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The legitimacy of investment treaties

Between Exit, Voice and James Crawford's quest for a more democratic international law

LLUÍS PARADELL TRIUS

Introduction

In the last decade, controversy has arisen regarding the compatibility of investment protection treaties and the ICSID Convention with national constitutions and State sovereignty. The focus of concerns has been the alleged lack of equality, transparency, predictability and accountability of investor–State arbitration under those treaties.[1] Horacio Rosatti, former attorney general of Argentina, was among the first to complain in 2003, when starting to defend Argentina from the avalanche of investment treaty claims brought by investors aggrieved by Argentina's 2002 measures to fight its economic crisis.[2]

Many more similar comments of unease followed suit in Argentina, including a book by the judge of the Supreme Court, Carlos Fayt.[3] Draft laws were prepared by Argentine MPs to declare bilateral investment treaties (BITs) unconstitutional.[4] Further, while Colombian and Bolivian courts heard and rejected constitutional challenges against investment treaties,[5] in Ecuador some BITs were declared unconstitutional and

[1] e.g. Public Statement on the International Investment Regime, 31 August 2010, available at www.osgoode.yorku.ca/public_statement.

[2] Horacio D. Rosatti, 'Los tratados bilaterales de inversión: el arbitraje internacional obligatorio y el sistema constitucional argentino', *La Ley*, 58 (2003), 1.

[3] Carlos S. Fayt, *La Constitución Nacional y los tribunales internacionales de arbitraje* (Buenos Aires: La Ley, 2007).

[4] e.g. Draft Law 4504-S-04, presented by Senator Capitanich in February 2005 and 532-S-05 presented by Senator Müller in March 2005.

[5] Sentencia de la Corte Constitucional de Colombia C-294/02, 23 April 2002, available at http://corte-constitucional.vlex.com.co/vid/-43618351. Sentencia del Tribunal Constitucional de Bolivia sobre constitucionalidad de leyes ratificadoras de Convenios y

others are still under review in Ecuador.[6] In Canada, NAFTA Chapter 11 investment protections were also attacked as unconstitutional.[7] Australia announced in 2011 that it would no longer include investor–State arbitration in its trade agreements, given its impact on State sovereignty.[8] Recently, a columnist of the UK newspaper *The Guardian* mounted a furious attack on the investment protection chapter of the EU–US Transatlantic Trade and Investment Partnership, which is being negotiated, because it 'would let rapacious companies subvert our laws, rights and national sovereignty' and 'kill regulations protecting people and the living planet'.[9] Professor Martti Koskenniemi has also argued that this agreement is 'a transfer of power from public authorities to an arbitration body, where a handful of people would be able to rule whether a country can enact a law or not and how the law must be interpreted'.[10]

The complaints have often been tainted by ideological opinions and political interests. Disapproval of investment treaties by States has frequently been a reaction to being sued under such treaties. The opposition to open market policies may also have influenced the doctrinal charge against the investment treaty regime. Thus, the critics have in turn been attacked for echoing prejudice and preconception, or at least an overstated and one-sided focus on the shortcomings of investment treaty arbitration, under the banner of the system's 'legitimacy crisis', rather than engaging in more fine-grained analysis.[11] Empirical research, in turn, has shown

Tratados, No. 0031/2006, 10 May 2006, available at http://italaw.com/sites/default/files/treaty-interpretations/ita0940.pdf.

[6] 'Ecuadorian Constitutional Court rulings on the constitutionality of UK, German, Chinese and Finish bilateral investment treaties', Investment Arbitration Reporter, 28 August 2010, available at http://iareporter.com/articles/20100830_2; 'Ecuador to Set Up Commission to Audit Bilateral Investment Treaties', *Practical Law Arbitration*, 16 October 2013.

[7] Ontario Supreme Court of Justice, *The Council of Canadians et al.* v. *Her Majesty in Right of Canada*, Decision of 8 July 2005 and Ontario Court of Appeal Decision of 30 November 2006, available at http://italaw.com/sites/default/files/treaty-interpretations/ita0941.pdf.

[8] Gillard Government Trade Policy Statement, 'Trading Our Way to More Jobs and Prosperity' (Department of Foreign affairs and Trade, April 2011), available at http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf.

[9] George Monbiot, 'This Transatlantic Trade Deal is a Full-frontal Assault on Democracy', *The Guardian*, 4 November 2013.

[10] 'Professor Martti Koskenniemi: Finland's Legislative Power May Be in Jeopardy', *Helsinki Times*, 16 December 2013, available at http://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in-jeopardy.html.

[11] Devashish Krishan, 'Thinking about BITs and BIT Arbitration: The Legitimacy Crisis that Never Was' in Todd Weiler and Freya Baetens (eds.), *New Directions in International*

(arguably) that States often prevail in investment treaty cases, so that the concern that investment treaties unduly constrain sovereignty and regulatory action may be somewhat exaggerated.[12]

There is no intention here to join either side of the debate, but to suggest that its mere existence should give pause for thought. Similar legitimacy issues have arisen in relation to other areas of international law and other international norm-generation institutions, like the WTO, the free trade provisions of the NAFTA and the international criminal courts.[13] Monroe Leigh's contention that due-process concerns generated by some of the decisions of the existing war crimes tribunals indicated the need 'to commence a campaign to add a Bill of Rights to the UN Charter'[14] is reminiscent of the familiar debate on the need to incorporate human rights protections in European Community law. Hence, 'critical transnational constitutional crises'[15] are not unheard of.

Two precedents of legitimacy crises will be reviewed here: the debate in US law in the 1950s and '60s on the constitutionality of human rights' treaties in the context of the civil rights movement; and the constitutionality problems linked to the supremacy of European Community (EC) law

Economic Law: In Memoriam Thomas Wälde (Leiden: Martinus Nijhoff, 2011), 107, providing a long list of references at n. 32.

