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What Roles Can Constitutional Law Play in Investment Arbitration?

Laurence Boisson de Chazournes
University of Geneva, Geneva, Switzerland
laurence.boissondechazournes@unige.ch

Brian McGarry
University of Geneva, Geneva, Switzerland
brian.mcgarry@unige.ch

Abstract

Interplays between international and domestic legal spheres have attracted increased attention in investor-State dispute settlement. From the treaty ratification process to award execution, constitutional norms play recurring roles before, during and after investment arbitrations. This contribution deals with the manner in which parties to such disputes can rely upon constitutional law or, more broadly speaking, domestic law. Notably, major hurdles to the application of domestic law in transnational fora have not necessarily constrained the arbitral profile of constitutional principles. This is because they may gain prominence through informal paths. Rather than directly...
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Keywords

investment arbitration – constitutional law – informal application – deference

1 Identifying General Links between Domestic and International Legal Spheres

Investor-State tribunals may hear disputes whose facts are interwoven into issues of constitutional law.¹ This underscores that domestic legal provisions are generally cognizable as facts (rather than applicable law) in international arbitration.² Moreover, constitutional law cannot directly trump obligations derived from international legal instruments. General international law does not permit States’ internal laws to justify the failure to perform such treaty obligations.³ These points form two distinct hurdles to the international legal force of domestic law.

Despite these hurdles, however, there are a significant number of avenues through which issues grounded in national law may be raised in international

² For an early judicial example see the Permanent Court of International Justice’s statement that “municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures.” Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland), Merits, 25 May 1926 PCIJ Series A No. 7, 19. This premise was later extended when the International Court of Justice stated that any international tribunal may find, as a factual matter, that domestic laws such as constitutions have caused a violation of international law. LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001, 466.
³ For investment-specific examples see National Grid v. Argentina, UNCITRAL Arbitration, Award, 3 November 2008; Bernardus Henricus Funnekotter v. Zimbabwe, ICSID Case No. ARB/05/6, Award, 22 April 2009.
investment arbitrations beyond the consideration of ‘facts’. The application of international law does not exclude per se the additional application of municipal laws; rather, international law may renvoi to these domestic counterparts.⁴ One instance wherein international adjudicative bodies have long resorted to domestic constitutional legal thresholds concerns the issue of the claimant’s (i.e., the investor’s) nationality.⁵ Yet while such analysis will naturally involve the constitution of the investor’s home State, more often it is the laws of the host State that preoccupy investment tribunals. Even the most foundational principles of such constitutions can require a tribunal to compare international and domestic norms.

Against this background, some well-known arbitrations have implied constitutional issues from within the wider scope of fundamental rights,⁶ which include not only human rights but also more general public policy-related rights, as well as basic legal values on which host States rely when contracting with investors.⁷ Moreover, variations between host State constitutions prevent any exhaustive listing of fundamental rights. These principles may therefore range from social justice and the rule of law, to transparency, accountability and local communities’ consultation rights concerning resource exploitation.

Furthermore, when some fundamental rights are found in constitutional law but not within treaties or customary law applicable to a dispute, constitutional law may offer a means of filling gaps in international law.⁸ The field of investment arbitration has shed some light on this issue, particularly with reference to the applicable law provisions of the ICSID Convention.⁹

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⁵ See, e.g., Siag v. Egypt, ICSID Case No. AB/05/15, Award, 1 June 2009.

⁶ For example, Argentina has argued that its financial crisis touched upon these rights, and that applying treaty-based investment protections “would be in violation of such constitutionally recognized rights.” CMS Gas Transmission v. Argentina, ICSID Case No. ARB/01/08, Award, 12 May 2005, para. 114. See also Siemens v. Argentina, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 75; Sempra Energy v. Argentina, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 332 (“[The] real issue is whether the constitutional order and the survival of the State were imperiled by the crisis ... [Here,] the constitutional order was not on the verge of collapse.”)

⁷ Boisson de Chazournes, supra note 1, p. 309.

⁸ Ibid., p. 318.

⁹ For example, the ICSID Convention states: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute
Such recourse by investment tribunals may be particularly helpful in, for example, determining whether the fair and equitable treatment standard has been breached by the denial of constitutional due process. In this light, we can see discretionary opportunities for arbitrators to intermingle two legal spheres that are often thought of as distinct.

2 Evolution of Overlaps in an Arbitral Context

We may note that links between international and domestic spheres can play a role in rooting arbitral awards in what the WTO Appellate Body in the EC—Hormones case described in memorably stark terms: “the real world where people live, work and die.”10 The following year, an ad hoc tribunal in the Himpurna California Energy case echoed this sentiment in an investment context.11 As to the applicable norms in a case involving corruption, that tribunal declared that it “do[es] not live in an ivory tower ... [n]or does [it] view the arbitral process as one which operates in a vacuum, divorced from reality.”12 The year thereafter, the S.D. Myers tribunal introduced this view into dispute settlement under the North American Free Trade Agreement (NAFTA).13 Moreover, it stressed its approach as deferential to democratic processes. In its evaluation of minimum standards of treatment, the tribunal stated that it

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12 Ibid., paras. 219–220.
“does not have an open-ended mandate to second-guess government decision-making,” finding instead that “[t]he ordinary remedy ... for errors in modern governments is through internal political and legal processes.”

