

“THERE IS NOTHING IN A CATERPILLAR THAT TELLS YOU IT IS GOING TO BE A BUTTERFLY”: PROPOSAL FOR A RECONCEPTUALIZATION OF INTERNATIONAL INVESTMENT PROTECTION LAW

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ABSTRACT

This Article argues that the initial rationale of bilateral investment treaties (BITs) was not to grant some privileged protection to foreign investors but to guarantee a reasonable level of protection that pertains to rule-of-law states (minimum standard of economic constitutionalism). The practice of investor-state dispute settlement (ISDS) detached from this original rationale and took on a life of its own. This deviation may be explained mainly by the fact that ISDS “privatized” disputes of public law. The Article proposes to treat investment protection as an example of a non-trade value protected in international trade: the same as intellectual property, environmental protection, and labor standards. While such non-trade values have clear links to trade and trade interests, they also have a normative value, which shapes their doctrinal conceptualization.

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I. INTRODUCTION

The purpose of this Article is to give a brief account of international investment protection law's trajectory and how this reinforces the current criticism against it. The Article's central point is that the initial rationale of bilateral investment treaties (BITs) was not to grant some privileged protection to foreign investors but to guarantee a reasonable level of protection that pertains to rule-of-law states (minimum standard of economic constitutionalism). The practice of investor-state dispute settlement (ISDS) detached from this original rationale and took on a life of its own. This deviation may be explained mainly by the fact that ISDS "privatized" disputes of public law. On the one hand, after a while, BITs espoused a dispute settlement pattern designed for commercial disputes (and not for public law disputes), which, as a matter of course, had an impact on investment protection law's reality. On the other hand, the doctrinal conceptualization also contributed to this process, when treating public law questions subject to ISDS as, at least partially, private law disputes. Notably, ISDS has two concurring explanations: according to the "international law" theory, BITs internationalized private law disputes through elevating them to public international law; according to the "contract" theory, in investment disputes public international law is downgraded to private law. This Article proposes, as a third approach, to treat investment protection as an example of a non-trade value protected in international trade: the same as intellectual property, environmental protection, and labor standards. While such non-trade values have clear links to trade and trade interests, they also have a normative value, which shapes their doctrinal conceptualization.

In this Article, "trade" refers to economic intercourse and international rules that eliminate or soften trade hurdles and frictions. These rules embrace the elimination (or alleviation) of tariffs, quantitative restrictions, and regulatory barriers to trade. Trade liberalization is not normative: within the limits of their treaty obligations, it is admittedly legitimate for states to restrict trade.¹ On the other hand, non-trade values, though related to trade and obviously affecting states' economic

1. See JOHN JACKSON, WILLIAM DAVEY & ALAN SKYES, MATERIALS AND TEXTS ON LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 30–63 (6th ed. 2013).

interests, are normative values that are not directly related to economic intercourse.²

Section II gives a brief account of the historical trajectory of international investment law and arbitration and offers an ontological explanation. It argues that the purpose of international investment protection is to reproduce the property protection recognized in constitutional democracies in international law (minimum standard of economic constitutionalism). Section III demonstrates how the scholarship and the arbitral and judicial practice failed to give a solid doctrinal conceptualization of this truly hybrid regime, and either tried to elevate private claims to the level of public international law or downgraded public international law rights to the level of private law disputes. Section IV offers an alternative theory and argues that investment protection is nothing more than one of the cross-cutting value standards that have emerged in international economic relations in the last few decades. Section V contains the Article's final conclusions.

II. THE GENESIS AND RATIONALE OF INVESTMENT TREATIES

It is submitted that the emergence of investment treaties was the result of a marriage between two factors: (1) the perception of an economic need for effective property rights protection as a precondition of (or at least major stimulus for) cross-border investments and (2) international law's failure to provide the needed legal protection.

On the one hand, investment treaties satisfy a perceived economic need. The actual impact of investment treaties on cross-border investments is disputed in the scholarship. While both intuition and some empirical evidence suggest that BITs may stimulate, to varying degrees and depending on various circumstances, cross-border investments,³

2. See Csongor István Nagy, *Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty*, 9 CZECH Y.B. INT'L L. 197, 203–05 (2018).

3. See, e.g., Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 3 WORLD DEV. 31 (2005) (using quantitative evidence to demonstrate that “a higher number of BITs raises the FDI that flows to a developing country.”); Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41 J. FOR DECISION 275 (2016) (demonstrating the “the positive role of BITs in attracting FDI inflows into India.”); Sarah Bauerle Danzman, *Contracting with Whom? The Differential Effects of Investment Treaties on FDI*, 42 INT'L INTERACTIONS 452 (2016) (noting that the effects of this stimulus depend on several circumstances. Investors may have “heterogeneous responses to ratification of investment treaties.”). Danzman further points out that “BITs are best equipped to increase FDI into activities that require a strong contract between governments and investors, such as infrastructure and utility service privatization. BITs, however, do not ameliorate investment risks related to private commercial contracts and are thus less able to overcome uncertainties that matter most to other foreign investors, such as manufacturers. *Id.*; see also KARL

such a general effect has not been empirically tested and confirmed.⁴ Nonetheless, the perceived impact is much more important than the actual economic effects. The lack of empirical evidence is of little relevance in relation to this point, given that state policy is determined by perceptions and not by facts (though it is hoped that most facts also become perceptions). The reality is that capital-importing countries have had the perception that investment treaties do stimulate the influx of capital, and this was the main reason why they accepted these extra international disciplines. The BIT-boom⁵ experienced since the pattern's emergence in the 1960s also demonstrates the (perceived) demand for internationally guaranteed property protection.⁶ While the interest of capital-exporting countries is obvious, this remarkable spread also suggests that capital-importing countries have been equally interested in the regime, as they have regarded it as a means to attract foreign investments.⁷ Whatever the actual impact of BITs has been, the

P. SAUVANT & LISA E. SACHS, *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* (2009) (providing an overview of the arguments for and against the significance of BITS in stimulating cross-border investments). ALEX STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* 77 (2017) (“[N]o one knows the extent to which international investment agreements have actually increased FDI in capital-poor states. Some major recipients of FDI – Brazil being the most prominent – have not ratified BITs and are not signatories of the ICSID Convention. Of course, we cannot know if such countries would have received even more FDI had they joined the system. A review of the scholarly literature in this regard suggests, at most, that BITs do increase investment for some (but not all) countries, in certain sectors of the economy, probably in tandem with other propitious domestic factors.”).