[12] For empirical research see Susan Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration', *North Carolina Law Review*, 86 (2007), 1; Susan Franck, 'Empiricism and International Law: Insights for Investment Treaty Dispute Resolution', *Virginia Journal of International Law*, 48 (2008), 767; Susan Franck, 'Development and Outcomes of Investment Treaty Arbitration', *Harvard International Law Journal*, 50 (2009), 435; Kassi Tallent, 'State Responsibility by the Numbers: Towards an Understanding of the Prevalence of the Latin America Countries in Investment Arbitration', *Transnational Dispute Management*, 1 (2010).

[13] Paul D. Marquardt, 'Law without Borders: The Constitutionality of an International Criminal Court', *Columbia Journal of Transnational Law*, 33 (1995), 73; Gordon A. Christenson and Kimberly Gambrel, 'Constitutionality of Binational Panel Review in Canada–U.S. Free Trade Agreement', *International Lawyer*, 23 (1989), 401; Bruce Ackerman and David Golove, 'Is NAFTA Constitutional?', *Harvard Law Review*, 108 (1995), 4; John Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results', *Columbia Journal of Transnational Law*, 36 (1997), 157; Steven Croley and John Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', *American Journal of International Law*, 90 (1996), 193; Robert Kushen and Kenneth Harris, 'Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda', *American Journal of International Law*, 90 (1996), 510.

[14] Monroe Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused', *American Journal of International Law*, 90 (1996), 238.

[15] W. Michael Reisman, 'Introductory Remarks', Symposium: Constitutionalism in the Post-Cold War World, *Yale Journal of International Law*, 19 (1994), 192.

in EC Member States. The US controversy resulted in the non-ratification by the US of human rights' treaties, and still today international law has a somewhat precarious status in the US legal system. Conversely, the EC debate resulted in the reinforcement of the EC system through dialogue and cross-fertilisation between national courts and the European Court of Justice (ECJ).

The suggestion in this chapter is that the investment treaty regime may learn some lessons from these crises. Before delving further into them, however, a brief explanation of the framework for the analysis is needed.

The Exit and Voice dichotomy, and James Crawford's quest for a more democratic international law

The disparity of approaches to an international regime's legitimacy crisis may be explained by the dichotomy between 'Exit' and 'Voice', used by Joseph Weiler to explain some of the dynamics in the EC legal order: 'Exit is the mechanism of organizational abandonment in the face of unsatisfactory performance. Voice is the mechanism of intraorganizational correction and recuperation.'[16] Thus, the legitimacy and constitutionality problems of international regimes may lead to opposite forces: withdrawal from the system (Exit) or demand for more participation (Voice). The greater the opportunities for Voice, the less the tendency for Exit.

In investment arbitration Exit has already appeared in the form of denunciation of the ICSID Convention[17] and termination of some BITs.[18] Voice too has been felt in the amendment of model investment treaties,[19] the issuance of biding interpretations of their provisions[20] and the participation of States as non-disputing parties in some cases. But the question here is whether the dynamics of Voice may also be heard on a day-to-day basis in the case law of investment treaty tribunals, in the way they

[16] Joseph H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, 100 (1991), 2411.

[17] Denunciations by Bolivia (16 May 2007), Ecuador (5 December 2007) and Venezuela (26 January 2012). See https://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp.

[18] 'Ecuadorian President Reportedly Asks Congress to Terminate 13 Bits; Move Comes on Heels of Earlier Termination of Multiple BITs', *Investment Arbitration Reporter*, 30 October 2009, available at www.iaireporter.com/articles/20091124_8.

[19] See e.g. the modification of the US Model BIT in 2012, available at www.ustr.gov/about-us/press-office/press-releases/2012/april/united-states-concludes-review-model-bilateral-inves.

[20] e.g. North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, available at www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

integrate national legal concepts and interact with domestic courts. If so, the tendency for Exit may be mitigated.

Inspiration is drawn, as ever, from James Crawford, my esteemed professor and mentor, an exceptional man and friend who has made international law and to whom this modest contribution is dedicated. Now that he is retiring from his chair as Whewell Professor of International Law at the University of Cambridge, I want to recall his inaugural lecture back in 1993, entitled 'Democracy in International Law', which I had the pleasure to attend and which influenced my PhD thesis on the interaction between international law and national constitutions, supervised by him.[21] In that lecture he addressed a number of facets of the relationship between international law and democratic principles. One of his arguments was to question the continuing acceptability of the rule of international law which provides that, except for treaties entered into in manifest violation of a rule of constitutional law of fundamental importance, national constitutional standards do not affect the international validity of international commitments and obligations.[22] In his lecture James referred to this rule as one of the 'deeply undemocratic features of classical international law'.[23]

No doubt the traditional rule of irrelevance of domestic law is required at a practical level, for international law to be able to function as a legal system binding its subjects, the States. However, at a more conceptual level this paradigm may not be fit for the increasing overlap between international and national constitutional law. Hence in 1997 James wrote as follows:

> [T]he relation between the international and constitutional levels can be reciprocal, and if there is to be a 'constitutionalisation' of international law and treaty making – which their effects on the individual increasingly seems to call for – it may occur by way of the co-opting of national constitutional limitations in the interests of international regularity.[24]

[21] Lluís Paradell Trius, 'International Law in National Legal Systems: Constitutional Obstacles and Opportunities', *TDM* 5 (2005).

[22] Arts. 27 and 46 of the 1969 Vienna Convention of the Law of Treaties (Vienna, adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

[23] James Crawford, *Democracy in International Law* (Cambridge University Press, 1994), 8 (reprinted in *British Yearbook of International Law*, 64 (1993), 113).

[24] James Crawford, 'International Law and Australian Federalism: Past, Present and Future' in Brian Opeskin and Donald R. Rothwell (eds.), *International Law and Australian Federalism* (Carlton: Melbourne University Press, 1997), 325.

