Introduction

[T]akings theory is ultimately about political theory—specifically, about how much faith one has in government.¹

I WHY THIS BOOK

SINCE GERMANY AND Pakistan signed the first BIT in 1959, the number of concluded bilateral investment treaties (BITs) has grown globally to 2,608.² Most of them were signed subsequent to the fall of the USSR, on the understanding that foreign direct investment (FDI) is a key factor for development which should be actively pursued.³

BITs, as well as other investment treaties such as free trade agreements (FTAs) containing investment chapters,⁴ regulate the admission, treatment and expropriation of foreign investment. This is accomplished, in short, through their dual function of providing a set of open-ended principles that govern state behavior towards foreign investors, and establishing a neutral forum for the resolution of investor–state disputes.

What makes these treaties truly unique is the fact that they are designed to function without the political involvement of either host- or home governments. Indeed, an overwhelming majority of BITs allow foreign investors to file damages actions directly against host states before international arbitral tribunals. Foreign investors are entitled to claim that legislative, administrative or judicial measures have breached the

¹ David A Dana and Tomas W Merrill, Property. Takings (New York, Foundation Press, 2002) 57.
substantive principles of these treaties, and they can do so without exhausting local remedies at host states’ courts, and without securing authorisation from or endorsement by their own home states. Moreover, under the authority of the New York Convention\(^5\) or ICSID Convention\(^6\) awards issued by these tribunals are directly enforceable in courts sitting in signatory states throughout the world.

As a consequence of this favourable legal architecture, foreign investors have been filing claims against host states at a pace of 25–45 per year,\(^7\) with a cumulative total of about 300 known cases (up to 2007).\(^8\) These claims have placed and will continue to place, a truly impressive array of regulatory action under the direct and immediate scrutiny of arbitral tribunals. These range from environmental policies, banking sector reforms, implementation of treaty obligations, and responses to economic crises; to revocations of licenses and permits, termination of concession contracts, contractual disagreements of all kinds, and application of tax laws, just to name a few.

One of the most distinctive features of this ‘worldwide BIT network’,\(^9\) is the degree of similarity to be found among core substantive provisions.\(^10\) As McLachlan et al have noted before, ‘this patchwork of interlocking but separate treaties—each the product of its own negotiation—in fact betrays a surprising pattern of common features’. (emphasis added)\(^11\)

Notwithstanding difference in wording, from a sociological perspective the language used by BITs’ key provisions is sufficiently uniform to have given birth to a common legal practice. As a result, since the first arbitral award based on a BIT was rendered in 1990,\(^12\) investment treaty arbitration has become a distinctive field in international law. In Duprey’s words, investment treaties have given way to ‘the establishment of a genuine arbitration case law specific to the field of investment’.\(^13\) Using


\(^7\) This pace corresponds to the period 2002–2007, which can be considered to represent the mature equilibrium of the system.

\(^8\) See UNCTAD, n 2, 17.

\(^9\) Asian Agricultural Products Ltd v Sri Lanka, ICSID Case No ARB/87/3 (El-Kosheri, Goldman, Asante), Award (27 June 1990) ¶ 49 (hereinafter, Asian Agricultural Products).

\(^10\) See eg Rainer Geiger, ‘The Multifaceted Nature of International Investment Law’ in Karl Sauvaut (ed), Appeals Mechanisms in International Investment Law (New York, OUP, 2008) 17, 18 (noting that ‘the treaty practice of most countries show a certain degree of convergence in investment protection provisions’).


\(^12\) The first award was rendered in Asian Agricultural Products.

the expression coined by Reisman and Sloane, today we live in the ‘BIT generation’.14

Investment treaty arbitration, also referred to here as investment arbitration, or international investment law, is certainly a new development in international law. While having roots in general international law—particularly in the traditional field of protection of aliens and their property—international investment law confronts challenges so novel, that older precedents, doctrines, and modes of thought, by their very nature, are suddenly of limited value. Indeed, never before has international law enjoyed so much authority over the regulatory state on a permanent basis and without the previous intervention of domestic courts.

The difficulty of the challenges that confront us in investment treaty arbitration derives not only from the novelty of the enterprise, but more importantly, from an absence of guidance provided by the relevant treaties. Indeed, investment treaties do not establish concrete rules, but only the most abstract and open-ended standards. As a consequence, arbitral tribunals are placed in the position of having to develop concrete norms of state behavior toward foreign investors. In international investment law, ‘[c]ase law thus plays a fundamental role in developing the scope of treaty obligations’.15 This effectively converts investment treaty arbitration into a form of global governance, which, moreover, to the extent that there is no central authority but only a constellation of arbitral panels, is private and decentralised.

Today, after 19 years of investment treaty arbitration practice, we are beginning to gain a clearer idea of what BITs’ key open-ended provisions actually mean. Although the precise content of these provisions is still far from settled, we are now in the position of determining, to a certain extent, conceptual ‘bands’ that apply to the potential meaning of those concepts. Stated more formally, to adapt Coe’s comment on NAFTA Chapter 11, we may say that ‘[t]hough a mature jurisprudence has by no means emerged, substantive trends have been established and several of investment treaties’ distinctive features, strengths, and weaknesses have been illuminated’.16

There is no doubt that, at present, the most pro-investor and the pro-state bounds for possible interpretations of investment treaties’ key

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provisions remain significantly different. Yet, their relative positions are already close enough to allow for an adequate discussion of the goals and functions of international investment law, and to more precisely identify the normative equilibria that should be sought in the process of balancing investors’ interests and the regulatory state’s powers.

Moreover, to the extent that jurisprudence in the short- and mid-term future will have to adopt various positions within this more narrow and more closely-defined context, international investment law is now entering its most critical phase. I believe that awards to be issued in the next few years will largely determine the future of the BIT generation—either as a successful institutional arrangement of global governance, or as a failed experiment that spawned an illegitimate and conservative system geared toward the excessive protection of investments. Fortunately, because there still exists a reasonable probability that BITs’ key provisions will stabilise at appropriate equilibria, I remain optimistic about the future of the BIT generation.

