Turning Enemies into Adversaries: TTIP Negotiations and the Quest for a New Westphalia Momentum

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ABSTRACT

Neither universalism nor isolationism can be regarded as legitimate representations of a pluralist global society. In economic terms the current paradigm engenders instability by enhancing inequality within and among diverse constituencies. The present-day factual reality denies the zero-sum game pattern and, together with that, the reliability of the Westphalian model. What type of legal processes should be used in order to ensure investor protection for the purpose of concluding free trade agreements between the EU and a sovereign of equal calibre? With this question in mind and against the reality of an enlarged EU and other altered economic contingencies, this essay explores a number of relevant disputes on investor protection obligations and state aid control. Eventually, the essay advocates a model based on enhanced systematic – and thus open – communication across various constituencies and a more perceptive contemplation of the interactions between state and non-state trade governance as ground for a new conception of international trade relations in the new millennium.

CONTENTS

I. INTRODUCTION: THE DILEMMAS OF LEGAL ALTERITY

II. THE TTIP MOMENT: TO ISDS OR NOT TO ISDS?
   a) A Quest for Meaningful Transatlantic Dialogue
      1. Before the TTIP
      2. TTIP and Beyond
   b) Law and Politics in the TTIP Negotiations
   c) TTIP and ISDS on the Other Side of the Ocean

III. THE METAMORPHOSIS OF INVESTMENT LAW
   a) Investment Law in the Westphalian Order: Bilateralism and FCN Treaties
b) A New Investment Paradigm: the BIT Network, ISDS and the Rise of ICSID

c) Beyond Westphalia: Multilateralism Revisited

IV. THE PARALLEL UNIVERSE OF THE EUROPEAN UNION

a) Dawn of a New Legal Order

b) Reformation without Revolution: The Lisbon Moment

V. THE TROUBLE WITH ENERGY: ECT ARBITRATIONS AND EU LAW ISSUES

a) ISDS in Action: AES and Electrabel

b) The View from the Other Side

1. Protection of Core Divergent Values

2. Hungarian PPAs: An Open-Ended Status De Jure

VI. CONSTITUTIONAL AUTHORITY BEYOND THE STATE: DEFINING SUBSIDIARITY IN NON- TERRITORIAL TERMS

a) Hegemonic Strategies and Legal Equilibrium

b) Excursus: A Brief History of Jurispathy

c) Across the Atlantic: Two Sides, One Agora

d) Out of the Labyrinth: Heterarchy and Constitutionalism

VII. CONCLUSIONS

In a more and more inter-connected legal world, autonomous legal systems (including dispute resolution systems) need to gradually accept that autonomy is not absolute.

(Konstanze von Papp)

I. INTRODUCTION: THE DILEMMAS OF LEGAL ALTERITY

In the history of international law, the Peace of Westphalia (1648) signifies the emergence of a new international order, entrenched in a different conceptual framework. Diverging from the medieval model, the Westphalian paradigm proposed a new concept of

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sovereignty, granted to each state in identical terms as concerns its international capacity and national hegemony. It was a legal revolution in the utmost sense of the word. It was not simply a moment, but a new age, the eruption of sovereignty into the world, shattering its foundations. The state now emerged as the sole subject of international law, excluding any other type of community from access in the 'great game' of high politics.

However, in our age, the question of legal alterity – the multiplicity of legal orders that appear unfamiliar and uncomfortable to each other – explores frontiers left unchartered by the Westphalian Nomos in territorial sovereignties. The universality of a state-dominated concept of international law, exclusionary with other types of trans- or supra-national entities, appears to be shattering.

In this context, the contemporaneous international legal agora presents itself as a space open to any type of conceptual conflict and symbolic violence. Now, not only state entities use exclusionary tactics among themselves, but so do other types of actors, creating a competition for legitimacy that transcends the boundaries of sovereignty. Such conflicts between states, transnational entities and supranational organisations appear on multiple levels – territorial, normative, economic – allowing different types of norms to engage in a race for overlapping hegemonies.

In contrast, opening up ‘one’s window on the world wider in order to see things to which our attention is drawn from the perspective offered by another cultural window is nevertheless not to be equated with looking at the world through that other cultural window’. Radical cultural differences can never be unified inside any system. Hence, the first question to be asked refers to the nature of disagreement that characterises the plurality of solutions for investor protection. Is there any radical form of difference?

This essay has emerged by exploring the idea of whether it would be preferable to include a clause providing for investor-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP). From the beginning, the pursuit was to attain a proper understanding of the situation of uncooperative legal orders that generally agree on common norms concerning free trade and investment protection, but despite this axiological overlapping consensus, have recurrently reached conflicting decisions on interrelated disputes.

A common answer to this conflict has been to confront the Other as a Schmittian ‘enemy’, as a ‘hostis’ whose (legal) existence must be obliterated. Such a response to alterity is, – as Paul Schiff Berman has argued – jurispathic, intending to ‘kill off all competing laws by declaring that one set of norms – and only one – shall prevail. This is a constitutional declaration founded solely on power or messianism’.


4 For a clear account of Carl Schmitt’s vision of the ‘enemy’, please see C. Schmitt, The Concept of the Political (Chicago: The University of Chicago Press, 2007), 27 et seq.

towards alterity can either manifest by direct confrontation and final subjugation of the Other or by tacitly and deliberately ignoring him in an annihilating manner.

The initial set of conditions revives the old philosophical debate as to the limits between law and non-law and who decides what law is. The Westphalian model provides a quick answer to the question who: the sovereign State. Yet, in our complex world, non-state governance is omnipresent and a web of heterarchy frames the global society. In the meantime, the State tends to incorporate non-state law and make its own or defer to non-state law often by denigrating it to the status of facts. What seems to be non-state law may still be circumscribed by the ambitus of State interests.

An attack on the identity of the Other does not have to be a direct denial of jurisdiction or a refusal to recognise and enforce – a classical jurispathic answer, as described by Robert Cover and Paul Schiff Berman – it could be instead a hegemonic domination making use of non-state forms of governance and leading to an inequality of opportunities. Hegemonic domination arises in the realm of social and cultural life i.e., in the system of shared values and meanings, thus it cannot be located or clearly delineated, as it is woven into the social fabric. Outside the domain of lived values and meanings, an open, brutal and disruptive form of hegemonic domination would be ineffective, as the predictable result would be isolation and lost legitimacy on the international relations arena. The rational response to this kind of interaction must be based on functional considerations; thus all law-sources including the State must justify their law-making role on functional grounds.

Non-state forms of governance may seem to be located outside the reach of hegemonic domination, but this instance may be deceptive. Whenever an argument is constructed on the false assumption that the Other is not so different from Oneself, the reach of hegemonic domination may be expanded. The British opposition to an ever closer union mirrors a critical reaction against the hegemonic domination exercised by the core states committed to push the EU towards a more federal Europe.

Society and law should be reformed to remove biases that might exist on both sides of an impending conflict of perspectives. The key question that arises from this set of assumptions is the choice between neutrality and special treatment. Neutrality (i.e., non-discrimination) flows harmoniously through the general legal discourse in the EU, while special treatment must be justifiable in the context and able to pass the tests of proportionality and subsidiarity. The US legal traditions follow a similar path.

Global constitutionalism may provide ‘a useful analytic lens for understanding how international law evolves and works, as long as it is understood as “thin” (contending itself with procedures as opposed to substance), and inevitably multi-level (necessarily involving domestic constitutional law)” Constitutionalism represents the new ius commune in the Western world, thus providing the basic axioms and theoretical instruments that generate law beyond the state and give authority to legal decisions derived from a normative thinking that would be perceived as binding among diverse constituencies, even if there were no State. The recognition of similarities and dissimilarities and the

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use of complementarities rely on the possibility of identification with the Other and this window towards the perspective of the Other must remain wide open.

Thus, while Section II of this essay presents the itinerary of the TTIP negotiations and the positions taken on both sides of the ocean, Section III dismantles the Westphalian order – a purely European concept – from the perspective of international investment, reflecting the dialectic of bilateralism and multilateralism, of symmetry and asymmetry in inter-state relations. Section IV reveals the quasi-federal character of the EU legal order and its ability to develop a flexible structure for heterarchic interaction among diverse constituencies. Section V analyses a number of investor protection disputes arising under the Energy Charter Treaty (ECT), thus giving an account of the assessment of the relevant national regulatory acts from the perspectives of investment law on one side, and the EU common rules on state aid control on the other. At the end of this exercise, Section VI shows that the labyrinth is not without exit and that the Other can be accommodated by abandoning the rhetoric of legal dichotomies, of supremacies and monopolies. Finally, Section VII puts forward ten propositions for enhancing jurisgenerative interactions across the plurality of constituencies. In such a manner, the previous ‘enemy’ might appear as a friendly ‘adversary’, the fellow which allows dialogue.

II. THE TTIP MOMENT: TO ISDS OR NOT TO ISDS?

a) A Quest for Meaningful Transatlantic Dialogue

1. Before the TTIP

The most striking debate of the moment, attracting the interest of the entire legal and extra-legal constituency, refers to the introduction or, rather, the maintaining of an ISDS clause in the transatlantic agreement currently under negotiation. The discussions concern at this point the scope of the TTIP negotiations i.e., the breadth of the mandate assigned to the Commission. The fears and dilemmas raised by the inclusion of an ISDS clause or with the entire investment law regime are no longer a novelty on either side of the Atlantic Ocean. This legal sphere has already been subject to objections, and fierce debates (both for and against unrestricted investment protection) since the early 2000s, although the idea of totally obliterating private arbitration has only recently been truly contemplated.

The first actions in restraining the discretion of arbitral tribunals were, maybe unexpectedly, advocated by the North American state actors (the United States, Canada and Mexico) and later transposed in the interpretive decision of the NAFTA Free Trade Commission. Thus, after a series of highly disputed arbitral awards in 2000, i.e., *Metalclad v. Mexico*, *S.D. Myers v. Canada*, and *Pope & Talbot v. Canada*, the North American Free Trade Agreement (NAFTA) member states deemed necessary exhaustively to define the meaning of the protection standards in order to avoid unnecessary ‘hermeneutic

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8 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000.
Caesarism” on behalf of tribunals.

In the NAFTA context, the ISDS – coupled with unqualified and unrestricted investment protection standards – proved to be a dangerous game right from the beginning, determining the signatory states to limit the discretion of tribunals. Moreover, in the following years, this trend was confirmed with the new model BITs of the United States as its third wave of agreements embodied a passage to a different type of investment policy.

Thus, after facing several arbitrations as a respondent and intense criticism from the NGOs, trade unions and left-wing leaning politicians against ‘secret tribunals’, ‘non-transparent procedures’, ‘arbitrators’ conflicts of interests’ (as it would be the case in Europe, a decade later), the United States envisioned a transfiguration of its investment protection policy, even if it had registered a record of never losing an investor-state arbitration dispute. The 2004 US Model BIT represented a quest for balance [...] between investor interests and host state regulatory prerogatives, redefining in clearer terms the liability of respondent states in relation to the adoption and implementation of legislative and administrative measures. Although the advantages offered by arbitration mechanisms were emphasised and promoted, the position of the United States was clear in restricting the interpretive powers of arbitral tribunals.

In April 2012, a new US Model BIT was released. It strengthened the protection of public interest in the field of financial services, environmental and labour obligations, though no significant changes were made regarding the provisions on investment arbitration or substantive investment law protection. The definition of expropriation was further clarified and the benefit of compensation was reinforced. The investor right to submit an investment dispute with the treaty partner’s government to international arbitration was maintained. No obligation to use the domestic courts was introduced by the new Model BIT.

In Europe, ranging from an ultra-liberal ‘Dutch model’, to a reluctant Cyprus or Malta and a rather absent Irish IIA programme, the Member States became the unchallenged

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13 See, for example, the landmark cases decided in the early 2000s: Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003; Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October, 2002; ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003.


15 An obligation not to waive or derogate from and not to fail to effectively enforce their domestic labour and environmental law was introduced. Commitments under ILO and multilateral environmental treaties were reaffirmed and consultations procedure become more detailed and extensive in scope compared with the previous BIT model.


17 At the present moment, The Republic of Ireland has no BIT in force with any state.
‘champions’ of the BIT world-wide network,

as well as of investment disputes, surpassing – in sheer numbers – the rest of the world. Until the TTIP moment, neither the European Union, nor its Member States, raised any far-reaching objections against the investment regime as such, or the necessity of using ISDS as procedural safeguards of treatment standards, at least not in an open and transparent manner. Although the Commission raised opposition regarding the compatibility of intra-EU BITs with the Treaties and the jurisdiction of arbitral tribunals to interpret EU law, the legitimacy of the investment regime per se had not been challenged hitherto.

Unlike the US experience, the European developed states faced no arbitrations as respondents, thus having no interest in restricting the powers of tribunals in their quest for ensuring investor protection. The explosion in the 2000s of investment treaty claims under the International Centre for Settlement of Investment Disputes (ICSID) or United Nations Commission on International Trade Law (UNCITRAL) Rules involved investors established in Western Europe seeking compensation for harm suffered in less developed countries where they maintained strong trade and investment positions.

The draft of the investment chapter in the European Union - Singapore Free Trade Agreement (EUSFTA) concluded in October 2014 presents a set of new features in regard to the scope and effects of classical treatment standards, as well as of ISDS procedural elements. More precisely, the US ‘right to regulation’ stance was introduced in the EUSFTA, precluding the consequence of liability for measures which – although potentially harmful or indirectly discriminatory – were taken as a safeguard of the public interest.

In this context, not only was ‘national treatment’ reshaped explicitly, but also the notion of ‘indirect expropriation’, which was further clarified in the interpretive Annex 9-A. However, the most significant amendment regarding the scope of the standards relates to the re-conceptualisation of ‘fair and equitable treatment’, as it was most frequently invoked for challenging regulatory measures of host states and qualifying an act as ‘wrongful’ when it did not fit in the classical taxonomy of treaty breaches. Thus, the Fair and Equitable Treatment (FET) clause could no longer serve as a ‘residual’ standard that allowed any type of damaging state behaviour to be characterised as wrongful.

As inspired by NAFTA, the EUSFTA also provides the opportunity for the Trade Committee to issue binding interpretive decisions regarding any provision of the agreement, thus being able to restrict – when the signatory states deem necessary – the discretion of the
arbitral tribunals and to prevent divergent arbitral interpretations from arising.

Both the Comprehensive Economic and Trade Agreement (CETA)\(^\text{23}\) and EUSFTA have a fast track system for rejecting unfounded or frivolous claims that can be discarded in a matter of weeks.\(^\text{24}\) The ISDS model under CETA and EUSFTA\(^\text{25}\) cannot lead to the repeal of a measure adopted by Parliaments in the Union, a Member State or the counterparty; the compensation limited to the level of the losses actually suffered is the only available remedy.\(^\text{26}\) CETA and EUSFTA have rules preventing fraudulent or manipulative claims.\(^\text{27}\) None of the previous ISDS agreements contains such a provision.