The demands of national constitutions cannot be ignored if developments in international law, notably its growing concern with the relationship between the State and the individual, are to be accepted. Some fundamental principles of national constitutions may be externalised and thus condition the development of international law. As public power is exercised and reviewed internationally, and international law is in many domains reconceived as a system of public law, constitutional principles may operate as constraints on international or supranational action, thereby reinforcing its legitimacy. If these dynamics appear, then Voice prevails over Exit. Conversely, exaggerated criticism leads to Exit, which represents the defeat of the fruitful interaction between international law and national law.

The risks of Exit: international law in US civil rights litigation

Writing in 1948, Paul Sayre criticised the Supreme Court landmark decision in *Shelley* v. *Kraemer* (1948)[25] because it had neglected to refer to the US obligations under the UN Charter as a basis for refusing to judicially enforce a racially restrictive covenant relating to private property. He added that the UN Charter 'is now not only part of our constitution, but by our constitutional act we are part of the United Nations . . . we are morally and legally bound to give them [the Charter's provisions] all full effect all the time'.[26] These were the early days of the American civil rights movement, in which civil liberties groups filed suits in both state and federal courts citing the Universal Declaration of Human Rights and Articles 55 and 56 of the UN Charter to challenge racial discrimination.[27] According to these human rights clauses of the Charter, each member pledges itself to promote, and to take action for the achievement of, 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

Sayre's contention seemed to find immediate support in two judicial decisions. In *Oyama* v. *California* (1948), the Supreme Court found that the California Alien Land Law, as applied to the case, deprived the applicant of the equal protection by discriminating against citizens of Japanese

[25] *Shelley* v. *Kraemer*, 334 US 1 (1948).
[26] Paul Sayre, '*Shelley* v. *Kraemer* and United Nations Law', *Iowa Law Review*, 34 (1948), 1.
[27] See generally Bert B. Lockwood, 'The United Nations Charter and United States Civil Rights Litigation: 1946–1955', *Iowa Law Review*, 69 (1984), 901.

origin.[28] The opinion did not reach the question of constitutionality of the Law, nor did it cite the UN Charter. However, two separate concurring opinions, in which four of the justices joined, not only mentioned the Charter but would have struck down the Law partially as infringing the international obligations there assumed.[29] These arguments were extensively relied on by the Oregon Supreme Court in *Namba* v. *McCourt* (1949).[30] In this decision, the Oregon Alien Land Law was held unconstitutional as racially discriminatory in violation of the equal protection clause of the Fourteenth Amendment, interpreted in the light of the UN Charter human rights provisions.[31]

This initial trend was to be halted by the landmark 1952 decision of the California Supreme Court in *Sei Fujii* v. *State* (1952).[32] The case concerned a challenge by a Japanese resident in California against the validity of the California Alien Land Law, which discriminated against Japanese landowners. It was alleged that the Law was racially discriminatory and that it violated Articles 1, 55 and 56 of the United Nations Charter, as well as the equal protection clause of the Fourteenth Amendment. The California District Court of Appeal held that the constitutional arguments would fail on the grounds of the authority of Supreme Court case law upholding the constitutionality of alien land laws, and went on to strike down the Law as infringing the human rights provisions of the UN Charter.[33]

This decision was followed by vivid controversy and widespread criticism, generated in particular by those that sought to prevent bringing an end to racial segregation by international agreement.[34] Together with

[28] *Oyama* v. *California*, 332 US 633 (1948).
[29] *Ibid*., 649–50 (Black, J., concurring), 673 (Murphy, J., concurring).
[30] *Namba* v. *McCourt*, 204 P2d 569 (1949). [31] *Ibid*., 579.
[32] *Sei Fujii* v. *State*, 217 P2d 481 (Cal D Ct App 1950), rehearing denied 218 P2d 595 (1950), affirmed on other grounds 242 P2d 617 (1952).
[33] *Ibid*., 217 P2d 481, 484–8 (Cal D Ct App 1950).
[34] See on the controversy e.g. George Finch, 'The Need to Restrain the Treaty-making Power of the United States within Constitutional Limits', *American Journal of International Law*, 48 (1954), 57; Quincy Wright, 'National Courts and Human Rights: The Fujii Case', *American Journal of International Law*, 45 (1951), 62; Oscar Schachter, 'The Charter and the Constitution: The Human Rights Provisions in American Law', *Vanderbilt Law Review*, 4 (1951), 643. See also Lockwood, 'The United Nations Charter and United States Civil Rights Litigation: 1946–1955', 924 *et seq*. The main criticism of the decision came from the American Bar Association as reflected in the pages of its journal. See e.g. Frank E. Holman, 'Treaty Law-making: A Blank Check for Writing a New Constitution', *American Bar Association Journal*, 36 (1950), 707; and Frank Ober, 'The Treaty-making and Amendment Powers: Do They Protect Our Fundamental Rights?', *American Bar Association Journal*, 36 (1950), 715.

the US signature of the Convention on the Prevention and Punishment of Genocide in 1948,[35] concern arose that international commitments might undermine State sovereignty, national autonomy and the US form of government. This set off a campaign to limit the treaty power, culminating in the proposed Bricker Amendment, which would have made all treaties non-self-executing.[36]

In response to all this debate, the California Supreme Court affirmed the lower court's decision solely on constitutional grounds, and held the human rights clauses of the UN Charter to be non-self-executing.[37] The Court found the Charter provisions to be vague and lacking the intent necessary to make them self-executing. The examination of the position taken by the US negotiators, and by the political branches in ratifying the Charter, led also to the conclusion that the US had not undertaken an immediate obligation to supersede conflicting national legislation. Thus, the Court held that the provisions Charter's invoked were not intended to become rules of law for the judiciary to apply.[38]

The debate around the self-executing doctrine generated by the *Fujii* case and the Bricker Amendment exerted very considerable influence thereafter. The US did not ratify any major human rights treaty until 1986. Since then it has ratified the Genocide Convention in 1986, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1990, the International Covenant on Civil and Political Rights in 1992 and the Convention of the Elimination of All Forms of Racial Discrimination in 1994. However, ratification has been subjected to comprehensive reservations which raise questions about the seriousness of the US's commitment, and to declarations establishing that the treaties are non-self-executing.

