BEYOND STATE FREEDOM AND INTERNATIONAL DISCIPLINE? QUESTIONING THE PLACE OF INTERNATIONAL INVESTMENT LAW IN CONFLICT AND POST-CONFLICT SETTINGS

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ABSTRACT

The small but growing body of literature on international investment law in (post-)conflict contexts has focused almost exclusively on identifying the doctrinal bases for investors' claims and state defenses. Underlying it are often celebratory narratives about the relationship between investment (law), development, and peace. This Article draws on—but departs from—these works to explore the dominant themes, assumptions, and argumentative patterns that have informed practitioners' and scholars' engagement with the investment law regime. It does so by juxtaposing what may be characterized as "state freedom" and "international discipline" arguments to examine how they can be invoked to defend different ways by which the developmental objective of investment law is to be achieved, how investment protection standards should respond to state weakness, and whether states should be condemned or absolved for failing to adhere to these standards. In doing so, it explores the promise and limits of legalist interventions within the confines of the investor-state dispute settlement (ISDS) system and invites practitioners and scholars of investment law to consider the critical implications of the various deformalizing techniques that have been proposed to reform the system, including the "contextualization" and "humanization" of investment standards, as well as the "loss of sovereignty" critique that is routinely invoked against it.

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I. Introduction

Recent claims[1] before investment arbitral tribunals following the Arab Spring, Syrian Civil War, and Russia's annexation of Crimea have brought into the spotlight a large number of doctrinal issues that may arise in investment arbitration involving states embroiled in or emerging from conflicts, such as the applicability of bilateral investment treaties (BITs) in annexed/occupied territories,[2] state succession,[3] and the potential interpretative difficulties in the application of investment protection standards to conflict situations. With a few exceptions, much of the growing body of literature on investment law and conflicts has focused exclusively on identifying the potential bases for investors' claims as well as state defenses, both at a general level[4] and with reference to particular conflicts or investment treaties.[5] While providing interesting insights, the broader impact of these "client-oriented" works will likely remain limited, given the paucity of arbitral awards relating to conflicts,[6] lack of interpretative concord, divergent treaty formulations, factual specificity of each conflict, and confidentiality of the recent awards in which many of these issues have been examined by the tribunals.

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1. *See, e.g.*, Odebrecht Eng'g & Constr. Ltd. v. State of Libya, Case No. 20892/MCP/DDA, Award (ICC Int'l Ct. Arb. 2018) (confidential and not published); Gamesa Eólica, SLU v. Syrian Arab Republic, Case No. 2012-11, Award (Perm. Ct. Arb. 2014); Lundin Tunisia BV v. République Tunisienne, ICSID Case No. ARB/12/30, Sentence (Dec. 22, 2015); Veolia Propreté v. Arab Republic of Egypt, ICSID Case No. ARB/12/15, Notice of Arbitration (June 25, 2012); NJSC Naftogaz of Ukraine v. Russian Federation, Case No. 2017-16 (Perm. Ct. Arb.).

2. *See, e.g.*, Odysseas G. Repousis, *Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo–Ukrainian Territorial Conflict*, 32 Arb. Int'l 459 (2016); Richard Happ & Sebastian Wuschka, *Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories*, 33 J. Int'l Arb. 245 (2016).

3. *See, e.g,* Patrick Dumberry, *An Overview of State Succession Issues Arising as a Result of an Armed Conflict*, *in* European Yearbook of International Economic Law: International Investment Law and the Law of Armed Conflict 93 (Katia Fach Gomez et al. eds., 2019); *See generally* Odysseas G. Repousis & James Fry, *Armed Conflict and State Succession in Investor-State Arbitration*, 22 Colum. J. Eur. L. 421 (2016).

4. *See, e.g.*, European Yearbook of International Economic Law: International Investment Law and the Law of Armed Conflict (Katia Fach Gomez et al. eds., 2019) (illustrating the general approach); 15 Nijhoff Int'l Investment L. Series, Investments in Conflict Zones: The Role of International Investment Law in Armed Conflicts, Disputed Territories, and 'Frozen' Conflicts (Tobias Ackermann & Sebastian Wuschka eds., 2020).

5. *See, e.g.*, Ferdinando Franceschelli, *Protecting Italian Investments in Libya's Changing Environment*, 23 Italian Y.B. Int'l L. 147 (2013); Josh Vaughan, *Arbitration in the Aftermath of the Arab Spring: From Uprisings to Awards*, 28 Ohio State J. Disp. Resol. 491 (2013).

6. Viacheslav Liubashenko, *Treatment of Foreign Investments During Armed Conflicts: The Regimes*, 24 J. Conflict & Sec. L. 145, 146 (2019).

With these limitations in mind, this Article draws on—but departs from—these doctrinal works to explore the broader conceptual issues that have arisen, or will likely arise, in investment arbitration in (post-) conflict contexts. This Article argues that thinking about investment arbitration and conflicts in conceptual terms remains one of the most productive ways of engaging with the investment law regime,[7] not only because it allows one to identify the underlying tensions that animate doctrinal disagreements, but also provides a fruitful avenue through which one can interrogate the regime's self-justifications, scrutinize investment lawyers' role in global economic governance, and explore the potential and limits of the regime in advancing values that one may find desirable.[8]

Part II of this Article examines the dominant narratives that connect investment (law) and peace, showing how the "peace-making" potential of investment arbitration is premised on its presupposed ability to "depoliticize" investment disputes through legalization, and on broader assumptions about the social benefits of foreign investment promotion and economic integration, especially in post-conflict contexts. Part III begins to question these celebratory narratives by showing how the peace-making potential of foreign investment may be limited by its nature and relationship with a host state's domestic peace, and how investor-state dispute settlement (ISDS) may unduly constrain a host state's ability to adopt post-conflict measures in addressing the "root causes" of conflicts.

Part IV scrutinizes the "loss of sovereignty" critique that is often invoked in international investment law scholarship to defend a host state's regulatory freedom against the absolutist position of investor protection. It highlights the promise and limits of such critique, specifically how its usefulness may be weakened in (post-)conflict situations where the host state is unwilling or unable to act in the interests of its population. Drawing from the above conclusions, Parts V–VI explore the tensions between "state freedom" and "international discipline" through an examination of the doctrinal disagreements over the interpretation of "war clauses" and state defenses in arguments made in investment arbitration.

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7. Other productive ways of engaging with the regime beyond doctrine are historical (*see infra* notes 9, 13), sociological and political-economic analyses. *See, e.g.*, Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 1 (2015); JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME (2017).

8. *See generally* Martti Koskenniemi, *What Is Critical Research in International Law? Celebrating Structuralism*, 29 LEIDEN J. INT'L L. 727 (2016).

Having explored the limits of legalism in addressing the complexities of conflict situations, Part VII examines the gradual "turn to equity" and de-formalization in investment legal scholarship in response to such complexities, in which scholars increasingly call for the "contextualization" and "humanization" of investment protection. A number of critiques against such a "turn to equity" will be outlined, particularly how it undermines the central premise of the "peace-making" potential of investment arbitration as providing formal rules and standards defined *ex ante* that could be applied with a high level of certainty and transparency.

Finally, Part VIII demonstrates that legalist interventions within the confines of ISDS remain limited in their ability to fully appreciate the deeply political character of investment claims adjudication involving (post-)conflict host states. Drawing on the idea of "local ownership" in peacebuilding literature, it argues that the "loss of sovereignty" critique must be understood *not* as a defense of state freedom, *but* as a defense of the right of the people to participate meaningfully in discussions about policies that impact their interests. This implies that any adjudicative exercise that subsumes the population's interests under a technical-rational process of "balancing" cannot address the normative concern of the "loss of sovereignty" critique, and is fundamentally incompatible with peacebuilding's goal of societal transformation in post-conflict host states.

II. Narratives of Investment and Peace

A. *The Contestable Histories of International Investment Law*

The international investment law regime's orientation and self-justifications are shaped by dominant narratives and assumptions about the social functions of investment, its relationship with the broader community, and the place of law in regulating that relationship. The construction and re-telling of a canonical disciplinary history not only provide a source of inspiration for professionals working in the field, but also propel, shape, and provide justifications for the various diagnoses of the regime's deficiencies and the forms of interventions that purport to address them.[9] One example is the prevailing idea that ISDS's unique achievement lies in its ability to depoliticize investment disputes by making them subject to a pre-defined adjudicative process that

9. For one recent example of the nascent 'turn to history' in the field, see Stephan W. Schill, Christian J. Tams & Rainer Hofmann, International Investment Law and History 4–5 (2018).

applies "objective, previously agreed standards."[10] This, as Moshe Hirsch observes, explains the reluctance among some arbitral tribunals to incorporating human rights norms in their decision-making, as these norms are perceived to be more ideologically controversial.[11] Those who see the central achievement of the system as its ability to maintain the presupposed boundaries between law and politics, then, would only find palatable proposals to incorporate human rights that neutralize the contestability of such rights, and only to the extent that such incorporation would maintain these boundaries.[12]

Yet, as recent critical histories of the discipline have amply shown, there are many ways by which the origin(s) of the field could be narrated.[13] The work of Third World Approaches to International Law (TWAIL) scholar James Gathii, for example, shows how post-colonial rules of international economic governance continue to reflect, entrench, and legitimize colonial patterns of exploitation and unequal economic relations, whose purpose is to ensure continued access to the natural resources in former colonies that was once secured through territorial conquests.[14] Scholars who understand the origins of international investment law in a similar way, then, are more likely to be suspicious of the presupposed law/politics divide,[15] to challenge the structure of power put in place by the system,[16] and to call for the system's increased responsiveness to non-investment considerations.[17]

What the above discussion illustrates is not that one narrative is necessarily more objectively correct than another, but rather the

10. Ursula Kriebaum, *Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes*, 33 ICSID REV. 14, 15 (2018). For one such historical narrative, see Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157 (2005).

11. *See* Moshe Hirsch, *Human Rights & Investment Tribunals Jurisprudence Along the Private/Public Divide*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE 5, 15–16 (Todd Weiler & Freya Baetens eds., Martinus Nijhoff Publishers, 2011).

12. DARIA DAVITTI, INVESTMENT AND HUMAN RIGHTS IN ARMED CONFLICT: CHARTING AN ELUSIVE INTERSECTION 147 (2019).

13. *See, e.g.*, KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL (2013); MUTHUCUMARASWAMY SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2015); Anne-Charlotte Martineau, *A Forgotten Chapter in the History of International Commercial Arbitration: The Slave Trade's Dispute Settlement System*, 31 LEIDEN J. INT'L L. 219 (2018).

14. *See* James T. Gathii, *War's Legacy in International Investment Law*, 11 INT'L COMMUNITY L. REV. 353, 354, 382–83 (2009); *see also* JAMES THUO GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW (2010).

15. *See* SORNARAJAH, *supra* note 13, at 27.

16. *See* Martineau, *supra* note 13, at 240–41.

17. *See* MILES, *supra* note 13, at 310–11.

importance of acknowledging the constructive nature and contestability of these histories, and thus the prism through which one examines the operation of international investment law and evaluates its successes and failures.[18] By narrating a story of the field, the narrator highlights the features that they attribute to the system's success or failure, which then provide the basis on which they could critique or defend a particular mode of "doing" investment law. The central lesson to be drawn here is that the tensions that underlie international investment law as a field do not reside in doctrinal disagreements alone, but extend to disagreements over the field's origins, *telos,* and its place in the world. In a similar way, this is the crux of Anthea Roberts' invitation to practitioners in the field to think about the development of international investment law as being animated by a "clash of paradigms"[19]—with its anxieties, tensions, and disruptions—which is different from a linear story of progressive development that some may choose to tell.

Indeed, as will be elaborated further below, it is far more productive to consider the disagreements over doctrinal interpretations as disagreements in a different register—such as ones over the *telos* of investment law, the role of the state, and the relationship between investment and conflict—than to fall on the interminable debates over source doctrines. With these in mind, productive scholarly work must begin with an articulation of how these narratives have made particular assumptions appear natural and unquestionable, and how these assumptions then inform the practice of professionals in their engagement with doctrines, concepts, and the field as a whole.

B. *Investment, Law, and Peace: "Dethronement of the State"?*

Given international law's preoccupation with peace, it is not surprising that international investment lawyers have provided various accounts of how the field contributes to peace.

The significance of modern ISDS in contributing to the peaceful settlement of investment disputes lies, as Stephen M. Schwebel puts it, in how it "reflects the dethronement of the state as the sole subject of international law."[20] This contrasts with historical instances of "gunboat diplomacy" and the practice of diplomatic protection—where in the

18. Andreas Kulick, *Narrating Narratives of International Investment Law: History and Epistemic Forces*, *in* INTERNATIONAL INVESTMENT LAW AND HISTORY 41, 68–69 (2018).

19. *See generally* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013).

20. Stephen M. Schwebel, *Introduction*, *in* ARBITRATING FOR PEACE: HOW ARBITRATION MADE A DIFFERENCE 1, 6 (2016).

former, economically and militarily powerful Western states sought to protect their investments and enforce debt contracts overseas through the threat of or actual military interventions;[21] and in the latter, when a state, subject to its discretion, asserts a claim against another state on behalf of its nationals who have been mistreated or suffered injury there.

This "dethronement of the state" narrative claims that ISDS contributes to peace by minimizing or removing sovereign caprice, as well as redressing the inherent power imbalances between states of differing levels of development and military might. Broadly speaking, ISDS is said to remove the wide discretionary powers the home states have in deciding which investors' claims to pursue and how to pursue them,[22] which, according to some, suffers from unfairness, inequality of access, and ineffectiveness, as states may base their decision on domestic or external political pressures instead of legal criteria or merits of the claims.[23] Scholars argue that removing the requirement that the home states make that decision would help diffuse inter-state tensions, avert diplomatic crises, or even prevent armed conflicts that might otherwise arise.[24] As the arbitral tribunal in *Banro v. Democratic Republic of the Congo*[25] puts it, the mechanisms introduced by the ICSID Convention[26] place "the private investor face to face with the host State [and] *avoid political confrontation* between the host State and the State of which the investor is a national."[27] Viewed in this light, states' prospective consent to ISDS under investment treaties can be understood as a strong pre-commitment to the peaceful settlement of investment disputes outside the perilous diplomatic arena.[28]

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21. *See, e.g.*, O. Thomas Johnson Jr. & Jonathan Gimblett, *From Gunboats to BITs: The Evolution of Modern International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010–2011 649, 652 (2012).

22. Jason Yackee, *Investor-State Dispute Settlement at the Dawn of International Investment Law: France, Mauritania, and the Nationalization of the MIFERMA Iron Ore Operations*, 59 AM. J. LEGAL HIST. 71, 72 (2019).

23. Kriebaum, *supra* note 10, at 15.

24. *See* Ole Kristian Fauchald & Daniel Behn, *World Peace and International Investment: The Role of Investment Treaties and Arbitration*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND PEACE 182, 182 (Cecilia M. Bailliet ed., Edward Elgar Publishing 2019).

25. Banro Am. Res., Inc. & Société Aurifère du Kivu et du Maniema S.A.R.L. v. Dem. Rep. Congo, ICSID Case No. ARB/98/7, Award (Sept. 1, 2000).

26. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966) [hereinafter ICSID Convention].

27. *Banro v. DRC* at ¶ 15 (emphasis added).

28. *See* Christoph Schreuer & Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 1079, 1080–81 (2011).