2.1 **Sovereign Resources and State Consent to Investment Arbitration**

Experience in the investor-State framework has begun to reverberate in the text of host States’ constitutions, with some enacting amendments explicitly referencing issues of natural resource sovereignty. For example, Bolivia adopted a new constitution vesting more natural resource control in government hands, resulting in the nationalization of the hydrocarbons sector and an ICSID claim in the *Pan American Energy* case. Meanwhile, successive Mexican administrations have attempted to modify that State’s constitution specifically in order to more flexibly control hydrocarbons as well as petroleum, but have faced political pressure stemming from economic reliance on foreign direct investment.

Questions of the legality of investments and other issues of consent may follow when States couple international investment agreements with domestic constitutions addressing foreign ownership of resources. These issues are directed at the legality of the investment itself. Investment tribunals have considered both international and municipal law in determining an investment’s lawfulness. A recent and complex example of this involves Ecuador’s 2008

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15 *Ibid*.
16 Though the tribunal in this case issued its Procedural Order No. 1 on 26 February 2013, the dispute has been muddied in questions over the effectiveness of Bolivia’s withdrawal from the ICSID Convention. For case background see Fernando Cabrera Diaz, ‘*Pan American Energy Takes Bolivia to ICSID over Nationalization of Chaco Petroleum*’, *International Institute for Sustainable Development* [IISD] *Investment Treaty News*, 11 May 2010 <www.iisd.org/itn/2010/05/11/pan-american-energy-takes-bolivia-to-icsid-over-nationalization-of-chaco-petroleum> (31 March 2014).
18 Such questions have arisen in a case before the Supreme Court of the Philippines concerning the compatibility of the investment chapter of the Japan-Philippines Economic Partnership Agreement with Philippine constitutional provisions limiting or banning foreign ownership in various economic sectors. For case background see Damon Vis-Dunbar, ‘*NGOs Claim the Philippine-Japan Free Trade Agreement Is Unconstitutional*’, IISD Investment Treaty News, 5 June 2009 <www.iisd.org/itn/2009/06/05/ngos-claim-the-philippine-japan-free-trade-agreement-is-unconstitutional> (31 March 2014).
19 See, e.g., *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, *ICSID* Case No. ARB/03/25, Award, 16 August 2007; *Inceysa Vallisoletana v. El Salvador*, *ICSID*
revision to its constitution, rendering private companies ineligible to collect ‘taxes’. Ecuador’s Constitutional Court has construed this broadly enough to invite a claim from a private foreign investor financing airport construction through previously agreed-upon user fees.20 Ecuador has since withdrawn from ICSID, and subsequent constitutional amendments may prevent future administrations from submitting to any investor-State arbitration outside of Latin America.21

It may be argued in this context that State constitutions, and at times constitutional jurisprudence, may have a role to play in defining essential consent to the terms of investment agreements, and thus establishing the jurisdiction of investor-State arbitral tribunals. A notable example of this in Energy Charter Treaty (ECT) dispute settlement is the jurisdictional decision in the Yukos case.22 At issue was Russia’s 1994 signature of the ECT and subsequent failure to ratify. Under Article 45(1) of the Treaty, a State in Russia’s position is bound “to apply [the] [t]reaty provisionally ... to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”23 Russia argued that the tribunal assembled in response to the request by Yukos had no jurisdiction in the matter because the dispute settlement provisions of the ECT were inconsistent with Russia’s constitution and other domestic laws.

The tribunal first determined that ECT Article 45(1) mandates provisional application unless the very principle of provisional application is incompatible with a signatory State’s constitution. It then consulted Russia’s political and jurisprudential history of provisionally applying international treaties in whole. The tribunal concluded that Russia had thus consented to do the same with the ECT and so consented to investor-State arbitration arising from the unratified treaty.24

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22 Yukos Universal v. Russia, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009.
24 Yukos Universal v. Russia, supra note 22, paras. 393–398.
In discussing such interrelations between State constitutional interpretations and the procedural matters of investor-State arbitrations, it is worth noting the increasing prominence of both transparency safeguards in national laws and transparency concerns in transnational fora. In this context, arbitral fora appear to be in relative congruence with domestic pushes toward procedural transparency as a matter of constitutional due process. Formative examples such as the *Suez* case have been noted for correlations between the admission of *amici curiae* and greater attention to host State public interests and, similarly, human rights among developing State populations. The *Methanex* and *Biwater Gauff* arbitrations likewise raised the issue of considering interests in public participation. Yet a potentially stronger bridge between investment arbitration procedures and constitutional guarantees appears to be on the horizon: the latest revisions of the UNCITRAL Arbitration Rule, the drafting of which has reflected member States’ constitutional principles of public participation. Such domestic principles have also been


26 *Suez, Sociedad General de Aguas de Barcelona and Vivendi Universal v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.


incorporated by reference into investment treaties, such as the recently signed investment treaty between Canada and China, which states that host State laws on access to information will trump a tribunal’s confidentiality orders to the extent they conflict.31

2.2 Constitutional Influences in Investor-State Claims and Defenses

In terms of tribunals’ analysis and consideration of domestic constitutions during the course of arbitrations, we can draw attention to two broad paths. The first concerns informal comity toward constitutional principles and idiosyncrasies that may lie at the heart of an investment dispute. The second is the extent to which a host State may formally rely upon constitutional guarantees to its people as a defense to a claim, particularly in the context of a domestic crisis.