With this general framework in mind, this book attempts to contribute to our general understanding of international investment law; particularly the policy objectives that should guide its development, and the normative equilibria that should be considered to represent its successful achievements. The timing is highly appropriate: we are in the midst of a once-in-a-century financial and economic crisis, which is bringing about globalisation’s ‘biggest reversal in the modern era’, and which will certainly test the soundness of the institutional foundations of the BIT generation (along with other arrangements of global governance).

Following earlier seminal works, investment arbitration is presented here as a form of public law adjudication. This means that the functions of arbitral tribunals do not substantially differ from those of public law courts throughout the Western world. They must review state action for unlawfulness, and ascertain whether the political branches of government have achieved a proper balance between private and public interests. Accordingly, state liability in investment arbitration is understood and explained here as a form of global constitutional and administrative law.

As a Chilean citizen, in this book I have tried to reflect the perspective of developing countries; specifically, those that are seriously committed to democracy, the rule of law, and regulatory capitalism. Given the

20 Of course, other views reflecting the perspective of developing countries can disagree with the ideas defended in this book. I do not claim any monopoly over such a perspective.
current dimensions of foreign direct investment and its relevance to the developing countries’ economies, investment arbitration can make considerable demands in terms of sovereignty and democracy, even more so than international trade regimes.\textsuperscript{22} We should not forget that, as Wälde has observed, ‘[i]nvestment treaties as international law disciplines interfere in domestic regulatory and administrative sovereignty; \textit{that is their very purpose}.’ (emphasis added)\textsuperscript{23}

Yet, notwithstanding the enormous intrusive potential of this new form of global public law, there has been relatively little analysis of the political and legal consequences to the commitments adopted by developing countries in investment treaties. This book tries to fill in some of these gaps, drawing inspiration from the nineteenth-century Latin American publicists—primarily Andrés Bello—who were active members in the debate concerning state responsibility for injuries to aliens.

Of course, today’s challenges are not those of the nineteenth century. Nor are we in need of a Manichean stance favouring developing countries, that disregards investors’ expectations and rights as a matter of principle, as was the case during the highly-polarised twentieth century. Instead, the true challenge ahead is the achievement of a proper balance between investors’ rights and expectations on the one hand, and valid and legitimate regulatory goals on the other.\textsuperscript{24} Only such a compromise can, in the field of investment arbitration, overcome what Keohane has referred to more generally as the ‘governance dilemmas’ of globalisation:

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? . . . [O]ur 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.\(^{25}\)

In sum, this book constitutes an effort to answer some of these questions in the context of the global institutional arrangements created for the protection of foreign investment. It takes an interdisciplinary approach which attempts to organise the key normative dimensions of international investment law, and to provide a critical assessment of the various arbitral decisions and academic commentary produced up until the present.

II WHAT THIS BOOK IS ABOUT

In the pages ahead lies an ambitious and novel understanding of state liability in investment arbitration, with an emphasis on the principles of no expropriation without compensation, and fair and equitable treatment (FET), the two most expansive and influential standards contained in investment treaties.

Having already touched upon a general summary of investment treaty arbitration, I will now provide a brief overview of the remaining building blocks of this work, which shape its overall tone and spirit. As the title indicates, this book is about: State Liability in Investment Treaty Arbitration, Global Constitutional and Administrative law, and the BIT Generation.

A State Liability in Investment Treaty Arbitration

The first major theme of this book is the idea of state liability, or more precisely, regulatory state liability. Because the regulatory state has the power to harm citizens and investors, state liability is explained and justified by a much more complex mixture of corrective and distributive justice rationales than tort liability in private law: not every intentional harm caused by the state is a wrong, not even prima facie; and, the state may be required to pay compensation even in the absence of wrongdoing. The public law nature of state liability deserves then a brief explanation at the outset.

As is well known, the administrative state that emerged in the first half of the twentieth century radically expanded the scope and depth of the public domain. In contrast to the laissez-faire liberal state, this form of

state—as Ackerman observes—‘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, subsidising there, regulating everywhere’.26

Today, throughout Western nations and even beyond, the administrative state has adopted a particular form: the regulatory state.27 The latter is the result of a transformative process that began with privatisations and deregulations in the 1970s and 1980s, and eventually replaced the previous dirigiste version of the administrative state.28 According to Harlow, this form of state is characterised by having ubiquitous regulatory functions:

The modern state, in which today I sit and write these words, is characterised 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 purposes of social control is both accepted and acceptable.29

Regulation’s central role at the beginning of the twenty-first century reminds us that the state possesses the constitutional power to redefine and readjust the relationship between private interests and the public interest. Put differently, it has the constitutional duty to allocate burdens and benefits across society in its permanent quest for the public good. The constant upsetting of the status quo, hence, is part of the essence of the regulatory state. As Craig notes, ‘legislation is constantly being 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’. (emphasis added)30

This legitimate power to harm—which may surprise those not trained in public law—constitutes a fundamental aspect of state liability, which any serious approach to the subject in international law must take into

26 Bruce Ackerman, Private Property and the Constitution (New Haven, Yale University Press, 1977) 1.


account. As Caranta notes, because ‘administrative decisions can legally encroach on citizens’ rights’,31 ‘[h]arm alone cannot therefore be sufficient to establish liability’.32 Something more than a demonstration of economic damages is needed in order to successfully demand that the government pay compensation.

Of course, this does not mean that private interests may always be sacrificed without consequence. There are circumstances in which private rights and expectations should prevail over the public interest, and others in which the affected citizen must at least be compensated. Here lies the dilemma of state liability that Ackerman so accurately sums up in the following words:

[W]elfare 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?33

It should be noted that defining state liability in the context of the regulatory state is a decidedly new task for international law. As recently as 1983, Judge Higgins commented that such a function was a ‘somewhat newer theme’,34 referring specifically to the question that lies at the core of the state liability dilemma: ‘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?’35

Notwithstanding the lack of experience characterising general international law in this area,36 investment treaty arbitration has been charged with the mission of ‘solving’ the state liability dilemma.37 Up until now,