4. Joachim Pohl, *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (Jan. 19, 2018), https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en.

5. There are currently 3,322 international investment agreements (2,946 BITs and 376 treaties with investment provisions). U.N. Conference on Trade and Development, *World Investment Report 2018*, 88 (2018).

6. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 186–87 (3d ed. 2010); Sanford U. Mba, ‘Africa for the Chinese’? *Revisiting Sino-African Bilateral Investment Treaties*, 58 HUNGARIAN J. LEGAL STUD. 434, 437–38 (2017).

7. LOUIS T. WELLS, *PROTECTING FOREIGN INVESTORS IN THE DEVELOPING WORLD: A SHIFT IN US POLICY IN THE 1990S*: 421, 444 (Robert Grosse eds., 2005) (“The rapid spread of BITs . . . was more likely the result of the increasing enthusiasm for foreign investment in the developing world. BITs appeared to address a need on the part of developing countries to add credibility to commitments these countries made to investors.”); ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 373 (2005) (“One of the answers to a problem of lack of foreign investment was for a developing state to enter into a bilateral investment treaty (BIT) which, because it guarantees protection of foreign investments, also promotes such investments.”).

important point is that developing countries have had the tendency to believe that they did stimulate the influx of capital.⁸

On the other hand, international law fails, in terms of both substantive and procedural law, to secure a sufficient (or a meaningful) level of protection. While it is generally accepted that states have a legal obligation to compensate foreign investors if they expropriate the latter's assets, there is no general understanding as to whether this compensation needs to be full or merely "appropriate."⁹ Although capital-exporting developed states, for economic reasons, tend to advocate

8. See Int'l Ctr. for Settlement of Inv. Disputes [ICSID], Summary Record of Proceedings, Addis Ababa Consultative Meeting of Legal Experts (1964), in HISTORY OF THE ICSID CONVENTION VOL. 11-1, at 255 (1968) ("[i]t would be easier for the developing countries to obtain the investments they needed if all agreements contained a clause to the effect that disputes could be referred to the [ICSID]"); WON L. KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION 133-34 (2017) ("Many developing countries accepted ICSID because of the perception that doing so would increase the flow of badly needed foreign direct investment (FDI) from the developed world.").

9. See JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 360 (2d ed. 2008); GIDEON BOAS, PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 300 (2012) ("[w]here a state expropriates the property of a foreign national, there is no general customary rule of 'prompt, adequate and effective' compensation (the so-called 'Hull formula'), as developing states have long considered that expropriation during non-discriminatory large scale nationalizations for a public purpose do not oblige states to pay full compensation. Appropriate compensation must take into account the state's right to permanent sovereignty over its resources."); G.A. Res. 1803 (XVII), ¶¶ 1, 4 (Dec. 14, 1962) (providing that "the owner shall be paid *appropriate* compensation.") (emphasis added); G.A. 3281 (XXIX), art. 2(2)(c) (Dec. 12, 1974) ("Each State has the right . . . [t]o nationalize, expropriate or transfer ownership of foreign property, in which case *appropriate compensation* should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be *settled under the domestic law* of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.") (emphasis added); 2 THE WORLD BANK GROUP, LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT, REP. TO DEV COMM. AND GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INV., at 41 (1992) (expropriation is acceptable, if it is done "against the payment of appropriate compensation." Compensation is appropriate if it is "adequate," that is, "based on the fair market value of the taken asset."); Lee A. O'Connor, *The International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State*, 6 LOY. L.A. INT'L & COMP. L. REV. 355, 360, 361-62 (1983); SORNARAJAH, *supra* note 6, at 183-84; ZOLTÁN VIG, TAKING IN INTERNATIONAL LAW 121-28 (2019); Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 N.W. J. INT'L L. & BUS. 327, 329 (1993) ("the frenetic conclusion of BITs is occasioned by the uncertainty that pervades international investment law since the advent of the developing countries on the international scene, and secondly, that international law has not kept pace with the developments that have taken place in the last thirty years in foreign direct investment.").

the right to full compensation, capital-importing developing states reject this notion and tend to be of the view that international law requires merely “appropriate” compensation and this is a matter for domestic law.¹⁰ The legal situation may be described at best with the existence of “two conflicting norms.”¹¹ Although one may argue for the right of full compensation as part of international law (in the same way as one may argue for its non-existence), the high level of uncertainty surrounding this right results in the lack of a meaningful legal guarantee. Furthermore, even if customary international law secured a right to full compensation, the ability to remedy a violation, or enforce this right, would be near impossible given the absence of an effective dispute settlement mechanism in international law.¹²

BITs addressed these shortcomings¹³ through establishing a set of protected rights and creating a highly effective dispute settlement mechanism that gives standing to private parties (investors).¹⁴ These

10. See MALCOM N. SHAW, *INTERNATIONAL LAW* 834–35 (6th ed. 2008); ALINA KACZOROWSKA, *PUBLIC INTERNATIONAL LAW* 451 (4th ed. 2010) (“Although it is generally agreed that expropriation may occur, the wide divergence of political and economic beliefs among States has resulted in little agreement as to the rules to be applied in cases of expropriation. Communist States believe that States may expropriate the means of production, distribution and exchange without paying any compensation, i.e. confiscation. Developing States believe the matter should be left to the expropriating State to regulate at its discretion and in accordance with its national law. Western capital-exporting States have, however, advocated an international minimum standard based on three principles.”).