2.2.1 Informal Deference to Constitutional Expertise

A general theme that emerges with respect to comity is tribunals’ unwillingness or reluctance to ‘second-guess’ domestic courts’ interpretations of their own constitutional safeguards and domestic legal complexities.32 The extent to which tribunals have regarded host State constitutions should not be viewed as a measure of the legal force of constitutional provisions against international law. Rather, we may see deference to national interpretations of principles enshrined in both domestic law and international law. Foremost among these principles is that of fair and equitable treatment. This is a fundamental principle of most domestic laws and the basis for a pervasive claim in investment dispute settlement.

It is possible for a treaty to refer directly to constitutional norms, as is the case in the CARICOM-Cuba investment treaty.33 This treaty incorporates by

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31 Agreement between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments, signed 9 September 2012, Art. 28(5).


reference the fair and equitable treatment standards found in the domestic legislation of the host State.\textsuperscript{34} However, such direct formulations are unique for straightforward reasons. If the meaning of fair and equitable is defined exclusively by the legal framework of the host State, tribunals may arguably lack interpretative norms for gauging State compliance.\textsuperscript{35}

Yet the difference between purely domestic versus international conceptions of fair and equitable treatment is not as distinct as it may seem.\textsuperscript{36} An examination of the element of ‘proportionality’ illuminates this point. In a purely domestic sense, this concept primarily serves to limit the involvement of public authorities within the private sphere.\textsuperscript{37} From these State-based origins, proportionality tests have increasingly penetrated transnational legal systems. Most notably, the adoption of such a test in the jurisprudence of the Court of Justice of the European Union (CJEU) has diffused this concept into the legal systems of States across Europe.\textsuperscript{38} This has paved two-way streets between domestic and international interpretations of fair and equitable treatment. A similar influence may be ascribed to the jurisprudence of the

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\textsuperscript{34} Ibid., Art. 4 (“Each Party shall ensure fair and equitable treatment of Investments of Investors of the other Party under and subject to national laws and regulations”).


\textsuperscript{36} Similarly, other guarantees against investor discrimination such as the national treatment standard are common to federal constitutions (such as that of the US), supranational entities (such as the EU), and, in particular, the WTO. In an investment context, most treaties take a minimalist approach to national treatment guarantees that results in a comparatively amorphous and complex study of trends. For an excellent analysis of the state of jurisprudence on this particular issue see Jürgen Kurtz, ‘The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO’ in Schill (ed.), supra note 25, pp. 243–278.

\textsuperscript{37} Kläger, supra note 35, pp. 236–237. This function of proportionality may have originated in the administrative law of Germany. The concept has since developed into a doctrinal element of constitutional law in that State.

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European Court of Human Rights (ECtHR). With respect to the latter, proportionality is firmly established as an important tool to restrict the discretion left to State authorities, and to scrutinize the legitimacy of their measures.\(^\text{39}\) The concept is also well-known in WTO law. In this area, analysis under Article XX of the General Agreement on Tariffs and Trade (GATT) has utilized a sort of proportionality test.\(^\text{40}\)

For the purposes of our review, however, it may suffice to narrow the focus toward those claims that specifically allege a denial of justice. Foreign investor claims that question the legal effectiveness of host State administrative procedures may informally trigger issues of comity. This is due to a true distinction between the aforementioned institutions and investment tribunals. Such tribunals are not constituted to serve as appellate courts reviewing domestic judicial decisions, much less very fine points of national law. To that extent, Jan Paulsson has submitted that even “gross or notorious injustice ... is not a denial of justice merely because the conclusion appears to be demonstrably wrong in substance; it must impel the adjudicator to conclude that it could not have been reached by an impartial judicial body worthy of that name.”\(^\text{41}\)

Denial of justice allegations do not direct arbitrators to gauge the substantive accuracy of a State’s application of its own laws. We must therefore consider fair and equitable treatment in this regard as a principle related to procedural fairness.\(^\text{42}\) With this in mind, we may turn to some recent NAFTA arbitrations that have raised related and complex constitutional issues. We can now more concretely appreciate how a tribunal—by emphasizing the

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\(^\text{39}\) See ibid., pp. 145 et seq.


\(^\text{42}\) It is in this light that some commentators have posited that the unifying theory behind the fair and equitable treatment standard is the concept of legality. Such a view concludes that investment tribunals implicitly interpret this standard as requiring treatment in accordance with the concept of the rule of law. See, e.g., Benedict Kingsbury and Stephan Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law’ New York University School of Law, Public Law & Legal Theory Research Working Paper No. 09–46 (2009) 10.
procedural character of its FET analysis—may therefore draw inspiration from domestic interpretations of this principle.

For example, the tribunal in the Glamis Gold case dealt with a US agency’s “lengthy, reasoned legal opinion” of constitutional law. The namesake Canadian corporation in this case was engaged in the exploration and extraction of precious metals throughout the continent. In 1994, Glamis Gold acquired mining rights for a proposed open-pit gold mine on US federal lands, in the California desert lands known as Imperial Valley. Given the potential ecological damages associated with the firm’s proposed mining practices, permission to commence exploration hinged on a thorough environmental review. This review considered, inter alia, the rights of indigenous populations in the area. In 2001, after years of study, the relevant federal agency formally denied the Glamis Gold project.

This rejection was based in large part on an apparent conflict between the longstanding US mining statute liberalizing mining rights in the American West, and the religious freedoms guaranteed under the State’s federal constitution. Noting that a local tribe’s religion required it to worship in a pathway traversing the proposed mining area—and analogizing US Supreme Court precedents addressing other natural resource agencies—the executive order found that the federal government was bound to “preserv[e] the physical integrity of the sites unless such a choice [was] impracticable, forbidden by law, or clearly inconsistent with essential agency functions.”