CETA and EUSFTA disallow parallel proceedings in order to avoid double compensation and conflicting decisions. Investors will not be able to seek remedies simultaneously via arbitration and domestic courts or other international tribunals.\(^\text{28}\) According to the current practice in the field, the arbitral awards cannot be appealed, even though Article 9.33, paragraph 1(c) EUSFTA and Article X.42 CETA explicitly envision the possibility of creating an appellate mechanism in the future,\(^\text{29}\) in line with the Commission’s communication on investment policy from 2010.\(^\text{30}\)

While the India and China agreements are still under negotiation and no final


\(^{24}\) Article 8.32 (Claims Manifestly without Legal Merit) and Article 8.33 (Claims Unfounded as a Matter of Law) in the draft CETA; Article 9.23 (Claims manifestly without Legal Merit) and Article 9.24 (Claims Unfounded as a Matter of Law) in EUSFTA.

\(^{25}\) Both CETA and EUSFTA have a binding code of conduct for arbitrators acting in an ISDS dispute. Article X.25 Constitution of the Tribunal, paras 5-11 in draft CETA; Annex 9-B of the ISDS Section in EUSFTA. They provide for a list of arbitrators pre-agreed by the Union on one side and Canada or Singapore respectively on the other. Article X.25 Constitution of the Tribunal, paras 1-4 in draft CETA; Article 9.21 (Constitution of the Tribunal), paras 1-4 in EUSFTA. All documents will be publicly available and all hearings will be open to the public. Interested parties will be able to make submissions and their right cannot be waived by the tribunal or the parties to a dispute. Article X.33 of (Draft CETA Transparency of Proceedings Applying the UNCITRAL Rules on Transparency). Article 9.25 and Annex 9-C to the ISDS Section of EUSFTA (Rules on Public Access to Documents, Hearings and the Possibility of Third Parties to Make Submissions).

\(^{26}\) Article X.36 paras 1, 3 and 4 Final Award in draft CETA; Article 9.27 paras 1 and 2 (Final Award) in EUSFTA.

\(^{27}\) Article X.17.3 (Scope of a Claim to Arbitration in draft CETA); Article 9.20 para. 6 and footnote 4(b) to Article 9.19 para. 1 in EUSFTA.

\(^{28}\) Article X.21 (Procedural and other Requirements for the Submission of a Claim to Arbitration in draft CETA); Article X.23 (Proceedings under different international agreements in CETA). Article 9.20 (Conditions to the Submission of Claim to Arbitration) in EUSFTA.

\(^{29}\) Under EUSFTA, the Committee on Trade in Services (EUSFTA) shall examine ‘whether, and if so, under what conditions, an appellate mechanism to review, on points of law, awards rendered under this Section could be created under this Agreement or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements’. ‘The Committee on Services and Investment (CETA) shall provide a forum for the Parties to consult on issues related to this Section, including: whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements’.

documents have been publicly provided, the EUSFTA and CETA and their investment chapters reflect the latest trend in investment law embraced by the EU: equilibrium, transparency, hermeneutic limitation and increased ethics for arbitrators. While still ensuring adequate protection, the US and the EU reformulated their investment policies in order to ‘trim’ the expansive ‘Dutch model’. In brief, the newly negotiated agreements of the EU – without taking into consideration the disputed TTIP – owe much to the NAFTA experience and to the corrections introduced by the third wave US BITs.31

The conceptual framework of the international investment law regime presented itself – before the TTIP debates – as one of increasing convergence on both sides of the ocean, strengthening the transatlantic strategic alliance. From a normative and practical perspective, the global system of investor protection seemed to evolve towards increased uniformity and consistency and advance exactly in the direction eulogised by ISDS critics, thus its upcoming contestation could not be foreseen at that moment.

2. TTIP and Beyond

As regards the present TTIP moment, the EU intended, at least initially, to include a clause providing investors the right to bring arbitral proceedings, despite the fact that the EU institutions had their reservations about investor-state arbitration, which were related to a conceivable threat to the autonomy of EU law. The incorporation of international law into EU law arises from a balancing exercise between safeguarding the constitutional identity of the Union and ensuring that EU law does not become hostile to the international constituency, but that it remains an active part of it.32

In order to make certain that EU law is distinguishable from general public international law, while the incorporation of the latter is still possible according to a monist approach, a series of solutions have been recently proposed by the Council and European Commission. Material from the Council of the EU containing directives for negotiations issued in June 2013 revealed that behind closed doors a set of uncertainties related to the necessity of an ISDS clause existed already from the start of negotiations. The Council of the EU stated in June 2013 that:

After prior consultation with Member States and in accordance with the EU Treaties, the inclusion of the ISDS will depend on whether a satisfactory solution, meeting the EU interests concerning the issues covered by paragraph 23 is achieved.33

Paragraph 23 requires that the investor protection shall be without prejudice to the right to adopt and enforce national and supranational regulation and build upon previous experiences and best practice regarding BITs with third countries. All the ‘innovative’ elements brought by CETA and EUSFTA were all part of the Commission’s negotiation mandate.

33 Directives for the negotiation on the TTIP between EU and USA, point 22, available at <https://www.laquadrature.net/files/TAFTA%20_%20Mandate%20%20%20130617.pdf>.
Yet, Dr Roland Kläger, a German lawyer specialised in international investment law, criticised this initial standpoint on two grounds arguing that: (a) on the one hand, it denied the step-back implied by an increased political interference for the purpose of obtaining an independent and reliable system of international arbitration, and (b) on the other hand, it did not recognize the recent emancipation of the arbitration system itself. The document from the Council shows nevertheless that the EU uses the ISDS clause also as a bargaining item, since it is underlined that the matter shall be viewed in the light of the final balance of the agreement.34

Meanwhile, the matter of the necessity concerning the inclusion of the ISDS clause in the TTIP should not be conflated with the matter of designing such a clause once it has been determined that it must be included. Necessity is intimately related with subsidiarity and proportionality in EU law, and given that Member States retain procedural autonomy, in fact, any ISDS implies a limitation of the national procedural autonomy and a test of necessity should be seen through this lens, namely that the content and form chosen for the ISDS shall not exceed what is necessary to achieve the objective of investor protection. The language of paragraph 23 of the Council Directives for the TTIP negotiation reveals such a stance specific to a proportionality test:

As regards investment protection, the objective of the respective provisions ... should be without prejudice to the right to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives, such as social, environmental, security, stability of the financial system, public health and safety in a non-discriminatory manner. 35

Then again, the effects of treaty provisions in public international law, particularly the direct effect, should be decided by the parties. The Court of Justice of the European Union itself upheld this principle, affirming that only if the EU institutions did not address the matter of direct effect, it would be up to this court to interpret an international treaty concluded by the Union, in order to determine whether individuals may rely upon it before a domestic court against obligations imposed by the EU secondary law.36

The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals.37

In this regard, Semertzi noticed an inclination of the CJEU to apply corresponding criteria for the interpretation of direct effect of judicial decisions and substantive...
provisions of an FTA. A limitation of direct effect of the substantive provisions of a treaty could indicate a restriction on the direct effect of the panel reports as well. 38 The EU’s FTA network is gradually expanding and the newest agreement, CETA, contains a relevant general clause as well in Article 14.16, which has established the lack of direct effect:

Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties. No Party may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement. 39

The autonomy of EU law requires in any case that whenever a matter under dispute verges on common rules of EU law, the CJEU shall be enabled to advise on the interpretation of the Treaties, including Article 63 Treaty on the Functioning of the European Union on free movement of capital and Article 17 of the Charter on the Right to Property. This matter of the right to interpret the balance of rights and obligations under the EU Treaties has not been seriously taken into account by any of the amendments proposed by the Commission. As long as an arbitral tribunal is not a court or tribunal for the purpose of making a referral for a preliminary ruling, the risk of divergent verdicts is still there.

b) Law and Politics in the TTIP Negotiations

In her letter of 26 January 2015 addressed to the UK Minister of State for Trade and Investment, the Trade Commissioner, Cecilia Malmström, sought to ensure that ‘nothing in either the 3,000 existing investment agreements, or in the future TTIP, could prevent a service being brought back into the public sector or force the payment of compensation for such an action’. 40 The EU Trade Commissioner appeared to be convinced – in any case at that point – that the use of the ISDS was limited to narrowly defined circumstances such as unfair or discriminatory treatment towards foreign investors.

However, in case C-264/09, the CJEU itself recognised that the provisions of an Investment Protection Agreement between the Swiss Confederation and the Slovak Republic meant to ensure a wider investment protection, covering not only direct and indirect expropriation measures, but also measures which have an effect equivalent to expropriation and ‘the obligation to provide compensation in the event of expropriation does not have the effect of cancelling out the Slovak Republic’s obligation not to take expropriation measures against investments which are protected by the Investment Protection Agreement’. 41


39 CETA Art. 14.16.


41 Commission v. Slovak Republic, Case C-264/09, para. 49.
Cecilia Malmström’s statement corresponds with the opinion of the USTR, namely that the role of the ISDS is to guarantee compliance with standards of fairness and not to insure a certain return on investment or cash-flow result. The USTR informed in March 2014 that:

Our investment rules do not in any way guarantee a firm’s rights to any profits or to its projected financial outcomes. Rather, they only provide basic rights – like non-discrimination and compensation in the event of an expropriation – that are already consistent with US law. Our investment rules seek to promote standards of fairness, not protect profits.42

Later on in May 2015, the EU Trade Commissioner in charge of the negotiation of the TTIP agreement returned with a new statement, which no longer denied the existence of certain flaws in the current systems of ISDS.43 Cecilia Malmström admitted that unclear definitions left too much room for interpretation and possible abuse, thus recognising the necessity to reform the arbitration system designed for trade agreements.44 Four areas have been identified as particularly problematic:

1. the protection of the right to regulate;
2. the establishment and functioning of arbitral tribunals;
3. the review of ISDS decisions through an appellate mechanism; and
4. the relationship between domestic judicial systems and ISDS.

Cecilia Malmström pointed out that the concept of protection of legitimate expectation has been given in certain cases an interpretation that implied a decree not to comply with EU law:

Disputes involving state aid have raised specific problems. In a recent case under an intra-EU BIT in a pre-accession situation, the Tribunal found that a Member State’s decision to discontinue the granting of a measure involving prohibited State aid was in breach of the Fair and Equitable Treatment (FET) clause. The Commission views this decision as an incorrect application of the FET clause given that EU law consistently denies legitimate expectations to investors as regards state aid. It has also taken the view that the compensation ordered by the Tribunal amounts de facto to the reinstatement of the prohibited state aid.45

Thus, according to the Concept Paper, the EU should pursue the creation of one permanent court and of an appellate mechanism, which will: (a) review awards as to errors of law and manifest errors in the assessment of facts; (b) ensure consistency in the interpretation of TTIP; and (c) increase legitimacy both on substance and through a

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44 Investment in TTIP and beyond - the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court. Concept Paper, Cecilia Malmstrom, European Commission.

reformed institutional design. Moreover the ISDS model proposed by the Commission confers a right to intervene to third parties with a direct and existing interest in the outcome of a dispute, in addition to the possibility to send an *amicus curiae* brief. ‘The proposal is a step in the right direction but it still does not go far enough to restore public confidence on the issue,’ said S&D MEP Bernd Lange, chairperson of the international trade committee in the European Parliament. This assertion reverberates an approach supporting the thesis that interlegality matters as much as other objectively constructed aspects.

Alongside with the TTIP take-off in December 2013, the 159 members of the World Trade Organization (WTO) agreed on a binding international agreement on trade facilitation, the first multilateral agreement since the WTO’s creation in 1995. The pending Trade Promotion Authority (TPA) Act makes several references to a WTO-instrument of surveillance of national trade policies, the so-called trade policy review mechanism or TPRM. In the last TPRM from 2013, the EU stated that it adopted new legislation that dealt with the division of competences between the EU and the Member States to negotiate and conclude BITs with countries not immediately scheduled for Union investment negotiations. Member States have retained a residual competence in the field of external trade, although they may exercise it under strict conditions ensuring that the provisions of such agreements do not create any serious obstacles to the smooth implementation of the EU investment policy.

The US constitutional structure is federal, while the EU is a sui generis legal order that presents many features of a federal state. According to Weiler, the EU reflects a combination of legal federalism and political confederalism, whereas its normativity is a heterarchical web of norms, not a hierarchic normativity. With regard to political decision-making in relation to treaty amendments, the dominance of the Member States is obvious, while the legal framework is de facto federal. The CJEU has no direct jurisdiction to invalidate state laws, although the combination of primacy, direct effect, state liability and preliminary references system operate by the same token.

It has been acknowledged that failure to negotiate the TTIP would allow other third party countries with different standards and values to assume the global norm-building role instead, although almost surprisingly, parliamentary groups in both the US and the EU oppose the inclusion of an ISDS-clause, because judicial systems in these parts of the world function commendably, thus it has been argued that there would not be any

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46 See also the discourse of 6 May 2015 at the Meeting of the International Trade Committee of the European Parliament.


need for such a mechanism in the TTIP. Alongside with the balance of risks, costs and benefits, even the matter of interlegality must be observed, since a discordance between justificatory statements and previous negotiations results brought about a certain disbelief vis-à-vis the Commission’s intentions and the reliability of its ISDS model.

The importance of addressing the existing flaws in the ISDS-model proposed for the TTIP cannot be highlighted enough. The central issue is, as discussed before, the proportionality of the ISDS mechanism that grants special substantive and procedural rights to a category of economic actors and, in doing so, how it could generate a public benefit that outweighs the negative externalities. The proportionality test would offer the occasion to internalise the discourse of externalities, no matter if eventually, the process led to either incorporation or deference vis-à-vis a non-state norm. Furthermore, the experiences, perception and consciousness of individuals and social groups as regards their previous interactions in the sphere of legal plurality also constitute a factor – so-called interlegality – that determines the result of the TTIP negotiations.

c) TTIP and ISDS on the Other Side of the Ocean

On the other side of the Atlantic, President Obama faced opposition from his own political allies. Senators Elizabeth Warren and Bernie Sanders were joined by all but one Senate Democrat, in voting against the TPA bill. In contrast, the Republican majority leader, Mitch McConnell, supported Barack Obama and, exactly like in Europe, the politics eventually withdrew into law.

Recalling that the US frequently loses challenges at the WTO, as well as regulatory suits in federal courts, Joseph E. Stiglitz emphasised in a recent letter that ‘most of the countries with which the US has such an agreement are developing countries with little investment in the United States or capacity to mount such challenges’, so just by the law of averages it should not be expected that the past US favourable record provides any form of reassurance in the context of a free trade agreement signed with Japan or the EU. He concluded his letter addressed to the Congress by pointing out that old ideas on trade ignore the economic realities of 21st century.

Senator Elizabeth Warren brought a series of arguments against the TPA bill, most recently claiming that the introduction of certain provisions in future trade agreements could undermine the Dodd-Frank Wall Street Reform and Consumer Protection Act. Laurence Tribe, law professor at Harvard University, agreed, confirming that any act of the Congress or duly ratified treaty overrides any contrary prior federal legislation. The US Constitution itself supersedes nevertheless all treaties, as it is superior to other

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55 Joseph Stiglitz served as World Bank Senior Vice President and Chief Economist between February 1997 and February 2000.