11. SORNARAJAH, *supra* note 6, at 451–52 (“In light of the controversy relating to the standard of compensation, the best solution that could be hoped for in the present state of international law is for states to settle the issue of compensation through bilateral investment treaties and agree upon the standard of compensation between themselves.”).

12. *Banro Am. Res., Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/98/7, Award, (Sept. 1, 2000) (“the purpose . . . was to remove disputes from the realm of diplomacy and bring them back to the realm of law.”).

13. ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 373–74, 377 (2005) (“The first, and most obvious [of a BIT], is that it avoids interminable and often inconclusive disputes as to what rules of customary international law govern investment, how the rules should be applied, and how an unresolved dispute between an investor and the host state can be resolved. . . . Without a BIT, there are no relatively easy (or indeed any) means of resolving the dispute.”); *CME Czech Republic BV v. Czech Republic*, 9 ICSID Rep. 264, ¶ 497 (2003) (the right to full compensation has been controversial, “[b]ut in the end, the international community put aside this controversy, surmounting it by the conclusion of more than 2200 bilateral (and a few multilateral) investment treaties. These treaties . . . concordantly provide for payment of ‘just compensation’, representing the ‘genuine’ or ‘fair market’ value of the property taken.”); SORNARAJAH, *supra* note 6, at 186–87.

14. See KACZOROWSKA, *supra* note 10, at 454 (noting that the debates and uncertainties about the compensation standard in international law have been overcome by the proliferation of BITs.).

substantive guarantees are the prohibition of arbitrary expropriation,¹⁵ the right to full compensation in case of expropriation,¹⁶ and the various treatment standards (such as fair and equitable treatment,¹⁷ security and protection, non-discrimination, and national treatment¹⁸).¹⁹ Interestingly, BITs did not create any novel procedural mechanism to satisfy the needs generated by the foregoing substantive rules, but, after a while, states uniformly made use of the well-established dispute settlement pattern of international commercial transactions: international commercial arbitration.²⁰

The above interpretation is underpinned by the historical trajectory of ISDS. Notably, the first investment protection treaty (Germany-Pakistan Treaty of 1959),²¹ which is generally considered to mark the emergence of investment protection law, did not give investors the right to enforce the treaty's rules against the host state and provided merely for inter-state dispute settlement. It was not until the mid-1970s that BITs started making provisions for investor-state dispute settlement.²²

It is difficult to interpret the genesis of investment treaties other than as an endeavor to project some minimum standards of economic constitutionalism to the level of international obligations so that they are guaranteed by international law and are not unilaterally rescindable. Although its implementation had to be adapted to the realities of international law and the chosen dispute settlement mechanism, the regime did not aim to afford any excessive and above-average protection to

15. That is, the requirement that expropriation should be warranted by the public interest and occur under due process of law and in a non-discriminatory manner.

16. See Vig Zoltan & Gajinov Tamara, *The Development of Compensation Theories in International Expropriation Law*, 57 HUNGARIAN J. LEGAL STUD. 447, 447–48 (2016).

17. See MARTINS PAPARINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* (2013); RUMAN ISLAM, *THE FAIR AND EQUITABLE TREATMENT (FET) STANDARD IN INTERNATIONAL INVESTMENT ARBITRATION: DEVELOPING COUNTRIES IN CONTEXT* 31 (2018).

18. The principle of national treatment demands that foreign and domestic investors have to be treated alike.

19. In fact, the majority of investment disputes center around the treatment standards, as in most cases, states do not expropriate the whole investment or suppress it with indirect means. See Frank Emmert & Begaiym Esenkulova, *Balancing Investor Protection and Sustainable Development in Investment Arbitration – Trying to Square the Circle?*, in *INVESTMENT ARBITRATION AND NATIONAL INTEREST* 13, 14 (Csongor István Nagy ed., 2018).

20. Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L & COMP. L.Q. 371, 377 (2007).

21. Treaty for the Promotion and Protection of Investments, Germany-Pakistan, Nov. 25, 1959, 457 U.N.T.S. 24, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef>.

22. CHIN LENG LIM, JEAN HO, & MARTINS PAPARINSKIS, *INTERNATIONAL INVESTMENT AND ARBITRATION* 61 (2018).

foreign investors that goes well beyond the constitutional traditions of developed democracies. The purpose was to upgrade certain constitutional requirements to the level of international disciplines. The rationale was to convert the relevant standards of economic constitutionalism into international law guarantees, so they could not be nullified unilaterally.²³

Historically, investment treaties have been the outcome of the wrestling between capital-exporting and capital-importing states. However, a normative analysis demonstrates that BITs could legitimately target neither less nor more than the minimum standards of economic constitutionalism.²⁴ The states' endeavors were probably driven by their actual interests: it is reasonable to assume that capital-importing states wanted to make the obligations as weak as possible, while capital-exporting states' endeavors had the opposite direction. Nonetheless, the bargain also had a normative basis, especially because BITs are not individual transactions but rule-setting treaties that create a framework for future individual transactions (e.g. investments).