32 ibid.
33 Ackerman, n 26, 1. Similarly, Jeremy Paul, ‘The Hidden Structure of Takings Law’ (1991) 64 Southern California Law Review 1393, 1406, poses the following question: ‘When do individual contributions to collective welfare cease to be a proper price of communal citizenship and become an unfair sacrifice of the few to the many?’
35 ibid.
37 See Mads Andenas, ‘An Introduction to the British Institute of International and Comparative Law’s Investment Forum’ in Federico Ortino et al (eds), Investment Treaty Law. Current Issues I (London, The British Institute of International and Comparative Law, 2006) 7, 7, noting that ‘[i]nvestment treaty law raises many difficult issues concerning the proper balance to be found between the rights of investors and rights of states’. See also, Kaj Hobér,
traditional views of investment arbitration, which are typically embedded in private law, have not fully grasped the proper scope and extent of this mission.\textsuperscript{38} The late professor Thomas W Wälde, to whom the international investment law community will always be in debt, remarked upon this point in at least two separate articles:

The commercial arbitration community . . . has in fact taken over investment arbitration and runs it as a new form of commercial arbitration business, with little understanding that enforcing disciplines against States is quite different from holding mature and experienced international commercial players to their bargains.\textsuperscript{39}

Investment arbitration is not international commercial arbitration. It is essentially a form of international judicial review of governmental (regulatory, administrative and at times fiscal) action, though using the forms of commercial arbitration. This is not always appreciated by lawyers used in the traditions of commercial arbitration [sic].\textsuperscript{40}

When viewed from a public law adjudication perspective, state liability comprises two different areas: torts and expropriations. Together, they constitute what the Germans referred to as \textit{staatliche Ersatzleistungen} or ‘public indemnifications’.\textsuperscript{41} This broad category—which I will classify in this work under the general heading of state liability—covers, on the one hand, indemnifications grounded in fault and negligence, including illegality and irrationality; and, on the other hand, indemnifications grounded in proportionality and equality.

Harlow refers to the first group as liability—which, to avoid confusion, I will refer to here as liability (\textit{stricto sensu})—and to the second as compensation.\textsuperscript{42} Liability (\textit{stricto sensu}) is governed mainly by principles of corrective justice. Generally speaking, this form of justice—which has traditionally lain at the heart of private law, at least of tort law—centers

attention on the direct and immediate relationship between two parties, and the wrongful character of the actions of one of them. Weinrib summarises the concept 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.44

In a Rechtsstaat or rule-of-law-state, citizens and investors may resist illegal or irrational burdens and harms. Consequently, liability is sometimes imposed in cases of wrongful behavior,45 whereby the decision-maker must review the potentially unlawful character of state action or inaction.46 As Mashaw has observed more generally, claimants who seek damages ‘invariably question the legality of administrative conduct. To that degree, suits against the government and its officials sounding essentially in tort, contract, or property also invite judicial review of administrative action’.47

On the other hand, compensation is guided by principles of distributive justice.48 Distributive justice, as Perry observes, is ‘most plausibly construed as social justice’.49 This implies that, in contrast to corrective justice, distributive justice focuses on multilateral considerations, particularly the substantive criteria determining the allocation of burdens and benefits between winners and losers. Wright provides a precise overview of this form of justice:

Distributive justice claims are multilateral. To determine the resources to which a person is entitled as a matter of distributive justice, we must know both the

OUP, 1995) 159, 182 (arguing that ‘[t]ort claims, being based on interactional injuries, fall within the domain of corrective justice’ and that ‘corrective justice . . . explains, justifies and illuminates the general structure, content and institutions of tort law’). See also, William Lucy, Philosophy of Private Law (New York, OUP, 2007) 268–326.


45 The standard remedy is the nullification of the wrongful measure.

46 The extent to which different legal systems view or don’t view the principle of legality as the state’s individualised duty towards each and every citizen, affects the connection between corrective justice and illegality, and indeed, explains differences in state liability regimes across legal cultures. These differences are explored in ch 4.


48 See Harlow, n 29, 3.

The distributive justice rationale of state liability dictates that citizens and investors receive compensation when the state harms them disproportionately or unequally, even if the process of burden allocation has been lawfully conducted. Given the anti-redistributive strength that property rights and investments possess in almost all legal cultures, courts and tribunals, to a certain extent, must (and do) control the design and implementation of regulatory programs by the political branches of government.

To take an example, in *Armstrong*, for instance, the United States Supreme Court stated, in a much cited holding, that:

> The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

As Dagan points out, in this case the Supreme Court placed ‘the Aristotelian notion of distributive justice—which requires that recipients of benefits and burdens receive their share according to some criterion—at the heart of takings jurisprudence’.

In short, this work analyses state liability in investment treaty arbitration, within the framework of public law adjudication. The key propositions put forth are that the regulatory state has the power to harm citizens and investors, but only if acting diligently and legitimately, and only if the resulting allocation of burdens and benefits complies with the

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50 Wright, n 43, 177. In the same vein, according to Weinrib, n 44, 62: ‘[D]istributive 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.’

51 See Frank I Michelman, ‘Possession vs Distribution in the Constitutional Idea of Property’ (1987) 72 Iowa Law Review 1319, 1319 (noting that ‘we primarily understand property in its constitutional sense as an antireistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends’).


constraints imposed by the anti-distributive strength of property rights and investments.

B Global Constitutional and Administrative Law

A second core idea explored in this book is the claim that investment treaty tribunals are involved in the process of developing a new form of global constitutional law (GCL), and of global administrative law (GAL). Investment treaties were deliberately designed to constrain sovereignty, and arbitral tribunals’ concrete expressions of those constraints can be usefully understood as matters of constitutional and administrative law character.

Indeed, by redefining the scope and limits of the rules for state liability, investment tribunals are currently creating a new body of law that trumps domestic constitutional law within the state’s own territory, as lex specialis applicable to foreign investors. This means that, since investment treaties delegate jurisdiction of constitutional character to arbitral tribunals, constitutional adjudication no longer resides exclusively in domestic supreme or constitutional courts.

In this regard, international investment law clearly demonstrates that, in the current era of global law, as Walter notes, domestic constitutional law ‘loses its claim to regulate comprehensively the exercise of public authority within the territorial limits of the state’. It also proves, in Cottier and Hertig’s words, that:

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.