57 Ibid.
laws, and the courts may examine the constitutionality of treaties as they do in regard to statutes, and for the same reasons.\textsuperscript{58}

Federal constitutionalism authorises the distinct treatment of internal and public international law in relation to hybrid disputes involving a foreign state and more than one State of a federal system, a situation which entails the interaction of internal and international systems. Moreover, the bill itself contains clear reservations in relation to conflicts of laws and an eventual inconsistency between the national legislation and the provisions of a trade agreement.

More precisely, the TPA bill of 2015 aims to restore the President’s authority to enter into multilateral and bilateral trade agreements. Secondly, the bill would restore the President’s authority to propose trade agreements under an expedited procedure for Congressional approval, often referred to as fast track authority.

Section 8 of the TPA bill entitled ‘Sovereignty’ states that:

(a) \textbf{UNITED STATES LAW TO PREVAIL IN EVENT OF CONFLICT.—} No provision of any trade agreement entered into under section 3(b)\textsuperscript{59}, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States, any State of the United States, or any locality of the United States shall have effect.

(b) \textbf{AMENDMENTS OR MODIFICATIONS OF UNITED STATES LAW.—} No provision of any trade agreement entered into under section 3(b) shall prevent the United States, any State of the United States, or any locality of the United States from amending or modifying any law of the United States, that State, or that locality (as the case may be).

(c) \textbf{DISPUTE SETTLEMENT REPORTS.—} Reports, including findings and recommendations, issued by dispute settlement panels convened pursuant to any trade agreement entered into under section 3(b) shall have no binding effect on the law of the United States, the Government of the United States, or the law or government of any State or locality of the United States.

It is common knowledge that an award is binding law on the parties and the possibilities to obtain a substantive review or amendment are limited. For that reason, the European Commission insisted on the creation of an appellate mechanism. Section 2 Sec 8 point (c) of the US TPA bill emphasises in any case that the findings of the arbitral tribunals do not have value of precedent within the US. The provision relies on a claim of comprehensive jurisdiction. However, arbitral findings that reflect a coherent trajectory as regards normative thinking might have a distinct value when viewed through the lens of global constitutionalism.

‘If this bill were to pass, it would indicate that the US government aims to maintain its intact competence to regulate and ensure that in case of conflict, the US laws shall prevail. It also makes clear that the findings issued by dispute settlement panels are not


\textsuperscript{59} Section 3(b) concerns the authority of the President to enter a trade agreement concerning tariff and non-tariff barriers.
binding law no matter whether the level of governance is local, state or federal. Thus, international law in a nutshell appears to function as a soul in search of a body willing and able to implement it. In this sense, international law counts for the global society, even if it does not exist as a complete institution, it still produces effects that matter. Yet again, we can notice that interlegality has an impact on legal reality.

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Consequently, when analysing the ongoing itinerary of the TTIP negotiations and the positions taken on both sides of the ocean, a shift emerges not just from a legal perspective, but also as a conceptual struggle to redefine the relationship between legal orders and to establish an accommodating paradigm for multipolarity. Thus, using Chantal Mouffe’s philosophy – which traces its roots to Schmitt, as well as to the Lacanian intellectual framework – another perspective can be asserted, aiming to change antagonism into agonism and transform enemies into adversaries.\(^\text{60}\) In this line of interpretation, the Schmittian-inspired ‘ineradicability of the conflictual dimension in social life’ is situated at the core of the political, a space of power, conflict and agonism.\(^\text{61}\)

Dissensus – as the symmetric opposite of ‘consensus’ – is not only impossible to avoid in certain situations, but it can even be desirable to cultivate dissensus and disallow in principle an absolute protection that trumps any competing values of any other constituencies. A default refusal to consider other interests in situations where two constituencies interact with each other and consensus is not a valid option may be seen as democratic at the level of nation-states, though from a global perspective neither universalism nor isolationism can be regarded as democratic i.e. as legitimate representations of a pluralist global society. Therefore, in the context of TTIP negotiations, the interaction between the involved constituencies is multi-layered and the antagonism has to be plurivalent.

III. THE METAMORPHOSIS OF INVESTMENT LAW

a) Investment Law in the Westphalian Order: Bilateralism and FCN Treaties

The Peace of Westphalia (1648) signified the emergence of a new international law order, entrenched in a different conceptual framework than the classical \textit{ius gentium} or the medieval \textit{respublica christiana}. Diverging from the overlapping and inter-connected model of the Holy Roman Empire – emblem of the Western order – the Westphalian paradigm proposed a new concept of sovereignty, granted to each state formation in identical terms as concerns its international capacity and national hegemony. Thus, every sovereign entity became capable of ‘contracting’ at international level, without any supranational or suzerain censorship of its foreign affairs.

In the context of the international legal order, when the first ‘Friendship, Commerce and Navigation’ agreements were signed at the end of the 18th century, they marked the

\(^{60}\) More precisely, two domains are defined in relation to each other in Mouffian thinking: the dynamic political \textit{and} politics – or the social consisting of sedimented practices. The former revolutionizes the latter. Agonism is the vital energy, the generative force of human societies. Since politics cannot be reduced to a rational discourse that excludes passionate stances, the Habermasian consensus upon which liberalism relies so uncritically, would be impossible to achieve.

beginning of the new American Republic’s independence in foreign affairs and its own geo-political interests toward continental European powers, the only ones that could shield it from the British Crown.

Bilateralism – the core principle of international relations of the pre-WWI world – was accurately reflected in these precursors of modern investment treaties. In essence, beyond their clear underlying political – and symbolic – agenda, the FCN agreements were supposed to grant certain rights to individuals of the other contracting state for establishing and maintaining trade activities on their territory. Unlike their successor instruments – the BITs – such treaties were mainly concluded between states rising to a similar level of development, symmetry being the principle that animated this balanced type of international agreements.

However, this type of treaty never resulted in a coherent global economic order, nor did it form a ‘network’ of connected provisions beyond the positivist formulas of each agreement. Although they frequently included most-favoured-nation clauses (mainly conditional until 1923 and unconditional afterwards), they never evolved into a normative content-importing mechanism, reflecting only the primary meaning of such a clause, i.e. that the contracting states shall grant a treatment – mostly in regard to trade tariffs – as good as offered to other states. More precisely, based on the 17th and 18th century mercantilist ideology, the MFN clauses of FCN agreements remained ‘an expression of a bilateral and protectionist view on international economic relations’. Not simply economic-oriented treaties, they were devised as ‘generalist’ agreements referring not only to trade, investment, circulation of goods, shipping issues, but also to human rights (in an incipient form) or immigration, on a reciprocal basis between the contracting states. Therefore, as Herman Walker – one of the architects of the 20th century FCN programme of the United States – illustratively argued, ‘[a]n FCN treaty in its fully realized form is a house of many mansions, concerned with all citizens and their interests, great and small, and whether or not of an economic nature; it is implicitly concerned also, in a major way, with the intangibles of good will between nations in their everyday relations.’

As regards the evolution of these treaties, in the pre-WWI period they mainly contained only ‘relative’ standards of treatment – such as ‘national treatment’ and ‘MFN’ – which supposed that the aggrieved party could only compare the conduct it has been subjected to with the conduct of the host state towards its own nationals or towards third-

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62 The first treaty was signed with the British Crown’s arch-enemy, France, in 1778, followed by the treaty with the Netherlands in 1782, with Sweden in 1783 and with Prussia in 1785.


65 J. F. Coyle, note 58, 312.


party states nationals. In the interwar period, the FCNs evolved, offering both ‘relative’ and ‘absolute’ treatment standards, the latter being linked with customary international law standards and playing the role of a ‘fair and equitable treatment’ clause *avant la lettre*.68

Despite the standards being generous as concerns the scope of the intended protection – not so far below BITs –, they were never able to transform into a fully self-standing legal regime applicable to trade and investment relations, readily available for individuals in their quest for justice. One of the reasons for this lack of further development was the method of resolving the disputes arising from breaches of the agreements. More precisely, the FCN treaties only provided access to national courts of the host state or to classical public international law forums (i.e., state-to-state dispute settlement).69 In the first case, the aggrieved national was obliged to appear before the domestic courts of the very state that initially harmed him, while in the second case he needed to convince his own state to litigate for his suffered losses.

Thus, without self-referential most favoured nations (MFN) mechanisms and with no frequent internationally-conducted dispute settlement, such agreements never developed beyond the Westphalian bilateral paradigm of contractual, synallagmatic and reciprocal relations among sovereign states. In this context, the story of FCN largely remained one of isolation – or rather ‘insulation’ – of preferential relations and legal regimes meant to establish a symbolical cooperation and political amity between two hegemonic entities, which entirely preserved the right of settling the possible disputes.

**b) A New Investment Paradigm: the BIT Network, ISDS and the Rise of ICSID**

The entire situation appeared radically different in the post-War world: the colonial European powers withered and the world was almost completely divided between the two undisputed hegemons. In this context, the classical FCNs – although maintaining an inertial existence for the United States until 1966, when the last one was signed – gradually disappeared due to their inadequacy with the new international *bipolar* order.70 Their highly generalist tendency to incorporate various unconnected legal regimes, combined with the politicized nature of negotiation-as-alliance-building, ‘detracted from the utility of the FCN as an investment protection device’.

Therefore, a new type of international – radically specialised – agreement appeared in the global agora: the Bilateral Investment ‘Treaty’. When signing the first agreement of this kind in 1959,72 the Federal Republic of Germany projected its newly developed international stance upon Pakistan. Not incidentally, the once feared continental hegemon, the foremost *Realpolitik* actor in international relations – defeated, devastated

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68 See K. J. Vandevelde, note 13, 21 et seq.
69 J. F. Coyle, note 58, p. 328.
Turning Enemies into Adversaries: TTIP Negotiations and the Quest for a New Westphalia Momentum

and reborn – sought a different manner to accommodate its increasing economic power, without recourse to politically-driven and forceful negotiations.

Thus, a new legal regime was emerging, along with a new Europe and a new type of relations between developed and developing states. Perhaps not more than a normative euphemism, the ‘bilateral’ assumed nature of the treaties described a rather unidirectional flow of capital which required independent – and Western – based – judicial protection from underdeveloped political and legal systems which tended to easily dismiss even the most fundamental elements of the rule of law.

In the ‘60s and the ‘70s, other European countries closely followed Germany, beginning their own BIT programmes – mostly with their former colonies or other developing states – while the North American states were more reluctant to enter in this sphere. Thus, the United States – still lingering on its tardive FCN programme until the end of the ‘60s – developed a model BIT only during the late ‘70s and negotiated its first such treaty in 1980. The initial rate of signing investment agreements was quite slow, as in the first decade only 75 BITs were concluded, while in the second decade the number was fairly similar, finally rising to 386 treaties signed until 1989.

This slow primary development – mostly European-based – can be explained by a variety of factors, ranging from the division of the world between competing blocs, a strong capital-reluctant side in the socialist sphere of influence, the crippled political state of ‘Old World’ post-colonial powers which advocated – and needed – the BIT programme, as well as by the conceptual framework of the New International Economic Order supported by developing countries.

However, once the bipolar international paradigm was shattered in the ‘90s and humanity had, presumably, reached Fukuyama’s ‘end of history’, the silent and ‘unabashed victory of economic and political liberalism’, the conclusion of BITs became endemic. In only one decade, the number of BITs increased to more than 3000, leaving almost no independent and recognized state outside the investment regime network. The full value of BITs was discovered during those years – as intensive litigation also emerged – transforming them in irreplaceable foreign affairs and economic policy instruments.

As everyone adhered to the liberal mind-set, seeing foreign direct investment as a panacea for economic growth, the BITs remained not only ‘decorative’ elements in the international order architecture, but became functional pillars that supported the whole edifice, contributing actively to the development of the entire system. The benefits and novelties of the treaties started to be practically discovered in litigation, as no other legal instrument possessed so many elements that could shield the investor from being treated unfairly.

First of all, right from its inception, the BIT programme aimed at a highly specialised

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73 For the history of the early BITs, see R. Dolzer and M. Stevens, Bilateral Investment Treaties (The Hague: Martinus Nijhoff Publishers, 1995), 1 et seq.
74 K. J. Vandevelde, note 13, 209-211.
75 S. W. Schill, note 61, 41.
type of agreement, restricted only to investments and excluding trade issues, human rights issues or other politically-sensitive topics that could move the negotiations of the agreement in the area of classical foreign policy. Thus, the BITs were able – in a certain manner – to offer a non-politicized legal instrument, conceived purely for exporting/impartialing capital without reference to ideology, military goals or old enmities. Their strict nature allowed a swifter and a more acceptable way of concluding them for both partners.

Moreover, unlike classical FCNs and their implicit, pre-treaty equilibrium of the parties, the BITs reflected a strongly asymmetrical relation, which did supposed ‘not a reciprocal trade-off between rights and obligations, but a ‘grand bargain’ of Northern capital in exchange for Southern countries tying their hands to investment protection standards’. Thus, the negotiation of BITs was carried out with two different goals in perspective: exporting capital abroad versus attracting foreign capital. None of the parties ever envisioned the investment flow as being bi-directional as it was assumed that the less developed party was not in the position to export itself capital, using the BIT solely for the domestic purposes of internal economic growth and not projecting its ‘soft power’ abroad.

In addition, one of the main reasons for which this intricate net of treaties finally appeared in the mind of the legal constituency as forming a unitary regime could be found in the increased uniformity of such treaties. Nearly all of them contain the same set of clauses, procedures and mode of functioning, reflecting not only common origins and mimetic normativism, but also an implicit common paradigm in regard to the legal and economic goals of investment. Beyond the existence of declaredly different Model BITs of one country or another, independent of the failed attempts and negotiations of multilateral investment treaties and regardless of the decisions to refuse a ‘Dutch standard’, the present BIT network presents itself as one of the most cohesive regimes of international law, with virtually no fundamental differences from one agreement to another.

Therefore, as Jeswald Salacuse pertinently argued ‘despite their textual difference ... each treaty, and therefore the entire regime, rests on two basic operational pillars: (1) promised standards of investment treatment and (2) applicable enforcement mechanisms in the event that the host government fails to grant the promised treatment’. These two elements are the key to understanding the unprecedented proliferation of investment agreements and their attractiveness for both states and investors.

First of all, the standards of treatment provided in BITs have crystallised into a real ‘canon’ which is rarely diminished or augmented. In this regard, almost all investment agreements contain the following clauses: (a) national treatment, (b) most-favoured-nation treatment, (c) fair and equitable treatment, (d) full protection and security, (e) protection against direct and indirect expropriation and (f) umbrella clauses that extend the effect of the treaty upon contracts. While the first two are regularly considered ‘relative’ standards that require a comparison with treatment granted to other investors

77 J. W. Salacuse, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’ (1990), The International Lawyer, Volume 24, Number 3, Fall 1990, 663.
78 W. Alschner, note 59, 458.
80 S. W. Schill, note 61, 74.
of different nationalities, the other clauses provide ‘absolute’ standards that assume an independent, *in abstracto* assessment of the measure, without reference to similar persons or undertakings.