The dethronement of the state is further achieved through legalization. As O. Thomas Johnson Jr. and Jonathan Gimblett explain, in the era of "gunboat diplomacy," the objective of the threat or use of force by powerful home states was often to coerce less powerful countries into the adjudication of claims under standards that the powerful states deemed acceptable.[29] In the specific context of post-conflict dispute settlement, Yarik Kryvoi has drawn comparisons between historical instances of international claims commissions and modern investment treaty arbitration to illustrate the shift from decision-making based on fairness and equity to one that is based on a set of rules and standards defined ex ante, which has enabled adjudication of investment claims to be subject to the "international rule of law."[30] Heather L. Bray observes a parallel movement from judicial nationalism in the claims commissions, where decision-makers acted more like political advocates of the disputing states that appointed them, to judicial independence in the modern investment treaty arbitration system, where nationality restrictions rules secure the impartiality and independence of decision-makers.[31] In other words, legalization is understood to be conducive to peace by providing a "civilized" framework for apolitical dispute resolution, one that is beyond the unilateral influence of any one state, and one that does not simply reproduce the unequal power relations between the disputing parties.[32]

As will be argued in Part VII below, if one is to take seriously the suggestion that the peace-making foundation of ISDS rests on the existence of formal, clearly defined rules with some level of resistance to politicization, then the increasing turn to equitable decision-making in investment arbitration generally, and in post-conflict dispute settlement more specifically, marks a departure from the premises underlying ISDS.

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29. Johnson Jr. & Gimblett, *supra* note 21, at 653.

30. For example, Alabama Claims Commission set up after the American Civil War and the Venezuela Mixed Claims Commission set up after the Venezuelan civil war of 1898–1902. Yarik Kryvoi, *The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions*, 33 ICSID REV. 743, 761–64 (2018).

31. Heather L. Bray, *Understanding Change: Evolution from International Claims Commissions to Investment Treaty Arbitration*, *in* INTERNATIONAL INVESTMENT LAW AND HISTORY 102, 122–30 (2018); *see also* Kryvoi, *supra* note 30, at 753–58.

32. Karl-Heinz Bockstiegel, *Arbitration for Peace—The Iran-United States Claims Tribunal*, *in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 37 (Andrea Menaker ed., 2017).

C. *From Investor Protection to Liberal Peace*

The idea that the influence of the state should be minimized has been particularly attractive to some scholars in the context of post-conflict dispute settlement. Bray, for example, situates international investment law within the "post-Westphalian turn" in international law after the Nuremberg and Tokyo trials after the Second World War. This period was marked by the gradual ascendance of non-state actors as the subjects of international law, which are now capable of assuming individual criminal responsibility as well as making individual reparation claims at the international level.[33] She argues that while international humanitarian law (IHL), the body of international rules applicable during armed conflicts, may appear to be the obvious place for victims to seek redress after conflicts, it lacks the necessary procedural mechanisms for adjudication of individual complaints.[34] International investment law on the other hand, provides such redress to foreign investors as one particular class of victims in armed conflicts.[35]

The idea that investors' independently exercisable rights to seek legal remedy under investment treaties should be protected in post-conflict situations is entangled, even if indirectly, with a number of mutually dependent arguments about the effects of investment treaties, ISDS, and investment generally on the host states—and thus arguments about their peace-making potential. Arguments of this kind often begin with the observation that the inflow of foreign direct investment (FDI) to a post-conflict host state is essential for the state's economic reconstruction and development, for it provides the host state with financial resources and technological capabilities for building infrastructure, as well as providing employment and other economic opportunities for its local population.[36] Direct connection between FDI inflow and peace has therefore been drawn on the basis that it provides a form of a "peace dividend" which "instill[s] the people with a stronger sense of hope and provid[es] incentives to consolidate peace."[37] Thus, it has

33. Heather L. Bray, *SOI—Save Our Investments! International Investment Law and International Humanitarian Law*, 14 J. WORLD INV. & TRADE 578, 581 (2013).

34. *Id.* at 579–81.

35. *Id.* at 579.

36. *See, e.g.*, Rahim Moloo & Alex Khachaturian, *Foreign Investment in a Post-Conflict Environment*, 10 J. WORLD INV. & TRADE 341, 341 (2009); Merryl Lawry-White, *International Investment Arbitration in a* Jus Post Bellum *Framework*, 16 J. WORLD INV. & TRADE 633, 634 (2015); *see also* INT'L LABOUR OFFICE, SOCIO-ECONOMIC REINTEGRATION OF EX-COMBATANTS: GUIDELINES (2010).

37. Nicholas Turner, Obijiofor Aginam & Vesselin Popovski, *Post-Conflict Countries and Foreign Investment*, 8 POL'Y BRIEF 1, 2 (2008); *see also* Moloo & Khachaturian, *supra* note 36, at 347.

been argued that, in order to promote FDI inflow, investment treaties are necessary for establishing a stable, predictable, and transparent framework according protections to investors and placing limitations on the host states' ability to interfere with foreign investments.[38]

Appeals to the idea of rule of law also pervade discourse on international investment law and are intimately linked to broader arguments made regarding the relationship between ISDS and peace. The dominant account of the rule of law emphasizes the depoliticizing effects of investment treaty arbitration and its ability to discipline "unruly" states by reference to some autonomous international standards[39]—which, as some have observed, in effect prioritizes the international rule of law (for private investors) over the host states' domestic rule of law.[40] As Velimir Živković points out, the conflation of the rule of law concept with compliance with obligations under international investment agreements can be seen as a "self-legitimising narrative" of the investment protection regime.[41] A more sophisticated account of the rule of law, he argues, must acknowledge the potential frictions between the domestic rule of law and the international rule of law, and explore how arbitrators may develop greater sensitivity to domestic rule of law concerns.[42]

Justifications for ISDS's contribution to peace in its rule of law formulation justifies the prioritization of international rules of the regime by invoking (explicitly or implicitly) what is known as the "good governance thesis," which, in broad terms, suggests that the investment law regime benefits host states by incentivizing them to embrace values such as transparency, consistency, and due process in their governance.[43] When read in conjunction with the above arguments that promoting FDI inflow is conducive to peace, some argue that host states could, by adhering to the demands of the regime, send a signal to investors that they are willing and capable of upholding the rule of

38. *See* Fauchald & Behn, *supra* note 24, at 198.

39. ADC Affiliate Ltd. v. Republic of Hung., ICSID Case No. ARB/03/16, Award, ¶ 423 (Oct. 2, 2006).

40. Ntina Tzouvala, *The Academic Debate About Mega-Regionals and International Lawyers: Legalism as Critique?*, 6 LONDON REV. INT'L LAW 189, 195–96 (2018).

41. Velimir Živković, *Pursuing and Reimagining the International Rule of Law through International Investment Law*, 12 HAGUE J. ON RULE L. 1, 8 (2020).

42. *Id.* at 21.

43. Jure Zrilič, *International Investment Law in the Context of* Jus Post Bellum*: Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace?*, 16 J. WORLD INV. & TRADE 604, 611 (2015).

law.[44] As Balakrishnan Rajagopal has observed, rule of law has sometimes been invoked uncritically in the post-conflict state-building literature as a panacea that would spur economic development, protect against human rights abuses, and guarantee against re-emergence of conflicts.[45] Given the idea that certain norms can be embedded in or internalized by the host states through their engagement with the regime,[46] one can envisage arguments being made that investment treaty arbitration diminishes the chances of conflict by addressing the structural or systemic causes of conflicts. For example, Ole Fauchald and Daniel Behn have argued that investment treaty arbitration provides a platform otherwise unavailable where corruption, despotism, and other endemic social ills in the host states could be divulged and challenged.[47]

Finally, the connections drawn between investment and peace must be understood against the background of what may be called the "liberal peace" thesis, which, in one of its simpler forms, suggests that increased economic interdependence between states would reduce the chances of conflicts.[48] For example, Stephan Schill argues that the multilateral ordering of investment relations and the emergence of uniform standards of treatment for foreign investors stabilize international relations by limiting states' ability to adopt discriminatory or isolationist practices, as well as ensuring free competition between states.[49] Others who subscribe to a narrower conception of the liberal peace thesis, which posits that liberal democratic states are less likely to go to war, may still be persuaded by arguments that investment arbitration promotes peace on the basis that the promoting good governance function of the regime would "strengthen liberal democracy within [host States]."[50]

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44. Fauchald & Behn, *supra* note 24, at 213; Christopher Schreuer, *War and Peace in International Investment Law*, 1 TRANSN'L DISP. MGMT. 1, 4 (2018).

45. Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1347–48 (2008).

46. Lawry-White, *supra* note 36, at 638.

47. Fauchald & Behn, *supra* note 24, at 213.

48. JURE ZRILIČ, THE PROTECTION OF FOREIGN INVESTMENT IN TIMES OF ARMED CONFLICT 237–38 (2019).

49. STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 117 (2010); *see also* Michail Risvas, *Non-discrimination and the Protection of Foreign Investments in the Context of an Armed Conflict*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT 199, 207–08 (Katia Fach Gomez et al. eds., 2019).

50. KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 113–14, 199 (2010) (quoted in MAVLUDA SATTOROVA, THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE 22 (2018)).

III. Uneasy Relationship Between Investment (Law) and Peace

A common thread that unites these divergent justifications put forward for the peace-making potential of FDI and the international investment law regime, as Gus Van Harten astutely points out, is that wider economic integration is portrayed as harmonious with, if not directly conducive to, domestic peace.[51] The congruence of the interest of foreign investors and that of the host state (and its population) is seen most clearly in the economic reforms instituted by the U.S.-led Coalition Provisional Authority (CPA) after the U.S. invasion of Iraq in 2003, specifically Order 39 on *Foreign Investment*,[52] which replaced all previously existing foreign investment law under the Ba'athist Government.[53] It states:

> This Order promotes and safeguards the *general welfare and interests of the Iraqi people* by promoting foreign investment through the protection of the rights and property of foreign investors in Iraq and the regulation through transparent processes of matters relating to foreign investments in Iraq . . .[54]

The connections drawn between the investment law regime and peace through recourse to the liberal peace and good governance theses thus allow one to make the argument, quite convincing on its face, that adherence to the regime would help address the social, economic, and structural root causes of conflicts.

A. *Locating the Place of Investments in Peace and Conflict*

The first objection to the celebratory narratives connecting investment (arbitration) and peace is that many foreign investors find conflict zones uniquely attractive despite higher security risks and instability due to factors such as lower costs, potential for higher rates

51. Gus Van Harten, *Guatemala's Peace Accords in a Free Trade Area of the Americas*, 3 Yale Hum. Rts. & Dev. L.J. 113, 114 (2000).

52. Foreign Investment, Coalition Provisional Authority Order No. 39 (Sept. 19, 2003) [hereinafter CPA Order No. 39].

53. For the discussion of the economic reforms implemented by the Coalition in the context of its other reforms, see Gregory H. Fox, *The Occupation of Iraq*, 36 Geo. J. Int'l L. 195 (2005). For a critique of the reforms, see Bassam Yousif, *Coalition Economic Policies in Iraq: Motivations and Outcomes*, 27 Third World Q. 491 (2006).

54. CPA Order No. 39, *supra* note 52, § 2 (emphasis added).

of return for being an early entrant to the market,[55] and the ability to leverage fragile domestic legal institutions or connections to corrupt or kleptocratic regimes to secure favorable deals unavailable elsewhere.[56] One example is the recent case of *Tethyan Copper v. Pakistan*,[57] which concerns an investment to extract minerals in the Reko Diq Mine in the province of Balochistan in Pakistan, an area known for the presence of Balochi separatist insurgents, a fact that both parties in the case acknowledged. One question that arose in the Award is the relevance of security risks to the valuation of the claimant's investment.[58] Another example is *Olin v. Libya*,[59] where the tribunal found that an Expropriation Order issued by Libya, even when later revoked by a Libyan court, still amounted to expropriation on the basis that it had caused delays in the launch of the claimant's products, which had deprived the claimant's expected first-mover advantage as a local private producer.[60]

Beyond the motivations of the foreign investors, questions can also be raised on whether the promotion of foreign investment in (post-) conflict contexts, regardless of its nature, is always conducive to peace or even beneficial to the host states.[61] First, some have observed that FDI inflow in (post-)conflict zones is often concentrated in extractive industries,[62] one notable example being blood diamonds in Angola and Sierra Leone.[63] Second, it has been shown that investments of this kind create limited linkages with the domestic economy as the majority

55. *See, e.g.*, Matthew T. Simpson, *Mitigating Volatility: Protecting Chinese Investment in Post-Conflict Regions*, 9 J. WORLD INV. & TRADE 317, 317 (2008) (describing the attractiveness of the African market to China).

56. *See, e.g.*, Ida Bastiaens, The Politics of Foreign Direct Investment in Authoritarian Regimes (2016) (Ph.D. thesis, Univ. of Pittsburgh).

57. Tethyan Copper Co. Pty. v. Islamic Republic of Pak., ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability (Nov. 10, 2017); Tethyan Copper Co. Pty. v. Islamic Republic of Pak., ICSID Case No. ARB/21/1, Award (July 12, 2019) [hereinafter *Tethyan Copper (Award)*].

58. Id. at 470 (especially section VII(D)).

59. Olin Holdings Ltd. v. Libya, Case No. 2035/MCP, Final Award (ICC Int'l Ct. Arb. 2018).

60. *Id.* ¶¶ 164–67.

61. Eric De Brabandere, *Jus Post Bellum and Foreign Direct Investment: Mapping the Debate*, 16 J. WORLD INV. & TRADE 590, 591 (2015) (Neth.).

62. *See generally* DANIËLLA DAM-DE JONG, INTERNATIONAL LAW AND GOVERNANCE OF NATURAL RESOURCES IN CONFLICT AND POST-CONFLICT SITUATIONS 58–104 (2015); U.N. Interagency Framework for Preventive Action Rep. on Extractive Industries and Conflict (2012). For one specific example of Iraq, see Irene Costantini, *Statebuilding and Foreign Direct Investment: The Case of Post-2003 Iraq*, 20 INT'L PEACEKEEPING 263 (2013).

63. Brian Ganson & Achim Wennmann, *The Corporation and Violent Conflict: Perspectives, Policy Responses and Future Trends*, *in* HANDBOOK OF THE INTERNATIONAL POLITICAL ECONOMY OF THE CORPORATION 295, 300 (Andreas Nölke & Christian May eds., 2018).

of the profits are often repatriated to the investors' home states.[64] Third, even if these investments create economic benefits for the (post-) conflict host states, there is no guarantee that such benefits will be fairly distributed, as they are prone to elite capture.[65] Fourth, the concept of "resource curse" illustrates how host states' dependence on natural resource exports may lead to poor domestic governance, a potential driver of unrest and conflict.[66] Finally, investment in these industries may also indirectly trigger or fuel conflicts over control of or access to resource-rich areas, especially in deeply divided societies such as Afghanistan.[67]

B. *Addressing the "Root Causes" of Conflicts under the Shadow of ISDS*

The purpose of the above discussion is to illustrate the potential disconnect between the broad promise of foreign investment promotion in ensuring peace and the concrete impact it has on domestic peace, especially in complex (post-)conflict contexts.[68] The implication is that, first, any statement drawing connections between investment (law) and peace must be subject to qualifications; and second, even if one is to accept the general peace-making nature of the regime as a whole, it could not be sufficient justification for its outright endorsement in these contexts. This is what underlies a second, and more sustained critique of the system in these contexts, which is how ISDS in post-conflict situations may circumscribe host states' ability to address the "root causes" of conflicts.

In his study on the impact of foreign investment protection on the transitional justice initiative in Colombia, Marco Velásquez-Ruiz explores the tensions between transitional justice and the protection of investors' interests after conflicts.[69] For him, transitional justice is a

64. Liesbeth Colen & Andrea Guariso, *What Type of Foreign Direct Investment is Attracted by Bilateral Investment Treaties?*, *in* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW OF ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 138, 156 (Olivier de Schutter et al. eds., 2013).

65. Olivier de Schutter, *The Host State: Improving the Monitoring of International Investment Agreements at the National Level*, *in* FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW OF ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS 157, 158 (Olivier de Schutter et al. eds., 2013).

66. Turner, Aginam & Popovski, *supra* note 37, at 3.

67. DAVITTI, *supra* note 12, at 6–7.

68. *See generally*, FOREIGN DIRECT INVESTMENT IN POST CONFLICT COUNTRIES: OPPORTUNITIES AND CHALLENGES (Virtus C. Igbokwe et al. eds., 2010).

