the loss are computed. . . A violation of corrective justice involves one party's gain at the other's expense. As compared with the mean of initial equality, the actor now has too much and the victim too little. Because the actor has gained what the victim has lost, equality is not restored merely by removing the actor's gain (which would still leave the victim with a shortfall) or by restoring the victim's loss (which would still leave the actor with an excess).[73]

On the other hand, *compensation* is guided both by principles of aggregative justice — the public sphere, as opposed to the private one — and distributive justice

[71] In Germany, *staatliche Ersatzleistungen* is the general concept which includes all types of compensations/damages that the State may have to pay to citizens, particularly: a) Torts or state responsibility *strictu sensu* (*Amtshaftung*); b) various legal concepts linked to expropriation: b1) expropriation *strictu sensu*; b2) state interventions tantamount to expropriation of illegitimate character (unlawful quasi-expropriatory encroachments) (*enteignungsgleicher Eingriff*); b3) state interventions tantamount to expropriation of legitimate character (*enteignender Eingriff*), now included in the more modern concept of "delimitation of rights that requires to pay compensation" (*ausgleichspflichtige Inhaltsbestimmung*); b4) unequal burdens or special sacrifices in relation to non-patrimonial rights (*Aufopferungsanspruch*). *See* MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE 244 ss (2001), ORIOL MIR PUIGPELAT, LA RESPONSABILIDAD PATRIMONIAL DE LA ADMINISTRACIÓN. HACIA UN NUEVO SISTEMA 71 ss (2002), and Wolfgang Rüfner, *Basic Elements of German Law on State Liability*, in GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY (John Bell & Anthony W. Bradley eds., 1991).

[72] *See* CAROL HARLOW, STATE RESPONSIBILITY: TORT LAW AND BEYOND 60 (2004).

[73] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 62 (1995).

strictu sensu — the share of the collective sphere that individuals have for themselves.[74] Both aggregative and distributive justice *strictu sensu* are generally included in the broad concept of distributive justice.[75]

At the most general level, it may be said that for damages to be acceptable and bearable by citizens and investors, they must result from a diligent and legitimate exercise of power by public authorities. But, in addition, the resulting allocation of burdens and benefits, even if it resulted from a legal and legitimate process, must also fulfill the basic requirements of aggregative and distributive justice as defined by that country's respective legal/political system. *Liability* and *compensation* are thus the two cornerstones of state responsibility.

b) BIT law as Global Constitutional Law

BIT adjudication, by being forced to take a position with respect to these corrective and distributive justice dilemmas, is fundamentally problematic. These conceptual hurdles remind us that BIT law and jurisprudence have a global constitutional law character. In fact, by redefining the scope and limits of the rules for expropriation and liability, BITs are creating a new body of GLC. Note that this new set of rules and principles trump domestic constitutional law within the state's own territory, at least as a *lex specialis* that applies only to foreign investors.

[74] *See* HARLOW, *supra* note 72, 3.

[75] According to WEINRIB, *supra* note 73, 62, "distributive justice divides a benefit or burden in accordance with some criterion. An exercise of distributive justice consists of three elements: the benefit or burden being distributed, the persons among whom it is distributed, and the criterion according to which it is distributed. The criterion determines the parties' comparative merit for a particular distribution. The greater a particular party's merit under the criterion of distribution, the larger the party's share in the thing being distributed."

The concept of constitutional law is used here in a broad sense, which includes administrative law. Following a continental law approach, administrative law is understood to comprise rules and principles also dealing with expropriation and state liability in tort, but to a larger and usually more protective extent than that found in constitutions and constitutional jurisprudence (the latter in the strict sense). It should not be forgotten that administrative law — particularly in Europe and Latin America, where democracy has not always been the dominant political arrangement — presented itself in the past as having the mission of protecting the citizen against the state.[76]

I am aware that the terms *constitution* and *constitutionalization* have proven to be difficult and controversial when they relate to international law and institutions, particularly in the absence of a relevant global policy. But they remain attractive. In this context, the main point to note is that arbitral tribunals confront a significant number of political and normative difficulties that have emerged at the domestic level presenting a characteristically constitutional-adjudicatory nature. All over the world, on both national and supranational levels, defining the scope and conditions of "public indemnifications" is one of the most sensitive and controversial topics of economic constitutional law.[77]

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[76] *See e.g.* EDUARDO GARCÍA DE ENTERRÍA, LA LUCHA CONTRA LAS INMUNIDADES DE PODER EN EL DERECHO ADMINISTRATIVO: PODERES DISCRECIONALES, PODERES DE GOBIERNO, PODERES NORMATIVOS (2004, 3th Ed.) (explaining administrative law as essentially inspired by the fight against power immunities). García de Enterría is the greatest exponent of modern Spanish Administrative Law, created during Franco's Regime. *See also*, Cottier & Hertig, supra note 5, 293-94 (2003) ("In general, the history of constitution-making shows that many constitutions were established by force or adopted after a period of crisis (revolution or civil or international war), at a time when a group with a common social and political vision came to prevail. . . Therefore, revolutionary constitution-making frequently fails to satisfy requirements of both efficiency and legitimacy.").

[77] For an excellent set of comparative works about the legal systems of Europe, including the ECJ and the ECHR, *see* PROPIEDAD, EXPROPIACIÓN Y RESPONSABILIDAD. DERECHO COMPARADO EUROPEO (Javier Barnés ed., 1995).