However, following a change in presidential administrations the same year, this opinion was reversed and the Imperial Valley Project was approved. In response to this federal turnaround, California adopted an emergency regulation implementing onerous remediation requirements designed to preserve lands near tribal sacred sites. This example of dual regulatory sovereignty results from a constitutionally enshrined federalism that surfaces somewhat frequently in NAFTA Chapter 11 claims, which are what Glamis Gold brought

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44 Constitution of the United States of America, amend. I.
45 Glamis Gold v. United States, supra note 43, para. 142.
46 NAFTA Chapter 11 is a notable prism through which we can view international and domestic legal interplay. One reason for this is that the basic constitutional tensions at play in federalist States are particularly visible in investment dispute settlement. NAFTA’s States Parties vest substantial constitutional authority in sub-federal sovereigns, governing economic and environmental matters alike. In Canada, for example, the federal government in 2010 settled a Chapter 11 claim brought by US investor AbitibiBowater, arising from an expropriation by the province of Newfoundland and Labrador. Canada’s constitution, however, does not include any mechanism whereby Ottawa can recoup its CAD
next. The firm filed NAFTA claims alleging regulatory expropriation under Article 1110 and a violation of fair and equitable treatment under Article 1105, stemming from both the initial federal ruling and the eventual state measures.

The latter claim serves as our focal point, as it required the tribunal to review what it called “[the US agency’s] complicated legal opinion on an issue of first impression that changed a ... century-old regime upon which Claimant had based reasonable expectations.” The question, therefore, was whether this administrative interpretation of constitutional law violated NAFTA’s incorporation of customary international standards of fair and equitable treatment by altering the investor’s legitimate expectations. The tribunal’s response cast NAFTA Article 1105 as deferential to the due process interpretations of domestic constitutional courts. The tribunal stated that it would not ‘second-guess’ the original federal opinion or California measures relying upon it unless such decisions had appeared “blatantly unfair or evidently discriminatory” or “evidence[d] a complete lack of process.” In so doing, the tribunal left the claimant’s only potential recourse at the courthouse steps.

In this manner, the tribunal implied a notable give-and-take in Chapter 11 disputes. Foreign investors may be inclined to select arbitration over domestic US litigation, as NAFTA tribunals may construe expropriation more broadly under Article 1110 than federal courts would construe the term under the US constitution. Yet when it comes to Article 1105 claims concerning fair and equitable treatment, investor-State tribunals—such as in the Glamis Gold case—may demonstrate more reluctance than their domestic judicial counterparts to review administrative decisions and constitutional interpretations.

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130 million settlement—the largest in NAFTA history at the time—from its province through legal action. See Lawrence L. Herman, ‘Federalism and International Investment Disputes’, IISD Investment Treaty News (12 July 2011) <www.iisd.org/itn/2011/07/12/federalism-and-international-investment-disputes> (31 March 2014). Similar issues abound in the US constitutional model, and are easily capable of yielding the opposite imbalance. For example, following the Methanex arbitration, Washington was able to recoup its arbitral costs from the unsuccessful Canadian claimant. However, California has no direct avenue in US constitutional law to claim from this sum its considerable expenses in preparing to defend the water health regulation at issue. See Mary Bottari and Lori Wallach, ‘Federalism and Global Governance’, Public Citizen Global Trade Watch, 2008 <www.citizen.org/documents/federalism.pdf> (31 March 2014).

48 Ibid., para. 24.
49 US Constitution, amend. V.
50 For the view that administrative acts can be more easily controlled by national courts than investor-State tribunals, see Anne van Aaken, ‘Primary and Secondary Remedies in...
The *Grand River* case was a subsequent NAFTA dispute with facts even more intertwined with domestic federalism issues and informal issues of ‘second-guessing’ domestic institutions. In this case, the investor, a Canadian cigarette distributor, arranged a business strategy that would mitigate its financial obligations under the contemporary tobacco laws in many US states. Such obligations required tobacco distributors to place large sums into escrow accounts in order to settle claims related to the damaging health effects of cigarettes.

However, Grand River attempted to circumvent these state requirements by distributing its product primarily through the quasi-sovereign ‘Indian territories’ occupied by federally recognized tribes. The major question for the tribunal in the eventual NAFTA case, therefore, was whether US constitutional law and federalism granted US states the regulatory authority to impose their escrow laws on commerce in tribal reservations within a state’s territory.

Striking a deferential note similar to *Glamis Gold*, the tribunal stated that “US federal Indian law is a complex and not altogether consistent mixture of constitutional provisions, federal statutes, and judicial decisions by the US Supreme Court ...” Finding that “US domestic law is currently far from conclusive about the question raised here of the extent of permissible state regulation,” the *Grand River* tribunal cautiously noted that “[d]etermining the contents of that law ... often calls for necessarily uncertain predictions of how future courts will apply past decisions involving different [state regulations].”

From this context, the tribunal forcefully returned to the themes of the *Glamis Gold* tribunal’s treatment of claims based on NAFTA Article 1105 fair and equitable treatment, stating that it “is loath to purport to address ... delicate and complex questions of US constitutional [law].” Dismissing Grand River’s claims in full, the tribunal asserted its reluctance to address delicate matters of federal law, finding instead that such “issues of national law belong in national courts, not in an international tribunal.”

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words, because US authorities’ determination on the matter had not presented a _prima facie_ case of denial of justice cognizable at the high threshold of customary international law under NAFTA Article 1105, the tribunal in _Grand River_ refused to ‘second-guess’ domestic constitutional interpretations.