69. Marco Alberto Velásquez-Ruiz, The Colliding Vernaculars of Foreign Investment Protection and Transitional Justice in Colombia: A Challenge for the Law in a Global Context

forward-looking project premised on an acknowledgement of the defects of past social relations, whose purpose is to confront and transform such relations. By contrast, investment protection under the regime is always a retrospective project that seeks to protect transactions, assurances, and expectations that arose from such relations (on which the investors rely).[70] In other words, if investment protection presumptively favors stability and continuity of historical relations, durable peace is only achievable through societal transformation that marks a destabilization of and discontinuity from such relations. This problem of incommensurability is what underlies Jonathan Bonnitcha's concern that newly-democratic countries transitioning from authoritarian rule may be constrained by the investment law regime in passing legislation that rectifies the wrongs caused by the previous regime and nullifies previous transactions not conducted at arm's length.[71]

The standard doctrinal response of investment law to the incommensurability problem is to establish a connection between the present illegitimacy of a particular transaction to some past illegal or censurable acts on part of the investor. Take the example of Colombia's land restitution law, *Ley de Víctimas y Restitución de Tierras*.[72] Passed in 2011, the law requires that land rights obtained by corporations during the conflict through dealings with paramilitaries and armed opposition groups be turned over in order to allow victims who were forcibly displaced from their lands to return to their property—effects of which may constitute direct expropriation of property.[73] In her analysis, Tara Van Ho explains how the land acquisitions may possibly be invalidated by reason of illegality or corruption under international investment law, even though she remains skeptical of their effectiveness due to evidentiary issues.[74] The most interesting aspect of her analysis, however, is that some of these land acquisitions were apparently legal, at least according to the assurances made by the previous government or its officers.[75] After

(May 27, 2016) (Ph.D. dissertation, Osgoode Hall Law School of York University) (Osgoode Digital Commons).

70. *Id.* at 160.

71. Jonathan Bonnitcha, *Investment Treaties and Transition from Authoritarian Rule*, 15 J. WORLD INV. & TRADE 965, 985 (2014).

72. L. 1448/11, junio 10, 2011, DIARIO OFICIAL [D.O.] (Colom.).

73. *See* Tara L. Van Ho, *Is it Already Too Late for Colombia's Land Restitution Process?: The Impact of International Investment Law on Transitional Justice Initiatives*, 5 INT'L HUM. RTS. L. REV. 60, 61–62, 80 (2016).

74. *See id.* at 76–80.

75. *Id.* at 77–78.

considering the arbitral decisions in *Metalclad*[76] and *Kardassopoulos*,[77] she finds problematic the conclusion that investors are able to rely on government assurances even if they are legally inaccurate.[78] She therefore suggests that arbitral tribunals could, *inter alia*, assess whether an investor could legitimately rely on such assurances, taking into account the timing of the investment and the history of forced displacement in the country.[79] As will be discussed further in Part VII below, Van Ho's argument provides a clear example of the turn to equity as a putatively progressive argumentative move with which investment law jurisprudence has increasingly become familiar. For the present purpose, one may observe that investment arbitration is always a retrospective exercise which requires grounding the present in the past.

Van Harten's prescient analysis of Guatemala's Peace Accords articulates, in broader terms, how investment protection standards may limit a state's ability to address the root causes of conflicts.[80] He argues that standards such as uniform national treatment, while uncontroversial on their face, limit a state's ability to adopt affirmative actions-type policies which give its domestic actors preferential treatment.[81] This is problematic in the context of Guatemala, as the root of the continuing conflict lies in inequality of access to and ownership of fertile lands caused by large-scale land-grabbing sometimes facilitated by the state government.[82] Another concrete example can be found in the widely-discussed *Foresti*,[83] where the investor alleged that South Africa's post-apartheid black empowerment measures were in violation of its investment treaty obligations. While the impugned measures in *Foresti* are characterized by many commentators as socio-economic or "human

76. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 5 ICSID Rep. 212 (2002) [hereinafter *Metalclad*].

77. Kardassopoulos v. Republic of Geor., ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (Mar. 3, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0445.pdf.

78. *See* Van Ho, *supra* note 73, at 77–78.

79. *Id.* at 83.

80. Van Harten, *supra* note 51.

81. *Id.* at 134–35.

82. *Id.* at 118–23. On land grabbing and international investment law generally, see Lorenzo Cotula, *Land 'Grabbing' and International Investment Law: Toward a Global Reconfiguration of Property?*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2014–2015 177 (Andrea K. Bjorklund ed., 2016).

83. *See* Foresti v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/01, Award, ¶¶ 64–66 (Aug. 4, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0337.pdf [hereinafter *Foresti*].

rights" measures,[84] they could also be plausibly characterized as "peace-making" measures to the extent that they serve the purpose of alleviating racial tensions or inequality which had been contributing factors to the interracial violence and conflict in the country.[85] Understood in this way, one can immediately see how the operationalization of the investment law regime may interfere with the peace-making process in the host state.

Finally, by providing an avenue for redress accessible only to foreign investors who may be given large awards that would never be available to domestic investors and other individuals, one may question whether the existence of the regime itself may contribute to the exacerbation of societal divisions and public discontent, thereby undermining peace in the host states.[86]

IV. "Loss of Sovereignty" Critique

The argument that international investment law may unduly constrain a post-conflict host state's ability to adopt policies and laws in addressing the root causes of conflicts, and impose extraordinary penalties on a state for doing so, is a familiar form of critique in international investment law which juxtaposes the protection of investors with a host state's regulatory freedom.[87] To understand the promise and limits of this kind of "loss of sovereignty" critique, one may begin by examining the debates over the doctrinal content of the "fair and equitable treatment" (FET) standard, especially as it is applied in arbitral decisions involving developing host states.[88]

The core of the debate is whether FET as a "non-contingent"[89] standard should be applied as a strict standard that accepts no consideration of the host states' developmental level or other circumstances, or as a relative or contextual standard, which leaves sufficient room for these states to legislate in the public interest. Many have observed an

84. *See, e.g.*, Annika Wythes, *Investor-State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?*, 23 Leiden J. Int'l L. 241, 242 (2010).

85. *See* Andreas Kulick, Global Public Interest in International Investment Law 288 (2012).

86. *See* René Urueña & María Angélica Prada-Uribe, *Transitional Justice and Economic Policy*, 14 Ann. Rev. L. & Soc. Sci. 397, 399 (2018).

87. *See, e.g.*, Lawry-White, *supra* note 36, at 646.

88. For a broad overview, see Rumana Islam, The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context (2018).

89. Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles 355 (2d ed. 2017).

increasing willingness of arbitral tribunals to take into account the host states' circumstances in their decision-making, which has led to a gradual relaxation of the FET standard as it is applied to developing countries.[90] This is achieved through the concept of "legitimate expectation" of the investors—which the FET standard protects—by positing that an investor's expectations are only reasonable or legitimate to the extent that they are informed by the prevailing circumstances in the host state.[91] Since then, much of the mainstream scholarship has explored the normative connections between investors' knowledge and the host states' other legal obligations, legal bases for the assimilation of the latter via the former under the concept of legitimate expectation, and the potential obstacles facing such assimilation.[92]

In the context of the FET debate, the essence of the loss of sovereignty critique in its doctrinal form[93] is that arbitral tribunals have, in their decision-making, favored investors' interests at the expense of the host states' regulatory freedom, marginalizing, if not disregarding the central object and purpose of the international investment law to promote development in the host states. Whether by reference to the

90. For illustrative examples, see S. Am. Silver Ltd. v. Plurinational State of Bol., Case No. 2013-15, Award (Perm. Ct. Arb. 2018), https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf; Saluka Invs. B.V. v. Czech Republic, Case No. 2001-04, Partial Award (Perm. Ct. Arb. 2006) [hereinafter *Saluka*], https://pcacases.com/web/sendAttach/880; Mamidoil Jetoil Greek Petrol. Prods. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award (Mar. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf [hereinafter *Mamidoil Jetoil v. Albania*]; Toto Costruzioni Generali S.P.A. v. The Republic of Leb., ICSID Case No. ARB/07/12, Award (June 7, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf [hereinafter *Toto v. Lebanon*]; Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pak., ICSID Case No. ARB/03/29, Award (Aug. 27, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0075.pdf [hereinafter *Bayindir*]; Duke Energy Electroquil Partners v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0256.pdf; Parkerings-Compagniet A.S. v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

91. *See Saluka*, *supra* note 90, Case No. 2001-04, Partial Award, ¶ 304.

92. *See, e.g.*, Fabio Giuseppe Santacroce, *The Applicability of Human Rights Law in International Investment Disputes*, 34 ICSID REV. 136 (2019).

93. "Loss of sovereignty" as a generalized form of critique can take many possible forms, including doctrinal (concerned with specific arbitral outcome or interpretation of the relevant law in unduly limiting sovereign discretion to make decisions), structural/institutional (concerned with how international investment law regime undermines sovereign equality), and normative (concerned with how arbitral decision-making deprives host States' populations' right to political participation).

actual text of investment treaties,[94] or by reference to the general *telos* of the investment treaty regime,[95] "development" is invoked in this context as a defense of host states' sovereign freedom—a preservation of their "policy space"—to pursue and protect public goods through adopting regulations and law at the state level.

The (re)discovery and affirmation of development as the proper objective of investment law would not necessarily tilt the balance towards host states' regulatory freedom or lead to a greater acceptance of the relative FET standard. This is because any arguments about development always turn on some a priori assumptions about the role of the state in development, and legal disagreements over whether a strict or relative FET standard should be adopted ultimately depend on some prior background political assumptions about what development as an objective requires and about the relationship between development and foreign investment.[96]

A. *"Development" as Defense of International Discipline*

On the one hand, "development" can be invoked to defend a strict FET standard by arguing that development requires the maximization of investor protection because it is necessary to ensure investors' confidence, which in turn secures the acceleration of the "movement of private funds into developing countries *for development purposes*."[97] It may also defend a strict standard by recourse to the good governance thesis by insisting that development demands the imposition of strict standards on developing host states so these countries will be incentivized to improve and develop their defective governance to meet international standards. In these instances, development is conceptualized not only in economic terms but also in social-political terms. As the tribunal in *Pantechniki*[98] explains, if a "relativistic standard" is accepted,

94. Prabhash Ranjan, *The "Object and Purpose" of Indian International Investment Agreements: Failing to Balance Investment Protection and Regulatory Power*, *in* FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 192 (Vivienne Bath & Luke Nottage eds., 2012).

95. Yannick Radi, *International Investment Law and Development: A History of Two Concepts*, *in* INTERNATIONAL LAW AND DEVELOPMENT: BRIDGING THE GAP 69, 71–72 (Stephan W. Schill et al. eds., 2015).

96. Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7, 12 (2009).

97. Sempra Energy Int'l v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, at ¶ 396 (Sept. 28, 2007) (emphasis added).

98. Pantechniki S.A. Contractors & Eng'rs v. The Republic of Alb., ICSID Case No. ARB/07/21, Award, ¶ 76 (July 30, 2009) [hereinafter *Pantechniki v. Albania*] (referring also to the "obedience to the rule of law" as a justification).

"international law [would then] provide no incentive for a state to improve," and that "a state which devoted more resources to its judiciary would run the risk of graduating into a more exacting category."[99] Based on this reasoning, the developmental objective of investment treaties demands that pressure be exerted on under-performing states to improve their defective governance structures to meet international standards, which may itself be conceived as a kind of socio-political development, if not as a necessary step towards economic development by creating favorable conditions for the flow of capital.[100]

Here, the insistence on the strict FET standard is justified, not on the basis that developmental concerns should be ignored or that investor protection must prevail over host states' development, but on the basis that ensuring investor protection is an instrument for, if not a necessary precondition to, the maximization of such development.

B. *"Development" as Defense of State Freedom*

On the other hand, development can be used to justify a relative standard by claiming that host states should not be deterred from implementing regulations in the general interest, as their developmental interests *encompass or precede* the protection of investors' interest. As the tribunal in *Mamidoil Jetoil* put it, "the legitimate interest of the Albanian Government to modernize the infrastructure in the general interest . . . ultimately encompasses all foreign investors' interests,"[101] and the FET standard "brings foreign investors into the normative sphere of rational policy in the general interest."[102] Or as the tribunal in *Lemire* describes, "[e]conomic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors."[103]

A relative standard can also be justified by insisting that development must be operationalized at the state level by facilitating a state's

99. *Id.* ¶ 76; *see also*, Ursula Kriebaum, *Are Investment Treaty Standards Flexible Enough to Meet the Needs of Developing Countries?, in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 330, 340 (Freya Baetens ed., 2013).

100. *See, e.g.*, Roberto Echandi, *What do Developing Countries Expect from the International Investment Regime?, in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS 3, 13 (José E. Alvarez & Karl P. Sauvant eds., 2011).

101. Mamidoil Jetoil Greek Petrol. Prods. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award, ¶ 723 (Mar. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf.

102. *Id.* ¶ 614.

103. Lemire v. Ukr., ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 273 (Jan. 14, 2010).

development of effective and accountable institutions, a goal which is potentially undermined by ISDS as investors can bypass the domestic legal system altogether.[104]

C. *"Development" Between State Freedom and International Discipline*

The same argumentative pattern on whether state freedom or international discipline should be prioritized animates much of the debate in mainstream progressive literature on how non-investment norms or values—from human rights[105] to environmental protection[106] to the protection of cultural property[107]—could be assimilated into arbitral decision-making. At risk of flattening the diverse ways in which these debates have been wrought, the dominant way of understanding the issue remains one that calls for states' "reassertion of control" over the regime.[108] So expressed, the loss of sovereignty critique suffers from the fundamental weakness of failing to take into account the often synergistic relationship between foreign investment and the promotion of these non-investment values. The host state's obligation to protect its population's "right to water," for example, may at first blush strengthen the state freedom argument, until one is confronted with the argument that foreign investment in privatized water services continues to play a significant role in ensuring clean water access in some countries.[109] In the context of the realization of human rights then, the contest between state freedom and international discipline is not only a legal question of forum, but a proper political question on how to best

104. Celine Tan, *Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law*, *in* INTERNATIONAL LAW AND DEVELOPMENT: BRIDGING THE GAP 147 (Stephan W. Schill et al. eds., 2015).

105. *See, e.g.*, HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009).

106. *See, e.g.*, JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (2012).

107. *See, e.g.*, VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2014).

108. This is the clearest in the attempt to articulate a doctrinal basis of host states' *right* to regulate. *See, e.g.*, CATHARINE TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014); *see also* REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME (Andreas Kulick ed., 2016).

109. *See, e.g.*, Emma Truswell, *Thirst for Profit: Water Privatisation, Investment Law and a Human Right to Water*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 570, 578–85 (Chester Brown & Kate Miles eds., 2011). *See generally* Ursula Kriebaum, *Water and Investment*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 69, 88–104 (Kate Miles ed., 2019).

realize such a right.[110] What the above discussion on the failure of development as an argumentative *topos* to resolve the debate over the strict/relative FET standard aims to illustrate is precisely the failure of this dominant form of loss of sovereignty critique to appreciate the undecidability of these concepts—their inability to prioritize the authority of the state over the international or vice versa.[111]

D. *Conflicts and the Problem of the "Defective Sovereign"*

One may object to the above criticism of the loss of sovereignty critique on the basis that it was never intended to be an interpretative device that gives certainty to the meaning of investment protection standards, but is invoked only as a rhetorical strategy to advocate for greater arbitral sensitivity and deference towards choices made by the sovereign host states, given their relative accountability, capacity, and suitability vis-à-vis arbitral tribunals in deciding on matters relating to the state's domestic priorities and constituencies.[112]

If one is to understand the loss of sovereignty critique as making a broader normative (instead of a strictly legal) claim, premised on the host states' relative suitability to act in the best interests of their populations, the immediate question that arises in (post-)conflict contexts is whether it would be persuasive for states embroiled in or emerging out of conflicts to rely on the argument that they are willing and capable of acting in the best interests of their citizens. While it may be conceivable that some countries are capable of adopting social, economic, and legal reforms in addressing the root causes of conflicts, can the same be said about countries such as Venezuela, whose government is persistently incapable of guaranteeing even the "minimum standard of subsistence, public services, and private liberties" of its citizenry,[113] or even failed states like Afghanistan? Put differently, how can one defend the regulatory freedom of a state that is fundamentally incapable of accomplishing the goals it sets out?