The constitutionality of these declarations is doubtful because they prevent judges from applying treaty law, for which they are empowered by the Constitution, and which contradicts the purpose of the Supremacy Clause.[39] In any case, this episode evidences the risks linked to Exit. As a result of the *Fujii* case and the ensuing controversy, courts revitalised and expanded the self-executing treaty doctrine to hold a series of human

[35] But not ratified (Senate advice and consent) until 1986.
[36] See Ch. 1, nn. 29 *et seq.*, and accompanying text.
[37] *Sei Fujii* v. *State*, 242 P2d 617 (1952). [38] *Ibid.*, 619–22.
[39] See Thomas Buergenthal, 'Modern Constitutions and Human Rights Treaties', *Columbia Journal of Transnational Law*, 36 (1997), 211; and Louis Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker', *American Journal of International Law*, 89 (1995), 341.

rights treaties to be non-self-executing.[40] International law was ousted from the civil rights litigation, and as a consequence it probably took longer for US racial segregation to end, even if the UN Charter may have had an indirect effect on the civil rights jurisprudence.[41] More generally, courts discovered the use of the doctrine of non-self-executing treaties to circumvent the consequences that the enforcement of treaty obligations may have upon internal law.

This is why multilateral treaties, with much greater impact in internal law than bilateral treaties, are almost always regarded as non-self-executing in US law.[42] Whenever the position of the US government is opposed to the enforcement of a treaty provision, or the latter may bring the court in conflict with, or embarrass, the political branches, courts may find a way out by determining the provisions of a treaty non-self-executing. In these situations courts avoid deciding substantive international law issues that cases may raise, so that the non-self-executing doctrine serves the same purpose as the 'political question' doctrine. The controlling rationale for both is the courts' understanding of the demands of the constitutional separation of powers: the need to preserve the authority of the political organs in matters which have been considered particularly within their competence.[43]

[40] *Vlissidis* v. *Anadell*, 262 F2d 398 (7th Cir, 1959) (Arts. 55 and 56 of the UN Charter non-self-executing); *Pauling* v. *McElroy*, 164 FSupp 390 (1958), affirmed 278 F2d 252 (DC Cir, 1960), certiorari denied 364 US 835 (1960) (same); *Camacho* v. *Rogers*, 199 FSupp 155, 158 (SDNY 1961) (same); *Frolova* v. *USSR*, 761 F2d 370, 374 (7th Cir, 1985) (same); *In re Alien Children Educ. Litig.*, 501 FSupp 544, 590 (SD Tex 1980), affirmed mem. (5th Cir, 1981), affirmed sub nom. *Plyler* v. *Doe*, 457 US 202 (1982) (OAS Charter non-self-executing); *Bertrand* v. *Sava*, 684 F2d 204, 218–19 (2nd Cir, 1982) (Refugees Protocol non-self-executing); *Spiess* v. *C. Itoh & Co. (America), Inc.*, 643 F2d 353 (5th Cir, 1981) (UN Charter non-self-executing).

[41] Lockwood, 'The United Nations Charter and United States Civil Rights Litigation: 1946–1955', 901.

[42] See e.g. *United States* v. *Postal*, 589 F2d 862 (5th Cir, 1979), certiorari denied 444 US 832 (1979); and *People of Saipan* v. *United States Dept of Interior*, 502 F2d 90 (9th Cir, 1974), certiorari denied 420 US 1003 (1975). See also Stefan Riesenfeld, 'The Doctrine of Self-Executing Treaties and *U.S.* v. *Postal*: Win at Any Price?', *American Journal of International Law*, 74 (1980), 892; and Richard Lillich and Hurst Hannum, 'Linkages between International Human Rights and U.S. Constitutional Law', *American Journal of International Law*, 79 (1985), 161.

[43] Thomas Buergenthal, 'Self-executing and Non-self-executing Treaties in National and International Law', *Collected Courses of the Hague Academy of International Law*, 235 (1992), 303; Charles Stotter, 'Self-executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem', *Buffalo Law Review*, 25 (1976), 773; Wright, 'National Courts and Human Rights: The Fujii Case', 62; Carlos

The potential and fruitful interaction between international law and national law, including constitutional law, came out unfulfilled. One example is that while an increasing number of States favour the normativity of international law, notably human rights law, by resorting to it in interpreting 'open – textured' provisions of the national constitution, this trend is much less perceptible in the United States. In particular, the Supreme Court has shown considerable disinclination towards using international instruments as a guiding principle for constitutional interpretation.

In *Stanford* v. *Kentucky* (1989), for instance, the question of the relevance of international and comparative law for constitutional interpretation was raised before the Court in a case concerning the imposition of capital punishment upon juveniles aged sixteen and seventeen. The Supreme Court examined whether the punishment was contrary to 'evolving standards of decency that mark the progress of a maturing society', the criterion for the determination of the infringement of the Eighth Amendment's prohibition against cruel and usual punishment. The majority's opinion, written by Justice Scalia, held that in examining the 'evolving standard of decency' only US conceptions of decency were relevant, and refused to take into consideration comparative and international law practice in connection with the death penalty.[44]

The virtues of Voice: constitutional dialogues in the EC legal order

It is well known that EC law has evolved 'into a vertically-integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory'.[45] This evolution was not explicitly envisaged by the founding treaties, but

Manuel Vázquez, 'The Four Doctrines of Self-Executing Treaties', *American Journal of International Law*, 89 (1995), 696, 722–3 (argues that the doctrine has an 'allocation of powers function', and is thus a matter of the proper institutional role of national courts).