There are two powerful reasons to consider BIT law as a manifestation of global constitutional law. The first is that constitutional law — beyond the discussion of what is and ought to be a constitutional norm — is also a methodology and technique in itself for approaching political and legal problems. Weiler has taken this view before to defend the idea of constitutional law and constitutionalization at supranational contexts:

> [Constitutionalism is also] a prism through which one can observe a landscape in a certain way, an academic artifact with which one can organize the milestones and landmarks within the landscape (indeed, determine what is a landmark or milestone), and intellectual construct by which one can assign meaning to, or even constitute, that which is observed.[78]

In the case of BITs, constitutional law traditions around the world have created several tools with which to assess expropriations and the protective scope of property rights. Expropriations protect not only against physical appropriations, but also, against what Tribe refers as spot-redistribution.[79] Consequently, there exists a constitutional law practice whose main objective is to identify the conditions and requirements permitting citizens and investors to claim compensation when they have been harmed through state action or inaction.

The second reason, following the EU's institutional experience, has become a classic one: direct effect, supremacy and judicial review. From a "non-democratic" perspective, more familiar to continental lawyers and scholars,[80] BIT law can more easily

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[78] J.H.H. Weiler, *Introduction: The Reformation of European Constitutionalism*, in J.H.H. WEILER, THE CONSTITUTION OF EUROPE 221 and 223 (1999).

[79] *See also*, LAURENCE TRIBE, CONSTITUTIONAL CHOICES 165 ss (1985).

[80] *See* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y. U. L. Rev. 1971, 1974-75 (2004) ("American constitutionalism differs in certain fundamental respects from contemporary European constitutionalism. . . . On this view [the American], which I will call 'democratic constitutionalism,' a constitution is, first and foremost, supposed to be the foundational law a particular polity has given itself through a special act of popular lawmaking. A very different account sees constitutionalism not as an act of democracy, but as a set of checks or restraints on democracy. These restraints are thought to be entitled to special authority because they express universal rights and principles, which in theory transcend national boundaries, applying to all societies alike. From this universalistic perspective, constitutional law is fundamentally antidemocratic; one of its central purposes is to put limits on democratic self-government.").

be equated with GLC. In the field to which they apply — the economic relations between the State and its investors — BIT's checks and restraints on democracy are clearly more rigorous than those of human rights treaties. For developing countries, whose economies are effectively owned by foreign investors in the post-Cold War world, these limitations can penetrate even further than those imposed by other modern global governance mechanisms, such as the WTO.

Moreover, at least three pragmatic reasons may be given to qualify this subject as global constitutional law. First, as a mechanism of global governance these indemnifications constitute a limit to states' police powers within their own territory. This is an external redefinition of domestic equilibria and boundaries between property rights and regulatory powers.[81] In Bruce Ackerman's nomenclature, this redefinition has the functional status of *higher lawmaking* because it transcends ordinary politics.[82] As mentioned before, BITs create a new "economic constitution" for foreign investors.

Second, from a structural perspective, the standards of review adopted by arbitral panels directly reflect — or more precisely, define — the distribution of powers that must inevitably occur between those arbitral tribunals and the national bodies under revision (primarily, Executive Agencies and Congresses). This structural issue is a classic

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[81] As has been remarked by the European Tribunal of Human Rights, in *Sporrong and Lönnroth v. Sweden*, 5 EUR. CT. H.R. REP. 35, 52 para. 69, "[T]he Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. . . The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1)."

[82] *See* BRUCE ACKERMAN, 1 WE THE PEOPLE 9 ss and 266 ss (1991). I state that this global law carries the "functional status" of higher law because it does not fulfill the normative elements that Ackerman requires of constitutional moments in a well-ordered dualist society.

constitutional law topic; it demarcates the boundary between the political and judicial branches of government.[83]

BIT tribunals, then, must adopt balancing tests to implement this distribution of powers. The stricter the standards of review finally adopted, the greater the transfer of power from the domestic to the global level. Cass has pointed out this aspect of GLC in the WTO context,

> The case law of the WTO is beginning to display some characteristics ordinarily associated with constitutional case law of national and supranational constitutional systems. So, the jurisprudence of the WTO exhibits an explicit concern with the delineation of power between member states and the centralized dispute settlement mechanism; in some cases, it borrows constitutional doctrines and techniques, such as proportionality; in other cases, it has extended its scope into subject matters, such as health, once considered exclusively national constitutional matter. As a result, a hybrid form of law is emerging bearing sufficient resemblance to national and supranational constitutional law to refer to it by the descriptor 'constitutionalization'.[84]

Finally, BITs replace domestic public law remedies with international remedies. It is well known that this is the most important aspect of BITs: they provide foreign investors with remedies arising directly from international law, waiving the requirements of exhaustion of local remedies and reference to the political organs of their home states. As the *Gas Natural SDG* tribunal pointed out, "a crucial element — *indeed perhaps the most crucial element* — has been the provision for independent international arbitration of disputes between investors and host states."[85]

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[83] *See* Cottier & Hertig, *supra* note 5, 317 ("In a multilayered system, defining the relationship and the boundaries between the different levels of governance are essential constitutional functions.").

[84] Cass, *supra* note 36, 42. This issue has been the focus of attention by WTO commentators, but not by investment ones, *see e.g.* MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION (2003), Steven P. Croley & John H. Jackson, *WTO Disputes Procedures, Standards of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996), and Cottier & Hertig, *supra* note 5, 327-328 (2003).