I am aware that the terms constitution and constitutionalization have proven difficult and controversial when trying to relate them to inter-

55 See Paulsson, n 23, 245; and Van Harten and Loughlin, n 18, 146.
56 See David Schneiderman, Constitutionalizing Economic Globalization. Investment Rules and Democracy’s Promise (New York, CUP, 2008) 3 (commenting that ‘the investment rules regime can be seen as disciplining and reshaping the constitutional law of various states across the globe’).
57 In strict terms, domestic constitutional law remains intact. The constitutional nature of the delegation of jurisdiction is only ‘philosophical’, not of a domestic law character. International investment law presents an alternative forum for foreign investors, that is, a substitute for domestic constitutional (and administrative) law. To the extent that these are indeed substitutes, and given what it is a stake in the decision of these disputes—for the reasons provided below—they share the same basic ‘constitutional’ nature.
national law and institutions, particularly in the absence of a relevant global polity. The lack of a democratic foundation for global governance mechanisms presents a formidable obstacle to any attempt to give a constitutionalised account of post-Cold War international law. The absence of any relevant political community, or global *demos*, renders most charged visions of what constitutional law is and should be, completely incompatible with the new phenomena that presently face us.

Several authors have tried to determine whether these notions can be expanded—or at least a minimum threshold recognised—so that they can be applied to global governance arrangements. Drawing upon some of those efforts, I have arrived at the opinion that the idea of constitutional law at the global level remains attractive. In all, there are five pragmatic reasons for insisting upon the notion that the BIT generation is a global constitutional phenomenon.

First, the key substantive provisions contained in investment treaties constitute a clear limit to states’ police powers within their own territory. This represents an external redefinition of the domestic equilibrium and boundaries between property rights and regulatory powers. To use Bruce Ackerman’s nomenclature, this redefinition has the functional status of *higher lawmaking*, because it transcends ordinary politics. In this sense, it would not be an exaggeration to say that investment treaties create a new ‘economic constitution’ favouring a relevant set of actors, as is the case with foreign investors in developing countries.

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62 See Schneiderman, n 56, 37 (noting that, ‘[a]t bottom, the investment rule regime represents a form of constitutional precommitment binding across generations that unreasonably constrains the capacity of self-government’). See also, Cheng, n 23, 482 (commenting that ‘[i]nternational investment law diminishes the authority and power of a state by restraining its internal decision-makers’).

63 See Bruce Ackerman, 1 *We the People* (Cambridge, Mass, Belknap Press of Harvard University Press, 1991) 9 ff, and 266 ff. 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.

The second reason—observable from the EU’s institutional experience—is already a classical one that involves the elements of direct effect, supremacy, and judicial review, all characteristics observed in investment treaty law. Although for Anglo-American lawyers those elements may be descriptively insufficient and normatively unacceptable, for continental lawyers—who are presumably more accustomed to, and therefore more afraid of non-democratic regimes—they represent a relatively standard approach to constitutional law. From this more formalistic perspective, international investment law would clearly qualify as GCL. Investment treaties possess direct effect and confer causes of actions to foreign investors, prevail over domestic law in the case of conflict, and charge arbitral tribunals with the function of reviewing state action and inaction.

Third, constitutional law is also a methodology for approaching certain types of political and legal problems. Weiler has taken this view before in defending the idea of constitutional law and constitutionalisation in 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 yardstick for the exercise of host states’ administrative, judicial or legislative activity vis-à-vis foreign investors).

See eg Alec Stone Sweet, The Judicial Construction of Europe (OUP, Oxford 2004) 65, who explains constitutionalization in the EU context in the following terms: ‘The constitutionalization of the EC refers to the process by which the Rome Treaty evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal persons and entities, public and private, within EC territory. The phrase thus captures the transformation of an intergovernmental organization governed by international law into a multi-tiered system of governance founded on higher-law constitutionalism’.

See Jed Rubenfeld, ‘Unilateralism and Constitutionalism’ (2004) 79 New York University Law Review 1971, 1974–75, who explains this difference in the following terms: ‘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’. See also, Christoph Möllers, ‘“We are (afraid of) the People”: Constituent Power in German Constitutionalism’ in Martin Loughlin and Neil Walker, The Paradox of Constitutionalism. Constituent Power and Constitutional Form (New York, OUP, 2007) 87.

Following the classification proposed by Neil Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’ (2008) 6 International Journal of Constitutional Law 373, 379, investment treaty arbitration seems to fit the category of ‘institutional incorporation’, the closest ‘institutional embrace’ in his framework, whereby ‘the host normative order makes general provision for the normative decisions of an external agency to be incorporated and, to that extent, to be treated as authoritative within the host normative order’.
landmark or milestone), an intellectual construct by which one can assign meaning to, or even constitute, that which is observed.68

In the case of BITs, constitutional law traditions around the world have created different techniques and methodologies with which to assess state liability as well as the protective scope of property rights and investments. It is a generally accepted fact that there exists a constitutional law practice whose main objective is to identify the conditions and requirements by which citizens and investors are permitted to claim damages when they have been harmed by state action or inaction.

Fourth, investment treaties replace domestic public law remedies with international remedies. At the domestic level, the legal architecture of public law remedies—a combination of judicial review and state liability—is clearly a matter of constitutional law. It reflects, operatively and procedurally, sensitive considerations about the proper balance of power between the judiciary, executive and legislature.69 Therefore, by providing foreign investors with a completely new remedial ‘toolkit’—which is, incidentally, in the Eastern Sugar Tribunal’s words, ‘the most essential provision of Bilateral Investment Treaties’70—investment treaty law can be characterised as global constitutional law.