[44] *Stanford* v. *Kentucky*, 492 US 361, 369 n. 1 (1989). This decision contrasts with the earlier one in *Thompson* v. *Oklahoma*, 487 US 815, 821 (1988), another case concerning the execution of juveniles, in which a different Supreme Court majority had favoured the use of international and comparative law in eighth amendment analysis. The new majority in the Supreme Court abandoned any attempt to reconcile international and internal law regarding the death penalty, and tended to exacerbate the differences between the two legal orders. See generally Joan Fitzpatrick, 'The Relevance of Customary International Norms to the Death Penalty in the United States', *Georgia Journal of International and Comparative Law*, 25 (1995–6).

[45] Alec Stone Sweet, 'Constitutional Dialogues in the European Community' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds.), *European Court and the*

resulted, first and foremost, from a series of landmark decisions of the ECJ starting in the 1960s which established the doctrines of direct effect and supremacy of EC law in national legal systems, pre-emption, interpretation of national law in conformity with EC law, and the doctrine of governmental liability for failure to properly implement EC law.[46]

The deepening legal integration involved the need for national legal orders to come to terms with the vast constitutional implications of European Community integration. Recognition of the Community order meant the introduction of EC law among the sources of national law, with primacy over them; the transfer of law-making powers, policy determination authority and executive competences to Community institutions in ever-expanding fields; as well as, in many cases, the reinforcement of the judicial branch by introducing the principle of judicial review of the consistency of national legislation with EC law.

The alteration of the national constitutional structures and their adaptation to the EC legal order was achieved primarily by constitutional interpretation, effectuated by the supreme and constitutional courts of the Member States.[47] In some cases, constitutions contained provisions permitting limitations of sovereignty and transfers of sovereign powers to international organisations.[48] In other cases, such general clauses on membership of international organisations were adopted with the prospect of the country's participation or accession to the EC.[49] These rules were interpreted extensively so as to legitimise the constitutional

National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context (Oxford: Hart, 1998), 306.

[46] On these developments see, among many others, *ibid.*; Weiler, 'The Transformation of Europe', 2403; Jean-Victor Louis, *L'Ordre juridique communautaire*, 5th edn (Luxembourg: Office des publications officielles des Communautés européennes, 1990).

[47] For an excellent and comprehensive description of the reception of the EC 'constitutional' doctrines in the various legal orders of the Member States see Henry Schermers and Denis Waelbroeck, *Judicial Protection in the European Communities* (Deventer: Kluwer, 1992). See also Thibaut de Berranger, *Constitutions nationales et construction communautaire* (Paris: LGDJ, 1995); and Santiago Muñoz Machado, *La Unión europea y las mutaciones del Estado* (Madrid: Alianza Universidad, 1993).

[48] Art. 11, Italian Constitution (1948); Art. 24(1), German Constitution (1949); Para. 15, Preamble to the French Constitution (1946), in force as part of the preamble of the 1958 Constitution.

[49] Art. 67 Netherlands Constitution (as amended in 1953, now renumbered Art. 92); Art. 49(bis) Luxembourg Constitution (1956 amendment); Art. 25(bis) Belgian Constitution (1970 amendment); Art. 20(1) Danish Constitution (1953); Art. 28(2) and (3) Greek Constitution (1975); Art. 93 Spanish Constitution (1978); Art. 7(5) Portuguese Constitution (1976). In the UK a legislative act, the European Communities Act (1972), was adopted at the time of accession.

adjustments required by the EC legal order. In addition, some countries inserted stipulations in their constitutions giving specific constitutional basis to European integration, notably in France and Germany in view of the ratification of the Maastricht Treaty (1992).[50]

However, the acceptance of the doctrines of EC legal integration and their consequences within national legal orders was not unconditional, nor did it necessarily comprise the endorsement of the ECJ's rationale for the constitutionalisation of the EC legal order. In particular, the highest courts in the Member States did not seem to subscribe to the legal basis for EC supremacy offered by the ECJ – namely, the EC as a new and autonomous legal system prevailing over national law of its own force. Instead they insisted on a national constitutional basis[51] or, exceptionally, an international law basis,[52] for EC supremacy. Further, some supreme or constitutional courts specified that the constitutional provisions which mediate in the relationship between EC law and national law are subordinated to other constitutional provisions. In so doing, they established constitutional limits on European integration as well as reserved for them the ultimate authority to control the legality of EC law.

Thus, for instance, accepting supremacy of EC law without a guarantee that this supreme law would not violate the essential constitutional principles and fundamental rights enshrined in the constitution of a Member State would have been practically impossible. This was made particularly clear in Italy and Germany, given that in these countries human rights enjoy constitutional protection, post-war national identity is to a large extent founded on and shaped by the Constitution, and the constitutional legality is safeguarded by specialised constitutional courts.

In Italy, for example, the EC legal order was subject to the so-called 'counter-limits' (*controlimiti*) – that is, EC law's respect for the fundamental principles of the constitutional system and the inalienable rights of individuals. The correlation in the jurisprudence of the Italian

[50] Title XIV of the French Constitution (as amended by Constitutional Law 92–554, 25 June 1992); Art. 23 German Constitution (as amended on 21 December 1992). In Ireland, a specific reference to the EC has existed since 1972, in Art. 29(4)(3)–(6) of the Constitution, amended to permit the ratification of the Single European Act (1986) and the Maastricht Treaty (1992).

[51] See Andrew Oppenheimer (ed.), *The Relationship between European Community Law and National Law: The Cases* (Cambridge University Press, 1994), 4–5, and the cases there cited and compiled. In the UK, supremacy was accepted on the basis of s. 2(1) of the 1972 European Communities Act.

[52] In Belgium and Luxembourg. See Oppenheimer, *The Relationship between European Community Law and National Law*.