The most used – and the most abused – standard from this ‘canon’ is the requirement to grant fair and equitable treatment (FET). Devoid of any positive prescription and open to a very broad interpretation, this standard has formed the basis of the regime’s success, being ‘at the heart of investment arbitration because of the vastness of factual situations pertaining to host state actions affecting the rights and interests of the investor’.\(^8^1\) Usually, an unqualified FET clause allows the investor to litigate against any type of measure taken by the host state, even a regulatory one, taken in utmost conformity with positive internal law and for reasons of public interest, if it appears to harm the investor.

Thus, this normatively *indeterminate* standard remains a ‘final frontier’ in guarding the rights of investors from every measure that could obliterates their investment, even if all the state’s authorities converge on the legitimacy of the measure or if the public opinion – and its unavoidable political capital – requests to see the investor out of business for one reason or another. Due to the versatility of the standard, almost all cases were tailored to ‘fit’ to the porous limits of FET, as states would definitely refrain from breaching another – more obvious and clear – type of treatment for which they could precisely anticipate the legal outcome.

Leaving aside the substantive protection offered by BITs, another – and, perhaps, the most innovative – element of their success relied on the procedural mechanisms offered for the settlement of disputes. Thus, unlike FCNs emphasis on domestic courts (or the inter-state litigation in front of the ICJ), the BITs introduced a novel manner of solving such cases, beyond the state-to-state classical paradigm: the possibility of the investor to commence international arbitral proceedings by filing its claim directly against the host state, without using his own state as a diplomatic proxy.

This new type of dispute settlement, the ISDS, was first provided in 1968 in the Indonesia-Netherlands BIT, followed by the Chad-Italy BIT from 1969.\(^8^2\) Unlike state-to-state arbitration, investor-state dispute settlement enabled the investor to build and control his own case, without fear that – due to foreign policy goals – his state of origin would drop the claim or settle it in an unsatisfactory manner. Moreover, as a new type of international litigation, the investor-state dispute settlement model conferred the investor a limited international capacity, both parallel with that of classical sovereign states and divergent in its purpose.

In this regard, Stephan Schill identified four fundamental elements of the ISDS system that transformed it into a highly efficient mechanism: ‘(1) the direct right of action by a foreign investor to seek damages for a violation of an investment treaty; (2) the limited influence of States on the arbitral process itself; (3) the limited review of arbitral awards;
and (4) the provisions on recognition and enforcement of investment treaty awards. 83

These last two points were inaugurated in 1966 with the establishment of the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the World Bank, as an independent and autonomous forum for dispute settlement. 84 Although a breakthrough in itself, the origin of ICSID initially lied in the previous failure of states to reach a conclusion in regard to substantive treatment standards that could have been multilateralised in a convention. 85 Thus, the Centre provided the first generation of BITs with an institutional framework that made investor-state dispute settlement possible and – eventually – effective, both in terms of arbitral procedural norms and in enforcing such issued awards against Member States.

In addition, in an age when politics and ideology roamed free in the international agora, ICSID – and its multilateral nature – provided investors and investment-requiring states with an impartial and apolitical forum. As Ibrahim Shihata influentially argued, ICSID represented ‘[a] forum for conflict resolution in a framework that carefully balances the interests and requirements of all the parties involved, and attempts in particular to ‘depoliticize’ the settlement of investment disputes’. 86

Therefore, the BIT paradigm – a novel one indeed – gradually developed into a full-standing legal regime that covered the sphere of foreign direct investment in a formalistic, apolitical and efficient manner, without recourse to ideology or larger strategic-oriented alliances. No matter how Westphalian in origin, the BIT perspective moved international law one step further, eroding the classical sovereignty-based model. Moreover, despite being bi-lateral formally, it never assumed a traditional reciprocal set of rights or obligations, but an asymmetrical dynamics of exchange and growth which set the global economy in motion. Coupled with ICSID-backed manners of dispute settlement, such treaties allowed investors to move their capital abroad and benefit from it without fear of subsequent retaliation and the impossibility to harness their own state to come to their aid.

The BIT era had just begun.

c) Beyond Westphalia: Multilateralism Revisited

The dissolution of the Eastern bloc and the end of the bipolar international order strongly reflected in the frenzy of BIT-signing and BIT-based dispute settlement. The previously unthinkable number of investment agreements and the rapid manner of concluding them, soon turned investment law from a Cinderella of international relations into the most referred and used sub-system of the global legal order. The entire manner of conceptualising, concluding and interpreting BITs transformed in this era, evolving into a veritable ‘multilateral’ regime.

83 S. W. Schill, note 61, 249.


More precisely, even though such multilateralism failed formally again and again, states never agreeing on common principles or goals, a structural multilateralism emerged from the practice of investment law. The BIT network was subject to a silent metamorphosis from a strictly classical bilateral stance, from a quid pro quo approach toward economic interaction, to a truly multilateral system [establishing] rather uniform general principles that order the relations between foreign investors and host States in a relatively uniform manner independently of the sources and targets of specific cross-border investment flows.87

Thus, the Westphalian dyadic interaction of contracting states appeared rather outdated in this self-referential enclosed system of interconnected and overlapping treaties, opening the gates for a new type of law. The structural multilateral setting emerged not as a consequence of the initial will of sovereign entities, but rather as an unintended result of ordinary BIT practice, both in the phase of negotiations and in that of litigation.

Therefore, three elements appear to generate the transition from the isolated and reciprocal bilateral character of BITs to a multilateral framework encompassing a self-standing legal regime. First of all, the originary mimetic normativism of negotiators has granted to the impossible number of 2,500 distinct treaties a unitary structure and a uniform set of clauses, an unofficial ‘standard’ to which states have tacitly adhered. Secondly, the general existence of the MFN provision in each treaty – usually an unconditional MFN – allowed investors to ‘import’ different normative contents in their applicable law, thus equalising the treatment and incident provisions for the entire regime. Thirdly, the convergent hermeneutics of arbitral tribunals led to the creation of derivative standards, identical in their effects and which supplemented the basic provisions with a more encompassing degree of protection.

In addition to these silent and underlying transformations, explicit multilateralism also gained ground in the ‘90s with the conclusion of a series of new international treaties. Much inspired by the regional and supranational union created in Europe, Canada together with the United States and Mexico signed in 1992 the North American Free Trade Agreement (NAFTA), which entered into force at the beginning of 1994. Beside a comprehensive trade part and liberalisation of the markets, the Agreement contained a specific chapter (11) dedicated to investment protection, much like a standard BIT. The ISDS clause was included and it resulted in the commencement of numerous proceedings that transgressed the old ‘North-South’ divide or the dialectic of ‘developed-developing’ states.88

Moreover, on the other side of the Atlantic, the multilateral tendency rather moved in the opposite direction: a higher specialisation. Thus, a true ‘child of the European Communities’, as it has often been called, the Energy Charter Treaty was opened for signatures in 1994 and entered into force in 1998, after its 30th ratification.89 It finally

87 S. W. Schill, note 61, 15-16.

88 Not only US or Canadian companies commenced arbitral proceedings against Mexico (as previously envisaged), but a rather consistent part of the NAFTA case-law refers to United States vs. Canada (or vice versa) disputes, with investors from both countries seeking redress against the other state.

reached more than fifty members, including the European Union as an autonomous supranational entity, besides its own Member States. Originating in the need to secure the energy supplies on the Eurasian territory after the fall of the Eastern bloc, it evolved from an EU project into a multilateral global agreement, encompassing members (or observers) from all continents. Its main part (XI) refers to the protection of investment in the field of energy, being configured in a NAFTA-inspired manner. Moreover, Article 26 contained an ISDS clause, which – coupled with the substantive protection offered – reflects a multilateralised BIT structure, among all the Member States.

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Therefore, after analysing sequentially the metamorphosis of investment protection from the post-mercantilist era of the FCNs until the present multilateral moment, it can be subtly discerned that the intended ‘straight line’ is neither straight, nor a line. Rather a spiral, its evolution passes from one conceptual pole to another and then returns in the same position, but to a different level. More precisely, investment protection appears to have departed from its ‘contamination’ with other legal spheres to an intended autonomous regime – a veritable enclosed horizon ‘quarantine’ – and then it re-emerged in the larger context of international law.

*Legal alterity* understood as Other than the State (non-state) appears to be a fragile model. The raison d’être of the BIT structure was to ensure a system of investor protection defined as autonomous from State influence, in particular escaping the judicial control of the State. The ISDS-clause was a tool designed for the purpose of autonomy vis-à-vis the judicial power of the state. The metamorphosis of investment protection shows nevertheless that the non-statist governance was sought de facto with regard to the less developed capital importing states, not the State in general defined as fundamental concept of IR-theories and subject of public international law.

**IV. THE PARALLEL UNIVERSE OF THE EUROPEAN UNION**

*a) Dawn of a New Legal Order*

At the very outset the idea of a united Europe has been dual in character and it combined the ideal of a peaceful integrated Europe with the economic interests involved in the production of steel and coal. During the ‘50s, the governance of the economic within the Union was assigned to a supranational structure of power, while other issues including external trade and cooperation with third countries, remained to be negotiated and decided at the intergovernmental level.

*Conviviality* – an advanced form of sociability oriented towards a common future – is the type of social relation that characterises the EU. Besides the property control, the Member States maintain nonetheless their hegemonic position in matters such as direct taxation, social security, health policy, criminal law and procedural autonomy. These hegemonic positions cannot be used in a manner that runs counter to the Union interest, particularly, to the good functioning of the internal market and the common


Turning Enemies into Adversaries: TTIP Negotiations and the Quest for a New Westphalia Momentum

external trade policy. Legally speaking, the revolution has indeed begun with the moment in which the CJEU gave its preliminary rulings in Costa v. ENEL and Van Gend en Loos. The emergence of the new legal order marks the end of the domination of the national legal systems as central building-blocks for legal authority within Europe, but it also generates a supranational political constituency in which the citizens of Europe are supposed to act as direct participants, since the constituent power of the new legal order resides in the peoples of Europe.⁹¹

When the European Community, now Union, has been formed from a group of contiguous states, their relations, previously governed by rules developed within the framework of the international legal order, became internalised and new rules were established reflecting the new (quasi)-federal context. A reverse process can also occur, by which rules developed for internal disputes are extended to international disputes. Both internalisation of international law and externalisation of Union law are jurisgenerative processes that emerge unsurprisingly in a 'glocal' world.⁹²

It might be difficult to determine with certainty whether the nature of a dispute is domestic, internal or international. A functioning market economy represents a fundamental condition as regards the possibility to accede to the European Union and all the twelve ex-communist European states had to pass a test, so-called the Copenhagen criteria, in order to be accepted as new members of the Union. They had to implement the Community acquis prior to their actual accession date and establish stable political institutions in compliance with the rule of law.

Even so, before the date of entering into force of the Treaty of Lisbon, the Charter of Fundamental Rights of the EU constituted only means of interpretation of Union law and the external commercial policy was integrated in the second pillar of the Treaty of Maastricht, hence being subject to the intergovernmental procedure.

Principle of primacy instituted in Costa v. ENEL did not imply an unlimited authority to dislocate other blocks of obligations derived from international law. Article 351 TFEU (ex 307 EC) is a reflection of the Article 30(4)(b) of the Vienna Convention (VCLT) and it stipulates that the principle of primacy does not affect the pre-existent obligations of a Member State with respect to third countries. Conversely, already in Case 10/61, the Court found that the provisions of an agreement concluded prior to the entry into force of the Treaty cannot be relied on in the case of intra-Union relations.⁹³ With respect to Article 351 TFEU, the CJEU established that ‘may in no circumstances permit any challenge to the principles that form part of the very foundations of the [Union] legal order’.⁹⁴ Article 351(1) TFEU is nonetheless designed to apply as long as there is an incompatibility between an obligation arising under the international convention, concluded by a Member State

⁹³ Commission v. Italy, Case 10/61; Levy, C-158/91, para. 13
⁹⁴ Kadi, C-402/05 P, para. 304.
before its accession to the Union and an obligation arising under Union law.\textsuperscript{95}

Despite the EU’s lack of membership in the IMO, the CJEU found in case C-45/07 that Greece failed to comply with its obligations under the Treaties by acting unilaterally and submitting a proposal to the IMO Maritime Safety Committee.\textsuperscript{96} This action was situated in an area comprised within the exclusive external competence of the EU, even though the EU was not a member of the IMO. The external competence of the EU shall be exercised through the joint action of the Member States taken in the interest of the EU.\textsuperscript{97} Later on, in the early ’70s, the CJEU established that the protection of fundamental rights must be ensured within the framework of the structure and objectives of the Union.\textsuperscript{98} This finding was to be reconfirmed by \textit{Kadi} in September 2008 and Opinion 2/2013 in December 2014. During the same decade, the CJEU ruled that once the EU approves or accedes to an international treaty, its provisions become integral part of the Union law.\textsuperscript{99}

\textit{The applicability of Article 267 TFEU (ex 234 EC) to any international agreement was decided in 1980 in \textit{Burgoa}, where the CJEU affirmed its general scope and applicability to any subject-matter that may have the quality of affecting the application of the Treaty.\textsuperscript{100} However, an arbitration tribunal is not a ‘court or tribunal of a Member State’ within the meaning of Article 267 TFEU, where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene ex-officio in the proceedings before the arbitrator.\textsuperscript{101} A number of factors must be examined in order to determine whether a body constitutes a court within the scope of Article 267 TFEU:}

\begin{itemize}
  \item whether the body is established by law;
  \item whether it is permanent;
  \item whether its jurisdiction is compulsory;
  \item whether its procedure is \textit{inter partes};
  \item whether it applies rules of law;
  \item whether it is independent.
\end{itemize}

The EU is not member of the ICSID, but as already discussed, the Member States of the EU are supposed to act in accordance with Article 4(3) TEU in the interest of the

\textsuperscript{97} \textit{Opinion 2/91}, EU:C:1993:106, para 5.
\textsuperscript{101} ‘\textit{Nordsee’ Deutsche Hochseefischerei}, Case 102/81, EU:C:1982:107, paras 10-12, and \textit{Eco Swiss}, Case C-126/97, EU:C:1999:269, para. 34.
EU and support each other’s actions in any field that falls within the external competence of the EU. The Commission pleads in favour of obtaining ICSID membership, exactly as it supports Union’s accession to the ECHR. The challenges are similar; the members of ICSID have to agree with an amendment of the ICSID-convention. An alternative could be to adopt a MoU or attach a protocol allowing a non-state to adhere to the ICSID-convention.