This comity toward executive opinions on ‘complex’ questions of constitutional law is particularly noteworthy because claimant Grand River argued that US authorities had violated one of the State’s international human rights obligations: the duty to consult with indigenous peoples prior to making important regulatory decisions affecting their interests.\(^{57}\) As this legal duty arguably formed part of the claimant’s reasonable expectations at the time of contracting, the _Grand River_ tribunal essentially deferred to domestic treatment of federalism questions in lieu of its own competence to counterbalance legitimate investor expectations.\(^{58}\)

On this point, we may return to our earlier discussion of the role of constitutional law in instances where an international treaty does not address relevant fundamental rights. Under NAFTA, a tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”\(^{59}\) This mandate does not refer expressly to constitutional or any State law, and yet we have seen NAFTA tribunals in _Glamis Gold_ and _Grand River_ find cause to show informal deference to domestic law. Concerning the legal interests of local populations that are intertwined in these cases, one may begin to discern a certain tendency in investor-State arbitration to recognize a rather broad margin for governments to make their own choices in ensuring the respect of constitutional norms within their jurisdictions.\(^{60}\)

\(^{57}\) _Ibid._, paras. 180–181.


\(^{59}\) NAFTA, Art. 1131.

\(^{60}\) Boisson de Chazournes, _supra_ note 1, p. 321.
2.2.2 Formal Application of Constitutional Obligations

The right of compensation in case of expropriation, like the guarantee of fair and equitable treatment, is a fundamental principle common to a majority of domestic legal systems, and many States codify this right at the constitutional level (including Croatia, Denmark, Germany and Italy). 61 US jurisprudence has explained that State’s constitutional permission of compensated takings on the basis of States’ implicit police powers: exercises of a government’s sovereign right to protect its people’s lives, health, morals, comfort and general welfare, at a level paramount to any rights under contracts between individuals. 62 In more recent decades, the US Supreme Court extended this reasoning to contracts between individuals and the entities of the states. 63

Like the constitutional courts of these domestic legal systems, those of transnational jurisdiction broadly support the principle that States may terminate or otherwise modify contracts with private parties in the event of superseding public interests. This authority is indeed so uncontroversial that it is generally read as an implied exception to investment treaty umbrella clauses. 64

However, despite overlaps between domestic and international legal principles in this context, direct reference to constitutional law as a host State defense against foreign investors’ claims has proven problematic in practice. This is because it is a formal path to applying domestic law. As such, it may be examined in contrast with the informal paths we have just seen in the context of fair and equitable treatment claims.

For example, if proof of a taking is established in an investment arbitration, constitutional law may inform the fact of whether sufficient justification exists to excuse the host State from any required and outstanding compensation. However, domestic constitutions vary widely on this point and may not provide substantive clarity to the tribunal concerning a government’s conformity or non-conformity with its own laws defining states of emergency. For example, France’s 1958 constitution vests broad discretion and powers in the President when “the proper functioning of the constitutional public


Ibid., pp. 8–12.

See CMS Gas Transmission v. Argentina, ICSID Case No. ARB/01/08, Award, 12 May 2005, para. 121.


See Continental Casualty v. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008.
protection of fundamental liberties was a proactive step that removed the necessity of later suspending such liberties to enforce social order.\textsuperscript{72}

The resulting deference that the \textit{Continental Casualty} tribunal granted to Argentina's crisis management decisions stands in stark contrast to the limited margin of appreciation that had been granted to Argentina under the same circumstances by the tribunal in the \textit{Siemens} case.\textsuperscript{73} Indeed, that tribunal had rejected as unformed Argentina's argument that the property rights claimed by Siemens would have forced Argentina to violate its constitutionally preeminent international human rights treaty obligations.\textsuperscript{74}

In a more recent case arising from the Argentine financial crisis, the tribunal in \textit{SAUR International} acknowledged fundamental human rights, and in particular the right to water, as safeguarded by both the Argentine constitution and general principles of international law.\textsuperscript{75} However, the tribunal held that this regulatory concern must be combined with investors' treaty rights to compensation for property.\textsuperscript{76}

2.3 \textit{Constitutional Interplay in Post-Award Procedures}

Recognition, enforcement and execution refer to phases between the issuance of an ICSID investment arbitration award and the successful claimant's collection of its due.\textsuperscript{77} These are stages during which a losing host State may have previously unavailable opportunities to insert its constitutional principles into the gears of ICSID's relatively automated dispute closure mechanism.

\textsuperscript{72} Ibid., paras. 180–181, 270. See also \textit{LG&E Energy v. Argentina}, ICSID Case No. ARB/01/1, Decision on Liability, 3 October 2006, para. 234. Argentina's necessity defense was successful in the \textit{LG&E Energy} case, although that tribunal relied upon a different rationale than in the subsequent \textit{Continental Casualty} case. Rather than expressly reference Argentina's human rights obligations, the \textit{LG&E Energy} decision emphasized the social and health-related effects of the financial crisis.

\textsuperscript{73} See \textit{Siemens v. Argentina}, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 79.

\textsuperscript{74} Ibid.


\textsuperscript{76} Ibid.

For example, concerning the recognition of the award, Article 54(1) of the ICSID Convention allows that “[a] Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.” In the same sense, Article 54(2) requires that a party seeking recognition and enforcement of an ICSID award in the territory of a Contracting State must provide a certified copy of the award to the competent court or other authority designated by the State. These two sub-sections, taken in tandem, suggest that a successful claimant faces distinct tasks depending on which sovereign it is dealing with.