Notwithstanding this ontology, international investment protection law took on a life of its own and brought about a bilaterally constructed multilateral regime²⁵ that went way beyond the initial contemplations. The main factor was probably procedural. With the adoption of the pattern of commercial arbitration to settle investment disputes, states subjected genuine public law disputes to a mechanism, which is—due to its secrecy, non-transparency, and ad-hoc nature—devoid of democratic legitimacy.²⁶ The major turning point was when solid constitutional democracies commenced to conclude BITs with each other. This resulted in investment disputes where arbitral tribunals virtually “heard appeals” against judgments of courts that are considered to provide the highest level of constitutional protection.²⁷ With this, the guarantee

23. NAGY, *supra* note 2, at 206.

24. *See, e.g.*, Stephan W. Schill, *International Investment Law and the Rule of Law*, in *RULE OF LAW SYMPOSIUM 2014: THE IMPORTANCE OF THE RULE OF LAW IN PROMOTING DEVELOPMENT I* (Jeffrey Lowell et al. eds., 2015) (suggesting that BITs and ISDS arguably contribute to the creation of a rule-of-law framework for investment relations).

25. STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

26. *Cf.* Joseph H.H. Weiler, *European hypocrisy: TTIP and ISDS*, 25 *EUR. J. INT'L L.* 961, 965 (2014) (“the Bar that adjudicates them [investment disputes] is of a limited range . . . , and dominated by arbitrators from private practice rather than public interest backgrounds . . . ; and most damning of all, the substantive provisions of the investment treaties, when it comes to protecting societal interests, are woefully defective and inferior when compared with similar public interest provisions in trade agreements such as the WTO itself.”).

27. *See* *Eli Lilly & Co. v. Canada*, ICSID Case No. UNCT/14/2.

function was played down, and investment protection law detached from its original *raison d'être*.²⁸

III. ISDS: INTERNATIONALIZING PRIVATE LAW DISPUTES OR PRIVATIZING INTERNATIONAL LAW DISPUTES

ISDS has two concurring explanations. According to the “international law” theory, which may be regarded the mainstream attitude, international investment protection law elevates private disputes to the rank of public international law. This implies that although standing is conferred on (private) investors, investment disputes have a truly public international law nature and may be conceived as the internationalization of economic constitutionalism. According to this construction, the regime is simply one of the exceptions where non-state entities and individuals are treated, in a restricted circle, as subjects of international law.²⁹ According to the “contract” theory, investment protection law downgrades public international law to private law and its *quid pro quo* logic.³⁰

A. *Internationalizing Private Law Disputes*

Despite its idiosyncratic nature,³¹ international investment law is generally treated as a parcel of public international law, and the private law element is conceptualized as upgrading private law rights to the level of international law.³² In this conception, ISDS remains a truly public law mechanism based on and framed by a public international law treaty.

28. Cf. ISLAM, *supra* note 17, at 188 (characterizing arbitral “tribunals’ interpretation of the FET standard . . . for the most part “investor-oriented.”).

29. Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*, iCOURTS (2018).

30. FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, INTERNATIONAL COMMERCIAL ARBITRATION 42–43 (Emmanuel Gaillard & John Savage eds., 1999).

31. See, e.g., Jan Paulsson, *Arbitration without Privity*, 10 ICSID REV. 232, 256 (1995) (international investment arbitration “is dramatically different from anything previously known in international sphere.”); Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRITISH YEARBOOK INT’L L. 151, 152–53 (2004) (international investment arbitration has a “hybrid or sui generis character.”); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 94 (2013) (“the investment treaty system may come to be seen as sui generis: something that defines its own category.”).

32. See, e.g., Stacie I. Strong, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 3 (2012); Martins Paporinskis, *Analogies and Other Regimes of International Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE (Zachary Douglas et al. eds., 2014) (arguing that international investment protection law is simply public international law and “there is nothing conceptually different, innovatory, or sui generis about [it]”).

For instance, the Court of Justice of the European Union (CJEU) in its recent ruling in *Achmea*³³ proceeded from this conceptualization when distinguishing between investment and commercial arbitration:

[Investment] arbitration proceedings . . . are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which . . . [EU law] requires them to establish. . . . In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT.³⁴

Of course, both commercial and investment arbitration are based on “the freely expressed wishes of the parties.”³⁵ The state expresses its consent to investment arbitration in a public treaty, while the investor accepts this by using the dispute settlement mechanism. It would be very difficult to describe this as a situation devoid of the “freely expressed wishes of the parties.”³⁶ The Court did not engage in any detailed explanation of this distinction, however, it seems that it was not party autonomy as such but the public law character of investment arbitration that distinguished it from commercial arbitration. Of course, both commercial and investment arbitration are based on the parties’ concurrence of wills and agreement to submit the matter to arbitration.³⁷ However, investment arbitration, in addition to consent, needs to have a treaty-law basis, which opens the castle of public international law to private law claims.³⁸ This may be a bilateral or multilateral investment treaty or, more importantly, the ICSID Convention, which provides for such a gate of entry in Article 25.³⁹ While the ICSID

33. Case C-284/16, *Slowakische Republik v. Achmea BV*, ECLI:EU:C:2018:158 (2018).

34. *Id.* para. 55.

35. *Id.*

36. *Id.*

37. See *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 206 (D.C. Cir. 2015) (“The BIT includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which Chevron accepted in the manner required by the treaty.”).

38. See Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT’L & COMP. L.Q. 371, 378–81 (2007).

39. Convention on the settlement of investment disputes between States and nationals of other States art. 25, Mar. 18, 1965, 575 U.N.T.S. 8359 (“The jurisdiction of the Centre shall

Convention does not provide consent, and no obligation regarding dispute settlement follows from adherence to ICSID, the Convention creates a treaty-basis for this consent. Although, as a matter of practice, this provision functions as a quasi-general authorization, given that 163 states signed and 154 ratified the ICSID Convention, it does not question the doctrinal tenet that investment arbitration must be based on the authorization of an inter-state treaty.⁴⁰

Some authorities have gone even further and asserted that investor-state relations may enter the sphere of public international law even absent a specific treaty provision. For instance, in *TOPCO v. Libya*,⁴¹ the arbitrator held that foreign investors have a “limited capacity” under international law and a concession agreement may validly provide for the “internationalization” of the contract, that is, may elevate the contract to the level of public international law.⁴² A similar conclusion was reached, with less doctrinal elaboration, in *Sandline International Inc. v. Papua New Guinea*.⁴³ However, these have remained exceptional and have not called the “states-only” nature of public international law into question.⁴⁴

extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute *consent in writing* to submit to the Centre.”).