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110. *See, e.g.*, Martti Koskenniemi, *The Effect of Rights on Political Culture*, *in* THE POLITICS OF INTERNATIONAL LAW 133, 147–48 (2011).

111. Sundhya Pahuja, *Laws of Encounter: A Jurisdictional Account of International Law*, 1 LONDON REV. INT'L LAW 63, 66 (2013).

112. *See, e.g.*, GUS VAN HARTEN, SOVEREIGN CHOICES AND SOVEREIGN CONSTRAINTS: JUDICIAL RESTRAINT IN INVESTMENT TREATY ARBITRATION (2013).

113. The example of Venezuela is given in Ricardo Campos, *Book Review: David Schneiderman. Resisting Economic Globalization. Critical Theory and International Investment Law*, 12 INT'L J. CONST. LAW 827, 831 (2014).

Perhaps one can extend this argument, as some have begun to do, to inquire if the nature of the government of a state—such as whether the government acts on behalf of the people—can or should impact how investment protection standards are interpreted.[114] Doctrinally, Walid Ben Hamida has shown that the nature of the regime with which an investment contract was made, cannot as a general rule be taken into account to determine the validity of the investment as contracts with despotic regimes are not *per se* illegal.[115] He shows that one exception to this may be specific investment treaties in the Arab world that make references to morality[116] where an argument could potentially be made that contracting with undemocratic governments is "immoral."[117]

While intuitively appealing, this kind of reasoning raises several important conceptual issues that merit closer consideration. As Bonnitcha has already observed, ideal-typical binaries such as authoritarian/democratic regime and pre/post-transition are untenable as they ignore the historical, political, and cultural specificities and complexities of each country's transition process.[118] One clear example is Pakistan as seen in *Bayindir* which, in its short history since the Partition of British India, has experienced three military coup d'états with long periods being under the rule of known corrupt leaders, and a civilian government still under significant influence of the military, yet still maintains fairly robust domestic governance structures.[119] In this light, is Pakistan's

114. Bonnitcha, *supra* note 71, at 981; *see also* Walid Ben Hamida, *Investment Treaties and Democratic Transition: Does Investment Law Authorize Not to Honor Contracts Concluded with Undemocratic Regimes?*, *in* INTERNATIONAL LAW AND DEVELOPMENT: BRIDGING THE GAP 309 (Stephan W. Schill et al. eds., 2015); Andreas Kulick, *Investment Arbitration, Investment Treaty Interpretation, and Democracy*, 4 CAMBRIDGE INT'L L.J. 441, 458–59 (2015).

115. Hamida, *supra* note 114, at 313–16.

116. Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, art. 9, June 1–5, 1981 (entered into force Sept. 23, 1986), Int'l Inv. Instruments.: A Compendium, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download; Unified Agreement for the Investment of Arab Capital in the Arab States, art. 14, Nov. 26, 1980 (entered into force Sept. 7, 1981), Int'l Inv. Instruments.: A Compendium, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2394/download#:~:text=The%20Unified%20Agreement%20for%20the,force%20on%2022%20February%201988.

117. Hamida, *supra* note 114, 323–26.

118. Bonnitcha, *supra* note 71, at 971; *see also* Kojo Yelpaala, *Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries*, 30 NW. J. INT'L L. & BUS. 23, 26 (2010).

119. A similar example is Myanmar (Burma). *See* Jonathan Bonnitcha, *International Investment Arbitration in Myanmar: Bounded Rationality, But Not as We Know It*, *in* INTERNATIONAL INVESTMENT TREATIES AND ARBITRATION ACROSS ASIA 335, 335–36 (Julien Chaisse & Luke Nottage eds., 2017).

sovereignty "defective"? Should the loss of sovereignty by Pakistan be celebrated or mourned? Similarly, while one could easily position post-conflict states as being at the juncture of positive transformation which require greater regulatory freedom,[120] cases such as the pending *Al Jazeera v. Egypt*[121]—where Al Jazeera alleges that the network and its journalists had been subject to harassment, arrest, and detention by the military government after the overthrow of the corrupt Mubarak Government, ostensibly in retaliation for Al Jazeera's reporting during the Egyptian Revolution[122]—bring into question the claim that deference should be presumptively given to governments simply because their states are in the process of transition. Recall the aforementioned example of Colombia where the acquisitions of land rights during conflicts were sanctioned or facilitated by the government, some of which were allegedly in violation of IHL. The oft-repeated "it takes two to tango" argument on state complicity or "contributory fault" in cases involving investors' corruption or other misconduct[123] provides a further illustration of how the normative form of the loss of sovereignty critique is not without its problems.

This is precisely what Paul Gilbert describes as the "tragic" character of this loss of sovereignty critique—one that understands ISDS as a dangerous capture of state sovereignty that requires its reclamation by the state.[124] Understanding such reclamation as emancipatory, he argues, relies on a somewhat romanticized vision of anti-colonial resistance from the decolonization era—one which ignores the "broken promises and sovereign excesses of the postcolonial present."[125] For him, the Bangladeshi state's violent treatment and shootings of citizens who were protesting against foreign ownership of a coal mine and a powerful plant is one example.[126] One could find other examples in countries such as Indonesia and Sudan, where in the former, the signing of BITs

120. De Brabandere, *supra* note 61, at 601.

121. Al Jazeera Media Network v. Arab Republic of Egypt, ICSID Case No. ARB/16/1 (pending and not public) [hereinafter *Al Jazeera v. Egypt*].

122. Press Release, Carter-Ruck Solicitors, Al Jazeera Serves Notification of Disp. on Egypt (Apr. 28, 2014).

123. *See, e.g.*, Isuru C. Devendra, *State Responsibility for Corruption in International Investment Arbitration*, 10 J. INT'L DISP. SETTLEMENT 248 (2019); MARTIN JARRETT, CONTRIBUTORY FAULT AND INVESTOR MISCONDUCT IN INVESTMENT ARBITRATION 153 (2019). One example is Egypt in Wena Hotel Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/3, Award (Dec. 8, 2000).

124. Paul Robert Gilbert, *Sovereignty and Tragedy in Contemporary Critiques of Investor State Dispute Settlement*, 6 LONDON J. INT'L L. 211, 215–20 (2018).

125. *Id.* at 213–15.

126. *Id.* at 225. So long as the "full protection and security" standard is concerned with the *treatment of investors/investment*, the inquiry of whether the standard has been breached would

in the context of centralized state control of natural resources exploitation have allowed elites of the regime to form a coalition with foreign investors and reap the benefits of investment to the detriment of indigenous communities;[127] and in the latter, strengthening commitment to international arbitration has allowed the now-deposed Omar al-Bashir to preserve control over Sudan's judiciary to maintain public order under his thirty-year dictatorship.[128]

E. *Utility of Defective Sovereignty as a Concept*

To many, the above conclusion about the limits of the loss of sovereignty critique would not be surprising. Indeed, many practitioners and scholars would argue that the function of the international investment law regime is precisely to protect, if not immunize, investors from the pathologies of "defective sovereigns."[129] Even proponents of the loss of sovereignty critique may take issue with the way the critique has been presented above as if it is an absolute principle that trumps investors' protection, while in reality they acknowledge that the sovereign right of states is only one out of many factors to be taken into account in a balancing exercise. This is true. However, the purpose of the above section is to begin articulating the political assumptions and values that have informed one generalized form of critique in defense of the state, thereby exposing its limits. As Jorge Viñuales reminds us, sovereignty as an assemblage of actionable legal concepts has no immediate legal consequences.[130] Thinking in this way, to invoke sovereignty as critique is to defend some desirable values that the state is supposed to embody. The idea of "defective sovereignty" provides a useful orienting concept to think of the relationship between investment law and the state because it raises the question: if the loss of sovereignty critique is premised on a level of capability of the state, does the critique still hold if

always focus on the effects of State actions (or lack thereof) *on investors/investments*, and ignores the nature and consequences of such actions on the local populations.

127. Muhammad Ya'kub Aiyub Kadir & Alexander Murray, *Resource Nationalism in the Law and Policies of Indonesia: A Contest of State, Foreign Investors, and Indigenous Peoples*, 9 ASIAN J. INT'L L. 298 (2019).

128. Mark Fathi Massoud, *International Arbitration and Judicial Politics in Authoritarian States*, 39 L. & SOC. INQUIRY 1 (2014).

129. *See e.g.*, Jan Kleinheisterkamp, *Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions*, 78 MOD. L. REV. 793, 811 (2015).

130. *See* Jorge E. Viñuales, *Sovereignty in Foreign Investment Law*, *in* THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 317, 318 (Zachary Douglas et al. eds., 2014).

that premise is open to question? And how would that impact this balancing exercise?

The productive value of problematizing the loss of sovereignty critique as a tool to re-balance state freedom against international discipline then, is that it invites one to take seriously the possibilities of piercing the veil of statehood to challenge international law's preponderant conceptualization of the state as a unitary actor.[131] For example, one common retort to the loss of sovereignty critique is the consensualist argument: by entering into investment treaties, states have voluntarily "[renounced] an element of [their] sovereignty" in return for the chance to attract foreign investments that would otherwise not be available to them.[132] This is why many critics with TWAIL sensibilities have, in response, attempted to show that this supposedly voluntary renouncement of sovereignty was effectuated upon false promises, such as by pointing out the unequal bargaining powers of the state parties when they entered into these treaties, that arbitral tribunals have systematically decided in favor of investors contrary to what the states have agreed to, or that these treaties do not in actuality promote (economic) development in the host states.[133] These two positions are irreconcilable because TWAIL scholars' criticisms of history, application, and empirical effects, are also fundamentally arguments about consent. The first position insists on the form of consent as it is effectuated at the moment of treaty ratification, whereas the second position focuses on the normative basis of consent as it is effective only if the treaty is faithfully applied, its desirable social effects realized, and in accordance with justice that the law is supposed to embody.

A more effective way of responding to the consensualist argument is to point out the distance between the state's ratification of investment treaties and the material effects of such treaties on the state's population. This is what informs Velásquez-Ruiz's project, which shows how the Columbian government's systemic conclusion of investment treaties as part of its economic internationalization strategy, while aiming to serve the benign purpose of promoting domestic economic growth, has undermined the achievement of peace in the country.[134] In other

131. *See* Stephen Gelb, *States and the Investor-State Arbitration Regime: Introduction*, *in* THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 123, 125 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2015).

132. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 20 (Oxford Univ. Press 2d ed. 2012).

133. Muthucumaraswamy Sornarajah's *oeuvre* touches upon many of these ideas. *See* SORNARAJAH, *supra* note 13.

134. Velásquez-Ruiz, *supra* note 69, at 63.

words, the congruence between economic integration and the interests of the population cannot simply be assumed *a priori*.

It is only through recognizing the promise and limits of the loss of sovereignty critique that one can begin to pose the questions: does a state act in accordance with the interests of its citizenry? Should it matter? For Hamida, the answer is probably no. Questioning the desirability of invoking the "clean hands" and "odious debt" doctrines, he argues that even if concluded with non-democratic regimes, investment contracts would still contribute to the state's development through revenue generation, expansion of employment opportunities, skills transfer, et cetera—and thus to declare such contracts illegal would "deprive the [State's] population of such benefits and increase its misery."[135] Such consequentialist argument depends, of course, on whether one accepts the assumption that a state's population's misery depends first and foremost on its economic development.

V. State Weakness as Basis for Relaxation or Intensification of Investment Protection?

Drawing on state theory, Todd Tucker has shown how, by engaging with the internal governance of states in their decision-making, investment arbitral tribunals invariably rely on, articulate, and then normalize particular assumptions about the idea of statehood.[136] He suggests that arbitral tribunals have in their evaluation of state behavior relied on inconsistent conceptions of the state. Tucker found that, on the one hand, some arbitral tribunals have conceptualized the state as having "asymmetric" powers over those in its territories (e.g. greater bargaining power and access to information), and therefore demand that a state must in its interactions with investors act to minimize the impact of this power asymmetry, even if it is to its detriment; on the other hand, some tribunals have conceptualized the state as being similar to a business, and therefore expect the state simply act in a "business-like" manner without a requirement to assume responsibility for the investors' failures.[137] Tucker's contribution lies in demonstrating how arbitral decision-making can be understood as an exercise under which

135. Hamida, *supra* note 114, at 322.

136. *See* Todd Tucker, *The Concept of the State in Investor-State Arbitration*, *in* The Role of the State in Investor-State Arbitration 131, 148 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., 2015).

137. *See id.* at 152–55 (citing, *inter alia*, Nykomb Synergetics Tech. Holding AB v. The Republic of Latvia, SCC Case No. 118/2001, Arbitral Award (Dec. 16, 2003); Ulysseas Inc. v. The Republic of Ecuador, Case No. 2009-19, Final Award (Perm. Ct. Arb. 2012)).

investors' vulnerability vis-à-vis the state is managed. This management, as he suggests, is not a neutral exercise of "treaty interpretation" as it relies on some contestable assumptions (whether stated or unstated) about the role of the state in international economic governance.[138]

Thinking in this way, conflict situations as the clearest instances of "defective sovereignty" can be understood as adding complexities to this management of investors' vulnerability and provide a good illustrative example of how arbitrators, informed by divergent understanding of the relationship between state and investor, may be inclined to make particular choices in treaty interpretation.

A. *War Clauses*

One example of the disagreements on how state weakness should be dealt with in conflict situations can be found in the disagreements over the application and effect of a particular type of war clause called the "compensation for losses" clause in international investment agreements. In general, these clauses stipulate that restitution, indemnification, compensation, and other measures adopted by a state in relation to the losses suffered by investors in armed conflicts, revolutions, states of emergency, civil unrests, and other similar events must be provided on a non-discriminatory basis.[139] One example of this is Article IV(3) of the US–Argentina BIT,[140] which states:

> Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.[141]

138. *See* Tucker, *supra* note 136, at 160–61.

139. Christoph Schreuer, *The Protection of Investments in Armed Conflicts*, 9 TRANSNAT'L DISP. MGMT. 1, 10 (2012).

140. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, T.I.A.S. No. 94-1020 (entered into force Oct. 20, 1994) [hereinafter US–Argentina BIT].

141. *Id.* art. IV(3).

While one must acknowledge that the specific textual formulations of different treaties, as well as the placement of the war clause in each treaty (i.e. whether it is a standalone article or one nested in an article providing for another investment protection standard) would invariably inform how arbitral tribunals interpret these treaties, for the present purpose, one may observe a broader disagreement over whether clauses like this supplant or supplement ordinary investment protection standards—in other words, whether state weakness justifies the relaxation or intensification of investment protection.

1. State Weakness as Basis for Relaxation of Investment Protection

On the one hand, these compensation for loss clauses have been understood as creating a special exception—a *lex specialis*—that is applicable during times of conflicts, national emergencies, and other crisis situations, which allows the host states to derogate from other investment treaty provisions during exceptional circumstances.[142] The most notable example is *LESI v. Algeria*,[143] which concerns the construction of the Koudiat Acerdoune dam in Bouïra, a mountainous and remote location in Algeria, which coincided with the Algerian Civil War. The initial construction method of the dam required explosives, which raised significant security concerns because of its potential to attract terrorist groups operating in the region.[144] The claimant alleged that the construction of the dam had been impeded because of the security problems near the site, and that Algeria had, in breach of its obligation to provide full and complete protection (Article 4.1 of the Algeria–Italy BIT), failed to take adequate measures to ensure security in the area.[145] Noting that during the execution of the contract there was a violent armed conflict between the Algerian government forces and terrorist movements, and that the whole of Algeria was impacted, the arbitral tribunal found that the circumstances fell under the exceptional situations set out in the war clause (Article 4.5).[146] It held that Articles 4.1 and 4.5 provided two different levels of investment protection, and

142. Suzanne Spears & Maria Fogdestam Agius, *Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT 283, 301 (Katia Fach Gomez et al. eds., 2019).