Constitutional Court between constitutional openness to European integration and its constitutional limitations arose for example in the *Frontini* case (1973).[53] Here the Italian Constitutional Court affirmed that the Constitution authorised restrictions of the legislative power by effect of EC law, but if ever EC law led to 'unacceptable power to violate the fundamental principles' of the constitutional order 'or the inalienable rights of man' 'the guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the above-mentioned fundamental principles'.[54]

Likewise, in its *Granital* decision (1984), the Constitutional Court recognised the immediate applicability and superiority of Community law over conflicting Italian legislation but also affirmed that 'the law implementing the Treaty could be subject to review by this Court with regard to the basic principles of the municipal legal order and the inalienable rights of man'.[55]

In the *Fragd* decision (1989) the Constitutional Court declared itself competent 'to verify whether or not a treaty norm, as interpreted and applied by the institutions and organs of the EEC, is in conflict with the fundamental principles of the Italian Constitution or violates the inalienable rights of man . . . Such a conflict, whilst being highly unlikely, could still happen.'[56]

In Germany, in the famous *Solange I* decision (1974)[57] the Constitutional Court held that the German constitutional openness to the EC had to 'be understood in the overall context of the Constitution', and did not consent to 'amending the basic structure of the Constitution, which forms the basis of its identity'. The Constitutional Court admitted that basic rights could be guaranteed on multiple levels but that, 'as long as' (*Solange*) 'the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution', the Constitutional Court would still control the constitutional legitimacy of EC law.[58]

[53] *Frontini et altri* v. *Ministro delle finanze et altri* (C. cost., 27 December 1973 no. 183), *Rivista di diritto internazionale*, 57 (1974), 130; 93 ILR 514 (English translation).

[54] *Ibid*., 93 ILR, 525.

[55] *Spa Granital* v. *Amministrazione delle finanze dello Stato* (C. cost., 5 June 1984 no. 170), *Rivista di diritto internazionale*, 67 (1984), 360; 93 ILR 527, 536 (English translation).

[56] *Fragd* v. *Amministrazione delle Finanze dello Stato* (C. cost., 21 April 1989 no. 232), *Rivista di diritto internazionale*, 72 (1989), 104; 93 ILR 538, 542–3 (English translation).

[57] *Solange I* - Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel, decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540.

[58] *Ibid*., 395.

After this decision, the Constitutional Court gradually showed more and more willingness to relinquish its control, on the very basis of the *Solange I* doctrine, as the Community system developed certain structural characteristics which ensured that the exercise of the competences transferred would not be contrary to the Constitution. The doctrine thus identified in the jurisprudence of the Constitutional Court a principle of structural congruence (*strukturelle Kongruenz*) – that is, the need for a substantial equivalence between the structure of the German constitutional order and the international organisation to which competences are transferred.[59] Thus, in its *Vielleicht* ('Maybe') decision of 1979, the Constitutional Court declared in *obiter dictum* that it left open 'whether and, if so, to what extent – maybe in view of political and legal developments in the European sphere occurring in the meantime – the principles contained in its decision of 29 May 1974 can continue to claim validity without limitation'.[60]

A turning point in the case law of the German Constitutional Court was its *Solange II* decision (1986).[61] The Court held that, at the EC level, 'there should be a guarantee of the application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Constitution',[62] and that 'so long as' (*Solange*) an effective protection was thus ensured, the Court would not exercise its jurisdiction 'to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities . . . and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution'.[63] Thus, the Constitutional Court stressed the 'functional interlocking of the jurisdiction of the European Communities with those of the Member-States'.[64] This strengthened the position of the ECJ, now considered the effective 'ordinary' guardian of fundamental rights, but also implied the Constitutional Court's final say in conflicts with the ECJ.

[59] Filippo Donati, *Diritto comunitario e sindacato di costituzionalità* (Milano: Giuffrè, 1995), 263; Enzo Cannizzaro, *Trattati internazionali e giudizio di costituzionalità* (Milano: Giuffrè, 1991), 340, and doctrinal references there cited.

[60] *F.a. Steinike & Weinlig* v. *Bundesamt für Ernährung & Forstwirtschaft (Vielleicht)*, BVerfG 25 July 1979, 52 BVerfGE 187; [1980] CMLR 531, 537 (English translation) (emphasis added). In the CMLR the word *vielleicht* is translated as 'for instance', although 'maybe' is a more common translation and also gives name to the decision.

[61] *Wünsche Handelsgesellschaft (Solange II)*, BVerfG 22 October 1986, 73 BVerfGE 339; 93 ILR 403 (English translation).

[62] *Ibid.*, 93 ILR, 427–8. [63] *Ibid.*, 436. [64] *Ibid.*, 420.

That all this concern for fundamental constitutional values may not have been unfounded may be illustrated with some practical examples. In *Groener* (1989), for instance, the ECJ balanced the protection of the Gaelic language in Ireland with the EC principle of free movement of labour, in holding that the Irish laws requiring teachers to pass a Gaelic-language exam to obtain a job was a reasonable and non-discriminatory restriction to EC law.[65] In *Grogan* (1991), the freedom to supply services was balanced against the Irish prohibition of the distribution of information concerning abortion services in another Member State. The ECJ held that while abortion could be considered a service under EC law, the Irish prohibition in cause did not violate EC law because in this case the link between the providers of information and the providers of abortion in another Member State was too indirect.[66]

In general, the ECJ has been cautious in giving a decision that may directly clash with national constitutional values. Further, it has incorporated human rights into the EC legal order, adopting for its criteria the constitutional traditions common to the Member States and the international human rights conventions to which they have subscribed.[67] Thus, the interaction between the ECJ and national constitutional courts has led to 'stable accommodations on rights and to the obligation of ordinary courts to enforce EC law'.[68] However, the problem remains who is the ultimate authority to determine the constitutionality of EC acts. This was recast in the *Maastricht* judgment of the German Constitutional Court in the form of the *Kompetenz-Kompetenz* problem, 'the question as to which jurisdiction, Community or national, has the ultimate authority to declare the unconstitutionality of Community measures on the

[65] Case C-379/87, *Groener* v. *Minister for Education and the City of Dublin* [1989] ECR I-3967.