40. *List of Contracting States and Other Signatories of the Convention*, INT’L CONVENTION ON THE SETTLEMENT OF INV. DISPUTES (2019), <https://icsid.worldbank.org/about/member-states/database-of-member-states>.

41. *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. The Government of the Libyan Arab Republic*, 53 I.L.R. 389 (1977). For a criticism of the award, see ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 124 (2010).

42. *Id.* para. 47 (“This Tribunal will abstain from going that far: it shall only consider as established today the concept that legal international capacity is not solely attributable to a State and that international law encompasses subjects of a diversified nature. If States, the original subjects of the international legal order, enjoy all the capacities offered by the latter, other subjects enjoy only limited capacities which are assigned to specific purposes. . . . In other words, stating that a contract between a State and a private person falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities. But, unlike a State, the private person has only a limited capacity and his quality as a subject of international law does enable him only to invoke, in the field of international law, the rights which he derives from the contract.”).

43. *Sandline Int’l Inc. v. Papua New Guinea*, 117 I.L.R. 552 (2000); *see also Sapphire Int’l Petroleum Ltd. v. Nat’l Iranian Oil Co.*, Arbitral Award, 35 I.L.R. 136, 175–76 (Cavin, Sole Arbitrator, 1967).

44. *See* Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* 196–98 (iCourts, Working Paper No. 139, 2018).

B. *Profaning Public Law Disputes*

Although the notional distinction between commercial and investment arbitration is generally accepted, the lines are rather blurred when it comes to practice.⁴⁵ Some even argue that investment arbitrations are “properly considered as ‘international commercial arbitrations.’”⁴⁶ This suggests that investment arbitration is a subset of commercial arbitration and, as such, it converts public law questions to private disputes, downgrading the prerogatives of sovereigns. The conceptual consequence is that the exercise of public authority, the use of legislative powers and the pursuit of the public interest are all judged on the basis of private law’s *quid pro quo* logic and framed by the privity of contract.

This thinking finds reflection, for instance, in the application of the 1958 New York Convention. Theoretically, the Convention’s scope is limited to commercial or private law disputes,⁴⁷ which, at least conceptually, should have nothing to do with investment arbitration. Still, there is a wealth of case-law that applies the New York Convention’s rules on recognition and enforcement to investment awards, without any doctrinal scruples.⁴⁸

The 1958 New York Convention has a central role in countries that did not ratify the ICSID Convention. For instance, Poland refused to join the ICSID Convention.⁴⁹ Recognition and enforcement of investment awards adopted in investor-state arbitral proceedings occurs under the 1958 New York Convention.⁵⁰ Interestingly, Poland made a reservation to Article I(3) of the New York Convention and, hence,

45. See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 243–45 (2d ed. 2012); SWEET & GRISEL, *supra* note 3, at 72–73.

46. FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 42–43 (Emmanuel Gaillard & John Savage eds., 1999) (“This is not to say that ICSID does not retain certain specific features, especially as regards questions of jurisdiction and procedure. On substantive issues, however, ICSID has not led to the creation of a body of international development law distinct from that arising from ordinary international arbitration.”).

47. *Cf.*, e.g., MOSES, *supra* note 45 at 31–32; UNCITRAL, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1 (1958) (identifying the New York Convention as a “means of settling international commercial disputes.”).

48. As to the position that the 1958 New York Convention applies to investment arbitration, see Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT’L & COMP. L.Q. 371, 378 (2007).

49. Anecdotal evidence suggests that the main reason has been that the ICSID tribunals’ awards are final and conclusive and enforceable in the signatory states without any possibility to reject recognition and enforcement with reference, for example, to public policy.

50. See Świątkowski Marek, *Investment Treaty Arbitration*, in *ARBITRATION IN POLAND* 159, 166–67 (Warsaw: Court of Arbitration at the Polish Chamber of Commerce, 2011).

applies the convention only to differences arising out of legal relationships that, whether contractual or not, are considered commercial under national law.⁵¹ This implies that investment matters are considered commercial in nature.

The same approach is taken by U.S. courts. In *Argentina v. BG Group PLC*, the BG Group launched arbitral proceedings on the basis of the Argentina-U.K. BIT, because of Argentinian regulatory measures that negatively affected the BG Group's investment.⁵² The U.S. District Court for the District of Columbia held that investment arbitration is subject to the Federal Arbitration Act⁵³ and the 1958 New York Convention.⁵⁴ In *Chevron Corp. v. Ecuador*, Chevron was awarded damages against Ecuador on the basis of the Ecuador-US BIT in an arbitral procedure in the Netherlands.⁵⁵ The U.S. Court of Appeals for the District of Columbia pronounced the award enforceable under the 1958 New York Convention.⁵⁶ In *Gold Reserve Inc. v. Venezuela*, the dispute emerged from Venezuela's curtailment of the petitioner's mining concessions.⁵⁷ The U.S. District Court for the District of Columbia pronounced the arbitral award rendered on the basis of the Canada-Venezuela BIT enforceable under the 1958 New York Convention.⁵⁸ In the same vein, in *Crystallex International v. Venezuela*, the plaintiff's claim emerged from Venezuela's expropriation of its investment and was based on the Canada-Venezuela BIT.⁵⁹ The U.S. District Court for the District of Columbia granted the petition to confirm the award and denied the motion to vacate with reference to the 1958 New York Convention.⁶⁰

It has to be noted that the applicability of the 1958 New York Convention to investment awards is far from being generally accepted, especially in countries that made a reservation to limit the

51. Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNITED NATIONS COMM'N ON INT'L TRADE LAW, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

52. See generally *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108 (D.D.C. 2010).

53. 9 U.S.C. §§ 1–14 (2006).