On the other hand, the accession to ICSID would not solve the key question of autonomy of EU law, since an ICSID Tribunal is not a court under Article 267 TFEU. Its jurisdiction is not compulsory,\(^{102}\) it is not independent and it does not apply rules of law. Therefore simply having a system based on a body of law with permanent character – as the system proposed by Cecilia Malmström following the model of WTO – would not dislodge the concerns related to the control exercised by CJEU in matters of external relations.\(^{103}\)

*The concept of ‘court or tribunal of a Member State’* covers anyway an ordinary court reviewing an arbitration award in the case of an appeal or counterclaim in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.\(^{104}\) It follows from the principles of the primacy of Union law and of its uniform application, in conjunction with Article 4(3) TEU, that a court of a Member State to which an appeal against an arbitration award is made pursuant to national law must observe the rules of Union law, in particular those relating to competition.\(^{105}\)

It is well-known that the ICSID does not provide for a public policy exception and the possibilities of revision or annulment by an ICSID Ad Hoc Committee shall be interpreted restrictively. Therefore, in the case of an ICSID-award, the action brought by the state before a national court will most commonly concern a challenge of the leave to issue execution or an application for an injunction order. An appeal or judicial review of the merits not being available, the crucial discussion will focus on the *enforceability* of the award.

National courts and international tribunals may perceive each other as competitors in certain situations. While internal rules offer no excuse for non-compliance with an international obligation under international law, they represent real practical barriers. It has been advanced that judgements of international courts and tribunals shall be enforced in the same way as judgements of foreign courts, because injustice would result and normal patterns of life would be disrupted, if in this polycentric world each constituency exhausted every possibility of defending its parochial interests. No single jurisdiction may comprise all relevant aspects of life in order to ensure stability, co-operation and unity of the international order according to von Mehren and Trautman, founders of the theory of

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102 This is a recurrent discussion in international law, namely that a jurisdiction that depends on the consent of the parties, in a form or another, it cannot be truly ‘compulsory’.


multistate problems.\textsuperscript{106}

The chilling effect refers to regulatory restraints imposed on states as a result of an imminent threat of international arbitration. However, an international tribunal does not rule on the validity of national legislation, which is a matter for the Constitutional Court of the Member State to decide and it does not amend or annul decisions taken by national institutions. Neither does CJEU have competence to invalidate national legislation, though it holds the authority to interpret EU law in order to ensure that the seized ordinary court will be able to rule on the matter of incompatibility with EU law and decide on the appropriate and effective remedies, while an arbitral tribunal would only be entitled to prescribe a specific type of remedies i.e. monetary sanctions. The Commission in its turn requires the Member States to take action and correct the incompatibilities, it does not decide on the validity of an act of national law. The treatment of state aid measures is governed by EU legislation and the constant jurisprudence of the CJEU on the interpretation of state aid rules established that the only effective means of enforcement is the recovery of illegal state aid.\textsuperscript{107}

Unlawful aid cannot be regarded as definitively existing and, consequently, it constitutes not an existing situation, but a temporary situation, since the Commission is the sole body competent to decide on the lawfulness or unlawfulness of the national measure in question, which could not, therefore, create a ‘definitively-established legal situation’ before the Commission’s decision.\textsuperscript{108}

The notion of unlawful state aid refers to a measure implemented in breach of the notification obligation or before the Commission’s approval has been issued. State aid law is supranational law par excellence, meaning that the measure would be lawful on any other account other than the conditional prohibition in Article 107 TFEU.\textsuperscript{109} The division of competencies between the Union institutions – the constitutional structure and the autonomy of the Union order – constitutes the big ‘aber’ and main source of antagonism. Compliance with state aid rules requires the Member State to turn back the clock and restore the economic situation existent before the illegal grant, hence it would entail the discontinuation of an investor-favourable regulatory regime. A chilling-heating effect may occur in some cases, where compliance with EU law implied monetary sanctions under the international investment law (IIL) regime, while compliance with IIL would imply an infringement of EU law.


\textsuperscript{107}When it comes to the calculation of the amount of illegal state aid and the practical modality of recovery, especially in taxation cases, there is a certain space left for the Member State to choose the methods as long as they result in an immediate effective restoration of competition on the internal market.


\textsuperscript{109}See judgement Iannelli & Volpi, Case 74/76, EU:C:1977:51, paras 14-17. The examination on the compatibility under Article 108(2) TFEU takes into consideration compliance with other supranational norms, especially the respect due to economic freedoms within the EU. A restriction of economic freedoms that cannot be justified according to those provisions cannot be saved by applying a state aid compatibility test in conformity with the severability rule established by Volpi.
b) Reformation without Revolution: The Lisbon Moment

The ability of the EU to conclude and negotiate international agreements, to become a member of international organisations and to join international conventions is anchored in Article 47 TEU. The explicit and exclusive competence of the EU within the common commercial policy is principle-based according to Article 207 TFEU and oriented towards global trade liberalisation.

After Lisbon, only the EU, and not individual member states, can legislate on trade matters and conclude international trade agreements. Besides the exclusivity to conclude and negotiate trade agreements, the Union has the ability to conclude an agreement with other international organisations or states, where such conclusion is necessary in order (a) to achieve one of the objectives referred to in the Treaties or (b) likely to produce effects on common rules or (c) alter their scope as provided by Article 216(1) TFEU.110 This likelihood does not imply that the areas covered by the international commitments and those covered by the Union rules shall entirely coincide.111

Even when there is no possible contradiction between commitments under international law and the common Union rules, it has been established that Member States may not – outside the framework of the Union institutions – engage in such commitments.112 Since such agreements are binding upon the institutions of the Union and its Member States, the submission to any method of settlement other than those provided by Union law of a dispute on the interpretation or application of the Treaties within areas covered by those international commitments is precluded by Article 344 TFEU. Any prior or subsequent external control of the jurisdiction of CJEU to settle intra-Union disputes within the scope of EU law could jeopardise the exclusive nature of its judicial authority.113

As per Council of the European Union and European Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe, ‘in conformity with the principles of international law, EU institutions which have power to negotiate and conclude such an agreement are free to agree with the non-member States concerned what effects the provisions of the agreement are to have in the internal legal order of the contracting parties’.114 The provisions of an international agreement to which the Union is a party can be relied on in support of an action for annulment of an act of secondary EU legislation or

111 In case T-170/11 the Convention between Switzerland and Germany on the reciprocal protection of patents, designs and trademarks signed in Berlin on 13 April 1892 was found inapplicable and the situation that the EU was not part of this convention lacked relevance in deciding the matter of applicability. The Union trade mark system being an autonomous system with own objectives and specific rules, it applies independently of any national system. OHIM itself emphasised at appeal that the principle of the unitary character of a Union trade mark is not absolute, but the list of admissible exceptions provided by Regulation No 207/2009 did not allow any additions. Sea transport and IPR are harmonized areas, hence the Member States are not allowed to diverge from the set of common rules and their interests also constitute a unitary framework supported by the Treaties and the Commission’s role.
112 Ibid., para. 71.
113 Opinion 2/2013, EU:C:2014:2454, para. 210, referring to Article 33 ECHR ‘Inter-state Cases’.
an exception based on the illegality of such an act only when the following conditions are cumulatively met: first, the nature and the broad logic of such agreement do not preclude it and, second, those provisions appear, as regards their content, to be unconditional and sufficiently precise.\textsuperscript{115}

A question that has not been expressly dealt with in such agreements, it will be clarified by the courts having jurisdiction ratione materiae and in particular the CJEU, within the framework of its jurisdiction, to decide it, ‘in the same manner as any other question of interpretation relating to the application of the agreement in question in the EU on the basis in particular of the agreement’s spirit, general scheme or terms’.\textsuperscript{116}

\textit{An overlapping consensus} occurred in \textit{Green Network}, where the scope of an agreement between Italy and the Swiss Confederation partly covered the scope of the Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market. Regarding the import of electricity produced in a third State, the Italian law provided an exemption from the obligation to purchase green certificates, if an agreement was concluded in order to ensure that the electricity was ‘produced from renewable energy sources and guaranteed as such according to the same arrangements as those provided for in Article 5 of Directive 2001/77’. This agreement was precluded by EU law and so was also the attempt of replacing it with a system of verification instituted between the grid managers in the Swiss Confederation and Italy.\textsuperscript{117}

The most important element in this examination is the overlapping of competences between the EU and any another legal order, which will be qualified as exterior vis-à-vis the EU, thus made subject to a Kadi-test, according to which compatibility with EU law is a condition for allowing those obligations to permeate the EU legal order.

\textit{Not being a complete federal state} with a Supreme Court and a certiorari petitioning system, in which the norms of the Other can be correlated with the internal norms, a procedural bridge had to be designed in order to cover the gap left behind by the institutional choices made by the Union and protect the political integrity and autonomy of the EU. Within the preliminary ruling procedural framework the CJEU acts as a \textit{Court of Courts}, its relation to the parties involved in litigation before a domestic court rather has an abstract acception, its main pursuit being the preservation of autonomy and the coherence of Union law application.

The issue of setting the balance between general and particular and individual justice considerations are for the referring court to see to. Since the matter of investor protection borders and touches upon subject-matters, such as competition law and internal market law, but also contemplations of fundamental rights, it must be assured that the CJEU would be able to give its interpretation of EU law, namely to determine whether and eventually in what manner the IIL obligations might permeate the Union legal order.

\textit{A new category of alterity} – the Union citizenship – has been introduced by the

\textsuperscript{115} Council of the European Union and European Commission \textit{v.} Stichting Natuur en Milieu, Joined Cases C-404/12 P and C-405/12 P, EU:C:2015:5.

\textsuperscript{116} See judgement in FIAMM and Others \textit{v.} Council and Commission, C-120/06 P and C-121/06 P, EU:C:2008:476, para. 108.

\textsuperscript{117} Green Network SpA \textit{v.} Autorità per l’energia elettrica e il gas, Case C-66/13, EU:C:2014:2399.
Lisbon Treaty.\textsuperscript{118} A person, who qualifies as a Union citizen under EU law, thus a non-
foreigner, may be regarded as a foreigner under national laws. Since the ISDS grants rights
to a specific category of subjects – foreign investors – the questions of equality before
the law and non-discrimination are relevant, in particular because the EU Treaty makes a
distinction\textsuperscript{119} between the nationality of the investor and the provenience of the capital.

As shown in Section III (b), right from its inception, the BIT programme has
aimed at a highly specialised type of agreement, hence it excluded \textit{inter alia} human rights
questions. In EU law, the principle of equality occupies a crucial position being the engine
of the economic integration in Europe, even though Member States may still enjoy
margins of discretion in the judicial review of national measures that allegedly contravene
the equality principle. In the 21st century, the distinction between citizenship and non-
citizenship has been blurred and a wide range of grey nuances need to be interpreted in
order to determine the status of a person and to avoid cases of differential treatment of
similar economic situations.

Between the national values and supranational law and between the latter and the
IIL obligations may arise complex interactions. In \textit{Omega},\textsuperscript{120} the underscored question
was whether a national value – human dignity – secured its counter-hegemonic position
\textit{from below}, because a restriction on supranational law was trumped by the application of
this value in German law, or did Union law reinforce its hegemonic position \textit{from above},
because the CJEU sanctioned this result?

This type of false dilemma is caused by the fact that the tradition of international
law sees constituencies as indivisible, and according to this perspective Germans are
isolated from the abstract supranational constituency. German thinking about ‘human
dignity’ cannot be severed from the common social identity as an integrated part of a set
of conditions having allowed the European Union to emerge as a possibility at the very
beginning.\textsuperscript{121}

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Voting with their feet by divesture could also constitute a possibility of preserving
the interests of the transnational investors and such transfers happen constantly for

\textsuperscript{118} The Treaty of Lisbon brought significant changes, an accelerated speed of integration and a more
powerful European Parliament. Most important of all changes is the conferral of legal personality to the
European Union and its ability to accede to international organisations.

\textsuperscript{119} See by analogy the Article 63 TFEU that establishes the free movement of capital between Member
States and between the latter and third countries and the Article 49 TFEU governing the freedom of a national
of a Member State in a different Member State. The capital must be free to circulate in and out the EU no matter
if its owner is a national of a Member State or not.

\textsuperscript{120} \textit{Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn}, Case
C-36/02, EU:C:2004:614.

\textsuperscript{121} The CJEU in \textit{Omega} reaffirmed its formula that ‘the Community legal order undeniably strives to
ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective
of protecting human dignity is compatible with Community law; it being immaterial in that respect that, in
Germany, the principle of respect for human dignity has a particular status as an independent fundamental
right.’ Moving further to the proportionality test, the discussion turns from the \textit{general} to the \textit{particular}, from
the value protection to ‘the level of protection of human dignity ... in the territory of the Federal Republic of
Germany'.
other purposes such as fiscal planning or relocation via outsourcing and insourcing. Both nation states and foreign investors would benefit from more flexibility in relation to their budgeting and technological strategies. Expecting stability in a dynamic global economy cannot reasonably give rise to legitimate expectations in the 21st century, though enabling divesture under conditions of fair treatment could be circumscribed to the rationality of legal certainty of the investment protection. On this purpose the rediscovery of the equilibrium of contractual parties – as discussed in Section III (b) – should be contemplated especially having in mind those cases, where there is a latent risk for chilling-heating regulatory effects.

Moreover, the positive interlegality of a constituency – such as the one of transnational investors – must be accomplished via institutional forms of dialogue and mutual monitoring. Besides increasing the trust, such network-integrated tools of communication could propagate changes in this constituency, which are harmoniously related to the other interlocking constituencies, including states and suprastates and their general normative discourse. Thus, the present-day institutional isolation that characterises the constituency of transnational investors, identified by us as a source of institutional distrust, co-existence instead of conviviality, information asymmetries and jurispathic killing instead of generative duelling should be eradicated. Substantive changes are a necessary and pertinent complement, but interlegality being a matter of perception, it requires a structural and procedural framework in which the two discourses – of trust and distrust – can flow into each other.

V. THE TROUBLE WITH ENERGY: ECT ARBITRATIONS AND EU LAW ISSUES

a) ISDS in Action: AES and Electrabel

Investment disputes between Member States had been quasi-absent up to the accession of Central-Eastern European countries to the EU, when a great majority of intra EU-BIT arbitration disputes emerged from the contestation of national measures adopted by the acceding states in order to avoid incompatibilities with EU law. In the case of disputes related to the interpretation of the ECT, a situation of overlapping consensus arose. First of all, the constitutional structure of the EU laid at the origins of the ECT. The Treaty itself was designed as a means to ensure fair rules for energy investors from the Union, outside the Union where no acquis was applicable so as to secure a level playing field. Moreover, not only all member states of the EU became signatories of the ECT, but also the EU in its own capacity.

What makes this happenstance even more peculiar is the fact that – teleologically speaking – the ECT was not conceived as offering a higher standard of protection than the EU law, but rather of offering a decent substantive and procedural framework for European investors operating in jurisdictions that failed to offer even the most essential rule of law guarantees and whose political transition made the legal regime highly inconsistent and unpredictable. The fact that a situation of overlapping consensus may generate a discussion on the appropriate calibration of margins of discretion is nevertheless fully expected.122

122 It would be enough to examine the incidence of the principle of non-discrimination in tax law in order to understand that while observing this principle each Member State applies its own definitions and procedures in order to safeguard it. There is consensus in relation to the necessity of preserving equal treatment in taxation, though no consensus concerning the means of doing that.
These basic assumptions concerning the (non)interaction among ECT provisions and EU law were challenged once Central-Eastern European countries entered the Union, while bringing along with them ‘preferential’ agreements protected by the ECT with Western European Member States. At this point, the two narratives of international law and EU law started to diverge and confront each other as enemies.