[85] The recent case *Gas Natural SDG, S.A. v. Argentine*, Decision on Jurisdiction, ICSID Case No. ARB/03/10, Decision on Jurisdiction, (June 17, 2005), para. 29. The Tribunal also mentioned, *id.*, that "the creation of ICSID and the adoption of bilateral investment treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts." *See also*, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL (The Netherlands/Czech Republic BIT), Partial Award (Sept. 13, 2001), para. 417 ("A purpose of an international investment treaty is to grant arbitral recourse outside the host country's

The legal architecture of domestic public law remedies — combining judicial review, expropriations and tort causes of actions — is clearly a matter of constitutional law. It reflects, at the operative and procedural levels, sensitive considerations about the proper balance of power between the Judiciary, Executive and Legislative Branches. In the U.K., the impact of EU law has led one important public law commentator to assert that "liability is, after all, a highly intrusive remedy, with considerable impact on national constitution."[86] Therefore, by providing foreign investors with a completely new alternative remedial "toolkit", BIT law constitutes GLC.

c) BIT law as Global Administrative Law (strictu sensu)

If, from a general perspective, BITs can be generally depicted as global constitutional law, from a more specific perspective they can also be seen as a mechanism of global governance that produces global administrative law *strictu sensu*.

A general summary of BIT jurisprudence must be provided at this point. AS noted, the two most important general clauses of BITs are expropriation and F&ET. Expropriations have followed something closely to, though not as strict as, the *Lucas* rules of expropriation in US constitutional law:[87] deprivations must be, if not total, at least substantial. The basic idea is that if property is destroyed, compensation must be

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domestic legal system. The clear purpose is to grant independent judicial remedies on the basis of an international, accepted legal standard in order to protect foreign investments.")

[86] HARLOW, *supra* note 72, 62. Analyzing the case of the ECJ and the ECHR, HARLOW, *Id.* at 85-86, makes an observation that fully applies to BIT tribunals: "Transnational courts have begun to make forays on to areas of national sovereignty and incursions deep into the territory of distributive justice. As increasingly courts dictate positive intervention by society, 'aggregative' and 'distributive' political 'principles' are becoming confused. In consequence, the share of collective goods assigned by courts to individuals for their personal use is beginning to impinge on the share at the disposal of government and public authorities for the collective benefit of the community."

[87] *See David H. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), requiring full destruction of economic value to find a taking.

paid no matter what (exceptions exist, though subject to debate). State action may be legitimate, justified under a public interest, but compensation is still needed.

By contrast, when property is not destroyed, and the investor is only harmed, BIT jurisprudence under the F&ET clause tends to refrain from focusing on the existence and contours of an existing investment, and instead pays attention to the legitimate or "arbitrary" nature of State action. Given that in the Regulatory State the typical situation is that of harm and not of full destruction of property rights, the F&ET clause has proven to be the central pillar of BIT adjudication. "Arbitrariness" is in fact at center stage in almost all BIT cases.

Following the analytical structure presented before, this means that the F&ET clause must fulfill two different functions, both included in the concept of "arbitrariness." From a corrective justice perspective, it must come up with criteria for identifying those negligent and illegal state acts that cause harm to investors, and that entitles them to indemnification; namely, "arbitrariness as illegality" and "arbitrariness as irrationality."[88]

From a distributive justice perspective, it must define the limits that BITs impose upon states in determining which private sacrifices will not be compensated, particularly when states are genuinely pursuing the public interest (in cases that do not amount to full or substantial deprivations); that is, "arbitrariness as special sacrifice/proportionality."

Here is the key point: the latter application of F&ET constitutes GAL in its most classical sense. I admit to be using a more continental administrative law, which has been historically obsessed to define what constitutes arbitrariness in state action. However, it

[88] This reminds us what JERRY L. MASHAW (et. al), ADMINISTRATIVE LAW. THE AMERICAN PUBLIC LAW SYSTEM. CASES AND MATERIALS 780 (2003) points out at the domestic level: plaintiffs who seek damages "also invariably question the legality of administrative conduct."

must also be noted that the problem of arbitrariness in the behavior of executive agencies has resided at the core of administrative law across all legal cultures since at least the 19th century. When comparing France and the U.S., Edley for example comments that "the project of administrative law has been the same: control of illegal and abusive discretion."[89]

4. WHAT THE BIT GENERATION CAN/SHOULD DEMAND FROM LATIN AMERICA: A WELL-BEHAVED REGULATORY STATE

Following Reisman & Sloane, we can affirm that the BIT generation requires Latin America and developing countries in general to "establish and maintain an appropriate legal, administrative, and regulatory framework, the legal environment that modern investment theory has come to recognize as a *conditio sine qua non* of the success of private enterprise,"[90] including "an efficient and legally constraint bureaucracy."[91] In accordance with Freeman's original intuition, in the BIT generation, the challenge for states is now to maintain a "*well-administered government*."[92]

The underlying assumption is that in the 21st century globalized world in which we live today, the importance of a well-administrated system of property rights and

[89] CHRISTOPHER F. EDLEY, ADMINISTRATIVE LAW. RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 245 (1990).
[90] Reisman & Sloan, *supra* note 2, 117.
[91] *Id. at* 117. They also comment that "an appropriately operational governmental framework must be in place".
[92] Alwyn V. Freeman, *Responsibility of states for unlawful acts of their armed forces*, in ACADEMIE DE DROIT INTERNATIONAL, 88 RECUEIL DES COURS 263, 277-278 (1955-II) (emphasis added). This concept was introduced by the first BIT tribunal, in *Asian Agric. Prod. Ltd. v. Sri Lanka*, supra *note* 37*,* para. 77 ("reasonably well organized modern State").

regulations has been accepted as part of the essence of development.[93] We respect once again property rights and individual economic freedom as proper values, but allowing ample room for economic and social regulation limiting those rights and freedoms. Today, property rights and economic freedom do no represent a collective threat to social justice, but rather, are constitutive pieces of it.