54. *Republic of Argentina*, 715 F. Supp. 2d at 117–20.

55. See generally *Chevron Corp.*, 795 F.3d 200 (D.C. Cir. 2015); *Republic of Ecuador v. Chevron Corp.*, 136 S. Ct. 2410 (2016) (certiorari denied).

56. *Chevron Corp.*, 795 F.3d at 207–09.

57. See generally *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112 (D.D.C. 2015).

58. *Id.* at 119–20.

59. See generally *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100 (D.D.C. 2017).

60. *Id.* at 123.

Convention's scope to commercial disputes. For instance, in *Union of India v. Lief Hoegh Co.*, the Gujarat High Court (India) held that the Convention applies to "all the business and trade transactions in any of their forms including the transportation, purchase, sale and exchange of commodities between the citizens of different countries."⁶¹ Given that the parties to investment arbitration include at least a sovereign and, hence, cannot be regarded as a dispute between private individuals, the 1958 New York Convention may not apply.⁶² In China, the Supreme Court created a clearer situation. In a circular on the implementation of the 1958 New York Convention, it indicated that, due to the Chinese commercial reservation, in China the Convention's scope "does not include the dispute between foreign investors and the host government."⁶³

Another sign of downgrading public law disputes is the inclination of arbitral tribunals to sanction the choice of public international law in investment contracts between private enterprises and sovereign states. If the concession agreement is backed by a bilateral or multilateral treaty that provides for the application of public international law rules, the investment contract's provision can be considered as simply replicating this. Nonetheless, it is a different situation if a private enterprise and a sovereign state pull into their contractual relationship rules of public international law and subject them to a commercial dispute settlement mechanism. For instance, in *LIAMCO v. Libya*,⁶⁴ the concession agreement between the investor and the host state provided for the application of "the Laws of Libya and such principles and rules of international law as may be relevant."⁶⁵ The arbitrator considered that the rules of public international law were applicable and had supremacy over national law because the parties, using their autonomy, chose them as the applicable law.⁶⁶ This implies that public international law can be chosen by the parties as any national law. This is of utmost relevance, given that the outcome of investment disputes hinges on the

61. *Union of India (Uoi) & Anr. v. Owner & Parties Interested In.*, AIR 1983 Guj. 34 (1983).

62. See Siddharth S. Aatreya, *Can Investment Arbitral Awards be Enforced in India?*, KLUWER ARBITRATION BLOG (Apr. 4, 2020), <http://arbitrationblog.kluwerarbitration.com/2019/04/04/can-investment-arbitral-awards-be-enforced-in-india/>.

63. Circular of Sup. People's Ct. on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China, *translated in* NEW YORK CONVENTION, <http://www.newyorkconvention.org/11165/web/files/document/2/1/21297.pdf>.

64. *Libyan Am. Oil Co. v. Libyan Arab Republic*, 20 I.L.M. 1, 87 (1981).

65. *Id.* at 63.

66. *Id.* at 67 (excluding "any part of Libyan law which is in conflict with the principles of international law").

application and interpretation of international law, national law typically being used for the purpose of expropriation or going counter to the investor's legitimate expectations.

The line between public and private law disputes (treaty claims and contractual claims, respectively) is also blurred by investment tribunals, which, not infrequently, have been ready to adjudicate purely contractual disputes,⁶⁷ suggesting that investment disputes' public law and private law identities are more or less on equal footing. For instance, in *Vigotop Limited v Hungary*, the arbitral tribunal had no scruples in judging a purely contractual issue.⁶⁸ A major question of the dispute was whether Hungary's termination of the concession agreement was lawful. Even though the act of terminating the concession agreement was an *actum jure gestionis* and, as such, a purely contractual dispute, the tribunal still inquired its legitimacy.⁶⁹ The tribunal explained that Hungary's termination was motivated (partially) by public policy reasons.⁷⁰ In the end, it was established that the termination was in accordance with the concession agreement, because the concessionaire failed to secure a suitable plot for the casino.⁷¹

IV. INVESTMENT PROTECTION AS A NON-TRADE VALUE IN INTERNATIONAL TRADE

The emerging concept of non-trade values in international trade gives a plausible explanation for international investment protection law, which helps to overcome the antagonism between the "international law" and the "contract" theory. The holistic treatment of these non-trade values, including investment protection, offers a solid doctrinal foundation and a reinforced legitimacy.

Trade has, long since, been not only about commercial intercourse but also about non-trade issues of trade relevance. Bilateral investment treaties, starting with the Germany-Pakistan BIT of 1959, other than guaranteeing the free movement of capital (such as the freedom of investment, national treatment of foreign capital and the right to repatriate the proceeds), also set out property protection standards, which

67. See Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835 (2005); M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 130–34 (2015).

68. *Vigotop Ltd. v Hungary*, ICSID Case No. ARB/11/22, Award, para. 5 (Oct. 1 2014), <https://oxia-ouplaw.com.proxygt-law.wrlc.org/view/10.1093/law:iic/721-2014.case.1/law-iic-721-2014>.

69. *Id.* para. 312–13.

70. *Id.* para. 328–31.