Fifth, 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 exist between those tribunals and the national bodies under control. This structural issue is a classic constitutional law topic, demarcating the boundary between the political and judicial branches of government.71

These five factors build a case for conceptualising investment treaty law as a form of global constitutional law. In this regard, I should be particularly explicit in clarifying what is not intended here when characterising this field as global constitutional law. Investments frequently clash with legitimate

69 For example, in the UK, the impact of EU law has led Harlow, n 29, 62, to assert that ‘[l]iability is, after all, a highly intrusive remedy, with considerable impact on national constitution’.
70 Eastern Sugar BV v The Czech Republic, UNCITRAL Ad-Hoc Arbitration (Karrer, Volterra, Gaillard), Partial Award (27 March 2007), ¶ 165. See also Gas Natural SDG, SA v Argentine, ICSID Case No ARB/03/10 (Lowenfeld, Alvarez, Nikken), Decision on Jurisdiction (17 June 2005), ¶ 29.
71 See Cottier and Hertig, n 59, 317 (stating that ‘[i]n a multilayered system, defining the relationship and the boundaries between the different levels of governance are essential constitutional functions’). See also, Deborah Z Cass, ‘The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’ (2001) 12 European Journal of International Law 39, 42. Standard of review issues have been the focus of attention by WTO commentators, but not by investment treaty ones; see eg Matthias Oesch, Standards of Review in WTO Dispute Resolution (New York, OUP, 2003), and Steven P Croley and John H Jackson, ’WTO Disputes Procedures, Standards of Review, and Deference to National Governments’ (1996) 90 AJIL 193.
regulatory goals (that is, economic or non-economic public interests). The idea of GCL, in this context, does not imply that the concept of investments is a super-value overriding all competing values in the set of ‘investment and...’ dichotomies. Nor does it suggest that investment treaty adjudication is legitimate per se, simply because it provides judicial review according to a set of rights that had been predefined as constitutional in nature.\(^{72}\)

Again, global constitutionalism refers here to the terms of the contest, the mere form of judicial review; not to the alleged trumping power of investments with respect to the outcome. It is a methodology that inquires about the conditions which, according to corrective justice rationales, demand the payment of damages in cases of wrongful state action, and, according to distributive justice rationales, demand payment in cases of proper and lawful state action. Ultimately, treating this field as GCL serves to increase awareness in the international investment law community of the serious and delicate nature of cases that involve state liability pursuant to investment treaties.

In addition, this book claims that international investment law constitutes a form of global administrative law. Those who agree with the characterisation of investment treaty law as a form of public law adjudication, but reject the idea of global constitutional law, may easily expand the concept of GAL to encompass this new field of international law. In this regard, the same reasons provided earlier in favour of investment treaty law as a form of GCL apply to the GAL thesis.

Not many commentators have recognised the GAL character of investment treaty arbitration. Van Harten and Loughlin deserve special recognition for being among the first to connect investment arbitration with the nascent concept of global administrative law:

\[\text{[T]he regime of international investment arbitration which has been rapidly developing since the 1990s provides not simply a singularly important and under-appreciated manifestation of an evolving system of global administrative law but that, owing to its unique features, it may in fact offer the only exemplar of global administrative law, strictly construed, yet to have emerged... [I]t is precisely because of the potential of these internationally generated adjudicative norms and mechanisms to exert a strong disciplinary influence over domestic administrative programmes that investment arbitration should be seen to constitute a powerful species of global administrative law.}\(^{73}\)


\(^{73}\) Van Harten and Loughlin, n 23, 122. See ibid 149: ‘Indeed, if one adopts a strict definition of global administrative law—as a system akin to domestic judicial review in that it keeps public authorities within the bounds of legality and provides enforceable remedies to individuals harmed by unlawful state conduct—then investment arbitration would appear to be the only case of global administrative law in the world today’.
Here, I follow a continental law approach, which conceptualises administrative law, to recall Werner’s classic phrase, as ‘constitutional law concretized’.\(^{74}\) By this understanding, GAL should not be regarded as opposing GCL, but rather, as a specific manifestation of it. The somewhat arbitrary line adopted here divides the global public law ‘pie’ into the following two portions: one slice, GCL, covers the protection of the core of investments in more or less absolute terms, representing fixed limits that the regulatory state cannot cross; and the other slice, GAL, covers the protection of the periphery of property rights and investments in relative terms, and subject to different types of arbitrariness tests.

In other words, the principle of no expropriation without compensation, and its corresponding focus on the scope of property rights and investments, is defined here as the ‘centre of gravity’ of GCL; and the FET standard, with its focus on arbitrariness, as the corresponding center of GAL. This perspective is consistent with traditional domestic public law views, where questions posed by expropriation clauses and the protective scope of property rights are usually matters to be settled within the realm of constitutional law, and questions of arbitrariness, within the realm of administrative law.

\[C\] The BIT Generation

The narrative of this book is deeply rooted in the sociological concept of the BIT generation. This concept, as used here, refers to the emergence of a common legal practice, addressing a distinctive set of legal and normative problems, which have resulted from having a network of thousands of investment treaties all worded in similar terms while simultaneously waiving the customary rule of exhaustion of local remedies.

Probably the best way of grasping the most critical aspects of the BIT generation is to contrast it with the previous legal practice that existed before investment treaties became predominant. In this regard, the most distinctive feature of that previous era, referred to in this work as the ‘denial of justice age’, was that state responsibility could only emerge or, at least, be claimed at the international level, once domestic courts had acted on the case under dispute.\(^{75}\)

Given the rule of exhaustion of local remedies, international law generally had to assess the judicial system of defendant states or, more


precisely, the domestic legal system as applied by domestic courts. In the words of the Commission of Arbitration in the *Ambatielos* case, ‘[i]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane.’ Or, as Judge Morelli expressed in his separate opinion in the *Barcelona Traction* case, ‘[t]he conduct which international law renders incumbent upon a State with regards to the rights which the same State confers on foreign nationals within its own municipal order consists, in the first place, in the judicial protection of those rights.’ (emphasis added)

Consequently, in this earlier era, international law was essentially concerned with the proper administration of justice and adequate maintenance of the *ordre public*, both central functions of the nineteenth century ‘night-watchman’ state. State responsibility for injuries to aliens was conceived as the obligation of states ‘to maintain and operate a machinery for protecting the rights of aliens’. In Freeman’s words, ‘the proper scope of the concept [denial of justice] is one bound up with the operation of the machinery for the vindication and enforcement of rights: the mechanism by which justice is administered’.

During the denial of justice age, the technical term *denial of justice*—that is, the ‘failure of redress in the prosecution of local remedies’—was the most important legal category in the area of state responsibility for injuries to aliens and their property. As indicated by one of the main publicists,

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76 In the words of Eagleton, n 75, 113, exhaustion of remedies and denial of justice were then ‘interlocking and inseparable’. See also Borchard, n 75, 179–180 (‘Again, before the international responsibility of the state may be invoked, the alien must under normal conditions exhaust his local remedies and establish a denial or undue delay of justice, which in last analysis is the fundamental basis of an international claim’) (emphasis added).