[66] Case C-159/90, *Society for the Protection of the Unborn Children Ireland* v. *Grogan* [1991] ECR I-4685. See also Diarmuid Rossa Phelan, 'Right to Life of the Unborn v. Promotion of Trade in Services', *Modern Law Review*, 55 (1992), 670; Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?', *Common Market Law Review*, 29 (1992), 669.

[67] On this jurisprudence see e.g. Joseph H. H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal Order of the European Communities', *Washington Law Review*, 61 (1986), 1103. The status of human rights as an integral part of EC law is now clearly stated in Art. F of the European Union Treaty (1992), amended by the Amsterdam Treaty (1997). See generally on this evolution F. Sudre, 'La Communauté européenne et les droits fondamentaux après le Traité d'Amsterdam: vers un nouveau système européen de protection des droits de l'homme?', *Juris classeur periodique*, part I, 100 (1998).

[68] Sweet, 'Constitutional Dialogues in the European Community', 319.

grounds of ultra vires and effectively to become the arbiter of the jurisdictional limits of the Community legal order'.[69] The German Constitutional Court's assertion of its competence reflects democracy concerns within national legal systems arising from the ever-expanding competences of the Community.

Thus, the legal integration with national legal systems attained by EC law was achieved in close partnership with national constitutional systems, which sanctioned, and therefore conditioned, the profound transformations of the EC legal order. It is precisely such legal integration that seemed 'to be more solicitous to an involvement of national jurisdictions in the determination of jurisdictional limits of the Community legal order'.[70]

While international law would not justify, except in the narrowest circumstances, a State's use of national law including constitutional law for non-performance of an international obligation, paradoxically this seems more acceptable in a vertically integrated system. As stated by Joseph Weiler and Ulrich Haltern, the approach of national constitutional courts 'is an insistence on a more polycentred view of constitutional adjudication and will eventually force a more even conversation between the European Court and its national constitutional counterparts'.[71]

This conferred on European integration a new dimension, as it demanded the reconciliation of EC law with fundamental constitutional values.[72] Constitutional limitations acted not as external constraints to the EC legal order but as demands that this had to satisfy within its own structure. While national constitutions were adapted to European integration, EC law 'draws on and integrates the national constitutional orders'.[73]

Voice in investment treaty case law: the comparative law perspective

The investment treaty regime does not have an institutional structure anywhere similar to the EU. It is still largely an inter-governmental framework which allows for traditional forms of Voice, such as direct amendment

[69] Joseph H. H. Weiler and Ulrich Haltern, 'Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetence-Kompetence' in Anne-Marie Slaughter, Alec Stone Sweet and Joseph H. H. Weiler (eds.), *European Court and the National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Oxford: Hart, 1998), 331.

[70] *Ibid.*, 336. [71] *Ibid.*, 363.

[72] Marta Cartabia, *Principi inviolabili e integrazione europea* (Milano: Giuffrè, 1995), 136–7.

[73] Weiler and Haltern, 'Constitutional or International?', 363.

by States of existing investment treaties or the issuance of binding interpretations of its terms. However, the investment treaty regime also has supranational features. Investment arbitration tribunals settle disputes in a binding form, allegedly constrain State action, and act as lawmakers in international investment law.[74] The question is whether, within these supranational dynamics, a more system-internal type of Voice may be developing, along the lines of the stable accommodation and dialogue between legal orders characteristic of the EU system.

One such phenomenon may be the comparative public law approach in the interpretation of investment treaty protections, that draws on domestic administrative and constitutional law in construing the scope of such standards. The genuinely public law nature of international investment law would justify it, and the approach could be a way to legitimise the investment treaty regime by making it more acceptable to national legal orders.[75]

The comparative law methodology is not a new development in the field. It was already present in the second award ever issued in investment treaty arbitration made public only recently, the *Saar Papier* v. *Poland* award.[76] The tribunal in this case made explicit use of domestic administrative law to interpret the provisions on indirect expropriation in the Germany–Poland BIT.[77] The tribunal pointed out that '[t]o interpret the Treaty administrative law practice in Germany and Poland would be helpful' and, after complaining that '[d]espite repeated requests, the arbitral tribunal received little help from the parties on German and Polish administrative law', relied on 'general administrative law and the principle of good faith to interpret the Treaty',[78] particularly the law of the States of nationality of the two arbitrators that formed the majority opinion, Germany and Switzerland.

[74] Stephan Schill, 'System-building in Investment Treaty Arbitration and Lawmaking', *German Law Journal*, 12 (2011), 1083.

[75] See e.g. Stephan Schill, 'International Investment Law and Comparative Public Law: An Introduction' in Stephan Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010), 3; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', *American Journal of International Law*, 107 (2013), 45.

[76] *Saar Papier Vertriebs GmbH* v. *Republic of Poland* (UNCITRAL), Final Award, 16 October 1995.

[77] Jarrod Hepburn, '*Saar Papier* v. *Poland*: Comparative Public Law and the Second-ever Investment Treaty Award', *EJIL: Talk!*, 3 February 2014, available at www.ejiltalk.org/saar-papier-v-poland-comparative-public-law-and-the-second-ever-investment-treaty-award/.

[78] *Saar Papier Vertriebs GmbH* v. *Republic of Poland*, para. 79.