So, BITs legally demand — and it is normatively desirable that they do so — that developing countries commit themselves to maintaining a stable regulatory system whose aim is the protection of investments. In their best reading, BITs require a commitment to the rule of law. As mentioned before, the idea is having a new layer of check and balances that permits bypassing local elites and special interests groups, or at least reducing the political and judicial effectiveness of those factions. At the end of the day, this can be a desirable form of accountability of the Regulatory State, and one that many developing countries have not been able to achieve internally.

More concretely, and following the general framework defined in the previous section, we can affirm that it is normatively desirable that the BIT generation demands the following elements from Latin America:

a) From the perspective of expropriations and GCL: a.1) From a corrective justice approach: the proscription of physical and non-physical appropriations, i.e., that changes in control of an investment just because of its worthiness should not be accepted without the payment of compensation; a.2) From a distributive justice approach: the definition of

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[93] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 36, 74 (1998); Carol Rose, *The Shadow of* The Cathedral*,* 106 YALE L. J. 2175, 2187 (1997).

reasonable anti-spot redistributional strength of investments and property rights vis-à-vis State regulatory powers.

b) From the perspective of fair and equitable treatment and GAL: a) From a corrective justice approach: the articulation of international minimum standards that applies to state legislation and regulation, and the obligation of state to be bound by its own rules when the latter are above minimum standards; b) from the perspective of distributive justice, the definition of non-interventionist tests of proportionality that define the limits of individual harm and sacrifice when pursuing the public interests.

BIT jurisprudence must recognize the place and functions of the Regulatory State, and demand appropriate outcomes from it according to its nature. As we all know, the Administrative State has undergone a profoundly transformative process that began with privatizations and deregulations in the 1970s and 1980s, that ultimately resulted in the replacement of the *dirigiste* state of the past with the Regulatory State of the present.[94] In Harlow's words,

> The modern state, in which today I sit and write these words, is characterized above all by its regulatory functions. The regulatory state operates on the risk averse society, where regulation is pervasive and the routine use of the vocabulary and procedural tools for purpose of social control is both accepted and acceptable.[95]

In other words, BITs' protection against expropriations and against unfair and inequitable state treatment does not exist in a vacuum, but in the concrete context of the

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[94] *See* Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77, 97 (1994), and FERRAN PONS CÀNOVAS, LA INCIDENCIA DE LAS INTERVENCIONES ADMINISTRATIVAS EN EL DERECHO DE PROPIEDAD. PERSPECTIVAS ACTUALES 17 (2004).

[95] HARLOW, *supra* note 72, 6. *See also*, Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L.Q. 811, 813 (2001) ("With economic regulation taking the role of public ownership as the now key method to pursue public policy objectives, and with private, in particular, foreign investors, entering the hitherto closed areas of public infrastructure, the definition of the boundary between legitimate regulation expressing inherent limitation of property and the State's police powers on the one hand and excessive regulation equivalent to a full or partial expropriation on the other will be a major challenge for international economic lawyers.")

market-based-but-highly-regulated economy of the 21st century. This model of capitalism presents a stark tension between property rights/investments on the one hand, and legitimate state regulatory goals and democratic choice, on the other. The Regulatory State is a fundamental dimension of modern life and a key player in the pursuit of collective goals that include, but transcend, efficiency and maximization of wealth.[96]

5. WHAT LATIN AMERICA CAN/SHOULD DEMAND FROM THE BIT GENERATION: DEFERENCE TOWARDS THE WELL-BEHAVED REGULATORY STATE (NO TRACES OF THE *LOCHNER* AND RESPECT FOR DOMESTIC PUBLIC LAW)

At this point is where the Bello/Calvo Doctrine, though an updated version of it, comes into play. The first prong to consider here derives indeed from one of the essential dimensions of this Doctrine: Equality of Nations. The basic claim defended here is fairly simple: BITs cannot crystallize principles of protection of property higher (more protective of property) than those existing in developed countries. I found it somewhat shocking that a U.S. investor may lose a case against its government in the U.S. Supreme Court, a German investor may lose the same case in the *Bundesverfassungsgericht* (Constitutional Court), and a French investor may lose it in the *Conseil d'État*, but, nevertheless, all of them win it against a developing country in a BIT tribunal.

Note that this claim does not defend the old idea of equality defined as "national treatment is the maximum." Indeed, as a matter of international law, we should not be bothered by the notion that BIT law can provide more protection than national law. What should strike us as problematic is that BIT law — whose main provisions refer to

[96] *See generally* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE (1997).

"international minimum standards" — may end up being more protective than legal systems in developed countries. So, the idea of equality is now, in my perspective, that of "developed countries' standards as the maximum." Though founded on the same principles, there is therefore a significant difference between the updated and the original versions of the Bello/Calvo Doctrine.