AES Summit v. Hungary. For international investment law practitioners, AES Summit v. Hungary\(^\text{123}\) seemed – at a first glance – the typical regulatory-harming case, in which a host state adopts different normative measures – following public debate and social pressure – that severely alter the legal and economic framework which was granted to the investor at the establishment moment.

More precisely, in AES Summit v. Hungary, the Hungarian state decided to unilaterally modify the pricing mechanism provided in a previous agreement (a so-called PPA) with the foreign investor, capping its returns from the energy-generating plants that he operated. In the chaotic ’90s of Hungary’s transition to a market economy, the Hungarian Government and AES Summit Generation Ltd – a British incorporated company – signed a Purchase and Sale Agreement with two state-owned entities, acquiring three power plants. This initial investment amounted to approximately 130 million USD and the contract envisioned further investment – new constructions, as well as modernisation of older installations – in return for long-term PPAs (Power Purchase Agreements).

As it appeared in 2000 that Hungary abolished the preferential system, the investor commenced arbitral proceedings under the ECT and the UK-Hungary BIT, which were finally settled the following year. As a consequence of this settlement, also in 2001, a new PPA was negotiated – amending the initial PPA – which also provided a price-establishing mechanism once the administrative price fixing should end. In return, the investor was also required to retrofit one of the owned power plants.

In 2004, Hungary joined the European Union and ended its administrative price fixing. Therefore, the prices began to be calculated on the basis of the negotiated 2001 PPA mechanism, while AES ended its retrofitting project valued at 98 million USD. Following the European Commission’s concerns about existing PPAs and their incompatibility with the competition law,\(^\text{124}\) as well as of lively debates in the Hungarian Parliament regarding overprices practiced by power generators such as AES and the losses of state-owned energy wholesalers, the legislative power modified in 2006 the Electricity Law.

Thus, a new administrative pricing regime was introduced, limiting the returns of power generators at a certain threshold. Two more Government Decrees were issued – in 2006 and 2007 – specifically modifying the pricing method of each individual power generator, fundamentally altering the negotiated PPA. Due to these reasons, the investor filed a claim before an ICSID tribunal, on the basis of the ECT. The arbitral tribunal was called upon to first establish the correct answer to a series of matters regarding applicable


\(^{124}\) In 2008, a decision was taken by the Commission regarding these issues. It was decided that the ‘suspect’ PPAs represented unlawful state aid. For more details, see Commission Decision of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (notified under document C(2008) 2223).
law.

Parallel lines of argumentation were advanced in respect to the influence of EU law upon the ECT legal paradigm, while both parties agreed that the ECT shall undoubtedly be the applicable law of the case. More precisely, as it came to the interpretation of the ECT, the investor argued that only the basic rules of the VCLT (Vienna Convention on the Law of Treaties) should be taken into consideration when interpreting the Treaty. On the contrary, the Hungarian state offered two alternative possibilities supporting the thesis of EU law relevance. Thus, it was argued that:

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\text{the ECT must be read in light of one of its own objectives, which is to promote the European Union's key energy objectives, market liberalization and free competition, and not as if it was entirely independent of critical EU laws and developments. ... when a state has obligations under two different treaties involving overlapping subject matter, those obligations should – to the extent possible – be read in harmony and be interpreted to minimize conflict.}^{125}
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The respondent state argued for the possibility of using EU law either as a teleological instrument of interpretation or as critical-historical aid in placing the ECT in the right framework. These hermeneutical methods did not – however – contradict the provisions of the VCLT which allowed interpretation to be made both in the context of other ‘relevant rules of international law applicable in the relations between the parties’\(^{126}\) and – by using supplementary means of interpretation where the meaning is unclear – in relation to the ‘preparatory work of the treaty and the circumstances of its conclusion’.\(^{127}\)

The tribunal finally decided – in a literal-positivist manner – that ‘although Article 32 provides for the use of historical interpretation, the Tribunal notes that such use is only as a complementary method of interpretation’\(^{128}\), thus seeing no reason to use EU law as a factor that could clarify the initial purposes and intended meaning of the ECT. Moreover, when analysing the nature of EU law in order to establish its correct interaction with the Treaty at hand, the arbitrators showed that:

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\text{The Community competition law regime, it has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders. It is common ground that in an international arbitration, national laws are to be considered as facts. Both parties having pleading that the Community competition law regime should be considered as a fact, it will be considered by this Tribunal as a fact, always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations.}^{129}
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As a result, the tribunal decided to treat state aid rules of the Union as national

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125 AES Summit Generation Limited and AES-Tisza Erömű Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010, paras 7.2.2-7.2.3.

126 See Article 31(3)(c) of the VCLT.

127 See Article 32 of the VCLT.

128 AES Summit Generation Limited and AES-Tisza Erömű Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.5.

129 Ibid., para. 7.6.6.
Turning Enemies into Adversaries: TTIP Negotiations and the Quest for a New Westphalia Momentum

law, namely mere ‘fact’ to be taken into consideration when practically assessing the reasonability or arbitrariness of a specific conduct. From the realm of legal theory and normative order dynamics, the discussion was moved to the more mundane field of concrete measures and their impact upon the state’s conduct. In this insufficiently reasoned manner, the tribunal arrived at the conclusion that ‘properly understood, the dispute under analysis in the present arbitration is not about a conflict between the EC Treaty or Community competition law and the ECT’, alleviating the task of deciding upon this uncomfortable issue.

Although placing itself in an entirely international investment law framework, the tribunal decided in the end against the investor, on grounds that it had not been treated in an inappropriate manner from the perspective of ECT. Its legitimate expectations had not been frustrated by the host state who acted in pursuit of a rational and public-interest-motivated goal. Moreover, the majority of the tribunal decided that the Commission’s investigation and indications were not the determining element in Hungary’s measures, but rather the domestic public pressure regarding the excessive profits of energy generators. In the end, no matter how important the dynamics of ECT-EU law appeared initially, its solving – one way or another – would not have led to a different result.

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In the same register as AES, this case referred to another power-related PPA, where the Hungarian state took a step further by terminating the contract. Factually assessing the details of the case, it can be shown that the history of the investment began in similar conditions when – in 1995 – the Belgian company Electrabel entered the Hungarian market through acquiring the former state-owned Dunamenti power plant. At this moment, a PPA was signed (with an expiry date in 2010, further prolonged until 2015) between the public distribution company and the investor.

However, in 2006, due to public pressure and continuous concerns expressed by the European Commission, the respondent state reintroduced administrative pricing and significantly reduced the returns (a cut of 40%) of the investor from its Dunamenti power plant. In 2008, Hungary went further and terminated the PPA in its entirety, following a European Commission final negative decision with recovery that found the contract to be incompatible with the EU competition law, particularly with the state aid regime.

Later that year, the Belgian company commenced arbitral proceedings against Hungary, under the auspices of ICSID, arguing that the respondent state breached the FET standard and resorted to expropriation by unilaterally and prematurely revoking the PPA. Interestingly – but not surprisingly after the too swift AES ruling – more than half of the decision treats the issues of applicable law and jurisdiction, although also establishing liability. Moreover, unlike the AES award, it explicitly addresses the issues raised by the European Commission as amicus curiae, giving detailed answers as if it acted as a party to the arbitration.

The entire case eventually appears as a dramaturgical structure, a veritable legal

130 Ibid., para. 7.6.8.
Greek tragedy, with an escalation of conflict between the parties and the ‘voice’ of the tribunal as an all-solving deus ex machina. Thus, in Electrabel – unlike many cases – not only two discourses are adversarial juxtaposed, but three, followed by a final, encompassing meta-narrative that establishes in isolation the underlying legal meaning of conflicting paradigms.

In its multiple submissions, the claimant discussed the interaction between the ECT and EU law at length, proposing parallel lines of interpretation. More precisely, the first element introduced – an argumentative core of its general discourse – was that ‘EU law should be analysed as an internal or municipal law; and EU law is therefore irrelevant, save as a possible factual matter’. A second idea was that even if EU law were to be considered as international law, only its Treaties would qualify for these purposes and not the secondary law. Moreover, the investor argued that – in any event – EU law incorporates the ECT and, if any inconsistencies between the two legal orders might exist, the ECT prevails over the EU law. The last solution – a legal back-up, attractive due to its systemic implications – was to propose a ‘harmonious’ interpretation of the intersecting legal regimes.

The respondent observed in its submission that the interaction between international law and national legal regime should be distinguished from the vertical relation between supranational law and its implementation at state level that can be pursued via legislation or administrative measures. An internal conflict of laws at the Union level shall be treated differently from a classic international conflict of laws, which takes place in a sphere of horizontal interests. While agreeing with the claimant that Union law also represents a part of the domestic legislation as a result of the host state’s accession to the EU, it also is international law as it derives from international treaties:

[w]hile EC law may be ‘internal’ to the system of the European Union – and thus of no relevance to States who are not Members of the European Union – for those who are Members, it is still the result of a multinational treaty, the EC Treaty (and the various accession Treaties by which new Member States became bound).

Further on, the Hungarian state argued that the provisions of the two treaties should be interpreted in a consistent manner, that is to say they should be ‘read in harmony’ with each other. For the respondent, this appeared logical due to historical and teleological reasons, as the drafting of the ECT was not only an EU project in its origin, but was also conceived in such a manner to serve the Union in its international law interaction with other states. Finally, it was contended that EU law cannot only be understood as a national law (i.e. as fact), but also as ‘supranational’ binding law for the state. From this ‘dual perspective’, the Commission’s final decision would not only represent a relevant factual element, but also a legal determination regarding the (un)lawfulness of the terminated PPAs.

In parallel with the parties’ adversarial argumentation, the European Commission also advanced its own position, reaching beyond the arguments of the respondent. The entire line of the Commission’s argumentation began by introducing the EU law framework under which its decision is binding in regard to the Member States notwithstanding any other contrary requirements that might be applicable. Furthermore, it argued that the

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132 Ibid., para. 4.26 – our emphasis in the text.

133 Ibid., para. 4.58, quoting the Respondent’s second submission.
historical development of the ECT should lead to the conclusion that the two legal orders are not conceived to derogate from each other’s provisions and if certain contradictions seem to exist between them, they are only apparent, as the ECT and EU law should be interpreted harmoniously. In this regard, the Commission supported the idea that even ECT mandates the application of EU law in its ‘international law’ stature, thus normatively accompanying the provisions of the ECT.

Finally, the European Commission asserted that even if an irreconcilable conflict should be considered to exist between EU law and the ECT, the former legal regime should prevail, considering that article 16 of the ECT bears no effects between Member States as ‘[a]ll the EU Member States, including Belgium and Hungary, have agreed in 2004 inter se not to apply the conflict rule contained in Article 16 ECT, but the general supremacy rule of EC law’.134

The last argument of the Commission appearing to be rather disconnected from applicable law assertions stated that primacy would prevail during the enforcement stage, no matter what the tribunal decided in consideration of conflict of laws and competent fora. Thus, it argued that ‘an award that substituted compensation for State aid unlawful under EU law would not be enforceable because it would be equivalent to a judgement of a national court of an EU Member State made in contradiction with EU law’.135 The tribunal replied to Commission’s arguments by reinstating the binding character of arbitral decisions and the margin of discretion that it is allowed to exercise as regards the interpretation of ECT:

[T]his Tribunal is placed in a public international law context and not a national or regional context. Moreover, this ICSID arbitration does not have its seat or legal place of arbitration in Hungary or elsewhere in the European Union. Such an arbitral seat could trigger the application of the lex loci arbitri and give rise to the jurisdiction of the local courts in regard to the arbitral process, including challenges to the award. This ICSID arbitration is a dispute resolution mechanism governed exclusively by international law. As a result of the Tribunal’s international status under the ECT and the ICSID Convention, several of the Commission’s submissions cannot be taken into account in this arbitration, because they are based on a hierarchy of legal rules seen only from the perspective of an EU legal order applying within the EU, whereas this Tribunal is required to operate in the international legal framework of the ECT and the ICSID Convention, outside the European Union.136

Starting with the idea that ‘EU law is a sui generis legal order’, the tribunal underlined that it has ‘a multiple nature: on the one hand, it is an international legal regime; on the other hand, once introduced in the national legal orders of EU Member States, it becomes also part of these national legal orders’.137 Building on the assertion of Advocate General Maduro, the tribunal further described the EU law as a ‘municipal legal order of

134 Ibid., para. 4.109, quoting the EC’s amicus brief (para. 135).
135 Ibid., para. 4.110.
136 Ibid., para. 4.112.
137 Ibid., para. 4.118.
transnational dimension’, arguing that:

The Tribunal accepts that EU law forms part of the Hungarian legal order; but it considers that the Claimant is wrong to so limit its nature. In the international setting in which this Tribunal is situated and from which it necessarily derives its perspective, EU law has to be classified first as international law, as explained below.138

When analysing the other side of the dual-nature perspective, i.e., EU law as national law, the tribunal presented the position that the internal application of this legal regime within the domestic legal order does not ‘deprive it of its international legal nature’ similar to other international law provisions which eventually become part of the domestic normative system. Thus, ‘there is no fundamental difference in nature between international law and EU law that could justify treating EU law, unlike other international rules, differently in an international arbitration requiring the application of relevant rules and principles of international law.’139

As regards the relationship between the two legal orders in light of the hermeneutic process, the tribunal showed that – although there exists no general requirement to interpret different treaties in a harmonious manner – the particular circumstances of these two normative regimes allow such a reading. Such a final convergence of meaning is desirable for three reasons:

The first derives from the ECT’s genesis: it would have made no sense for the European Union to promote and subscribe to the ECT if that had meant entering into obligations inconsistent with EU law. The second derives from one of the ECT’s objectives: it is an instrument clearly intended to combat anti-competitive conduct, which is the same objective as the European Union’s objective in combating unlawful State aid. The third derives from the ECT’s implicit recognition that decisions by the European Commission are legally binding on all EU Member States which are party to the ECT.140

The apparent synchrony of normative goals and reciprocal acceptance of the two legal regimes has induced the conclusion that there was no veritable inconsistency between the EU and the ECT, thus no need for harmonisation. Another novelty of this case is that the jurisdiction of the tribunal is contested not by the Respondent, but by a non-disputing part, the European Commission asserting that ‘the existence of arbitral tribunals interpreting EU law could jeopardise its uniform application’.141 Following the same path even further, the Commission contended that, in reality, the actions of Hungary were determined by it and, therefore, the case appears to be one against the Commission’s orders to terminate the PPA in accordance with EU competition law, brought to the scrutiny of a wrong forum. These contentions were rejected by the tribunal alleging that, although the CJEU holds the monopoly over EU law interpretation according to the Treaties, there are other forums (arbitral and judicial) that apply and interpret it without

138 Ibid., para. 4.119.
139 Ibid., para. 4.126.
140 Ibid., para. 4.133.
141 Ibid., para. 4.146.
being part of its court system.