77 *Ambatielos* Claim (Greece v UK) (3 March 1956) (2006) 12 RIAA 83, 120 (2006) (available at http://www.un.org/law/riaa/). See Campbell McLachlan QC, ‘Investment Treaties and General International Law’ (2008) 57 ICLQ 361, 366, commenting precisely that: ‘In practice, save in cases of a refusal to investigate or prosecute, the cases on the international minimum standard and denial of justice were almost always concerned with alleged failures in the judicial system of the host State. Any failures in the administrative decision-making would not give rise themselves to an international claim, since they would first have had to be tested by the investor in the local courts’.


79 Freeman, n 75, 45.

80 ibid 162.

81 Edwin M Borchard, ‘Theoretical Aspects of the International Responsibility of States’ (1929) 1 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 242, 245. As GG Fitzmaurice, ‘The Meaning of the Term “Denial of Justice”’ (1932) 13 British Ybk of Intl Law 93, 108–09, explains, a denial of justice may consist in ‘a failure to redress a previous wrong [by the Executive or the Congress], or in an original wrong committed by the court or other organ itself’. See also Charles Cheney Hyde, *International law: Chiefly as Interpreted and Applied by the United States* (Boston, Little, Brown, 1922) 547.

82 In fact, denial of justice was so important, that in one of its meaning it was equated with the idea of state responsibility for injuries to aliens in its entirety. See 1 Hyde, n 81, 491.
Edwin Borchard, ‘[p]erhaps no concept and term in the law of state responsibility is more important than that of “denial of justice” ‘. This was certainly true statistically speaking: most cases of state responsibility involved denial of justice allegations.

In the denial of justice age, international law was characterised by a strong respect for state sovereignty. International courts and tribunals were reluctant to interfere with the ways in which domestic policy and law were created and implemented by the political branches of government. Domestic law and its application were considered matters of domestic jurisdiction, forming part of the *domaine réservé*. A pronounced dualism, in which national and international law were kept completely separate, was considered to best describe the proper relationship between the two legal orders.

The BIT generation presents a stark contrast to the denial of justice age. Today, the primary object of scrutiny for investment treaty tribunals is not judicial decisions, but regulatory action or inaction. As Reisman and Sloane explain, BITs require governments to ‘establish and maintain an appropriate legal, administrative, and regulatory framework, the legal environment that modern investment theory has come to recognise as a *conditio sine qua non* of the success of private enterprise,’ which includes an ‘efficient and legally restrained bureaucracy’. As a result of the waiver of the rule of exhaustion of local remedies, international investment law today is in charge of controlling the regulatory state.

As noted, the idea of the BIT generation as a common legal practice critically depends on the existence of a system that contains thousands of investment treaties, all having substantive provisions worded in closely similar terms. This system of treaties has given way to a common vocabulary, framework of argumentation, and epistemic community. Courses on investment arbitration are taught in elite law schools, seminars on the topic are conducted throughout the world, and groups specialising in this area...
are included in law firms. Books that give a comprehensive treatment of this subject-matter—among others the recent Law and Practice of Investment Treaties, Principles of International Investment Law, The Oxford Handbook of International Investment Law, Standards of Investment Protection, and International Investment Arbitration. Substantive Principles—are indeed, some of the best examples of what I mean here by a common legal practice. Ultimately, as McLachlan et al have recently observed, we are witnessing the emergence of a ‘common law of investment protection’:

[What is emerging is a common law of investment protection, with a substantially shared understanding of its general tenets. This still depends for the most part on the existence of a treaty forming the basis for the enforceable rights. It will always yield to particular provisions of a treaty which diverge from the general rule, or to other contrary indications resulting from the application of the rules of treaty interpretation. But the differences between treaties, and indeed between treaty and the substantive rights in custom, may be less than the common elements.]

Chapter 2 will take this idea even further, envisioning the BIT generation as a network of treaties in a more precise technical sense. The substantive similarity of wording among the treaties’ main provisions—particularly the expropriation and FET clauses—is such, that case law developed under one treaty influences the future interpretation of all other treaties. This occurs because, even in the absence of a formal concept of precedent, the international investment community, to a certain extent, takes previous decisions seriously, and cares about the coherence and consistency of the system. This constitutes a true ‘network externality’—a positive demand-side externality, growing in magnitude with the number of existing treaties—which, effectively, defines the BIT generation as a virtual network.

91 Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties. Standards of Treatment (Alphen Aan Den Rijn, Kluwer Law and Business, 2009). Unfortunately, this excellent book was published just a few weeks before I sent the manuscript for publication.
92 Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (New York, OUP, 2008).
93 Peter Muchlinski et al (eds), The Oxford Handbook of International Investment Law (New York, OUP, 2008).
94 August Reinisch (ed), Standards of Investment Protection (New York, OUP, 2008).
95 McLachlan et al, n 11.
96 ibid 19. See also, Thomas W Wälde, ‘The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research’ in Centre for Studies and Research in International Law and International Relations, New Aspects of International Investment Law (Leiden, Nijhoff, 2006) 63, 120 (observing the emergence of a ‘common law of world investment . . . with an increasingly dense and increasingly similar and sometimes in the core identical treaty network as foundation’).
97 McLachlan et al, n 11, 19.
III THE BOOK’S MAIN NORMATIVE CLAIMS

Because this book adopts a critical position with respect to several developments within international investment law, it is important at the outset to summarise some of the main normative claims that underpin the entire work. To be clear, this book does not adopt a pro-state stance, nor is it a blatant critique of investment treaty arbitration from the perspective of developing countries’ sovereignty. At the same time, no sentimental reminiscences of the new international economic order (NIEO) and its various doctrines of lack of responsibility in international law will be found in these pages.

Instead, it is claimed here that state liability in investment treaty arbitration, as a form of global constitutional and administrative law, should be concerned with the development of a balanced and prudent system of protection of foreign investment. Such a system, as stated by McLachlan et al, would be one characterised by ‘an appropriate balance between protection of the rights of foreign investors on the one hand, and recognition of the legitimate sphere of operation of the host State on the other’. 98

This means that the objective of international investment law should not be the super-protection of investments and property rights. 99 By contrast, following the reasoning of the Mexican–United States General Claims Commission, in the BIT generation, states should only be liable for the ‘failure to maintain the usual order which it is the duty of every state to maintain within its territory’. (emphasis added) 100 In other words, as observed in the very first award based on a BIT, a ‘reasonably well organized modern State’ 101 should not be liable. In sum, when applying the key common substantive standards of BITs, investment treaty tribunals must limit themselves to defining minimum thresholds of what is expected from a ‘reasonably well-behaved regulatory state’.