Another way to express this idea is to say that Latin America should demand the BIT generation to take comparative law and its benchmarks more seriously. In a sense, the experience of the European Union should set an example for the BIT generation, where the ECJ has had permanent consideration for public law traditions of member countries.[97] Equality of nations demands that developing countries can not be subject to standards of protection of investments more strict — particularly the distributive justice dimension, that defines the level of commitment to the status quo — than those standards that developed countries apply to themselves.

In fact, the empirical evidence shows us that an absolute or almost-absolute standard is not needed for a capitalist society to work properly. That is at least the experience of the U.S., France, Germany, U.K., among others. Most capital exporting

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[97] In the case of the ECJ, the Court has had to borrow from the domestic law of different State members, and from the jurisprudence of the ECHR. That is the opinion of Detlef Kröger, *La Propiedad Privada como Derecho Fundamental de la Unión Europea*, in PROPIEDAD, EXPROPIACIÓN Y RESPONSABILIDAD. DERECHO COMPARADO EUROPEO 107 (Javier Barnés ed., 1995) ("Para determinar cuál es el ámbito de protección o el objeto del derecho de propiedad el TJCE se sirve, como hemos dicho, tanto de la mera referencia a las tradiciones constitucionales de los Estados miembros como cuanto a lo que dispone el CEDH."). *See also*, MIGUEL POIARES MADURO, WE THE COURT. THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION. A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY 78 (1998) who devise the concept of "majoritarian activism." along these lines: "What the Court does when it considers Article 30 is not to impose a certain constitutional conception of public intervention in the market, but to compensate for the lack of Community harmonisation. This is why the regulatory balance set by the Court normally corresponds to the view of the Commission, *and to the legislation of the majority of Member States*. On the one hand, *the Court is not imposing its own particular economic model of regulation*. On the other hand, the Court does not accept State's different economic models, even if non-protectionist. Its yardstick is what the Court identifies as the European Union majority policy, in this way subjecting States regulation to harmonisation in the Court." (emphasis added).

countries have already been committed for a long time to broader collective goals such as the protection of health, safety and the environment, and more generally, to the self-determination of their citizens. There is no solid normative basis for defending a strong commitment to property rights and the status quo like the one that the *Lochner* era represents.[98] Such a commitment is not only deemed incompatible with larger goals that transcend maximizing wealth, but not even justified by efficiency itself.[99]

Note that the argument is not only political, but also legal. I see no way to interpret BITs as giving foreign investors higher protection than developed legal systems do. From a methodological perspective, the low legal density of international law, particularly in the application of loose standards such as expropriation and F&ET, compels us to reference article 38(1)(c) of the International Court of Justice's Statute, which defines as one of the international law sources "general principles of law recognized by civilized nations."[100]

On this reading, international minimum standards force adjudicators to refer to the general solutions already adopted by the world's main legal systems, and not to presume an unlimited discretion to "deduce" or "induce" rules and principles idiosyncratically on a case-by-case basis. As Sunstein remarks, "when courts resolve genuine ambiguities,

[98] *See Lochner v. New York*, 198 U.S. 45 (1905). In that case, the Supreme Court struck down a New York statute establishing maximum hours for bakers. The right to contract affirmed in *Lochner* was later expanded to cover property rights in *Coppage v. Kansas*, 236 U.S. 1 (1915).

[99] For law & economics approaches to expropriations, *see* Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis,* 72 CAL. L. REV. 569 (1984); Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?,* 99 Q.J. ECON. 71 (1984); Louis Kaplow, *An Economic Analysis of Legal Transitions,* 99 HARV. L. REV. 509 (1986), William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings,* 88 COLUM. L. REV. 1581 (1988); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law,* 17 J. LEGAL STUD. 269 (1988); and Rose-Ackerman, *supra* note 67.

[100] The Court's Statute is available at http://www.icj-cij.org.

they cannot appeal to any 'brooding omnipresence in the sky.'"[101] In this sense, and old and an acronychal conservative *Lochnerian* view of property rights can be as dangerous as a view that fully depends on the whimsical intuitions of different arbitrators.

A second normative demand that Latin America should pose to the BIT generation, which is also based on the idea of equality of nations, is that BIT adjudication takes domestic public law seriously. The predominant State in the world today is, and should be, a *Rechtsstaat* or law-state, in which those who exercise public powers must primarily follow the program of action prescribed by domestic public law.[102] And beyond the ideal of the rule of law, and from a political perspective, it must be noted following Reisman that "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."[103]

A balanced and appropriate BIT jurisprudence demands a much richer and more complex dialogue between international and domestic law. Arbitral tribunals should

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[101] Cass R. Sunstein, *Beyond* Marbury: *The Executive Power to Say What the Law Is*, 115 YALE LAW JOURNAL 2580, 2583 (2006), citing *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
[102] *See* NEIL MACCORMICK, QUESTIONING SOVEREIGNTY. LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH 9 (1999).
[103] W. Michael Reisman, *The Regime for* Lacunae *in the ICSID Choice of Law Provision and the Question of its Threshold*, 15 ICSID REV. — FOREIGN INV. L. J. 362, 366 (2000). *See also id.* at 367 ("This public international law principle has a direct relation to private international choice of law. As an expression of and implementation of the basic right expressed in Friendly Relations [The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations], the content of the various legal codes of each state may be expected to vary, quite legitimately, reflecting the diversity of national political, economic, social, and cultural values that the international system permits and even encourages. As a reflection of those different values and social preferences, the various parts of the law of each community may vary with regard to the distribution of benefits and burdens in economic and social relationships and, in particular, in the allocation of risk for various commercial contingencies. The point of emphasis here is that the legislative expression of these variations in the law of different states is internationally lawful and entitled to respect.").