The other jurisdictional disputation was dismissed as well by the tribunal, more precisely, since the application for damages was filed against Hungary for its own actions – no matter who or what determined them – and in accordance with the relevant international legal provisions. Therefore, from the perspective of the tribunal, the claim is not oriented against the Commission and its measures and its competence is not subject to any other rules than those contained in the ECT and the ICSID Convention, whose requirements had been fulfilled.

Analysing the Electrabel case in light of its systemic implications, it can be argued that the tribunal resolved a series of questions left unanswered in AES and other intra-EU investment cases, finally explaining the relation between international law and EU law, the dual nature of the latter, as well as the convergence of goals between the legal orders. Its conceptual equilibrium lies in the manner in which it allowed the EU law to play its role as international law in the coherence-building process, while not capitulating its own identity as a mandatary of a permeating demos sharing a common conscience, not a common territory.

The most important question derived from this line of reasoning is whether claiming authority to interpret the law of the Other actually represents a concealed claim to a hegemonic position expressing a jurispathic tendency, which would be even more impervious than a claim of applicable law or competent forum on its own premises. Authority over a dispute does not imply authority to interpret any tangential laws that might be relevant for the enforceability of a dispute resolution.

Thus, from a jurisgenerative perspective, a decision-maker may integrate the rationality of a different system, but it cannot integrate the law of the Other and make it its own, if the interpretation produced internally by that other system is not observed. A different interpretation implies an act of ‘anarchism’ against the political integrity of the Other and when integrity is established by law and not by a mandate granted by a unifying demos the risk of dismantling the constitutional foundation appears even greater.

b) The View from the Other Side

1. Protection of Core Divergent Values

Unlike the general BIT regime and its formal bilateral basis, the ECT finds itself in the privileged – although not unique – situation of having as members not only all the states of the Union, but also the EU itself. However, the framework for cooperation between a Member State and a third state after Lisbon Treaty falls inside the exclusive competence of the EU being based on a supranational foundation, which overlaps with the ECT-framework for cooperation based on international agreements.

The principle of non-discrimination is not only key in human rights law, but it is also part of the DNA of the European Union from the very beginning. Therefore a regime which avows that it aims to guarantee a wider degree of protection to certain subjects under an international investment agreement, than the level afforded under EU law on non-discriminatory basis appears to be fundamentally at odds with EU law. Furthermore in EU law, a clear distinction is made between direct and indirect discrimination, the latter enjoying a more lenient deferential regime.
Besides the economic freedoms and the general prohibition against discrimination on grounds of nationality, the state aid regime is intrinsically inclined to collide with the discourse of extensive investor rights granted only to certain nationals. From a pluralist point of view, the idea of dialogue should be institutionalised and – at a minimum – conflicting values should be exposed to each other’s justificatory discourse. Since all sovereigns have enshrined certain supreme values in their constitutional order intending to delineate their constitutional identity, there will always exist a limitation of the achievable deference.

2. **Hungarian PPAs: An Open-Ended Status De Jure**

*Dunamenti Erőmű v. Commission.* The Hungarian state-owned and monopolistic network operator, MVM, had incurred an obligation to buy a fixed quantity of electricity at a fixed price under a number of long term power purchase agreements (‘PPAs’), thereby guaranteeing a return on investment to the generators without any risk. The PPAs also included a guaranteed profit. They were signed between 1995 and 2001 and had to expire between 2010 and 2020 depending on the generators. In 2002 the Hungarian authorities notified to the Commission the state measures, which instituted a system of compensation for the costs borne by MVM as an electricity wholesaler. Soon after, they withdrew this notification. In May 2004, Hungary acceded to the European Union:

... in the case of an accession of a State to the European Union, a major change in legal and economic features of a market occurs and, in that context, a measure may become incompatible State aid, without that undermining the legitimate expectations of the interested party or the principle of legal certainty.142

In November 2005, the Commission opened a formal investigation into the Hungarian PPAs and in June 2008 it issued a negative decision ordering recovery, while it found that the PPAs must be terminated by the end of the year.143 Three state aid beneficiaries, Tisza Erőmű,144 Budapesti Erőmű145 and Dunamenti Erőmű146 brought actions for annulment against the negative decision issued by the Commission. The core of the argumentation against the illegal character of the state aid and the legality of the recovery order was constructed around the principle of protection of legitimate expectations in international public law.

The principle of bona fide represents in international public law the corollary of the principle of the protection of legitimate expectations, and hence it forms part of the European Union legal order. However, the concluding of the ECT by the Commission on behalf of the Union cannot be held – in light of EU law principles – to constitute a precise, unconditional and consistent assurance capable of giving rise to a legitimate expectation.

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142 *Dunamenti Erőmű v. Commission*, Case T-179/09, EU:T:2014:236, para. 105. The applicant is 75% owned by Electrabel SA, which itself forms part of the group of companies headed by GDF Suez SA.


on the part of the applicant as to the compatibility of the PPA at issue with the rules of EU law on State aid.

Without the need for an examination of the relevance of ICSID’s decision of 30 November 2012, the CJEU found that a beneficiary of non-notified state aid could not rely on a failure to observe the principle of the protection of legitimate expectations on the basis of Article 10 ECT. Under Union law:

Three conditions must be satisfied cumulatively in order for a claim to entitlement to the protection of legitimate expectations to be well founded. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.

It could be reasonable from the point of view of the beneficiary to assume that the Hungarian authorities had properly notified the aid measure entailed by the PPA in the context of the interim procedure. However, this reasonable assumption is deemed ineffective for the purpose of showing a violation of the principle of the protection of legitimate expectations committed by the Commission. In conclusion, the Articles 10 and 13 of the ECT embody principles and general rules of protection that do not offer precise, unconditional and consistent guarantees against the standstill clause in Article 108(3) TFEU. Moreover the possible guarantees offered by an acceding State do not have binding effect in relation to the Commission and other institutions of the EU. In the field of state aid the protection of legitimate expectation relies on the examination of compatibility performed by the Commission. In case of doubt as to whether or not a certain exemption from notification may be applicable the best thing to do is to notify the new measure before setting it in place.

Prior to the moment when the Commission decided that they were incompatible with EU law and granted in breach of the standstill obligation, the Hungarian PPAs had been characterised by an indefinite legal status; legally, a state aid measure does not gain a definitive foundation under EU law, unless it has been notified and approved by the Commission. It can be observed that the EU legal order combines elements of classic approach with jurisgenerative methods and it uses the ex-ante mechanism of state aid control in order to avoid a jurispathic confrontation. Failure to consider the path of dialogue offered by the ex-ante examination and/or the preliminary ruling mechanism entails a change towards a more jurispathic landscape in which the main pursuit is the defence of the autonomy and consistent application of EU law.

147 ARB/07/19, Electrabel v. Hungary.
VI. CONSTITUTIONAL AUTHORITY BEYOND THE STATE: DEFINING SUBSIDIARITY IN NON-TERRITORIAL TERMS

The present essay defends the idea that the purpose of attaining uniformity in an interlocking international legal order and reaching close to a point of global substantive convergence, where identities collapse into each other, is not only a utopia, but also an irrational, potentially harmful projection. This is the space that Hannah Arendt warned us about; it is an oppressive civitas, where the word 'oppressive' has been deleted from the dictionary.\textsuperscript{150}

Exactly as constitutionalism, rule of law can be redefined in the now fragmented and pluralistic international context, even in the absence of a demos in the statist sense of the term. If demos were conceptually replaced by a constituency that gives directives to a mandatary to represent its interests according to law, the rule of law would be definable as a set of norms designed to limit and control the discretion of the mandatary in relation to the exercise of its mandate. A constituency that is more fragmented than an ethnic demos can still impose conditions regarding the exercise of conferred power. The important differentiation relates to the way in which the legitimacy of this mandate is perceived by other constituencies, especially as regards cases of negative interference with the interests of the Other.

A national preference for a higher level of protection, when the objective of protecting that value is compatible with supranational law, may be explained in terms of margin of appreciation. Burke-White and von Staden argue that importing a standard of review based on the margin of appreciation could restore the legitimacy of the ICSID system and can give arbitrators an applicable standard in order to deal with the nature of public law disputes and the self-contained – thus isolated – positioning of investor-state arbitral tribunals in the international system:\textsuperscript{151}

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\text{[t]he margin of appreciation . . . permits the Court to show the proper degree of respect for the objectives that a Contracting Party may wish to pursue, and the trade-offs that it wants to make . . . while at the same time preventing unnecessary restrictions on the fullness of the protection which the Convention can provide.}\textsuperscript{152}
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In plain terms, different levels of protection of one common value may be normatively acceptable, if the balance struck between individual rights and governmental interests is reasonable. The principle of subsidiarity is situated at the foundation of the doctrine of margin of discretion as a normative support. The balance has to be struck closer to the people concerned by those social realities and this closeness entitles the act of deference to alter-legality.

\textsuperscript{150} J. A. Beckett, The Violence of Wording: Robert Cover on Legal Interpretation, May 2011, available at <http://www.helsinki.fi/nofo/NoFo8Beckett.pdf>. ‘Thus implementing any way of thinking entails destroying the alternatives (or at the very least discrediting, silencing, them). This is a violent process, with winners and losers, and that fact is important – it is also lost or hidden through the gentle language of reduction, or the search for an essence’.


In such a context, *alter-legality* could be defined as a different choice selected from a common referential set that underlies the constitutional federal thinking, while not covering a conflicting choice out of a distinct set of options. Therefore, the doctrine of *margin of discretion* is intimately related to the doctrine of exhaustion of domestic remedies, as supranational or international levels of governance are defined as subsidiary to the national or regional or local administrations deemed to be closer to the social realities concerned by a dispute.¹⁵³

Subsidiarity does not necessarily mean the same to all constituencies and all interactions between them. *Closeness*, as a preference for *localisms*, must be relevant for the issue under examination and this is why the results in *Omega* and *Laval*¹⁵⁴ rulings appear to be contradictory. The local preference in *Omega* was relevant in the context of locally provided combat games, namely it could be distinguished from the applicable supranational norm – free movement of services – and in this way the CJEU could adopt a deferential approach in relation to the German localism, while in *Laval* the locally preferred solution – Swedish labour law embodied in collective agreements – could not be situated above the concerned supranational economic freedom without risking to make its exercise virtually impossible or extremely difficult.¹⁵⁵

Thus, in light of the *Laval* jurisprudence, it can be observed that – at a first glance – some values appear to be local, as a result closer to the people, but in reality they represent *jurispathic* wolves in *counter-hegemonic* clothing. If such claims were successful, a local law with extraterritorial implications would be on the verge to set aside the supranational norm in contradiction with the primacy and direct effect principles that govern EU law. Moreover, the national law in question represented an institutional model belonging to a distinct set of choices, which was characterised by lack of transparency and which from an external perspective, it cannot be defined as *alter-legality*, but rather as *outer-legality*, which is *in toto* a different class.

In this essay, it is argued that such a distinction is essential, even in the case of interactions between IIL and EU law inside the frame of conferred powers. First, the EU is subsidiary to the national dimension, then the ISDS-protection is subsidiary to the domestic systems of judicial protection. The foreign investor protection system must concede that its necessity arose from the incompleteness of the system of protection arranged by states and supra-states, thus it does not exist in a position of *otherworldliness* and isolated contemplation of the prosaic statist world.

**a) Hegemonic Strategies and Legal Equilibrium**

Inspired by Mouffe, Cover and Berman, the present inquiry intends to discover a different approach that can improve the result of balancing between, on the one hand, the prevailing

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¹⁵³ However in a ‘glocal’ world characterised by a heterarchy of legal communities, not all of them would reasonably define ‘closeness’ in territorial terms. There is no ‘territorial’ intrinsic feature governing cryptocurrencies, sports, internet or space exploration, so normative discourses that aim to impose statist territorial conditions to non-territorial ontologies, must be understood as jurispathic tendencies.

¹⁵⁴ *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan och Svenska Elektrikerförbundet*, Case C-341/05, EU:C:2007:809.

internalised value and on the other hand, the external substantive values embraced by other constituencies than the forum having the formal jurisdiction to adjudicate on the same or on interconnected legal matters. Following in the steps of Robert Cover, Berman depicts a world of multiple overlapping constituencies, both territorial and deterritorialised, that define themselves through the assertion of jurisdiction, which is understood as ‘the locus for debates about constituency definition, sovereignty, and legitimacy’.156

Deference does not occur instantly, but only when the conflicting values border each other’s rationalities and run into a collision course that requires a procedural framework in order to transform enemies into adversaries.157 It cannot and should not be agreed to posit a complete convergence of the substantive rules, but rather the idea of a convergence of procedural standards should be contemplated as a tool for solving conflicts between investor rights and investor-friendly values and other, at least apparently, conflicting interests that relate to external legal orders:

[E]very legal order is based on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of the two distinct elements of the juristic-norm and decision. Like every other order, the legal order rests on a decision and not on a norm.158

Following in the steps of Schmitt, Giorgio Agamben affirmed that, as paradoxical as it might sound, a sovereign could be situated simultaneously inside and outside the legal order. Agamben recognised that the constituting power in contemporary world was neither irreducible and originary, nor isolated from external constraints.159 In a time of globalisation and Europeanisation, it is much easier to comprehend the complex dynamics of pluralistic legal orders, where the internalisation of Other-values and externalisation of Self-values constitute unremitting occurrences. The post-Westphalian landscape does not allow isolationism as a pertinent solution:

At the interface between internationally protected human rights and supranationally guaranteed fundamental rights, in particular there arise legal problems that lead to an entanglement of orders and therefore require a constitutional ‘conversation’.160

Meanwhile, there is no intrinsic reason to believe that state-made law shall be considered either more democratic or more despotic than non-state law. In the same light, legal pluralism cannot be defined as the perfect antonym of legal positivism and non-hegemonic forms of law are not necessarily anti-hegemonic. In the present essay, a preference is shown towards a specific form of non-hegemonic law, as part and parcel of a ubiquitous legality bridging across different constituencies, which is a transcalar form of legality.161 Law may evolve towards regulation or emancipation, in a way that depends on

161 Ibid., p. 468.
the political mobilisation, i.e. on the institutional choice particularly in the core countries of the world, which preferably should enable a constitutional conversation.

b) **Excursus: A Brief History of Jurispathy**

Nationalism can be regarded as a form of zero-sum politics, as the claims it makes, to sovereignty and statehood, are non-divisible and non-negotiable. However, a common legal culture beyond and across territorial divisions, *ius commune* dominated Europe during many centuries, starting with *Corpus iuris civilis*, the unified glosses created in medieval Italy and France, the parallel existence of *ius proprium* and canon law, the 13th century treatise of English law and the rediscovery of *Corpus iuris civilis* in the 16th century.

Thus, a combination between unity (*ius commune*) and diversity (*ius proprium*) was present all over Europe until the 18th century, when new law codes unified the local laws and abolished *ius commune*. In a profound sense, the legal culture founded by Roman jurists has nonetheless lasted two millennia. Though, common legal culture must be distinguished from common law.