Note that these minimum thresholds do not pose an obstacle to those investors who may wish to secure more demanding commitments; they remain free to conclude tailor-made concession contracts and investment

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98 ibid, 21.
99 In the extreme, as the ICJ held in Barcelona Traction, Light, and Power Company, Limited (Second Phase) (Belgium v Spain) [1970] ICJ Rep 3, ¶ 87: ‘When a State admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State’s wealth which these investments represent. Every investment of this kind carries certain risks’.
100 George Adams Kennedy (USA) v United Mexican States (1927) 4 RIAA 194, 198, ¶ 7 (available at http://www.un.org/law/riaa/).
101 Asian Agricultural Products, ¶ 77. The Tribunal took the concept from Alwyn V Freeman, ‘Responsibility of states for unlawful acts of their armed forces’ in Académie de Droit International, 88 Recueil des Cours—1955 II (AW Sijthoff, Leyde 1956) 263, 277–78 (who refers to the concept of ‘well-administered government’).
agreements with host states. There is no question of states’ obligation to honor those agreements in accordance with the rules and principles of the applicable law, and the right of investors to enforce them before the proper fora.102

A critical requirement for the development of such a balanced system of protection of investments is that the necessary ‘attitude’ dominate among arbitral tribunals. International investment law, understood as global constitutional and administrative law, demands that arbitral tribunals be guided by a principle of ‘judicial restraint’.103 Justice Breyer’s words, crafted in the context of constitutional adjudication, fit the case of investment arbitration equally well:

A judge, when interpreting such open-ended provisions, must avoid being ‘willful, in the sense of enforcing individual views.’ A judge cannot ‘enforce what he thinks best.’ ‘In the exercise of’ the ‘high power’ of judicial review, says Justice Louis Brandeis, ‘we must be ever on our guard, lest we erect our prejudices into legal principles’.104

This, indeed, constitutes one of the most important normative claims of this book: arbitral tribunals, when reviewing whether the state has behaved in accordance with the standards of a reasonably well-behaved regulatory state, should demonstrate deference and respect toward governments. In short, the BIT generation should place a special premium maintaining a jurisprudence of ‘modesty’.105

Only such a reasonable and well-balanced international investment jurisprudence, guided by judicial modesty, can achieve one of the structural conditions for minimal legitimacy of the BIT generation which this work refers to as the updated Calvo Doctrine. The Doctrine states that BIT jurisprudence should not crystallise rules of protection of investments that are more demanding than those which developed countries’ courts apply in favour of their own national investors.

It is shocking to consider that a United States investor may lose a case against its government in the United States Supreme Court, a German

102 In the absence of umbrella clauses or broad jurisdictional clauses, investment treaty tribunals are not competent to entertain contract claims. This is, of course, without prejudice of the treaty claims that investors may have in such situations.
104 Ibid 18–19 (internal citations omitted).
105 See Stephen Breyer, ‘Our Democratic Constitution’, The Fall 2001 James Madison Lecture New York University Law School New York, New York October 22, 2001 (available at http://www.supremecourtus.gov/publicinfo/speeches/sp_10-22-01.html), who explains judicial modesty in the following terms: ‘That modesty embodies an understanding of the judges’ own expertise compared, for example, with that of a legislature. It reflects the concern that a judiciary too ready to “correct” legislative error may deprive “the people” of “the political experience and the moral education that come from . . . correcting their own errors.” It encompasses that doubt, caution, prudence, and concern—that state of not being “too sure” of oneself—that Learned Hand described as the “spirit of liberty”. In a word, it argues for traditional “judicial restraint”’. (internal citations omitted).
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, that any of them may win it against a Sri Lanka or Bolivia on the basis of such open-ended BIT principles as no expropriation without compensation or FET.

There is no major Western legal tradition today in which property rights and economic liberties receive the strongest possible protection against the public interest. In the United States, such a tradition existed during the early twentieth century, and was made possible by a ‘singular lack of [judicial] modesty’. Yet today, such a commitment to the status quo is deemed incompatible with larger goals that transcend the maximisation of wealth. In simple terms, 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 and welfare of their citizens.

Note that this updated Calvo Doctrine does not defend the old Latin American idea of equality, defined as ‘national treatment is the maximum’. International investment law can certainly provide higher protection than domestic law. By contrast, the most problematic scenario today, as noted, is that the general and open-ended standards of investment treaties—which should be interpreted in the proper context of general international law, international minimum standards, general principles of the law, and comparative law—may end up being more protective of investors’ rights than developed countries’ own legal systems. The idea of equality—the key normative element of the Calvo Doctrine in the nineteenth century—is updated and defended here as that of ‘developed countries’ standards as the maximum’.

106 According to Justice Breyer, n 103, 41, the failing of Lochner—the case that represents those times of heightened judicial scrutiny of economic regulation—was due to a ‘singular lack of modesty’.


108 For the complete explanation of the ‘transmission belt’ linking general international law to comparative law, see ch 6, 303–310.
IV THE BOOK’S PLAN

This book is divided into two parts. The First Part addresses the key descriptive and normative questions confronted by the BIT generation: How did developing countries end up as part of this network of treaties, after more than 150 years defending the idea of national treatment as the maximum? Why did they delegate sovereign powers to arbitral tribunals? Are these treaties convenient for developing countries? Are they legitimate?

Chapter 1 situates these questions within a historical timeline. It begins by providing a detailed explanation of the traditional Latin American position against diplomatic protection during the nineteenth century. Then, it proceeds to study the development of state responsibility during the twentieth century. This includes the victories made by developing countries before the Cold War—the definitive prohibition of forcible self-help in diplomatic protection—and later—the advancement of NIEO, according to which expropriations did not require the payment of prompt, adequate, and effective compensation.