abandon old and inapplicable doctrines of strict dualism, and be prepared to apply domestic constitutional and administrative law, instead of inventing from scratch new rules and principles that lack a basis in any formal source of international law. BIT tribunals should not forget the lesson of U.S. realist judges: "when courts resolve genuine ambiguities, they cannot appeal to any 'brooding omnipresence in the sky.'"[104]

One example may help to understand the idea I am trying to convey. No case has been more commented than *Metalclad v. Mexico*,[105] but I have never seen the key critique that that award deserves. In this case, one central point was "whether, in addition to the above-mentioned permits, a municipal permit for the construction of a hazardous waste landfill was required."[106] Because the municipal permit had been denied, the investor could not proceed to successfully operate the landfill. The tribunal proceeded to rule on this issue in the following terms: "[T]he Municipality denied the local construction permit in part because of the Municipality's perception of the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site. *In so doing, the Municipality acted outside its authority.*"[107]

Note that the issue here comes in two parts: first, whether the Mexican legal system as such falls below international minimum standards; if that is the case, then an expropriation has occurred. But, if the legal system does not fall below those standards, it is crucial to know whether the Municipality acted or not in accordance with Mexican law. But the Tribunal made no effort to argue or show that, as a matter of Mexican Law, no

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[104] *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
[105] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).
[106] *Metalclad*, para. 79.
[107] *Id.* at para. 106 (emphasis added).

additional permit was required. Other two interesting recent cases to analyze under this perspective are *Thunderbird v. Mexico*[108] and *Saluka v. Czech Republic*.[109]

So, particularly in cases involving the corrective justice rationale — termination concession, denials of permit, imposition of fines and seizures, etc. — judicial norm-creation in the BIT network must clarify the relation between domestic illegalities and international wrongful acts. The Regulatory State has the power to cause injury only when acting legally under domestic law (its own law). If the legal system itself meets international minimum standards, then the domestic legality or illegality of the measure under scrutiny is also relevant at the international plane.

There is, therefore, a conflicts-of-laws law side that is of the essence in the BIT generation, even if the applicable law is only international law. Of course, this does not mean that international law fully depends on domestic law, or that there cannot be an international delict without a domestic illegality.[110] It only means that domestic public law can have an important say in the resolution of cases between state and investors, and BIT tribunals should be aware of it.

A final observation must be made in this regard. If we accept this conflicts-of-laws law dimension of BIT law, we have to conclude that BIT tribunals must perform

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[108] *International Thunderbird Gaming v. Mexico*, UNCITRAL (Canada/Mexico NAFTA), Award (Jan. 26, 2006).

[109] *Saluka Investments v. Czech Republic*, UNCITRAL (Netherland/Czech Republic BIT), Partial Award (March 17, 2006)

[110] According to Article 3 of the International Law Commission's Article on state Responsibility, "the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by international law." Yet that does not constitute an obstacle for international law making domestic law relevant. *See* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY. INTRODUCTION, TEXT AND COMMENTARIES 89 (2002), comment (7) ("Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility.")

judicial review of the application of domestic public law by administrative agencies. This confirms that BIT law is a form of GAL, and not only in the sense that it reviews administrative agencies under global law, but also under domestic law. Today, BIT tribunals tend to ignore this unavoidable facet of the adjudicative process, and simply rely on the old international law tenet of "municipal law as facts." And that principle typically leads to a zero-deference standard of review, that is, the worst possible scenario for the Regulatory State.

6. The Challenges That Latin America Must Self-Impose as a Consequence of Being Part of the BIT Network: A Well-Behaved Regulatory State For All (Avoiding *Reverse-Discrimination*)

The Bello/Calvo Doctrine has a second foundation that remains highly attractive in the BIT generation: equality between domestic and foreign investors. If we demand and accept reasonable international minimum standards from the BIT generation, then this second condition becomes of purely national character: domestic public law must be "improved" via the internal political processes (and legal processes too, if we take the equal protection of the law provisions of constitution seriously) to cover any possible gap that puts domestic investors in a situation weaker than that of foreign ones.

Unlike other commentators, I do not go so far as to claim that the procedural safeguards which BITs confer to foreign investors should also be extended to domestic investors.[111] My argument extends only to substantive standards of protection of investment and property rights. As Been & Beauvois point out, any policy that

[111] *See* Wälde, *supra* note 57, 188 ("The aim should be an external governance discipline available to both national and foreign investors — such as Article 1 of the Additional Protocol of the European Convention on Human Rights".)

discriminates between national and foreign investors — such as what Europeans called *reverse discrimination*[112] — on a structural/constitutional level as deep as the standards of protection of property rights and economic freedoms, "seems objectionable on its face."[113]

But this fact begs a crucial question: provided that standards of protection of property rights under BIT jurisprudence are reasonable, how will these new standards be incorporated by developing countries into their own legal systems? If we do not wish BITs to become "legal enclaves" for foreign investors,[114] then the mechanism by which these standards are internalized and implemented remains a highly relevant concern to the updated version of the Bello/Calvo Doctrine.