71. *Id.* para. 634.

would normally be considered human rights in nature.⁷² The Marrakesh Agreement establishing the WTO, with the TRIPS Agreement, made the protection of intellectual property rights (up to a certain level) a condition of membership in the world trade club.⁷³ Recently, the EU announced its refusal to conclude free trade agreements (FTAs) with countries not ratifying the Paris Climate Change Agreement.⁷⁴ Furthermore, the most recent period has seen the emergence of a new species of non-trade standards, which are increasingly gaining ground in international trade. Most new generation FTAs contain provisions which are allegedly of a non-trade nature, though all these issues are, without exception, of trade relevance. The most notable examples are environmental and labor standards.⁷⁵ A common feature of these is that they are fueled by regulatory competition concerns and, instead of protecting foreign investors, they aim to burden domestic firms. While, for instance, BITs oblige the host country to protect foreign investments, and only foreign investments, agreements on labor standards aim to curb domestic producers to protect their workers. These provisions require trading partners to respect certain (minimum) standards on their own territory.

It is noteworthy that non-trade values have a long history in international trade and appear to have been an inevitable element of all trade regimes. For example, GATT '47's predecessor, the Havana Charter, referred to labor standards in the context of world trade in Article 7 (1).⁷⁶ In the WTO, labor standards, among other ostensibly non-trade issues, have been on the table from the very beginning; an attempt to bring labor standards under the auspices of the WTO was, with the confirmation of the organization's "commitment to the observance of internationally recognized core labor standards," rejected in 1996.⁷⁷

72. See, e.g., Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, COUNCIL OF EUROPE (Mar. 20, 1952), <https://rm.coe.int/168006377c>.

73. Marrakesh Agreement establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter *Marrakesh Agreement*].

74. Jon Stone, *EU to refuse to sign trade deals with countries that don't ratify Paris climate change accord*, THE INDEPENDENT (Feb. 12, 2018), <https://www.independent.co.uk/news/world/europe/eu-trade-deal-paris-climate-change-accord-agreement-cecilia-malmstu-m-a8206806.html>.

75. NAGY, *supra* note 2, at 203–05.

76. U.N. Conference on Trade and Employment, *Final Act of the United Nations Conference on Trade and Employment*, Art. 7(1), U.N. Doc E/Conf. 2/78 (Apr. 1948), https://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

77. World Trade Organization, Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC. 36 LL.M. 218 ¶ 4 (1997) ("We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in

The debate on trade and environment earned formal recognition as early as 1971, when the GATT Council of Representatives set up the Group on Environmental Measures and International Trade, which, since 1995, has subsisted as the WTO Committee on Trade and Environment.⁷⁸ The 1994 Agreement Establishing the World Trade Organization, right in its preamble's first recital, recognized that trade cooperation efforts shall allow "for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."⁷⁹ The genesis of the EU principle of equal treatment between men and women demonstrates the subject's two-faced nature. This principle was inserted into the EEC Treaty because France feared that French enterprises would suffer a competitive disadvantage if other Member States allowed women to be paid less.⁸⁰

Non-trade values came to the fore in the context of new generation FTAs, which have proudly included minimum standards on environmental protection⁸¹ and labor rights⁸² and provisions on the protection of intellectual property and investments. Not surprisingly, these values have become one of the major issues of world trade: while fundamental rights, at first glance, may not appear to be of trade relevance (and there is no global endeavor to create a global regime for these universal values), states have realized that compliance with these standards has enormous cost implications.

promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.”).

78. The Committee was set up by the Ministerial Decision on Trade and Environment adopted in Marrakesh on April 15, 1994. *Relevant WTO Provisions: Text of 1994 Decision*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/envir_e/issu5_e.htm#:~:text=The%20ministerial%20Decision%20on%20Trade,from%20the%20GATT%20EMIT%20group.

79. *Marrakesh Agreement*, *supra* note 73.

80. BOB HEPPEL, *LABOUR LAWS AND GLOBAL TRADE 200* (2005); EUROPEAN COMMISSION, *QUESTIONS AND ANSWERS: WHAT HAS THE EU DONE FOR WOMEN? 50 YEARS OF EU ACTION ON GENDER EQUALITY FOR ONE CONTINENT* (Mar. 14, 2014), http://europa.eu/rapid/press-release_MEMO-14-156_en.htm.

81. *See* Human Rights and Social and Environmental Standards in International Trade Agreements, EUR. PARL. DOC. (2009/2219(INI)) ¶15(a) (2010).

82. *See* Phillip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457 (2004).

As to environmental and labor standards, there has been a perception that higher local standards put domestic producers at a competitive disadvantage and stimulate the relocation of production plants to low-standard countries (which are, at same time, also low-wage countries). Although this may seem not to be different from a traditional regulatory competition (so-called race to the bottom) problem, these value standards have a special status: states are disinclined to lower their standards and may easily vesture their economic considerations with normative claims,⁸³ which may corroborate the designation of the low-standard country's comparative advantage as "unfair."⁸⁴

The protection of intellectual property and investments have a different economic rationale: these are considered to be, in some way, the preconditions of intensive economic intercourse and their economic logic is shaped by this perception.⁸⁵ According to the proposed conceptualization, the protection of intellectual property qualifies as a genuine non-trade value. Trade in knowledge (such as technology transfer) consists in selling useful knowledge in exchange for an appropriate exchange-value. This may occur (in fact, it does occur) even absent an appropriate level of international protection of intellectual property. There had been trade in knowledge way before the TRIPS and trade in knowledge also occurs in relation to countries, which systematically violate TRIPS. While intuition suggests that having a satisfactory level of intellectual property protection stimulates the influx of knowledge, the lack of this is not considered to be a hurdle and friction of trade, which remains free even if intellectual property is not sufficiently protected. In the same vein, there is a distinction between trade and non-trade values in international trade in capital. The influx of foreign capital, the free movement of investments, the repatriation of local profits are all trade in capital in the sense that they are closely linked to economic intercourse. While trade in capital has seen a remarkable liberalization in the last decades, it has not always been so evidently free (but subject to bans, local-partner requirements and discriminatory rules). In this dichotomy, investment protection is considered to be a normative value (the counterpart of constitutional law's property protection) that

83. See Christopher McCrudden & Anne Davies, *A Perspective on Trade and Labor Rights*, 3 J. INT'L ECON. L. 43, 50 (2000).