The tribunal found that '[i]n administrative law practice two approaches converge to deal with this type of problem', meaning the definition of indirect expropriation. First, the tribunal referred to an effects and proportionality test:

> [I]f the right of property is limited in a way that in its economic effect must be equated to expropriation, compensation must be paid. This is called '*materielle Enleignung*' . . . A 'materielle Enteignung' is present in particular if a measure has a general impact but nevertheless burdens a particular right of ownership far more than all others.[79]

Secondly, the tribunal alluded to a legitimate expectations approach:

> The second approach was developed mostly after World War II and starts from the general proposition that there is an *obligation of good faith in public law* which applies to all branches of government. Under certain circumstances a law is not applied to certain private persons or, if it is applied, they must be fully compensated even though the application of the law is lawful. *This* principle applies where the state has given *misleading information* about the law or where the law or administrative or court practice have changed.[80]

As noted by a commentator, the arbitrators in this case seemed to be 'unaware of relevant international jurisprudence' and 'simply reached for the closest analogy that they could find'.[81] This may be right, and indeed it is curious that, for example, no case of the Iran–US Claims Tribunal is cited as international law authority for the effects test. In any case, the fact remains that this is the first example of the comparative public law approach in investment treaty case law, providing comparative administrative law support for international law doctrines that have been subject to much criticism in today's commentary.

Reasoning similar to the *Saar Papier* tribunal only resurfaced in investment treaty case law many years later, for example in the *Tecmed* v. *Mexico* award as far as the good faith principle and proportionality test is concerned.[82] For its part, the comparative public law approach reappeared even later. In fact, this approach was not fully and explicitly used until the liability decision in *Total* v. *Argentina*, dated 27 December 2010. In this case the tribunal found that the comparative law analysis was justified in interpreting the fair and equitable treatment standard:

[79] *Ibid.*, paras. 81, 83. [80] *Ibid.*, para. 92.

[81] Hepburn, '*Saar Papier* v. *Poland*: Comparative Public Law and the Second-ever Investment Treaty Award'.

[82] *Técnicas Medioambientales Tecmed, S.A.* v. *The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award, 29 May 2003.

> In determining the scope of a right or obligation, Tribunals have often looked as a benchmark to international or comparative standards. Indeed, as is often the case for general standards applicable in any legal system (such as 'due process'), a comparative analysis of what is considered generally fair or unfair conduct by domestic public authorities in respect of private firms and investors in domestic law may also be relevant to identify the legal standards under BITs. Such an approach is justified because, factually, the situations and conduct to be evaluated under a BIT occur within the legal system and social, economic and business environment of the host State.[83]

The tribunal elaborated on the comparative law perspective, in particular in relation to the legitimate expectations doctrine:

> Since the concept of legitimate expectations is based on the requirement of good faith, one of the general principles referred to in Article 38(1)(c) of the Statute of the International Court of Justice as a source of international law, the Tribunal believes that a comparative analysis of the protection of legitimate expectations in domestic jurisdictions is justified at this point.[84]

In this same line, the tribunal in *Toto* v. *Lebanon* stated that '[t]he fair and equitable treatment standard of international law does not depend on the perception of the frustrated investor, but should use public international law and comparative domestic public law as a benchmark'.[85]

The comparative law perspective is not without problems, for example that of the criteria for the selection of the comparative legal orders, and the inherent abstraction involved in assessing the recognition of a specific legal principle across different legal systems. Further, investment arbitration tribunals interpret treaty provisions and as such must apply international law. In this context, whether a certain principle of comparative law may be regarded as either a rule of customary international law or a general principle of law under Article 38(1) of the ICJ Statute may be arguable in many cases. No doubt this problem will need to be addressed in the jurisprudence if the comparative law perspective, with (and perhaps because of) its system-building capabilities, is to be applied in future cases.

[83] *Total S.A.* v. *The Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Liability, para. 111.
[84] *Ibid.*, para. 128.
[85] *Toto Costruzioni Generali S.p.A.* v. *The Republic of Lebanon* (ICSID Case No. ARB/07/12), Award, 7 June 2012, para. 166; see also para. 193.

Conclusion

The *ad hoc* nature of investment treaty tribunals makes it more likely, and perhaps even desirable,[86] that tribunals focus on the application of the law to a given dispute rather than on systemic elucidations. This, however, does not exclude the emergence in the case law of some system-building paradigms regarding the interaction between the investment treaty regime and domestic legal principles and courts. One such phenomenon may be the comparative law perspective, which is reminiscent of the dynamics of Voice, in the form of a dialogue between legal orders, in the EC framework. Other forms of Voice, existing or to be developed in further case law, may concern a more clear division of competence between national courts and investment tribunals depending on the nature and substantiation of disputes,[87] and the possibility of contract or domestic law counterclaims in investment cases.

Voice is a mechanism for the enhanced participation of domestic legal systems in the realm of international law. It has the virtue of contributing to the shaping of the international regime, gradually enriching it, and reinforcing its legitimacy. In contrast, Exit is the abandonment of the international regime altogether with the associated defeat of its fruitful interaction with national legal systems. In the investment treaty framework, both dynamics are at play. While exaggerated criticism pushes for Exit, Voice may be allowed to be heard in the more day-to-day workings of its supranational features – that is, investment treaty arbitration. As James Crawford suggested in 1997, 'the relation between the international and constitutional levels can be reciprocal' and this helps international law by 'the co-opting of national constitutional limitations in the interests of international regularity'.[88]

[86] W. Michael Reisman, '"Case Specific Mandates" versus "Systemic Implications": How Should Investment Tribunals Decide? – The Freshfields Arbitration Lecture', *Arbitration International*, 29 (2013), 131.

[87] See e.g. the application for the 'prima facie' test of jurisdiction *ratione materiae* in *Iberdrola Energía S.A.* v. *Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012. See also similarly, *Robert Azinian, Kenneth Davitian, & Ellen Baca* v. *The United Mexican States* (ICSID Case No. ARB (AF)/97/2), Award, 1 November 1999.

[88] Crawford, 'International Law and Australian Federalism: Past, Present and Future', 325.