I suggest that those theses which simply affirm that international law can enhance the rule of law *per se* are, by themselves, incomplete. The "halo effect,"[115] the "desideratum effect,"[116] and the mere "signaling effect"[117] do not possess sufficient

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[112] *See* W. van Gerven, *Mutual Permeation of Public and Private Law at the National and Supranational Level*, in 5 MAASTRICHT J. EUR. & COMP. L. 7, 23-24 (1998) ("Multiple mutual permeation is a good thing. Let us, where possible, promote it. The underlying reason for this is of both a legal and a pedagogic nature. The legal reason: in conformity with the principle of equal treatment it is a good thing that persons who are in the same situation, irrespective of the legal are involved, receive equal treatment, first and foremost, in the field of legal protection. It is indeed a matter of principle that equivalent positions, irrespective of the legal area, be judge equally, expect where there are objective reasons justifying inequality of treatment."). *See also*, POIARES MADURO, *supra* note 97, 71.

[113] 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, 120 (2003).

[114] *See* Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World*, draft, available at www.unisi.it/lawandeconomics/stile2004/daniels.pdf (last visited Apr. 18, 2006).

[115] WORLD BANK, WORLD DEVELOPMENT REPORT 179 (2005) ("While ICSID is designed to encourage foreign investment, domestic can benefit from the halo effect provided by stronger constraints on arbitrary government action.").

[116] LOUIS B. SOHN & R. BAXTER, HARVARD LAW SCHOOL, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS. PRELIMINARY DRAFT WITH EXPLANATORY NOTES 28 (1959) ("By the establishment of an international minimum standard, the law has not only protected aliens but has also suggested a desideratum for States in their relationships with their own nationals.").

strength to really introduce international minimum standards into the internal legal culture of developing countries. Something more is required to fully exploit the *potential* of the BIT generation's for enhancing the rule of law, including equality, while successfully avoiding the "legal enclave" scenario.

The two cases represented by the internalization of international human rights law and the "constitutionalization" of European Law, provide valuable lessons for the updated Bello/Calvo Doctrine. With that background, the main device I envision to achieve this purpose is to force developing countries' domestic legal cultures to become familiarized and acknowledge the norms and principles of BITs and their jurisprudence. More precisely, I am thinking of one concrete and practical legal policy that may help this process: recognizing BITs as self-executing treaties, that is, as treaties containing norms which are directly applicable to favor foreign investors before local courts.

Note that, at first glance, equality is not really achieved by this policy. If BITs are self-executing, they are *lex specialis*, in the sense of being applicable only in favor of foreign investors. In other words, national investors are not beneficiaries of the treaties, so they cannot claim any treaty violation before domestic courts. But this feature can produce a real "communicating vessels" effect. If this is the case, international minimum standards will be incorporated as "real domestic law" by domestic tribunals. Foreign investors will be able to bring BITs' causes of action in substitution of small and medium size cases (in monetary terms) that otherwise would have been litigated not in

[117] Wälde, *supra* note 57, 188 ("The example effect of treat-based contract protection is likely to have an indirect effect also on the treatment of domestic investors, as it signals to the host-State institutions what a proper, international and universal standard of governance is. Such signaling effect provides a benchmark for domestic judicial procedures as well.").

international arbitral tribunals but under domestic constitutional and administrative law schemes (simply because of the small size of the dispute).

This solution is not a mere legal technicality. As proven by the history of European law — albeit in a much different historical, institutional and legal setting — a "direct effect" policy can have strong implications for governance in both domestic and supranational legal systems.[118] Concretely, in the case of BITs, I envision four important effects. First, domestic tribunals, working *as* international tribunals, would begin to develop jurisprudence that would end up necessarily cross-fertilizing domestic law with elements and principles of international law.[119] Second, international law institutions would not continue to be seen as an esoteric category completely separate from the domestic political and legal process. Third, domestic legal education would also be transformed if international law were viewed as a domain over which domestic courts have actual jurisdiction.

But, here is the fourth and most important effect: as a consequence of the other results just mentioned, one would now be able to observe domestic politics doing its part at the local level. Only when domestic tribunals find themselves applying two different

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[118] *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413-14 (1991), who explains how the doctrine of direct effect played a crucial role in the "constitutionalization" of the Community Legal Structure. Specifically, *Id.* at 1414, he notes that "direct effect meant that Member States violating their Community obligations could not shift the locus of dispute to the interstate or Community plane. They would be faced with legal actions before their own courts at the suit of individual within their own legal order. Individuals (and their lawyers) noticed this practical implication, and the number of cases brought on the basis of this doctrine grew exponentially." *See also*, STONE SWEET, supra *note* 48, 64 ss (2004) (explaining how supremacy, direct effect, and related constitutional doctrines created by the ECJ "reconfigured the normative foundations of the Community, thereby upgrading the capacity of the legal system to respond to the demands of transnational society", *Id.* at 65). For more detailed legal studies of the doctrine of direct effect, *see* PAUL CRAIG & GRÁINNE DE BÚRCA, EC LAW. TEXT, CASES, AND MATERIALS 151 (1995), and Brunno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in THE EVOLUTION OF EU LAW (Paul Craig & Gráinne de Búrca, eds.) 177 ss (1999).

[119] *See* Claire L'Heureux-Dube, *The importance of dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998), and Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

standards, it will be possible to effectively level up the playing field for domestic investors. Only if domestic tribunals are forced to apply both standards, will developing countries face a serious revision of their own standards in those areas where any gap disadvantages nationals. Similarly intense pressure will then be placed upon the political branches of government to reform the legal system in order to forestall future discrimination against national investors.