One of the main objectives of chapter 1 is to show that the foundations of the Calvo Doctrine—at least, as it was originally conceived by Andres Bello in the first half of the nineteenth century—if properly updated, can help us to establish minimal proper conditions of legitimacy for the BIT generation. After pointing out the potential fallacy of conflating the Calvo Doctrine with NIEO—there are more than 100 years of distance between the two of them—this chapter argues that this Doctrine, with its emphasis on equality, should be interpreted today as establishing the aforementioned principle of ‘developed countries’ standards as the maximum’.

Chapter 2 studies the BIT generation descriptively. One of the basic goals of this chapter is to dispute the theory that was recently advanced by Guzman, and later refined by that author together with Elkins and Simmons (EGS). In Guzman’s account, the current world order of thousands of BITs is the result of a prisoner’s dilemma among developing countries, whereby those countries, competing against each other to attract FDI, have all ended up worse off by signing the treaties. This model of the BIT generation is unsatisfactory; as some commentators on game theory and the law have warned us, the situation has been ‘too quickly identified as a prisoner’s dilemma’.

Although that theory is correct when identifying a collective action problem that arises from competition, it fails to take into account two highly relevant aspects of this particular ‘game’ that distinguish it from a prisoner’s dilemma: first, its sequential/evolutionary nature, stemming

from the fact that developing countries have been joining (and rejecting) the BIT network at different points in time since 1959; and, second, the positive externalities or network effects of having a system of treaties, nearly all of which share the same key substantive clauses. Once those two factors are taken into consideration, a new theory emerges: the BIT generation as a virtual network.

Chapter 3 develops a framework to analyse the set of normative questions previously identified as the key ones surrounding the BIT generation. It explores the legitimacy deficits that the BIT generation faces as a scheme of global governance, and then assesses alternative sources of legitimacy for the system, which include consent-legitimacy, output-legitimacy, exit-legitimacy, rule of law-legitimacy, and institution building-legitimacy.

In addition, this chapter evaluates the idea of creating an appellate body or international court of investment arbitration. The conclusion is that developing countries should reject such a project; the main concern is the additional danger that investment treaty jurisprudence, under such a regime, could ultimately crystallise standards and rules which are significantly more favourable to investors than those which constitutional courts and supreme courts of developed capitalist countries apply to their own investors (that is, the updated Calvo Doctrine).

The Second Part analyses the current state of investment treaty arbitration jurisprudence, in accordance with the normative framework developed in the First Part. The objective of this part is to determine, from a pragmatic perspective, whether investment treaty jurisprudence is currently ensuring a higher protection of property rights than that provided by the constitutional and administrative courts of developed countries.

Accordingly, chapter 4 analyses, through a comparative approach, the modern regulatory state and its power to harm citizens and investors. The purpose is to show that according to the constitutions of several Western regimes, regulatory reforms will nearly always, by explicit design, harm some groups of citizens and investors. Therefore, legal systems must impose conditions and requirements for the right to claim damages that go substantially beyond the mere fact of harm. Those structural conditions and requirements are the focus of this chapter.

Chapter 5 studies indirect takings in the BIT generation. The focus is on the perennial question of how to distinguish regulation from expropriation. Rather than analyse cases concerning outrageous deprivations, or creeping forms of takings adopted by government that are trying to remove the property of foreign investors—both of which are less frequent

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110 According to Jan Paulsson and Zachary Douglas, ‘Indirect Expropriation in Investment Treaty Arbitrations’ in Norbert Horn and Stefan Kröll (eds), Arbitrating Foreign Investment Disputes (Kluwer Law International, The Hague 2004) 145, 151, ‘[d]irect expropriations are now overshadowed by the more prevalent paradigm of indirect expropriations’. See also
today—I focus attention here on non-discriminatory and bona fide regulation adopted in the genuine pursuit of the public interest.

One of the key questions of this chapter can be stated in the following terms: Which burdens that are justified by the public interest must, nevertheless, not be borne by foreign investors? Or, in other words, how much anti-redistributive strength does the concept of investments confer to investors’ interests? Expressed this way, the scope of indirect takings in investment treaties, and the judicial norm-creation that concretises the precise meaning of those treaties’ clauses, are strictly matters of global constitutional law.

Chapter 6 provides a fresh and original approach to the most complex problem touched upon in this work: the FET clause and the quest for operative standards of arbitrariness in the BIT generation. If the expropriation clause is reserved for total or substantial deprivations—as it appears from the analysis of investment treaty jurisprudence—then the most difficult cases, which involve non-destructive state interventions, are left to be resolved by application of the FET clause.

According to the global administrative law approach proposed here, this clause must fulfill two different functions, both included in the general concept of ‘arbitrariness’. From a corrective justice perspective, it must recognise the criteria for identifying those wrongful state acts that have caused harm to investors, and which entitle them to damages; namely, ‘arbitrariness as illegality’ and ‘arbitrariness as irrationality’. From a distributive justice perspective, it must define the limits that investment treaties impose upon states in determining which private sacrifices will not be compensated, particularly when those states are genuinely acting in the public interest; that is, ‘arbitrariness as special sacrifice’ and ‘arbitrariness as lack of proportionality’. ‘Administrative due process’ is another category that is dealt with in this chapter.

Finally, the Conclusions reiterate just how critical it is that the BIT generation achieves a balanced and ‘modest’ jurisprudence when it comes to investment protection. While I remain optimistic, I also emphasise here that the absence of constraints over the arbitral tribunals’ discretion continues to be a source of major concern. Given this concern, the Conclusions insist on the importance of constraints on at least two dimensions. These consist of a vertical dimension, which demands that investment treaty tribunals develop a much richer and more complex view of domestic law’s role in investor-state disputes; and, a horizontal dimension, according to which investment treaty tribunals should refrain from leaping to any

Steven R Ratner, ‘Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law’ (2008) 102 AJIL 475, 477. In Telenor Mobile Communications AS v Hungary, ICSID Case No ARB/04/15 (Goode, Allard, Marriott), Award (13 September 2006), ¶ 69, the Tribunal noted that ‘[n]owadays direct expropriation is the exception rather than the rule’.
conclusion that might simply appear ‘equitable’, ‘just’ or ‘common sense’, without having first taken into consideration the existing public law traditions of developed countries.

I sincerely hope that the following pages will contribute to this debate, and ultimately, that they can enrich our understanding of international investment law as a form of global governance and public law adjudication.