84. José Manuel Salazar-Xirinachs & Jorge Mario Martínez-Piva, *Trade, Labour Standards and Global Governance: A Perspective from the Americas*, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 315, 327-28 (Stefan Griller ed., 2003).

85. As regards intellectual property, see CARLOS M. CORREA, INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 23-38 (2000).

becomes relevant in the context of trade in capital but is not connected to a trade hurdle or friction. Trade in capital remains free even if investments are not sufficiently protected. In fact, the movement of capital as a channel of trade does not necessarily presuppose rules on investment protection and the history of international law is replete with disputes involving investments that were not backed by any international agreement securing the property rights of investors.⁸⁶

All non-trade values have three things in common: (1) they have genuine normative value in and of themselves; (2) they are made relevant by their links to and impact on trade; and (3) their international protection is necessary to further the development of international economic intercourse.

The notion of linking trade and ostensibly non-trade values leads us back to old questions of social theory. Do value-standards shape trade policy, or do trade interests determine which values are to be protected, and how? At first glance, these may appear to be purely value-driven, suggesting that trade is not only about economic interests. However, a closer look reveals that they not only impact on trade and economic intercourse but are profoundly influenced by such economic considerations. It is no exaggeration to see this ‘chicken or egg’ dilemma as reflecting a more general question of social theory: does economy determine culture (Karl Marx),⁸⁷ or may culture exert an independent causal effect on economy (Max Weber)?⁸⁸ And indeed, the antagonism between international trade policy and value standards is none an easier issue.

Nonetheless, it is likely more reasonable to hypothesize that the emergence and development of non-trade values is based on a complex dialectic interaction between economic interests and normative non-trade values, whose structural interdependence has given rise to a remarkable evolution in international trade. Although with varying focus and emphasis, this interaction between normative values and pure economic interests can be perceived in relation to all non-trade values.⁸⁹

86. See SHAW, *supra* note 10, at 840–41.

87. FRIEDRICH ENGELS, SOCIALISM: UTOPIAN AND SCIENTIFIC 54 (Andrew Moore ed., 2006) (“[T]he final causes of all social changes and political revolutions are to be sought, not in men’s brains, not in man’s insight into internal truth and justice . . . but in the economics of each particular epoch.”). See also KARL MARX & FRIEDRICH ENGELS, THE GERMAN IDEOLOGY (C.J. Arthur ed., 2004); KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (1888).

88. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1958).

89. Csongor István Nagy, *Trade Interests and Extraterritorial Value Considerations in New-Generation Free Trade Agreements: The Psychology of Redirection*, 18 J. INT’L BUS. & L. 128 (2020).

International investment protection, which was initially motivated by the normative purpose of internationalizing certain standards of economic constitutionalism, and has gradually become a precondition of the large-scale influx of capital, resulted in a dispute settlement pattern that is often accused of stripping national courts, including national constitutional courts, of their legitimate powers, and vesting ad-hoc and intransparent bodies with the competence to adjudicate genuine public law disputes.⁹⁰ It is submitted that it would be more reasonable, both in terms of doctrinal foundation and legitimacy, to treat international investment protection as one of the non-trade values that frame international economic intercourse. As noted above, investment treaties are not individual transactions but rule-setting treaties that create a framework for future individual transactions (e.g. investments) and are based on a normative value (minimum standards of economic constitutionalism).

V. CONCLUSIONS

As the foregoing outlines, trade is not merely about trade, and calls for addressing various seemingly non-trade issues. The latter are intrinsically linked to trade and trade interests and, at the same time, have a normative value. While the debate on non-trade values has been dialectic, that is, it has been the result of an interaction between selfish economic interests and normative considerations, their complexity is shaped by these two factors equally. In this Article, I have argued that it is time for international economic law to address these sporadically emerging non-trade values in a holistic way. The economic implications of these non-trade values differ considerably and this certainly impacts on the way normative considerations and economic interests interact. While environmental and labor standards are made relevant by the regulatory competition perceived in developed countries, the protection of intellectual property rights and investments has a different logic: these are related to the economic and legal preconditions of international economic relations. Still, this does not falsify the tenet that international trade has reached a level of development where non-trade values play a pivotal role.

The current debate on investment protection should be conceived in this context. It is submitted that the original purpose of investment treaties was not to provide any extra-guarantee or privileged status to

90. As to the investment court system as a proposed alternative of investment arbitration, see Zoltán Víg & Gábor Hajdu, *Investment Protection under CETA: a New Paradigm?*, in INVESTMENT ARBITRATION AND NATIONAL INTEREST 209 (Csongor István Nagy ed., 2018).

foreign investors but to secure, by international law, the requirements of economic constitutionalism in this context. It is high time to reduce the minimum requirements of investment protection to a multilateral treaty, in the same way as the TRIPS did with intellectual property. In 1959, when the first investment treaty was concluded, this was very probably an unrealistic proposition, given the resistance of developing countries to accept the principle of full compensation. Nonetheless, the world has fundamentally changed since then, due to the frenetic spread of BITs and treaties with investment chapters. Hence, the adoption of a multilateral (or plurilateral) treaty embedding the minimum standards would accomplish these goals while being a less dramatic—and thus more realistic—departure from the status quo.