Argentina, for example, has interpreted this Article as requiring claimants to first obtain enforcement of ICSID awards against it in Argentine courts. Annulment committees in Enron, Vivendi Universal, Sempra Energy, and Continental Casualty have rejected this interpretation. The last said:

[Argentina contends] that in order for Continental to obtain payment of the Award, it would be necessary for Continental to follow the formalities applicable to enforcement in Argentina of final judgments of Argentine courts [...] this position of Argentina is inconsistent with Argentina’s obligation under Article 53 of the ICSID Convention to carry out without delay the provisions of the award without the need for enforcement action under Article 54.

A more textually direct path through which ICSID may lead claimants to the constitutional laws of recalcitrant host States is Article 54(3) of the Convention, which governs the final stage of execution and which states: “Execution of the award shall be governed by the laws concerning the execution of judgments in
force in the State in whose territories such execution is sought.” The pre-
eminence of this reference to State law is reassured in the following Article:
“Nothing in Article 54 shall be construed as derogating from the law in force in
any Contracting State relating to immunity of that State or of any State from
execution.”

Sovereign immunity laws vary widely among different States. Under the law
of many States, waiving sovereign immunity from suit (for example, by ratify-
ing the ICSID Convention) does not imply that the State has waived its sover-
eign immunity from execution. Some national constitutions provide States
with a shield of absolute immunity from execution, while others permit execu-
tion against sovereign assets when such assets have taken on a commercial
function or concern the State obligation at issue. Recalling our earlier discus-
sion of issues of host State federalism, it is worth noting that State constitu-
tions may extend sovereign immunity to their constituent federal subdivisions
and executive agencies.

In practice, this has not led to commonplace problems with execution. However, the few outliers have resulted in very convoluted execution proceed-
ings. In the primary example of the Benvenuti case, the claimant applied to
the Tribunal de Grande Instance de Paris to enforce its ICSID award. The court
obliged, but noted that the order could not be executed against Republic of
Congo assets in French territory without additional authorization, since such
constitutional sovereign immunity might shield those assets. The investor
appealed this decision to the Cour d’appel de Paris, which overturned the caveat
to execution on the basis that it violated the ICSID Convention’s streamlined
enforcement procedure. According to the Court, the lower body had exceeded
its competence: while it had been requested to enforce the award, it had made
an unnecessary finding concerning the award’s execution.

While an investor may attempt to persuade the prospective investment’s
host State, at the time of contracting, to waive sovereign immunity, it is unlikely
that any State would easily relinquish its constitutional protections against

84 ICSID Convention, Art. 54(3).
85 Ibid., Art. 55.
86 See Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration (2nd ed.,
87 Ibid.
89 271 ICSID Convention arbitrations had been registered as of January 2010, resulting in
only four execution proceedings. Ibid., p. 186.
90 Benvenuti and Bonfant v. Republic of the Congo, ICSID Case No. ARB/77/2.
asset attachment by foreign investors. For the investor already at the end of its options within the ICSID framework, resort may be made to traditional diplomatic or political means, as was exercised by the US in 2012 by removing Argentina from the list of trade beneficiaries of its Generalized System of Preferences (GSP) program. Argentina has also recently seen the sovereign immunity of its overseas assets draw more notable attention from bondholders, as they have attempted to enforce judgments arising from unpaid sovereign debt incurred during the State’s financial crisis.

3 Normative Harmonization and Comparative Constitutional Analysis

More than ever, international arbitrators are called to rule upon matters of transnational law and transnational public policies. Certainly, the increased contribution of these tribunals is a conspicuous feature of contemporary international law. Some have argued that tribunals’ consideration of comparative constitutional law can reinforce sovereign norms in investor-State dispute settlement by utilizing comparators that reflect general principles of

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92 The administration of US President Barack Obama pursued this option following requests from two US investors, Azurix and Blue Ridge Investments (formerly CMS), in light of Argentina’s non-enforcement of awards in their favor. For background see ‘US Suspends Argentina from Trade Preference Scheme’ (28 March 2012) 16 International Centre for Trade and Sustainable Development [ICTSD] ‘Bridges’ Weekly Trade News Digest 12, <ictsd.org/i/news/bridgesweekly/129975> (31 March 2014). It does not appear that either investor attempted to enforce the awards before Argentine courts, though Argentina’s Attorney General has publicly insisted that Argentine courts are not bound to enforce ICSID awards they deem unconstitutional. See Jorge E. Viñuales and Dolores Bentolila, ‘The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States’ in L. Boisson de Chazournes, M. Kohen and J. E. Viñuales (eds.), Diplomatic and Judicial Means of Dispute Settlement (Koninklijke Brill 2013) 46.

93 A group of bondholders attempted to enforce a US court judgment against Argentina in late 2012 by compelling Ghanaian port authorities to seize a visiting Argentine warship. A tense diplomatic standoff concluded with an order adopted unanimously by the International Tribunal for the Law of the Sea for the release of the vessel. The ‘ARA Libertad’ Case (Argentina v. Ghana), Provisional Measures, ITLOS Case No. 20, Order, 15 December 2012.

94 See Boisson de Chazournes, supra note 1, p. 324.

The use of comparative constitutional law may thus be viewed as a harmonious intermingling of legal orders, reducing the institutional risks that some commentators see in the emphasis of constitutional provisions unique to individual host States. It may serve a gap-filling function complementary to the application of public international law, and in the context of our analysis, it may also be understood as an ‘informal’ path through which constitutional norms surface today in investor-State arbitrations.