143. LESI SpA v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Award (Nov. 12, 2008) [hereinafter *LESI v. Algeria*].

144. *Id.* ¶¶ 14–15.

145. *Id.* ¶ 165.

146. *Id.* ¶ 175.

thus could not be cumulatively applied.[147] Instead, Article 4.5 precluded the application of operation of Article 4.1 during times of armed conflicts as the *lex specialis*.[148] In effect, Algeria was released from the obligations of full and complete protection and was only required to grant the claimant no less favorable treatment than other victims of the conflict, which Algeria was found to have fulfilled if not gone beyond when armed *patriotes* were established by the *Agence Nationale des Barrages*.[149] This characterization of the war clause as creating a special regime that operates during the exceptional situations enumerated therein—which is also implicitly endorsed by the tribunal in *Pezold v. Zimbabwe*[150]—was drawn from Samuel Asante's dissenting opinion in *AAPL v. Sri Lanka*,[151] where he found that the war clause simply restated the general principle under customary international law that states are not internationally responsible for losses suffered by foreign investments during armed conflicts.[152]

As Michail Risvas has shown, the tribunal's conclusion in *LESI v. Algeria* was informed by the reasoning that host states should be given greater latitude under extraordinary circumstances where strict adherence to investment standards would be impossible.[153] This position reflects a similar concern raised by the sole arbitrator Jan Paulsson in *Pantechniki v. Albania*, where he states:

> failure of protection and security is … likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile … it seems difficult to maintain that a government incurs international responsibility for failure to plan for *unprecedented trouble of unprecedented magnitude in unprecedented places*.[154]

147. *Id.* ¶ 174.

148. *Id.* ¶¶ 174, 177.

149. *Id.* ¶ 180.

150. *See* Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, ¶ 598 (July 28, 2015).

151. Asian Agric. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante (June 15, 1990), 6 ICSID Rev. 574 (1991) [hereinafter *AAPL v. Sri Lanka (Asante)*].

152. *Id.* at 580.

153. Michail Risvas, *Non-Discrimination and the Protection of Foreign Investments in the Context of an Armed Conflict*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT 199, 204 (Katia Fach Gomez et al. eds., 2019).

154. Pantechniki S.A. Contractors & Eng'rs v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, ¶ 77 (July 30, 2009) (emphasis added).

By focusing on the unprecedented character of these situations, "state weakness" as an argumentative *topos* is invoked to justify the relaxation of investment protection. It does so by emphasizing the lack of culpability on the part of the host state, which then provides the justification for the strengthening of state freedom against international discipline through removing constraints that are normally imposed on state action. This can be observed in *LESI v. Algeria*, where the tribunal cited the difficulty of access to the construction site due to its geographical isolation before coming to the conclusion that Algeria had adopted reasonable and proportionate security measures.[155] The prioritization of state freedom is also clearly reflected in Asante's observation in *AAPL v. Sri Lanka*, where he defends his interpretation of the war clause as requiring no more than NT and MFN in stating that "nationals and companies of the other contracting party are to be paid compensation *only if it is the policy and practice of the host State* to pay compensation . . . to its own nationals."[156] On this account, any interpretation that reinforces international discipline at the expense of state freedom in such exceptional circumstances is pure utopianism, oppressive and indefensible.

2. State Weakness as Basis for Intensification of Investment Protection

On the other hand, these compensation for losses clauses have been found by other tribunals not to be exculpatory clauses that exonerate a host state from its ordinary obligations, but a supplement to other substantive provisions which provide "*further* guarantee of equal treatment" to investors during times of conflict and other crisis situations.[157] As the

155. LESI SpA v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Award ¶¶ 180–181 (Nov. 12, 2008).

156. *AAPL v. Sri Lanka (Asante)*, at 580 (emphasis added).

157. Funnekotter v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009) (emphasis added). As reported by IAReporter, this is the position taken by the tribunals in three recent cases arising from the Libyan Civil War: Way2B ACE v. State of Libya, ICSID Case No. 20971/MCP/DDA, Award (May 24, 2018); Cengiz İnşaat Sanayi ve Ticaret AS v. Libya, Case No. 21537/ZF/AYZ, Award (ICC Int'l Ct. Arb. 2018) [hereinafter *Cengiz v. Libya*]; Güriş İnşaat ve Mühendislik A.Ş. v. Libya (ICC Int'l Ct. Arb. 4 Feb. 2020) (unpublished). *See* Luke Eric Peterson, *Way2B v. Libya Tribunal Finds That Bit's War-Losses Clause Does Not Exclude Operation of Other BIT Protections (Including Full Protection & Security), but Foreign Investor Fails to Meet Evidentiary Burdens*, IAREPORTER (Jan. 8, 2019), https://www.iareporter.com/articles/tribunal-finds-that-bits-war-losses-clause-does-not-exclude-operation-of-other-bit-protections-including-full-protection-security-but-foreign-investor-fails-to-meet-evidentiary-burdens; Luke Eric Peterson, *Revealed: In Cengiz v. Libya, ICC Tribunal Saw Dual-Faceted Failure of State to Provide Basic Security During War, but Frowned on Bid for Loss Profits*, IAREPORTER (Sept. 9, 2019), https://www.iareporter.com/articles/revealed-in-

arbitral tribunal in *Total SA v. Argentina*[158] explains, this equality of treatment not only applies to the compensation that the host state is liable for under the investment treaties, but extends to compensation that the host state has provided for the losses suffered to its own nationals or investors of third states "even if [it is] not internationally obliged to do so."[159] This position has been justified, *inter alia*, on that basis that BITs provide a more *specific* undertaking by the party states to provide protection to investors, which modifies the application of the customary principle of non-responsibility.[160]

Here, "state weakness" as an argumentative *topos* is invoked to defend the intensification of investment protection during conflicts and crisis situations. Instead of placing the emphasis on the host state's lack of culpability, the accent is placed squarely on the potential impact of state weakness on foreign investors. One example of this is found in *National Grid v. Argentina*,[161] where the tribunal states:

> It is evident from the foregoing that the purpose of [the 'war clause'] is not to exclude compensation for losses arising from, among other situations, national emergency but rather the contrary. The commitment of the parties is *to ensure that their respective investors do not lose out in such situations.*[162]

By placing the emphasis on the vulnerability of foreign investors, state weakness now demands the strengthening of international discipline over state freedom by imposing *further* constraints on state action and according additional protection to foreign investors in crisis situations. This is what underlies Sébastien Manciaux's argument against the tribunal's reasoning in *LESI v. Algeria*, which he argues would lead to the "paradoxical result" of encouraging the host state to not compensate anyone so as to avoid the application of the NT and MFN

cengiz-v-libya-bit-award-icc-tribunal-saw-dual-faceted-failure-of-state-to-provide-basic-security-during-war-but-frowned-on-bid-for-lost-profits; Damien Charlotin, *Analysis: Tribunal in Guris v. Libya Award Draws Contrast with Cengiz Award on FPS Interpretation and Sides with Majority of Prior Libya Awards with respect to War Losses Clause* (Mar. 5, 2020), https://www.iareporter.com/articles/analysis-tribunal-in-guris-v-libya-award-draws-contrast-with-cengiz-award-on-fps-interpretation-and-sides-with-majority-of-prior-libya-awards-with-respect-to-war-losses-clause.

158. Total SA v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability (Dec. 27, 2010) [hereinafter *Total SA v. Argentina*].

159. *Id.* ¶ 230.

160. Spears & Agius, *supra* note 142, at 30; ZRILIČ, *supra* note 48, at 164.

161. Nat'l Grid Plc. v. The Argentine Republic, UNCITRAL, Award (Nov. 3, 2008).

162. *Id.* ¶ 253 (emphasis added).

mechanisms provided in the compensation for losses clauses.[163] On this account, conflicts and other crisis situations are precisely when investors need the most protection, and thus any interpretation that prioritizes state freedom over international discipline would be unpersuasive so long as it operates as pure apology for sovereign action.

3. State Weakness and the Politics of Rule/Exception

As Facundo Pérez-Aznar has observed, Argentina has relied on the *LESI v. Algeria* interpretation unsuccessfully in the Argentine crisis cases, but the two different interpretations of the clause were acknowledged by a number of Annulment Committees in those cases.[164] For example, the Annulment Committee in *Enron v. Argentina*,[165] despite finding that the tribunal had not made any annullable error, explicitly stated that "it may well be that different interpretations of [the] provision are possible."[166] Juxtaposition of the two positions in the above discussion reveals that interpretative discord over the relationship between war clauses and other investment protection standards reflects a more fundamental disagreement over how investment law should respond to state weakness. The fact that state weakness can be invoked to defend both the relaxation and intensification of investment protection, to both exculpate and penalize the host state for its failures to accord the usual protection to investors, is not only a matter of theoretical discussion but can be translated into legal terms by alternatively placing emphasis on the special character of armed conflicts or the special character of investment protection through recourse to the *lex specialis* principle.

As the International Law Commission's (ILC) Fragmentation Report ("the Report") explains, *lex specialis drogat legi generali* as a standard technique of legal reasoning establishes normative priority for any special rules applicable in a situation by permitting it to elaborate the meaning of, modify the application of, or create an exception to a general

163. Sébastien Manciaux, *The Full Protection and Security Standard in Investment Law: A Specific Obligation?*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT 217, 226 (2019).

164. Facundo Pérez-Aznar, *Investment Protection in Exceptional Situations: Compensation-for-Losses Clauses in IIAs*, 32 ICSID Rep. 696, 711 (2017).

165. Enron Creditors Recovery Corps. v. Argentine Republic, ICSID Case No. ARB/01/3, Annulment Proceeding (July 30, 2010) [hereinafter *Enron v. Argentina*].

166. *Id.* ¶ 398.

rule.[167] The difficulty with the principle, as the Report makes clear, is that "generality" and "speciality" are essentially *relational*; whether a rule is "special" or "general" depends on the characterization of the context, purpose, capacity to reflect party will, and other normative considerations that foreground the interpretative exercise.[168] In other words, no definite relationships of priority between different rules can be established a priori, and any exercise in establishing a hierarchy between two rules is always ad hoc and contextual, reflecting a particular understanding of how a problem should be resolved, which is in turn informed by the (political) preferences of those who undertake the exercise.[169]

For the exculpatory mode of reasoning in *LESI v. Algeria*, the prioritization of state freedom over international discipline as the response to the problem of state weakness can be achieved by placing emphasis on the special (unprecedented) character of the situations of conflicts, which is then used to justify the application of conflicts-related provisions as *lex specialis* on the basis that their application is only triggered by the exceptional state of affairs that is the existence of the situations enumerated in the war clauses. In other words, "war clause" is the special rule because of the specific subject matter that it governs.[170] For the disciplinary mode of reasoning in the Argentine cases however, prioritization of international discipline over state freedom as the response to the problem of state weakness can be defended by placing the emphasis on the special character of investment treaty obligations as more specific undertakings by the state parties towards investors, which is then used to justify the application of the rules resulting from such undertaking as the *lex specialis*.[171]

VI. State Defenses Between State Freedom and International Discipline

For states involved in conflicts-related claims, the use of defenses (both in the invocation of non-precluded measures (NPM) clauses, and that of necessity as circumstances precluding wrongfulness) provides states with an opportunity to reassert their sovereignty against its

167. Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law ¶ 64 (finalised by Martti Koskenniemi, 2006).

168. *Id.* ¶¶ 111–12, 119–22.

169. *Id.* ¶ 484–85.

170. *Id.* ¶¶ 116–18.

171. *Id.* ¶¶ 113–15.

perceived encroachment by investment protection. John Reynolds, for example, sees the emerging pattern in arbitral jurisprudence where the scope of necessity is expanded beyond existential threats to capture economic crises as evidence for the potential of investment arbitration to provide a "site of resistance for Third World states."[172]

Much of the literature on the defense of necessity and security exceptions in international investment law has drawn on the Argentine economic crisis cases to illustrate the inconsistency, if not fundamental irreconcilability, of the various doctrinal positions put forward by the arbitral tribunals.[173] One example of this is the debate on whether the security exceptions in BITs reflect the content of the (customary) plea of necessity under Article 25 of the ILC Articles on State Responsibility[174]; provide a separate treaty-based defense that displaces the plea of necessity as *lex specialis*; or exist as a primary legal standard (which determines whether a breach occurred), that is distinct from the plea of necessity as a secondary defense (which determines whether a finding of wrongfulness should be precluded only after a breach has been found).[175]

There are obvious limits on what broader doctrinal conclusions one could draw from these analyses, as they focus on one US-Argentina BIT, and exception clauses in different investment treaties diverge in their textual formulations. One productive way of engaging with arbitral jurisprudence and the literature, then, is to examine the justifications that have been put forward for each of these conflicting arbitral decisions, and to articulate the underlying tensions that animate them.

A. *State Freedom in State Defenses*

The purpose of invoking a NPM clause or the defense of necessity is for a host state to justify actions taken that would otherwise be prohibited under the investment treaty.[176] In the context of conflict situations,

172. John Reynolds, *The Political Economy of States of Emergency*, 14 OR. REV. INT'L LAW 85, 120 (2012).

173. *See, e.g.*, Peter Tomka, *Defences Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 477 (Meg Kinnear et al. eds., 2016).

174. Int'l Law Comm'n, Rep. on Its Fifty-Third Session, U.N. Doc. A/56/10, at ch. IV(E) (2001) (Draft Articles on Responsibility of States for Internationally Wrongful Acts) [hereinafter ILC Articles on State Responsibility].

175. For the clearest comparison of these three interpretative approaches, see Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 INT'L & COMP. L. Q. 325 (2010).

176. Schreuer, *supra* note 44, at 13.

the most relevant NPM clauses are those that exculpate state actions found to be necessary for the protection of the state's security interests or the maintenance of public order (or in some investment treaties, such as the US-Ukraine BIT 1994, "necessary for the fulfilment of [the State's] obligations with respect to the maintenance or restoration of international peace and security").[177]

Arguments in favor of according greater deference to decisions made by host states for the purposes enumerated in the NPM clause have three primary justifications. First, it is the inherent suitability and capability of the host state in assessing whether a situation poses a threat to the host state's security or other interests and in determining the measures in response to that threat. For example, in *Devas v. India*,[178] India unsuccessfully argued that the NPM clause should be "self-judging" on the basis that national authorities (Cabinet Committee on Security in that case) are "uniquely positioned to determine what constitutes a state's essential security interests."[179] The respect for sovereign choice is recognized in *Continental Casualty*,[180] where the tribunal stated that it is "not its mandate to pass judgment upon Argentina's economic policy, nor to censure Argentina's sovereign choices as an independent state."[181] For others, host states are also better placed to make these assessments because of their ability to better appreciate the sensitivity of the subject matters and political acceptability of the choices being made.[182]

Second, likely more relevant in conflicts and other exceptional situations, is the argument that states should be given greater freedom of action in emergency situations because states are compelled to take actions "at the point of an uplifted knife," and thus should not be subject to intense post facto scrutiny by arbitral tribunals far removed from the situation.[183] The idea that the state's decisions in response to

177. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ukr., art. IX(1), Mar. 4, 1994, T.I.A.S. No. 96-1116 (entered into force Nov. 16, 1996) [hereinafter US-Ukraine BIT 1994].

178. CC/Devas (Mauritius) Ltd. v. The Republic of India, Case No. 2013-09 (Perm. Ct. Arb. 2013) [hereinafter *Devas v. India*].

179. *Id.* ¶ 214.