By the mid-12th century, the Church in its autonomous and unified form outdid the political systems of that time. Before states succeeded to develop coherent, hegemonic, unified, and jurisgenerative forms of governance, the Church had already done so. The creation of a jurisgenerative legal hierarchy achieved through organisation and codification of canon law implied a reconciliation of discordant canons compiled in 1140 under the title, *Concordia Discordantium Canonum*. The process of integration enabled an enhanced coherence in the legal judgements and the public law of the Church identified the Pope as having the right of final appeal in canon-legal disputes i.e., an authority of supreme instance.

A usual misunderstanding is to see the Justinian codification with regard to Roman law in the previous millennium as a coherent system or an instrument of government. In effect, ‘it formed a realm of ideas, which were influential on the activities of both rulers and judges but … it was primarily the product of scholarly interpretation’. Law codification, in its characteristic form adopted by Napoleon, obliterated the local *ius proprium*, the European *ius commune* and the universal law of the Enlightenment.

The *usus modernus Pandectarum* turned into a form of institutional writings and later into national law. The learning of *ius commune* has been incorporated into a law, seen as national law, and more important, viewed as a coherent and logically integrated body of law i.e. as a hierarchical series of norms, justified and made mandatory by a higher authority. By incorporating non-state norms into state law, states reiterate their own monopoly on the production of legal norms. Hence, the *nationalisation of law* via codification implied a decline of a legally pluralistic Europe, where local, European and universal law-making co-existed for ages.

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165 R. Michaels, note 48, 1233.

The first phase of this process can be similar with the *localised globalism*, an integration of a global set of norms into the local law.\textsuperscript{167} The *legal formalism* and the ideology of state exclusivism rose and fell several times in a historically contingent manner, and so did the classic choice of law theory, as an antithesis of *legal pluralism*.\textsuperscript{168} Conviviality as choice would generate a common cultural frame and together with it a new kind of subsidiarity, a deterritorialised closeness transcending the State. The redefinition of subsidiarity could provide a space for dialogue between otherwise remote constituencies, even if it must be recognised as well that outer- legality cannot be eradicated and legal identities cannot be blurred without risking to abandon the pluralistic perspective of the world.

c) **Across the Atlantic: Two Sides, One Agora**

An emancipatory movement would endeavour to ensure equality or equal access to dialogue by revealing the lack of consistency of the political discourse as a *jurispathbic* wolf in jurisgenerative clothing. ‘Indeed, much of the time, the globe will turn out to be the US and Western Europe with shadowy agenda’ affirms Shapiro.\textsuperscript{169} Snyder\textsuperscript{170} and Santos\textsuperscript{171} seem to agree as well that the centre of gravity of non-state law-making, especially in matters of capital market and investment relations, remains in the transatlantic US-EU connection. During the TTIP negotiations, lots of minor normative differences fill the public space for dialogue, though the concrete cohesive pursuit to maintain the hub of projecting *jurisgenerative* activities in the transatlantic space is deeply embedded in this process. The implicit agreement to spread the Self-values and promote widely their positive interlegality appears to be silenced.

However, if the EU and the US are considered to constitute equal competitors with a genuine cooperative responsiveness, the strategic game would rather be built on a foundation of common primarily economic interests:

\textsuperscript{167} The High Contracting Parties of the EU, *desirous of clarifying* specific politically sensitive issues, allow for instance a *thin* level of differentiation, such as the application and justiciability within the territory of the Charter of the Fundamental Rights of the EU in relation to laws and administrative measures of Poland and the UK. An attentive reading of Protocol no. 30 reveals its explanatory content. The discourse of Protocol no. 21 *desiring to settle certain issues* related to judicial cooperation in civil matters is different, allowing Ireland and the UK to not be bound by any measures adopted pursuant to Part Three of Title V of the Treaty on the Functioning. Even the opposite is possible, as ensnared in Protocol no. 20, the Member States, whose currency is the euro, have agreed to engage in *an enhanced dialogue and ever-closer coordination* of economic policies, expecting nevertheless the euro to become the currency of all Member States of the Union.

\textsuperscript{168} At this moment, many international law conventions, for example the CISG, permit the parties upon ratifying to declare that certain parts would not apply to local situations, certain localisms remaining unchanged or untouched by globalisation. As regards the CISG, the formation of contracts of sales between businesses established in the Nordic countries, Denmark, Iceland, Finland, Norway and Sweden falls outside the Part II of the CISG according to Articles 92(1), 94(1) and 94(2) of the CISG. A common legal culture shared by the Nordic countries gave legitimacy to their opt-out with regard to a unified law on the formation of sales contracts. Transnational accountancy standard-setting, such as IASB-IFRS, may be described as an advanced form of globalised localism, comparable with the widespread dissemination of the Roman *ius commune* in the previous millennium.


\textsuperscript{171} B. de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Cambridge: CUP, 2002), 18 et seq.
This requires providing channels through which collective passions will be given ways to express themselves over issues, which while allowing enough possibility of identification, will not construct the opponent as an enemy, but as an adversary.\textsuperscript{172}

The possibility of identification is related to the recognition of similarities and dissimilarities, and the use of complementarities as a \textit{jurisgenerative} source. Institutions, in particular courts, compete with each other in their pursuit to enhance the perceived legitimacy and reinforce their jurisdiction over a given matter. The system for preliminary rulings of the EU is the most developed and complex form of judicial cooperation.

The antithesis of normative discontent may be wiped out by a perceived legitimacy of cross-constituency, which is a form of legality bridging across different constituencies, in contrast to the formalistic legality that envisions loyalty to a single core constituency, the mandate provider. The interlegality, or in other words the perceived legitimacy of cross-constituency underscored the ultimate authority – supranational hegemony – of the CJEU over questions of EU law, mirroring the ultimate authority – national hegemony – of domestic courts over questions of domestic law and, most important, bolstered the European project by grounding EU law in domestic law principles.\textsuperscript{173}

The European Communities, now the European Union, created a complex structure of interlocking affiliations between the national law and different layers of supranational law, ECHR, WTO and Union law, thus constructing the possibility of a \textit{postmodern renaissance} of the European legal culture, a \textit{ius commune} for the new millennium. In parallel, the rediscovery of the European constitutional axiological common roots (a constitutionalist habit of thinking) might enable the development of an overarching theory of \textit{institutional constitutionalism}.

Maduro underlines the importance of being aware of the \textit{institutional choice} that require ‘each legal order and its respective institutions [to] be fully aware of the institutional choices involved in any request for action in a pluralist legal constituency’. The identity of the European legal order shall not be affirmed in a manner that contradicts its own pluralist conception or challenges the identity of other legal orders.\textsuperscript{174}

In the larger context, both IIL and EU law – as direct heirs to the \textit{Jus Publicum Europaeum}\textsuperscript{175} – are constructed from this conceptual building-blocks and can reach a \textit{conviviality} beyond mere co-existence, a shared presence in an open normative field, without malevolently ignoring or eliminating each other from the legal narrative. Therefore, while searching beyond mere formalistic rules of conflict of norms and outside the supremacy-logic imbued in almost every legal discourse, the common axiological roots may lead to a field of \textit{overlapping consensus}. The Justinian \textit{ius commune} itself did not contain a collection of legal norms, but a common legal culture and a long-lasting \textit{heterarchical} thinking about the law.

Looking for pre-conflict common legal values and establishing an appropriate

\textsuperscript{172} C. Mouffe, \textit{The Democratic Paradox} (London: Verso, 2000), 103.

\textsuperscript{173} Y. Shany, \textit{Assessing the Effectiveness of International Courts} (Oxford: OUP, 2014), 150.


procedural framework might eventually lead to a post-conflictual normative flexibility necessary in order to find solutions that allow different orders to preserve their political integrity and function together without being necessary to agree on a predetermined hierarchic relation among them. Mutual monitoring, periodic reports, transparency, networking via public-private hubs should be prone to foster understanding for the institutional choices of the Other, thus decisions leading to a point-of-no-return could be avoided.

In the context of TTIP negotiations, the transparency of arbitral proceedings, the independence of arbitrators, legal certainty, rule of law, possibility to appeal not restricted to procedural errors are such values and concrete objectives that allow a tangible possibility of identification between the US and the EU normative spaces. The interaction between heterarchical legal orders, namely the IIL and the Union law, requires a jurisgenerative approach.

d) Out of the Labyrinth: Heterarchy and Constitutionalism

Uniformity and consensus cannot not be effectively imposed from above, since fake consensus would further engender fake antagonism, which ultimately will lead to opposing an idea embraced by the large majority without any reasoning, just for the sake of diversity or freedom of opinion. Thus, ‘[i]t can be convincingly argued that the imposition of uniformity does not lead to unity, but to resistance, further repression and disunity’. 176

The constitutionalism in an interlocked international order employs a heterarchy of constituencies. In this heterarchical web of authorities, an overlapping consensus may arise from an historical on-going interaction between political views, use of public reason and political institutions agreeing on what kind of arguments may be accepted as legitimate. In this heterarchy of competing norm-generating constituencies, a dominant field inside which people seek homogenisation of economic law can be identified, but in the meanwhile other constituencies assert normative differences and emphasise their importance.

The good news is that those normative differences engage in a web of complementarities that may support a win-win result, or at least a result perceivable as legal. This situation would be characterised by a positive interlegality, a normative contentment. An effective procedural framework should be designed in such a way that the positive perception of legality – positive interlegality – is constantly reaffirmed.

The decision-maker must show consideration for the external values and if possible, internalise them in the process of decision-making. If internalisation is not possible, an explanation containing pertinent argumentation shall be provided. Deference is nonetheless regarded as an alternative to incorporation, even if the norms of other constituencies are denigrated to the status of facts and only allowed to fill spaces left open by law. The decision to grant space does not follow from the sovereignty of the other constituency, but rather from an examination of appropriateness and proportionality produced internally. 177

The international legal order may be depicted as a heterarchy, since it does not have a final decider and each court reserves the right to assert its jurisdiction in relation to the violation of those comprehensively shared fundamental principles. The interpretation adopted in each jurisdiction may differ, but if this judicial heterarchy fosters a periodic


177 R. Michaels, note 48, 1233 et seq.
reconsideration of framing principles and continuous mutual regard to the Other’s interpretations, autonomy and pluralism could be equally promoted. The possibility to influence the formation of a dominant norm – propagation of globalised localism – via a panoply of processes and multiple affiliations appeared as the preferred solution of governance for core states.

In such a context, the discourse of global constitutionalism does not attempt to shape a global constitution. The constitutionalisation of law outside the nation-state constitutes a consequence of the so-called fragmentation of international law, which in its turn represents a reflection of the plurality of legal orders; their co-existence witnesses an appetite for pluralism, a lack of coherence, a heterarchical normativitby and a possibility to employ a jurisgenerative logic. In this heterarchical web of pluralistic authorities, a possibility to engage in a radical conflict also may emerge under certain conditions, where the level of protection of a certain value fluctuates from a legal order to another. The agonistic view posits that such conflicts may be beneficial or even emancipatory.

The jurispathic decision-maker relies on a switch on/off system that predetermines which interest shall prevail in the name of sovereignty, legal certainty, effectiveness and uniform application of law on a specific territory. Most counterarguments will be killed without a fight, the prevailing value will not have to take up the gauntlet. Quite the reverse, a classic constitutional approach admits the reality that the prevalence of a certain value implies the sacrifice of conflicting values, hence it ensures a minimum protection of legal alteritby via the test of subsidiarity and proportionality.

In the real world, however, from the local to the global and further to deterritorialised or non-state or glocal law-making, states need not only be seen as jurispathic forces that impose law from above and eradicate all competing forces, but they may actually act as jurisgenerative forces, recognising and submitting to the norms of the competing forces, including non-state norms. Then again, the term non-state shall not be understood as completely outside the state, but sooner as a deterritorialised form of authority transcending the state or sometimes in the shadows of the state. What is perceived as non-state norm-setting may entail bearing with each other, while reaffirming clearly a normative difference, but it can also accommodate a form of covert domination of the Other.

VII. CONCLUSIONS

A jurisgenerative approach relying on the constitutional foundation of international law provides the suitable lens to manage the complexity of ubiquitous interactions and


179 R. Cover et al., Narrative, Violence, and the Law: The Essays of Robert Cover (Ann Arbor, MI: University of Michigan Press, 1992), 1-2. The term ‘jurispathic’ refers to the power and practice of a government that rules by displacing, suppressing or exterminating values that run counter to its own.

180 National liberal democratic or parliamentary constitutionalism not only limits the political power of the sovereign, but also grants such power. The EU Treaties contain such provisions granting power to EU’s institutions.

complementarities contained by the present-day *heterarchy* of competing normative constituencies, above, within and beyond the nation-state. The present essay proposes ten conceptual and practical guidelines for engaging the relevant mandate providers in a constitutional conversation. The final pursuit is to reinforce a positive *interlegality* of the system of procedural protection of investor rights.

First, the constitutional identity of each normative constituency relies on a set of values and their autonomous interpretation, thus each constituency shall refrain from affirming its own identity in a manner that can be perceived as a threat brought against the constitutional foundation of an alter-constituency.

Second, the investor-state adjudication model shall be reformed in light of its rule of law origins and goals, emphasising the core tenets of its rationale: neutrality, autonomy, transparency, subsidiarity, external and internal consistency.

Third, the investor-state system of adjudication should be allowed to establish a direct relationship with the CJEU via the preliminary ruling mechanism, if not as a form of a court or tribunal with equal status for the purpose of Article 267 TFEU, at least via a procedure engaging a local court of a Member State, as a referring court.

Fourth, an alternative solution could be to empower the Commission with a function of monitoring the application of EU law in investor-state disputes and enable it to send preliminary questions to the CJEU ensuring in this way a pre-control of the relevance of the issues to be referred as to avoid an over-loading of the CJEU with repetitive questions.

Fifth, the investor-state system of adjudication should be integrated in a heterarchical network of trans-judicial dialogue, thus joining other interlocking forums in order to enable a systematic monitoring of court decisions, enhance interlegal communication and foster institutional trust.

Sixth, in light of the doctrine of margin of appreciation, an adjudication body might be entitled to adopt an extensive interpretation of an investor right implying a higher standard of protection than the one afforded under the ECHR law, provided that this reading would be compatible with general principles of law and fundamental rights enshrined in the EU Charter, especially the prohibition of non-discrimination on grounds of nationality.

Seventh, a system of ex-ante control of regulatory measures through the perspective of investor protection may offer the perfect temporal window for the coordination of those potentially conflicting normative choices interacting in the web of interlegal identities.

Eighth, in those rare cases where a radical normative difference still persists, a decision favouring an internal value in opposition with an external value must be based on substantive and comprehensive argumentation founded on a jurisgenerative constitutionalist perspective making use of terminology that constitutes the language of *ius commune* in present time.

Ninth, in specific cases, where monetary remedies do not constitute appropriate means of protecting investor rights, alternative remedies must be identified and made available before irreparable harm occurs.

Tenth, a shift to a different paradigm – meant to replace the Westphalian model with a new epitome that could provide a better representation of the contemporary economic realities – should be prepared.