Yet if as some commentators have noted—the primary motivation for the application of comparative constitutional law is the prevention of arbitral law-making, it may be worth examining the extent to which investment tribunals have assimilated the traditional constitutive functions of legislatures. Some such blurring can be seen in democratic constitutional organs’ increasing participation in areas of transnational concern, such as military operations and international trade. More frequently, however, it is the reverse evolution (i.e., international dispute settlement practices progressing to more closely resemble their domestic counterparts) that has attracted scholarly attention.

In the context of this blurring, investment arbitration may be more constructively understood in relation to administrative or constitutional judicial review than to private international procedures such as commercial
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arbitration.\textsuperscript{102} Like international public dispute settlement mechanisms at the WTO, CJEU and ECtHR, investment tribunals may offer a form of constitutional litigation: a judicial review of government conduct towards a private party.\textsuperscript{103} By contrast, such standards of good governance are not prone to factor into the work of commercial arbitration tribunals.\textsuperscript{104} In this view of State-investor obligations as functionally similar to State-individual constitutional guarantees, the utility of consulting comparative constitutional law may become more readily apparent.\textsuperscript{105}

The extent to which tribunals rely upon constitutional law may be apparent in the informal context of transnational public policy. Arbitrators may choose to consider a form of ‘global constitutional law’ or international public order to give weight to certain sovereign norms in the context of international arbitration.\textsuperscript{106} Yet perhaps the primary parallel between the notion of investment law as a “new form of global public law”\textsuperscript{107} and the constitutional litigation of domestic courts is the standing of non-State actors to initiate proceedings.\textsuperscript{108}

Individual standing before international courts and tribunals has been a major feature of dispute settlement bodies addressing human rights at the regional level, such as the ECtHR. Investment treaties’ grant of the same traditionally domestic procedural right to business actors can be viewed within a broader trend of individual empowerment in international dispute settlement. An example in a criminal context is that of the International Criminal Court, which grants participatory rights to individual victims during the course of a trial.\textsuperscript{109} This trend can also be seen in an environmental context, where legal instruments such as the Aarhus Convention permit individual persons and

\textsuperscript{103} Ibid., p. 78.
\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid., p. 100.
\textsuperscript{106} The tribunal in the World Duty Free case utilized this reasoning when it stated “that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.” World Duty Free v. Kenia, supra note 19, para. 157. On the application of the concept of transnational public policy see Boisson de Chazournes, supra note 1, pp. 322–323.
\textsuperscript{107} Montt, supra note 35, p. 12.
\textsuperscript{108} See Ulfstein, supra note 94, pp. 132–33; Anne Peters, ‘Membership in the Global Constitutional Community’ in Klabbers et al., supra note 94, pp. 161–163.
\textsuperscript{109} See generally T. M. Funk, Victims’ Rights and Advocacy at the International Criminal Court (OUP 2010).
non-governmental organizations (NGOs) to submit communications alleging State non-compliance with treaty obligations.\textsuperscript{110}

It is from within this broader trend that commentators have suggested an evolving constitutionalization of international law: the notion that international law increasingly exhibits a ‘communitarian character’, which may gradually supplant traditional paradigms of power and reciprocity in favor of globally common interests, objectives or values.\textsuperscript{111} In this sense, some have viewed those investment treaty provisions that bestow substantive and procedural rights on investors as serving to shift traditional legal relationships between the State and individuals.\textsuperscript{112}

International law has grown from a framework for coordinating relations between equal sovereigns to the mixed dynamic of hybrid-party disputes.\textsuperscript{113} The introduction of non-State entities into previously inter-State legal regimes has triggered some analytical pivoting from contractual (i.e., relations between equal sovereigns) to quasi-constitutional conceptions of some international legal relationships.\textsuperscript{114} From the vantage of some arbitrators, investment dispute settlement may be well-suited for this transition.\textsuperscript{115}

\textsuperscript{110} For an analysis of the contribution of environmental compliance mechanisms such as this to the participation of non-State actors in the international legal sphere see Laurence Boisson de Chazournes, \textit{Fresh Water in International Law} (OUP 2013) ch. VII (‘Dispute Settlement and Fresh Water: Trends, Means and Practice’).

\textsuperscript{111} Kläger, \textit{supra} note 35, p. 134.


\textsuperscript{113} Schill, \textit{supra} note 101, pp. 91–92.

\textsuperscript{114} See Kläger, \textit{supra} note 35, p. 313.

\textsuperscript{115} See, e.g., \textit{International Thunderbird Gaming v. Mexico}, Award (Separate Opinion of Thomas Wälde), NAFTA/UNCITRAL, 26 January 2006, paras. 12–13 (“[I]nvestment treaties such as the NAFTA deal with a significantly different context from the one envisaged by traditional public international law: At its heart lies the right of a private actor to engage in an arbitral litigation against a (foreign) government over governmental conduct affecting the investor. That is fundamentally different from traditional international public law, which is based on solving disputes between sovereign states and where private parties have no standing”); paras. 27–30 (suggesting the complementary application of comparative public law). As for counsel, it may be worth noting that, despite the emergence of a specialized investment arbitration bar, most of those entering investor-State arbitral practice do so from a commercial arbitration orientation. Stephan W. Schill, ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’ (2011) 22 \textit{Eur. J. Int’l L.} 880.
However, critical questions have been raised as to the coherence of the constitutional analogy in international investment law. Primary among these involve the lack or limitation of judicial review of investment awards, implying that such arbitrations may not maintain the same degree of constitutional accountability as domestic proceedings. In response, some have praised the WTO Appellate Body as a model of constitutionalized judicial review in this regard. While importing this model into an investment regime such as ICSID might pose a danger of ‘coherence in the wrong direction’, the relative lack of uniformity in investment jurisprudence may appear to some observers as a deficit in the constitutionalization of arbitral practices.