180. Continental Casualty v. Argentine Republic, ICSID Case No. ARB/03/09, Award (Sept. 5, 2008) [hereinafter *Continental Casualty*].

181. *Id.* ¶ 199.

182. *See, e.g.*, William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 372, 463 (2008).

183. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 550–51 (4th ed., Cambridge Univ Press 2017).

imminent peril or danger should not be judged by the highest standard of (economic) rationality is alluded to in *LG&E v. Argentina*,[184] where the arbitral tribunal explained its reason for rejecting the claimant's contention that the necessity defense is not applicable because the measures taken by Argentina in response to the crisis were not the only means available:

> Article XI refers to situations in which a State has *no choice but to act*. A State may have several responses at its disposal to maintain public order or protect is essential security interest . . . Under the conditions the Government faced in December 2001, *time was of the essence* in crafting a response. Drafted in just six days, the Emergency Law took the *swift, unilateral action* against the economic crisis that was *necessary* at the time . . . .[185]

Third, criticizing the conflation of the exception clause in the US-Argentina and the ILC Article 25 defense of necessity by the tribunals in *CMS*,[186] *Enron*[187] and *Sempra*,[188] Jürgen Kurtz draws from the history of the US-Argentina BIT to argue that the treaty was designed not only to restrain state conduct, but to specifically provide new flexibilities for state action in certain limited circumstances.[189]

B. *International Discipline in State Defenses*

Those who are in favor of imposing strict conditions on the invocation of the NPM clause or the necessity defense find expansive interpretations of these state defenses unacceptable on the basis that they could easily be abused by host states to elude their obligations under investment treaties. In justifying this consequentialist reasoning, recourse is often made to the "object and purpose" of the investment treaty, such as in *Enron v. Argentina*, where the tribunal states:

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184. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (July 25, 2007) [hereinafter *LG&E v. Argentina*].

185. *Id.* ¶ 239 (emphases added).

186. CMS Gas Transmission Co. v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005).

187. Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (May 22, 2007) [hereinafter *Enron*].

188. Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) [hereinafter *Sempra (Award)*].

189. Jürgen Kurtz, *The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration*, 25 ICSID REV. 200, 210–14 (2010).

> [T]he object and purpose of the Treaty is, as a general proposition, to apply in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation, resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.[190]

Intimately linked to this is the idea that expansive interpretations of these defenses would upset the actual bargain struck by the state parties to ensure legal stability and predictability even in (if not especially in) situations of economic difficulty and hardship. For example, José Alvarez and Kathryn Khamsi argue that the US–Argentina BIT was designed specifically in view of Argentina's history of "diplomacy of default" in which the Argentine government would declare national emergencies in order to avoid its international commitments to the detriment of foreign investors.[191] Andrea Bjorklund goes even further to suggest that it may be plausible to argue that by entering into a BIT, the parties have "waived their right to raise the necessity defense."[192]

C. *Between State Freedom and International Discipline*

The purpose of understanding state defenses as a tussle between the competing demands of state freedom versus international discipline is that one can begin to understand how interpretative discords in their various manifestations—regardless of the specific textual formulation of the treaty from which they emanate—are always animated by an underlying disagreement over the allocation of authority between the state and the international. For example, one may observe that the disagreement over the proper relationship between the necessity plea under the ILC Articles and investment treaty exception is reflective of a more fundamental disagreement over the level of restraints that should be put on state discretion.

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190. *Enron*, *supra* note 187, ¶ 331.

191. José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008/2009 379, 414–15, 460–61 (Karl P. Sauvant ed., 2009).

192. Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and* Force Majeure, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 460, 490 (Peter Muchlinski et al. eds., 2008).

The same tension can also be observed in how the good faith review has been understood by scholars of different orientations in the literature. As some have observed, self-judging and non-self-judging are essentially misnomers, for the level of deference to be given to a state in its invocation of the defenses falls on a continuum and depends on the precise wording and structure of the investment treaties in question. Even for investment treaties with self-judging clauses (e.g. "it considers necessary" clause), the measures taken by a state purportedly in protection of its security interests (or in fulfilment of one of the purposes in the exception) would still be subject to the principle of *pacta sunt servanda* in Article 26 of the Vienna Convention of the Law of Treaties (VCLT),[193] and thus subject to good faith review by arbitral tribunals.[194] Noting the paucity of international authority on what good faith review demands, William Burke-White and Andrea von Staden suggest that such good faith review should require a determination of whether the state was acting with honesty and fairness in invoking the exception, as well as whether there is a rational basis for that invocation.[195] Skeptical of the suitability of the arbitral tribunals to adjudicate on matters relating to security, Jure Zrilič criticizes the "rational basis" limb above on the basis that it would move too close to a substantive examination of the reasonableness of the impugned measure that is required by non-self-judging clauses. Drawing inspiration from the WTO Report of *Russia—Traffic in Transit*,[196] he instead argues that good faith review should focus on determining if there is a "manifest lack of connection" between the impugned measure and the objective that it purports to pursue.[197] Stephan Schill and Robyn Briese alternatively suggest that arbitral tribunals in interpreting self-judging clauses should perform a function similar to judicial review in domestic legal systems where instead of substituting the state's determination with their own, they should limit themselves to scrutiny over the formal aspects of the state's determination, such as whether the factual basis on which the tribunal relied was adequate, whether proper procedures had been followed,

193. *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

194. *See, e.g.*, Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award ¶ 366 (Sept. 28, 2007).

195. *See* Burke-White & von Staden, *supra* note 182, at 376–80.

196. Panel Report, *Russia – Measures Concerning Traffic in Transit*, ¶¶ 7.138–7.139 WTO Doc. WT/DS512/7 (adopted Apr. 29, 2019).

197. ZRILIČ, *supra* note 48, at 144.

and whether the state's exercise of discretion was guided by relevant or irrelevant considerations.[198]

D. *Beyond State Freedom and International Discipline?*

As Robert Sloane points out, beneath the "veneer of technical legal craft" in the Argentine cases lies the "normative dispute about the relative priority of diverse social interests and values."[199] As a matter of practice, each of the above exercises in concretizing the scope of state defenses or the content of good faith review serves an important purpose in providing the doctrinal grounding for one particular way of allocating authority between the state and the international. However, these exercises remain limited to the extent that the generality of their formulations precludes explicit discussion of the values that are being balanced.

One may argue that state defenses are essentially devices to ensure that the interests being protected in the circumstances outweigh the losses: the utilitarian argument. The natural question that arises is: between whose interests or losses must such an exercise strike a balance? Some may argue that foreign investors' losses must remain central to this utilitarian calculus, as the successful invocation of the state defenses effectively transfers the costs of the state action onto the investors.[200] However, others may question if it is even conceivable under any circumstances that private investors' losses may outweigh the interests being served by state action. This is the concern of TWAIL scholar M. Sornarajah, who argues that the plea of necessity under the ILC Articles was designed to operate in the context of inter-state liability and should therefore not be directly transposed into a state-investor context. In other words, only losses suffered by another sovereign state are comparable to the interests of another.[201] This kind of reasoning was adopted by Egypt in *Unión Fenosa v. Egypt*,[202] where it argued that its impugned actions did not impair the essential interest of Spain, the home state of the investor—a point that the tribunal did not address.[203]

198. Stephan Schill & Robyn Briese, *"If the State Considers": Self-judging Clauses in International Dispute Settlement*, 13 Max Planck U.N.Y.B. 61, 138–39 (2009).

199. Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 502 (2012).

200. Cynthia C. Galvez, *"Necessity," Investor Rights, and State Sovereignty for NAFTA Investment Arbitration*, 46 CORNELL INT'L L.J. 143, 146 (2013).

201. *See* SORNARAJAH, *supra* note 183, at 465.

202. Unión Fenosa Gas SA v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award (Aug. 31, 2018) [hereinafter *Unión Fenosa*].

203. *Id.* ¶ 8.15.

The concept of "defective sovereignty" reminds us of the inherent limit of state freedom arguments in accounting for the interests of the population beyond those represented by the state whose action is being challenged. As Reynolds has observed, Argentina's security defense was presented primarily in terms of the health of the state's financial system and institutions, instead of the socio-economic conditions and rights of its citizens.[204] This is what underlies Sloane's argument that judicial interpretation of "necessity" must be "tempered by the recognition that contemporary international law . . . no longer privileges the state's preservation for the *state's* sake."[205]

VII. Responding to Complexities: (Re)turn to Equity

Parts II and III of this Article have attempted to show the complex relationship between peace, conflicts, and investment (law). On the one hand, it showed that the peace-making potential of investment arbitration is premised on two main claims: first, investment arbitration depoliticizes investment disputes by providing formal rules and standards that can be applied with a degree of certainty and transparency; and second, the acceleration of foreign investment inflow plays a positive if not decisive role in post-conflict host states. On the other hand, it showed that the investment law may have a negative impact on peace by limiting post-conflict states' regulatory freedom to adopt laws in redressing harms caused by the conflicts and addressing the root causes of conflicts, which is particularly problematic when the transactions on which the investors' claims rely were made with authoritarian regimes or were implicated in the conflicts.

While outside of (post-)conflict contexts, the absolutist position on the maximization of investment protection may find resonance with those who see the free flow of foreign investment as being crucial to achieving the objective of investment treaties to promote development in the host states, there is a broad recognition in the small but growing body of literature on investment law and conflicts that such absolutist positions must be moderated in investment arbitration involving states embroiled in or emerging out of conflicts.[206] First, such recognition reflects the concern that the technocratic nature of investment arbitration would be at risk of decontextualizing the conflicts in which they operate and fail to take into account the historical, political, cultural,

204. Reynolds, *supra* note 172, at 121.

205. Sloane, *supra* note 199, at 503.

206. *See, e.g.*, De Brabandere, *supra* note 61.

and other specificities of each conflict situation.[207] Second, it is informed by the belief that, given the significant material impact of their decisions, arbitrators' adjudication of these claims assumes a "humanitarian" character and must therefore be more attentive to the broader public interests implicated.[208] Third, it is connected to broader considerations of fairness in holding host states accountable for investors' losses in exceptional circumstances as illustrated in the discussion above.

A. *Contextualizing Protection*

The most common strategy in moderating the absolutism of investor protection in (post-)conflict settings is to appeal to the elasticity of investment protection standards and the potential for contextual sensitivity in their application. Yannick Radi, for example, argues that there "exists a space of indeterminacy" in investment protection standards to which arbitrators could inject public interests considerations.[209] One example is the "FET" standard discussed briefly above, where arbitral tribunals in cases such as *Saluka* have found that in order for an investor's expectations to attract the protection of the standard, they must be reasonable and legitimate in light of the broader circumstances surrounding the investment.[210] This provides a clear point of entry for arbitral tribunals to display responsiveness to different considerations in (post-)conflict situations. A commonly cited example is *Toto v. Lebanon*, where the tribunal found that the claimant's expectation that taxes and custom duties would remain unchanged in post-civil war Lebanon was unjustifiable.[211] The arbitral tribunals in *EDF v. Romania*[212] and *Mamidoil Jetoil v. Albania*[213] have shown sensitivity

207. *See, e.g.*, Urueña & Prada-Uribe, *supra* note 86, at 406–07.

208. René Urueña, *The Colombian Peace Negotiation and Foreign Investment Law*, 110 AJIL UNBOUND 199, 203 (2016).

209. Radi, *supra* note 95, at 78–79.

210. *See, e.g.,* Ursula Kriebaum, *Are Investment Treaty Standards Flexible Enough to Meet the Needs of Developing Countries?*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 330 (Freya Baetens ed., 2013).

211. Toto Costruzioni Generali S.P.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Award, ¶¶ 245–46 (June 7, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf.

212. EDF (Services) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award (Oct. 8, 2009) [hereinafter *EDF v. Romania*].

213. Mamidoil Jetoil Greek Petrol. Prods. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award (Mar. 30, 2015) [hereinafter *Mamidoil*], https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf.

towards the particular needs of transitional economies, where the former suggests that legal stability guaranteed by the FET standard must not be overstated so as to ignore the "evolutionary character of economic life,"[214] whereas the latter notes that the impugned post-Communist Albanian policy "did not offend a sense of propriety" because it was "supported by international donor community and expert advice" and was "consistent and beneficial for investors and consumers in the long run."[215]

One may further observe that broad formulations in *Duke Energy v. Ecuador*, where it was found that the reasonableness and legitimacy of investors' expectations depended on the "[prevailing] political, socioeconomic, cultural and historical conditions,"[216] provide at least the doctrinal possibility for arbitral tribunals to take into account any interests or considerations it may find "relevant," perhaps only subject to the qualification that such conditions must exist at the various critical junctures where the investment was created, expanded, developed, or reorganized.[217] Just as much of the existing progressive scholarship has emphasized the need for arbitral tribunals to take into account the developmental imperatives of the host states in the construction of FET and indirect expropriation standards, one may envisage arguments that the prevailing conditions of a post-conflict host state demand that investors' expectation take into account these states' needs to adopt economic and social reforms, provide reparations to victims, and take any other actions that could plausibly be connected to the consolidation of peace.

Another possibility of contextualizing investment protection in conflicts-related claims is through the concept of due diligence of the full protection and security (FPS) standard. As Andrew Newcombe and Lluís Paradell explain, the FPS standard does not impose strict liability but only requires the host states to exercise due diligence by reference to the state's particular circumstances, including its level of development and stability.[218] Recent cases arising from the Arab Spring show

214. *EDF v. Romania*, *supra* note 212, ¶ 217.

215. *Mamidoil*, *supra* note 213, ¶¶ 732–33.

216. Duke Energy Electroquil Partners v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 340 (Aug. 18, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0256.pdf.

217. Christoph Schreuer & Ursula Kriebaum, *At What Time Must Legitimate Expectations Exist?*, *in* A LIBER AMICORUM: THOMAS WÄLDE—LAW BEYOND CONVENTIONAL THOUGHT 265, 266–70 (Jacques Werner & Arif Hyder Ali eds., 2009) (approved by the tribunal in *Mamidoil Jetoil v. Albania* (Award), at ¶ 702).

218. ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 309–10 (2009).

that arbitral consideration of contextual factors in determining whether the FPS standard has been breached provides some room for tribunals to reflect upon the complex circumstances in which the claimant's losses occurred. For example, in *Ampal v. Egypt*,[219] the tribunal acknowledges the reality that armed militant groups were taking advantage of the instability, insecurity, and lawlessness in North Sinai to perpetrate attacks on the Trans-Sinai Pipeline.[220] The tribunal found that the first attack could not have been prevented by Egypt and thus did not amount to a breach of the standard, but upon reflecting on the "totality of [the thirteen] attacks," it observed a pattern in which Egypt would react months later after each attack, adopting measures that were not fully implemented before another attack occurred.[221] It further suggested that the first four attacks should have been seen by Egypt as a "warning" of further attacks if Egypt failed to implement security measures.[222] The contextualization exercise undertaken by the tribunal here not only took into account the instability of Egypt as a whole, but also assessed the specific modes of actions taken by the Egyptian state at various times. In *Cengiz v. Libya*, the Turkish construction company Cengiz brought an FPS claim against Libya for failing to prevent the looting and destruction of its property and equipment during the 2011 uprising. Noting the broader challenges and lack of resources faced by Libya at the time, the tribunal found that while Libya could not reasonably be expected to provide "dynamic protection," which would allow Cengiz to continue its work across various construction sites scattered around the country, it had breached the standard for failing to provide "static protection" to Cengiz's two main camps where a number of industrial facilities were located.[223]

B. *Incorporating "Humanitarian" Considerations into Arbitral Decision-making*

Another strategy to moderate the absolutism of investor protection in (post-)conflict settings is to incorporate humanitarian norms and considerations into arbitral decision-making.

219. Ampal-American Israel Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (Feb. 21, 2017).

220. *Id.* ¶ 284.

221. *Id.* ¶¶ 285–86.

222. *Id.* ¶ 289.