The bottom line is, from a normative perspective, differentiation of foreigners and nationals should only be accepted under two conditions: that those differences merely represent an initial tool to foster investment and development, and are therefore limited in time; and that nationals will "soon" enjoy the same rights and privileges provided to foreigners. Now that the clash between international minimum standards and national standards has formally ended, it is necessary to reformulate the Bello/Calvo Doctrine and force developing countries to afford nationals the same treatment they afford foreigners.[120] If globalization produces inequalities, it is in the hands of developing countries to overcome them, and to extend to their nationals the same treatment that BITs provide for foreigners.

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[120] For the European context, opposed to this idea, *see* SØREN J. SCHØNBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW 27 (2000) ("Why should individuals be treated less favourably under national law than under EC law? Would different treatment of domestic and EC situations not offend against substantive equality and thereby the Rule of Law in so far as it is taken to include substantive, as well as formal, equality? The answer is that differential treatment does not violate the principle of equality, as it is justified by two considerations.")

CONCLUSIONS: THE UPDATED BELLO/CALVO DOCTRINE

It is only now, in the BIT generation, that the questions of equality which Latin American scholars and statesmen introduced in the international law debate in the 19th century are once again relevant ones. This means that the movement from Bello and Calvo to BITs is far from being a regional flip-flop. That is, the BIT generation does not contradict Latin American' 19th century teachings, but rather, it represents a new institutional setting in which to apply the lessons inherited from the regional framers who fought so hard against diplomatic protection.

If the main tenet of the Bello and Calvo Doctrines in the 19th century used to be equality-as-"national treatment" (in opposition to international minimum standards), now the updated version must hold "equality-as-reasonable-international-minimum-standards for all," national and aliens. For the reasons provided in this paper, the BIT generation, as an experiment of international governance can be fruitful for Latin America and developing countries if those conditions are met.

This requires that BIT jurisprudence should not crystallize in more protective terms than those that developed countries' domestic courts apply in favor of their own national investors; and, also, that BIT jurisprudence should permeate the domestic legal system of developing countries, weighting the content of domestic constitutional and administrative law in favor of domestic investment. This requires to keep *Lochner*'s ghost away from BIT adjudication, to force arbitrators to take both comparative and

domestic public law seriously, and to demand from the domestic political and legal system to take the necessary steps to avoid situations of "reverse discrimination."

The BIT network is still in the process of defining a consistent body of law. Although I remain optimistic about the network's future, capital importing countries should remain cognizant of the level of protection of property rights and investments that this network crystallizes. If an equilibrium is finally reached at a level consistently higher than that which major legal traditions of Western capital exporting countries prescribe for their own domestic investors, including their constitutional and administrative laws, then developing countries should seriously consider abandoning the BIT network. This option, in fact, is an essential part of the "exit legitimacy" which supports the BIT network, so considering exiting is always an appropriate concern.

But a more interesting question is what Latin America can do now, if anything, when the jurisprudence is still not crystallized, in order to force the system to adopt the proper jurisprudential equilibrium. The answer appears clear to me: there are many things we can do. Indeed, we should do exactly what the U.S. has been doing. Given that BITs contain too broad principles, that arbitrators frequently misapplied, Latin American countries can and must produce a model BIT — such as the 2004 U.S. Model BIT — that continues providing protection for investment and investors, but which curtail some excesses by providing clearer limits on the relation between property rights and the public interest.[121] It is at least curious that the U.S. has responded, but Latin America has not. Again, the region can and must display a level of collective action equivalent to that

[121] Indeed, the 2004 U.S. model BIT, and most recent investment chapters of FTA treaties, intend to strike a more desirable balance between property rights and regulatory powers. It expressly limits the discretion of arbitral tribunals when giving content to the two broad clauses of "indirect takings" and "fair and equitable treatment."

shown in the past when defending the Bello/Calvo Doctrine — which we did consistently in every international fora or meeting for more than 150 years.

To finish, a BIT network equilibrium like the one suggested here, i.e. not higher than capital exporting countries, should not be underestimated. On the one hand, the protection of property rights and economic liberties in developed countries, as practiced today, has proven to be a more than sufficient condition for the healthy performance of capitalist societies. Indeed, most capital exporting countries have long been committed to broader collective goals such as the protection of health, safety and the environment, and more generally, the self-determination of their citizens.

On the other hand, the benefits that a fair and equilibrated BIT network can produce in developing countries are considerable. Creating and developing a global constitutional and administrative law that actually functions may represent a substantial advancement of the rule of law. Imposing those standards top-down from the international level — one of the consequences of trading sovereignty for credibility — may be an efficient means of bypassing the powerful practices of local elites and special interests groups, who are one of the main culprits responsible for the institutional weaknesses of developing countries.

The BIT generation is not an exception to Keohane's assertion quoted at the head of this paper: "If global institutions are designed well, they will promote human welfare. But if we bungle the job, the results could be disastrous." The Bello/Calvo Doctrine, duly updated, provides us not only with normative goals to pursue — equality, rule of law, good governance — but it also marks us the way on how to do it. We should demand a global legal system committed to the rule of law, and ultimately, to personal autonomy

and individual flourishing. Again, as Keohane notes, “to make a partially globalized world benign, we need not just effective governance, but the *right kind* of governance.”[122]

[122] Keohane, supra note 1, 1.