Yet if uniformity is a sign of constitutionalized law, legitimacy arguably remains its primary motive. Just as constitutional norms such as fair and equitable treatment may affirm the central tenets of a legal system, so too have some investment tribunals considered that they, “as a matter of international constitutional law [have] an independent duty to apply imperative principles of law or jus cogens,” regardless of a traditional arbitral reliance on parties’ specifications of applicable law.

Despite frequent mention to the contrary, the matrix of State obligations in international investment disputes (e.g., duties to both investors and public interests) need not necessarily be viewed in perpetual inconsistency. As in human rights analysis, investment law may utilize analogous methods of interpretation to prevent conflicts with other obligations at international law or

116 See Peters, supra note 107, p. 252.
117 Ibid., p. 253; see also Kläger, supra note 35, pp. 311–312.
118 Montt, supra note 35, p. 158.
119 See Ari Afilalo, ‘Constitutionalization Through the Back Door’ (2001) 34 N.Y.U. J. Int’l L. & Pol. 1, 43 (as to the lack of permanent judicial institutions to oversee investment arbitrations) and 52 (as to the perception of a resulting ‘crisis of legitimacy’ investor-State dispute settlement).
121 See Kläger, supra note 35, p. 314 (stating that these meta-norms “infus[e] [legal regimes] with a sense of meaning and objectivity”).
123 See Jan Klabbers, ‘Setting the Scene’ in Klabbers et al., supra note 94, p. 17 (“[M]any exercise of domestic public power ... end up in tension with the internationally recognized rights of investors”). See also Stepan Wood and Stephen Clarkson, ‘NAFTA Chapter 11 as Supraconstitution’, 5 Comparative Research in Law and Political Economy [CLPE] Research Paper 43/2009 (no. 8) 15.
domestic constitutional law. For the investment tribunal, the emergent trend toward harmonization between these interests may be a matter of viewing the relevant rules from a vantage of interpretation, rather than one of conflict. In other words, the issue of violating one duty by adhering to another need not be viewed as a formal conflict of norms. The impossibility of simultaneously obeying multiple obligations does not mean that those obligations are per se in conflict with one another; rather, some commentators have advocated that these alleged conflicts of principles be viewed instead as conflicts of factual results.

In this regard, soft law may serve a role in permitting a balance of compatibility between obligations of private and public concern. It can be argued that some instruments constituted under the OECD and other institutions—addressed not only to host States but also to foreign investors—provide a dispute-preventive framework of norms influencing public and private actors operating in public services sectors. Moreover, such a framework may conform to international law as well as constitutional provisions common to a great number of States. Such developments may well serve as landmarks on the path toward more coherent constitutionalization in investment law or other public-private international regimes. This path may also lead to greater emphasis on balance and mutual supportiveness in the obligations of States and the rule-based interpretations of tribunals. Whether

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127 See Peters, supra note 107, pp. 251–254.

128 Tanzi, supra note 27, p. 67.

129 Ibid.

130 For an example of this principle of mutually supportive norms surfacing in a soft law forum concerning investment protection duties and environmental obligations, see OECD, ‘Harnessing Freedom of Investment for Green Growth’, Freedom of Investment
such harmonization in international investment arbitration will reduce any perceptions of conflict between tribunals and traditional domestic constitutional instruments, however, remains a viable question.

4 Conclusion

As the application of domestic law in international dispute settlement is an exercise in overcoming hurdles—and as investment arbitration today offers an evolving but inherently fragmented body of precedents—it should not surprise that different tribunals have thus exhibited varying degrees of comity toward States’ administrative and judicial procedures. The informal paths that we have traced between constitutional law and investment arbitration rely upon such comity. It entails tribunals’ reluctance to probe alleged denials of justice when host State procedures do not appear to contradict principles of due process and the rule of law. Moreover, it may compel those tribunals’ deference to domestic interpretations of constitutional complexities. In practice, these paths have more effectively assimilated constitutional law than have more formal approaches, such as we have seen in host State defenses based on emergency powers.

Yet these faint but clearing paths between the two legal spheres do not tell the end of the story. There may be marked trails as well, such as our earlier mention of investment treaties incorporating host State norms by reference. Still another portal may be found in the premise of comparative constitutional analysis. This is not a merely theoretical model or a one-sided push to ‘domesticate’ investor-State dispute settlement through traditional constitutional constraints. It acknowledges that the standards and tests embraced by tribunals are likely to influence both the future conduct of States and the decisions of other tribunals. Moreover, the trend toward viewing investor-State arbitration as part of a global governance structure naturally encourages resort to principles of comparative constitutional law, particularly when assessing the concept of fair and equitable treatment.

In this sense, the content of fair and equitable treatment standards is poised to evolve further in the coming years of investment arbitration. Despite the general supremacy of international law, tribunals called upon to decide

matters of transnational law may well serve the institutional interests of investment arbitration by integrating a mutually supportive understanding of constitutional and international norms. The doorways between these constructs may remain works in progress for the time being, but as tribunals have increasingly implied, no such edifice is an “ivory tower” of limited view or reach.131

131 Himpurna California Energy v. Indonesia, supra note 11, para. 219.