223. Cengiz İnşaat Sanayi ve Ticaret AS v. Libya, Case No. 21537/ZF/AYZ, Award ¶¶ 445–448 (ICC Int'l Ct. Arb. 2018).

First, some insist that humanitarian norms could supply the substantive content of investment protection standards, which would allow arbitral tribunals to move beyond "generic solutions" and to engage in a more "holistic" assessment of the circumstances and interests implicated in each investment dispute.[224] One obvious example of this in conflicts-related contexts is the drawing of interpretative references from IHL to ascertain the meaning of terms such as necessity in investment treaties, which, according to some, would provide greater deference to sovereign prerogative and enhance the persuasiveness and credibility of the arbitrators.[225] Another way to achieve this is the imputation of knowledge of the host states' international legal obligations to investors through the concept of "legitimate expectation." This is the general idea behind Van Ho's proposal, discussed in Part III(B), where she argues that arbitral tribunals, when dealing with land restitution cases involving dispossession of land in violation of human rights and IHL—even when investors had relied on government assurances of the legality of these transactions—should determine if such reliance is reasonable in the circumstances, such as by examining whether the surrounding facts would suggest that the investors had "constructive knowledge" of these violations.[226]

Second, others place faith in the potential of investment arbitration in providing a platform where certain aspects of investment disputes arising from conflicts-related contexts can be determined based on equitable considerations. The assessment of compensation to investors in case of breaches provides a clear illustration of this. As Irmgard Marboe observes, since valuation always requires a level of judgment, "equitable considerations" have informed some tribunals' exercise of judicial discretion in the assessment of compensation, although their role remains marginal given the use of equity without party authorization can constitute a ground for annulment under the ICSID Convention.[227] One may observe that standard arbitral practice and valuation methods have already provided ample room for tribunals to take into consideration factors relevant to conflicts, such as investors' contributions to its losses, level of country risk, and other circumstances that may impact the

224. Lawry-White, *supra* note 36, at 635.

225. Teerawat Wongkaew, *The Cross-Fertilisation of International Investment Law and International Humanitarian Law: Prospects and Pitfalls*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT 385, 402–05 (Katia Fach Gomez et al. eds., 2019).

226. *See* Van Ho, *supra* note 73, at 69.

227. IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 153–55 (2d ed., 2017).

potential value of the investment. For example, there is some recognition that the wrongdoing state's economic situation may be relevant in the assessment of damages.[228] As Ian Brownlie points out in his separate opinion in *CME v. Czech Republic*,[229] "[e]ven States which have been held responsible for wars of aggression and crimes against humanity are not subjected to economic ruin,"[230] and that "it would be strange . . . if the outcome of acceptance of a bilateral investment treaty took the form of liabilities 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population' of the [host State]."[231]

Zrilič explicitly calls for a more central role of equity in the assessment of compensation in post-conflict contexts. He observes the dominant practice that the payment of compensation after conflicts is in the form of a lump sum as determined by reference to a peace agreement and done on a government-to-government basis.[232] While acknowledging the distinct advantages of such inter-governmental arrangements, such as the ability to take into account each country's broader strategic considerations in determining quantum, Zrilič still sees investment arbitration as the preferable venue for adjudicating compensation.[233] He argues that arbitral tribunals' determination of compensation should be guided by "inclusive equity" in order to arrive at "just and optimal outcome[s]."[234] For him, to achieve "just and sustainable peace," arbitral assessment of compensation must maintain the "delicate balance" between investor indemnification, financial burden imposed on the host state, as well as hardship that such compensation may impose on the state's population.[235] Drawing liberally from the jurisprudence of other international bodies such as the Eritrea-Ethiopia Claims Commission, he argues that it would be "overly legalistic" for a tribunal to only consider factors that existed at the time of the violation while ignoring those that exist at the time when the damages are

228. *Id.* at 158–61; *see also* José Gustavo Prieto Muñoz, *Awarding Damages in Times of Armed Conflict: An Emerging Standard of "Economic Capacity" for the Host State*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL INVESTMENT LAW AND THE LAW OF ARMED CONFLICT 363 (Katia Fach Gomez et al. eds., 2019).

229. CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Separate Opinion of Ian Brownlie (Mar. 14, 2003).

230. *Id.* ¶ 77.

231. *Id.* ¶ 78.

232. Zrilič, *supra* note 43, at 613–15.

233. *Id.* at 614–15.

234. *Id.* at 627–28.

235. ZRILIČ, *supra* note 48, at 207.

calculated, such as the host state's financial ability to pay and the award's potential effects on the state's welfare or the re-escalation of conflict.[236] Zrilič's proposal marks a significant departure from the dominant arbitral approaches in that it effectively demands tribunals explicitly address the material consequences of their decisions. As he acknowledges, no simplistic connections between investment and peace can be drawn, and there are often other drivers of conflicts such as religion, ideology, and struggle for resources.[237] Taking the potential effect of an award on the re-escalation of conflict into consideration opens up the possibility for tribunals to play a much more interventionist role in managing the peace of post-conflict host states, for it effectively requires a tribunal to place the award in relation to other drivers of conflicts, establish their connections, and assess circumstances that are yet to materialize.

C. *Deformalizing Justice?*

The potential to contextualize or humanize investment protection by drawing on the elasticity and malleability of the investment protection standards is seen by many scholars as the most redeeming feature of investment arbitration and has been used to defend its continued importance in (post-)conflict settings. However, these proposals to contextualize or humanize investment protection are often presented in an uncomfortably contrived, self-conscious way. They almost always begin with the observation of the structural limits that constrain a tribunal's ability to take into account broader considerations, such as how arbitral tribunals are specialized bodies with highly circumscribed jurisdiction, or that investment treaties reflect an inviolable balance of interests struck between the parties that should not be altered by arbitral interventions.[238] Notwithstanding these structural limits, they proceed to argue that investment arbitration could still legitimately take into account external norms through recourse to Article 42 of the ICSID Convention, doctrinal techniques such as systemic integration under the VCLT,[239] or even "cross-regime comparison" (e.g. drawing from other bodies of international law such as WTO law).[240] This standard script of defending arbitral tribunals' continued relevance in face of complexities—and the concomitant idea that the optimal solution to a

236. *Id.* at 251–53.
237. Zrilič, *supra* note 43, at 611.
238. Lawry-White, *supra* note 36, at 639.
239. VCLT, *supra* note 193, art. 31(3)(c).
240. Lawry-White, *supra* note 36, at 641–44.

problem lies simultaneously within the text as a reflection of party will and outside the text—reflects the anxieties experienced by practitioners arising from the competing impulses of the boundedness of formalism and the flexibility of deformalization which international investment law literature has only begun to tackle.[241] One may observe that this tension further reflects, on the one hand, international investment law's self-image as a discipline that protects legal stability and predictability as the supposed precondition for investment promotion (concerns of legality), while on another hand, international investment practitioners' "fear of irrelevance" in the complex world in which the field must operate (concerns of legitimacy).[242] One clear example of this can be found in Michael Nolan and Frédéric Sourgens' discussion of the self-judging NPM clauses, where they begin by reflecting on the doctrinal constraints in the interpretation of these clauses, explaining in particular the centrality of the object and purpose referenced in the treaty in determining the scope of the clauses, but then conclude by showing that the reasonableness of a state's exercise of right under such clauses would ultimately turn on a balancing exercise that compares such exercise with the corresponding losses of the investors.[243]

The increasing turn to equity in the literature reflects the increasing blurring of the boundaries between legality and legitimacy in the field, which is made possible through appeal to the almost always contestable object and purpose argument (both generally and specifically by reference to the treaty text),[244] questionable consequentialist or pragmatist reasoning (e.g. emphasis on effects of decision), use of intricate doctrinal tools that purport to manage complexities while preserving a semblance of objectivity (e.g. multi-layered proportionality analysis),[245]

241. *See, e.g.*, Jean d'Aspremont, *The Politics of Deformalization in International Law*, 3 GOETTINGEN J. INT'L L. 503 (2011).

242. On the 'anxieties of influence' experienced by international lawyers in general, see Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 LEIDEN J. INT'L L. 339 (2006).

243. *See* Michael D. Nolan & Frédéric G. Sourgens, *The Limits of Discretion? Self-judging Emergency Clauses in International Investment Agreements*, *in* YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2010–2011 363 (Karl Sauvant ed., 2011).

244. *See* discussion in Part IV of this Article.

245. DAVITTI, *supra* note 12, at 180–81; *see also* Luke Nottage, *Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches*, 17 J. WORLD INV. & TRADE 1015, 1035–36 (2016) (discussing CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION: BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY (2015)).

dubious invocation of customary rules (e.g. in the Argentine cases),[246] or the general reliance on the lack of doctrine of precedent in investment arbitration. As Martti Koskenniemi explains, deformalization is perceived as useful because of the "apparent necessity of applying the *reason* for the rule over the empty form of the rule."[247] The significance of the interests at stake (state sovereignty, individual rights) in the face of the uneasy relationship between investment and conflict encourages one to avoid speaking in categorical terms, but instead turn to the underdetermined equity, contextualization, and balancing—effectively deferring decision-making to a later interpretative exercise.[248]

D. *Problems with "Equity" and its Relationship to Peace*

As a response to complexities, the turn to equity raises significant practical and conceptual challenges and goes against the premise that justifies the peace-making potential of investment law in the first place.

First, one may observe that the increasing reliance on "circumstantial analysis"[249] will likely raise complex if not insurmountable evidentiary obstacles that may turn adjudicative exercises into mere guesswork. One example of this is the widely divergent analyses of the majority and the dissenting opinion of Steve Hammond in *Mamidoil Jetoil v. Albania* on whether the "legitimate expectation" of the investor has been frustrated.[250] In *Mitchell v. Democratic Republic of the Congo*,[251] which concerns the military seizure of the claimant's business during the Congolese Civil War based on its alleged ties with the rebels, the Annulment Committee suggested that the tribunal did not have "enough information to evaluate, under all pertinent angles" to determine if the situation constituted a threat to the security of the state and thus whether

246. Jean d'Aspremont, *International Customary Investment Law: Story of a Paradox*, *in* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 5, 33–40 (Tarcisio Gazzini & Eric De Brabandere eds., 2012).

247. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 595 (Cambridge Univ. Press re-issue with epilogue 2006).

248. Martti Koskenniemi, *Peaceful Settlement of Environmental Disputes*, 60 NORDIC J. INT'L L. 73, 76 (1991).

249. Lawry-White, *supra* note 36, at 645.

250. *Compare* Mamidoil Jetoil Greek Petrol. Prods. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award, ¶¶ 676–735 (Mar. 30, 2015), *with* Mamidoil Jetoil Greek Petroleum Prods. Societe SA v. Republic of Albania, ICSID Case No. ARB/11/24, Dissenting Opinion of Steven A. Hammond, ¶¶ 79–110 (Mar. 30, 2015).

251. Patrick Mitchell v. Dem. Rep. Congo, ICSID Case No. ARB/99/7, Annulment Decision (Nov. 1, 2006) [hereinafter *Mitchell v. Democratic Republic of Congo*].

the impugned measures were "necessary."[252] Zrilič criticizes the decision for having presumptively rejected the state's analysis of the situation based on its limited access to information and argues that that is precisely the reason why deference should be accorded to the state.[253] As Andrew D. Mitchell and Caroline Henckels explain, the question of whether alternative measures that could achieve the impugned measure's purpose exist is not necessarily straightforward, especially in policy areas involving considerations such as resources allocation, which require balancing of divergent interests.[254]

Second, as shown in Part III, the undecidability of concepts such as development means that any attempts to incorporate norms and values into arbitral decision-making must first tackle the political question of whether the realization of such values would demand the prioritization of state freedom or international discipline. The often-synergetic relationship between foreign investment and the fulfilment of such values provides no automatic or easy answer to the question. Parts IV and V further illustrated how those disagreements over the interpretation of war clauses and state defenses also reflect the underlying normative divergence over the allocation of authority between the state and the international. The concept of defective sovereignty—being of particular relevance in (post-)conflict situations as states embroiled in or emerging from conflicts are more likely to lack the ability to pursue public goods on which the loss of sovereignty critique is predicated—further complicates this inquiry.

Third, ostensibly progressive doctrinal moves to incorporate humanitarian considerations, such as the domestication of desirable norms and values under investors' knowledge or expectation, always raise the questions of whether and to what extent should it be made subject to practical considerations such as investors' actual knowledge; and if it should be made so subject, whether it would simply become a convenient guise for arbitrators to further expand investment protection.[255] One may plausibly argue that the principle of systemic integration that is routinely invoked in scholarship to defend the incorporation of external norms into arbitral decision-making reflects a different normative concern from that reflected by concepts like legitimate

252. *Id.* ¶ 58.

253. ZRILIČ, *supra* note 48, at 127–28.

254. Andrew D. Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law*, 14 CHI. J. INT'L L. 93, 100 (2013).

255. *See, e.g.*, MILES, *supra* note 13, at 320–30. The expansionist impulse of the investment arbitrator is Sornarajah's object of criticism. *See, e.g.*, SORNARAJAH, *supra* note 13.

expectation, which makes them fundamentally irreconcilable with each other; where systemic integration places investment law within the broader framework of public international law and insists on the formal coherence and systematicity of such law, legitimate expectation is a legal concept that grounds investment protection in the pragmatic and realistic concerns of the investors. Should systematicity or pragmatism be preferred? On the one hand, there is no answer that can be immune from the criticism that it has not disturbed the "bargain" struck by the parties in the investment treaty or the elusive object and purpose of the treaty or regime. On another hand, the balancing between systematicity and pragmatism is not reducible to a legal criterion, for it depends on whether one emphasizes the public or private dimension of investment arbitration.[256]

Finally, against the background of the above observations, situational assessment, context-sensitive evaluation and ad hoc balancing demanded by this turn to equity introduces a huge amount of uncertainties and policy questions that go against one of the central premises of the peace-making potential of investment arbitration—its ability to depoliticize investment disputes by providing a set of formal rules and standards defined *ex ante* that can be applied with a degree of certainty and transparency. Of course, in a trivial sense, investment disputes are still depoliticized in that their resolution is put beyond the diplomatic arena.[257] However, in a substantive sense, the resolution of these disputes remains deeply political. The "dethronement of the state" made possible by the availability of ISDS does not extinguish politics, but only re-enacts it on the international plane. While broad references to the potential for interpretative flexibilities provided within the investment law regime allow one to demonstrate in a formal way, quite elegantly, investment arbitration's receptiveness towards complexities and thus its continued relevance, they are dissatisfying for any holistic assessment that demands one to take into account "all relevant considerations" to produce "just and optimal outcomes" (in Schill and Zrilič's terms respectively) assume that arbitrators' understanding of "justice," "optimality," or even "relevance" are not subject to intense disagreement.[258] Invoking these words does not lead to better decision-making because

256. The choice of "public"/"private" vocabulary through which an issue is examined is a political one. *See* Koskenniemi, *supra* note 96, at 11 (quoted in Roberts, *supra* note 19, at 57). *See also* René Urueña, *Subsidiarity and the Public-Private Distinction in Investment Treaty Arbitration*, 79 L. & CONTEMP. PROBS. 99, 99–100 (2016).

257. Kriebaum, *supra* note 10, at 15.

258. *See generally* Ingo Venzke, *The Practice of Interpretation in International Law: Strategies of Critique* 7–10 (Sept. 10, 2018) (Amsterdam Law School Legal Studies Research Paper No. 2018-22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247125.

disagreements over the content of rules merely transform into disagreements over what these words mean.

VIII. Beyond Legal Justice?

Discussion of the uneasy relationship between investment and conflict brings to the fore the huge political stakes involved in adjudication of investment claims arising from (post-)conflict contexts. Doctrinal irresolution in the field remains animated by the competing demands of state freedom and international discipline, and the choice between them is a political one, invariably shaped by one's understanding of the relationship between investment and conflict and of international investment law's *telos* and its place in the world.

A. *Limits of Legalism in Investment Law Scholarship*

Relying on the standard repertoire of doctrinal techniques and legal concepts, much of the scholarship in the field has engaged with these questions in a pragmatic manner, focusing on how doctrines can be "(re)calibrated," how various values and norms can be massaged into legal interpretations, and how arbitral tribunals could be persuaded to adopt a more progressive interpretation in favor of others.[259] As Ntina Tzouvala pointedly observes, mainstream critiques of international investment law and the reform proposals that accompany them—from the critiques of misinterpretation, inconsistency and bias, to proposals such as establishment of a multilateral investment court, articulation of various standards of review, special treaty carve-outs, and proceduralisation[260]—remain deeply committed to the project of judicialization.[261] One example of this is the work of Kate Miles, who, after presenting a trenchant critique of the investment law regime by demonstrating its inextricable links with its colonial commercial expansionist origins, and demonstrating the regime's structural impermeability to broader interests, retreats in her conclusion that most of the problems she identified can be addressed by the establishment of an appellate body, adoption

259. *See, e.g.*, Eric De Brabandere, *(Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration*, 59 Bos. C.L. Rev. 2607 (2018).

260. The clearest example of this is the work of the Working Group III of UNCITRAL on Investor-State Dispute Settlement Reform. *See Working Group III: Investor-State Dispute Settlement Reform*, U.N. Comm'n on Int'l Trade L. (Feb. 12, 2021), https://uncitral.un.org/en/working_groups/3/investor-state.

261. Tzouvala, *supra* note 40, at 195–96.

of transparency rules, and acceptance of amicus briefs.[262] One may argue that this is precisely the role of investment scholar-practitioners, whose work is limited by the vocabulary of their field and the professional context in which they operate. However, as Jochen von Bernstorff has rightly pointed out, academic scholarship that fails to maintain a reflexive distance from practice may inadvertently normalize questionable disciplinary assumptions and overstate the redeeming potential of the discipline.[263]

One example of this is the loss of sovereignty critique examined above. Operating within the confines of investment rules, such critique could only insist that state freedom be protected by relaxing investment protection standards to accord greater regulatory freedom to states or by adopting a more deferential standard of review of state actions. In these ways, the defense of the state is only meant to operate as a proxy for the public interests to which state freedom arguments are supposed to give expression. Yet, as the above discussion has shown, such critique is weak—particularly so in (post-)conflict contexts—precisely because of the potential distance between state interests and public interests. Being a system of dispute resolution between states and investors, this limitation cannot be overcome. Some may suggest that this limitation is desirable as ISDS is meant to insulate technical/rational decision-making of international economic governance from the manipulable notions of public interests or the irrationality of majoritarian politics from which they flow.[264] It is by acknowledging the limits of state freedom arguments, and that the realization of public interests may lie beyond state freedom and international discipline, that one begins to recognize the limits of doctrinal work that operates within the limits of the structure of ISDS.[265]

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262. MILES, *supra* note 13, at 377; *see* David Schneiderman, *Book Review*, 25 EUR. J. INT'L L. 942, 944–45 (2014) (reviewing KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL (2013)).

263. Jochen Von Bernstorff, *The Relationship between Theory and Practice in International Law: Affirmation Versus Reflexive Distance*, *in* INTERNATIONAL LAW AS A PROFESSION 222 (Jean d'Aspremont et al. eds., 2017). *See also* Jochen Von Bernstorff, *International Legal Scholarship as Cooling Medium in International Law and Politics*, 25 EUR. J. INT'L L. 977 (2014).

264. For a critique of this theme, see DAVID SCHNEIDERMAN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY'S PROMISE (2008).

265. Anthea Roberts' work on State-to-State investment arbitration provides one example of how thinking beyond ISDS may produce fruitful results. *See* Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretative Authority*, 55 HARV. INT'L L.J. 1 (2014).*See also* Yackee, *supra* note 22.

Another example is the increasing reliance on contextualization and equity to rehabilitate the credibility of the investment law regime. In a way, these proposals should be welcomed because some of them recognize the political contestability of arbitral decision-making as well as its material consequences. However, by placing emphasis on the elasticity of doctrines (or interpretative creativity of the arbitrators) as evidence for the potential of the system to take seriously competing priorities that lay beyond each investment dispute, it fails to question the propriety of arbitrators' monopolized authority to decide what is equitable or to resolve disagreements over the legitimate scope of state action. As Koskenniemi puts it most eloquently:

> Even the meticulous proceduralism of investment arbitration fails to explain how the interests of domestic constituencies can be translated into "legitimate regulatory interest" without assuming the presence of a global language of "legitimacy" whose authoritative speakers would be just those actors whose power it is designed to justify and consolidate.[266]

This is precisely why the legitimacy discourse in international investment law remains questionable[267]: on the one hand, the turn to equity in arbitral decision-making is seen by many as providing a fresh source of legitimacy for a regime that has been dominated by a small coterie of commercially-minded arbitrators;[268] on the other hand, arbitral tribunals' ever-expanding jurisdiction to decide upon public interest matters raises new legitimacy challenges as arbitrators lack the democratic accountability many see as necessary to adjudicate over such matters.[269]

Take the example of *Paushok v. Mongolia*,[270] where the tribunal found that the fact that a "democratically elected legislature has passed legislation that may be considered ill-conceived, counter-productive and excessively burdensome" does not automatically amount to a breach of

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266. Martti Koskenniemi, *Epilogue: To Enable and Enchant—On the Power of Law, in* THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI 393, 396 (Wouter Werner et al. eds., 2017).

267. For a useful critique of 'legitimacy' as a concept generally, see Martti Koskenniemi, *Legitimacy, Rights, and Ideology: Notes Towards a Critique of the New Moral Internationalism*, 7 ASS'NS 349 (2003).

268. *See, e.g.*, Zrilič, *supra* note 43, at 630.

269. *See* Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008).

270. Sergei Paushok v. Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability (Apr. 28, 2011).

an investment treaty because one of the main roles of a legislative assembly is to amend and adjust laws "to correct serious mistakes that were made at the time of their adoption."[271] Some have seen this reasoning as a welcome departure from the usual arbitral suspicion of democratic processes and one that is more reflective of the Tocquevillian conception of democracy as the ability to make "repairable mistakes."[272] While it is true that the reasoning in *Paushok* provides a useful point of reference (not precedent) for practitioners to defend states in future arbitral cases, its usefulness remains limited to the extent that *Paushok* fails to question why any expression of democracy should be subject to arbitral scrutiny. Similarly, some may place faith in the potential of *amicus curiae* participation in arbitral proceedings to better inform arbitral tribunals' decision-making on matters pertaining to public interests.[273] However, as Nicolas Hachez and Jan Wouters have shown, not only could such additional participation not guarantee that public interests would be taken into account by tribunals, but also that *amicus curiae* participation may inadvertently harm states by raising arbitration costs and disorganizing defenses.[274] More relevantly, the defense of *amicus curiae* participation does not challenge but rather consolidates the central role of arbitral tribunals in deciding on such public interest matters.

B. *Beyond Legalism: Normative Dimension of the "Loss of Sovereignty" Critique*

Investment arbitration in (post-)conflict contexts presents three fundamental challenges. The first is that it brings into question the assumption held by many that the maximization of investment protection and/or promotion is necessarily conducive to the realization of social goods in the host states. The second is that investment arbitration in (post-)conflict contexts exposes the limits of the loss of sovereignty critique—the main way by which that assumption that had thus far

271. *Id.* ¶ 299.

272. Kulick, *supra* note 114, at 448–49. On the usual arbitral suspicion of democratic decision-making processes, see Tim Wood, *Political Risk or Political Right? Reconciling the International Legal Norms of Investment Protection and Political Participation*, 30 ICSID REV. 665 (2015).

273. *See, e.g.*, Aguas Argentinas SA v. The Argentine Republic, ICSID Case No. ARB/03/19, at ¶¶ 20–22 Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005).

274. Nicolas Hachez & Jan Wouters, *International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 417, 439 (Freya Baetens ed., 2013).

been challenged—by showing how there is no necessary connection between the defense of state freedom and the defense of public interests. The third challenge is that by showing the complex relationship between investment and conflict, investment arbitration in (post-)conflict contexts brings into focus the far-reaching potential for disagreements over what measures or reforms are necessary to achieve peace, and what is the proper role of investment and of the state in the process.

One productive way of responding to the challenges posed above is to take the idea of local ownership in peacebuilding scholarship seriously. As Timothy Donais shows, the communitarian conception of local ownership suggests that post-conflict peacebuilding processes must be done from the bottom-up, taking into account domestic social realities and allowing meaningful participation of local actors in their design, management, and implementation.[275] Local ownership is justified on the bases that, first, it is the local actors who need to live with the outcomes of such processes, and second, externally imposed top-down arrangements are more likely to fail because of their perceived lack of legitimacy.[276]

As José Alvarez rightly points out, the defense of sovereignty in particular circumstances requires a defense not only in legal terms but also in moral terms.[277] With the limits of the state freedom arguments in mind, one may then be tempted to reframe the loss of sovereignty critique not as a defense of the post-conflict host states but as a defense of the interests of the people in those states. However, this does not go far enough. Even if the focus is placed squarely on the interests of the population, apologists of ISDS would still insist that through careful balancing of interests, arbitral tribunals could—and arguably already claim to[278]—determine if the state is acting in good faith when it defends its regulatory measures or actions so as to ensure that the population's interests and rights remain secure.

However, a population's interests and rights are not as much about formal legal entitlements as they are about the recognition that people should be able to participate meaningfully in discussions about policies and actions that impact their interests and rights, and exert real

275. *See, e.g.*, Timothy Donais, *Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes*, 34 PEACE & CHANGE 3, 9–10 (2009).

276. *Id.* at 10, 20.

277. José E. Alvarez, *State Sovereignty in Not Withering Away: A Few Lessons for the Future*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 26, 37 (Antonio Cassese ed., 2012).

278. Stephan W. Schill & Vladislav Djanic, *Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law*, 33 ICSID REV. 29 (2018).

influence over their formulation and implementation. To reduce a population's interests to objectives to be managed or optimal outcomes to be derived from expert calculation is to deny the ideal of self-hood that sovereignty is meant to embody—the ability of the community to decide for itself its identity, purpose, and the values that it finds important.[279] Given the political stakes involved in any adjudication of investment claims arising from conflict contexts, it may be argued that one must allow the local population to determine the agenda through which peace, development, or any other valuable goals are to be achieved. In this light, local ownership requires one to understand the loss of sovereignty not as a loss of state freedom, but as the more fundamental loss of the state population's right to be "the master of one's life."[280]

C. *The Necessity of Repoliticization*

To take local ownership seriously means placing the population's right to participation at the center of any reform proposal. First, this requires one to think beyond the dichotomy of state freedom versus international discipline, and beyond the abstract ideal of systematicity or the immediate appeal of (arbitral) pragmatism. Recourse to systematicity to integrate or balance the populations' interests with the investors' interests invariably places them on an equal plane and thus trivializes the former, while the focus on pragmatism always obscures disagreements over what is pragmatic in the circumstances. Second, taking local ownership seriously demands one to acknowledge that questions about the relationship among investment, conflict, peace, and public interests are not amenable to technical-rational calculation, but are deeply political questions that must be resolved through a political process where the population's participation plays an integral role.[281] This is particularly important post-conflict when most conflict-related investment claims are likely to be made—a time when the community is more likely to be undergoing fundamental societal transformation. As explained in Part III(B), the retrospective character of investment arbitration cannot be easily reconciled with the forward-looking nature of transitional justice.

As Isabel Feichtner observes, doctrinal techniques provide limited assistance in revealing the relationship between investment law and

279. Martti Koskenniemi, *What Use of Sovereignty Today?*, 1 ASIAN J. INT'L L. 61, 69–70 (2011).

280. *Id.* at 70.

281. Dustin N. Sharp, *Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique*, 14 CHI. J. INT'L L. 165, 182 (2013).

human rights.[282] She therefore argues that international (investment) lawyers must acknowledge the political dimension of their work, remain sensitive to the distributive and political-economic effects of their decision-making, and be ready to interrogate their own normative assumptions.[283] Going beyond this, instead of placing investment lawyers at the center of social change, local ownership places the community at the center: the community itself freely determines its goals and their implementation, including the priority to be accorded to investment protection in post-conflict situations. The emphasis would not be on establishing a priori hierarchy between investment protection and public interests, nor would it be on arriving at the optimal outcome. Instead, local ownership demands that communities decide matters and accept the consequences on a collective basis. This implies the need for a platform on which various interests, priorities, trade-offs, and their justifications can be openly considered, debated, and assessed.[284]

As the rich body of peacebuilding and transitional justice literature have shown, designing such a process requires close attention to the specific contexts in which the process will operate.[285] It is therefore neither desirable nor possible for this Article to articulate in broad terms how such a process should be implemented. However, based on the discussion above, ISDS does not appear to satisfy the normative demands of local ownership because of its structural limits, legitimacy deficit, and technocratic orientation.

IX. Conclusion

Thinking about the relationship between investment (law) and peace in conceptual terms has provided this Article with the opportunity to critically engage with the dominant modes of justifications and critiques in the field of international investment law, which has then allowed for a productive discussion of the promise and limits of investment arbitration in (post-)conflict contexts.

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282. Isabel Feichtner, *Thinking Utopia and Politics of Paradise*, *in* International Investment Law and its Others 79, 82 (Rainer Hoffmann & Christian J. Tams eds., 2012); *see also* Davitti, *supra* note 12, at 145–47, 230.

283. Isabel Feichtner, *Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?*, 29 Leiden J. Int'l L. 979 (2016).

284. Sharp, *supra* note 281.

285. Laurel E. Fletcher, Harvey M. Weinstein & Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 Hum. Rts. Q. 163 (2009).

This Article began by highlighting the contestability of the historical and conceptual frames through which one may assess the successes and failures of the investment law regime, showing how productive scholarly work must acknowledge the partiality of each frame and grapple with the broader tensions that animate disagreements over doctrinal interpretations and various reform proposals. The Article then turned to articulate one such tension by juxtaposing the dominant narratives about foreign investment and ISDS' contribution to peace, and their uneasy relationship. In doing so, it highlighted the dominant narratives' assumption that foreign investment and ISDS establishes a congruence of economic integration with domestic peace in the host state.

After finding indefensible the absolutist position of investment protection, the Article then turned to examine the operation of and normative justifications for the loss of sovereignty critique, which has been invoked in investment law scholarship to counter such absolutism. Showing how the critique has been invoked primarily as a defense of state freedom, the Article questioned its utility and persuasiveness in (post-)conflict contexts where the states are more likely to lack the capacity or willingness to act in the public interest, the core assumption underlying such critique.

Drawing on the debates over the interpretation of war clauses and state defenses, the Article demonstrated how interpretative discords among arbitral tribunals are reflective of the divergent assumptions made about the role of the state and its relationship with investment and conflict, and how formal rules remain limited in reconciling the divergent normative concerns raised by different doctrinal positions. Showing how investment law scholarship has begun to acknowledge the complexities arising in (post-)conflict situations, the Article then examined the gradual turn to equity and deformalization in investment arbitration, showing that it reflects the competing impulses of stability/flexibility and legality/legitimacy. The Article argued that while intuitively appealing, this turn to equity through the contextualization and humanization of investment protection not only exacerbates the political contestability of arbitral decision-making, but also betrays the central premise of the peace-making potential of investment arbitration: to provide formal rules and standards defined *ex ante* that could resist politicization.

In light of these conclusions, the final part of this Article explicitly explored the limits of legal justice in post-conflict contexts, first by identifying the structural limits of ISDS in addressing the normative concerns raised by the idea of defective sovereignty, and second by questioning the benefit of subsuming deeply political questions under

rational-technical decision-making. Drawing on the idea of local ownership in peacebuilding literature, the Article argued that the focus of the loss of sovereignty critique must shift from a defense of state freedom to a defense of the people's right to decide for themselves on what priorities and values they find important and by what means they should be realized.