Revised Final Submission

The Material Constitution of International Investment Law

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1. Introduction

When an owner of capital invests this capital in the state of their citizenship or nationality, this 'domestic' investment is governed by the ordinary rules of national law. But when an investor *exports* their capital, investing it in a state in which they are legally a foreigner, a whole extra body of law supplements, and in some cases supplants, these domestic arrangements. This is international investment law (IIL): the vast and ever-growing body of international investment agreements (IIAs), decisions of arbitral tribunals, and other forms of law—formal and informal, 'hard' and 'soft'—that seek to protect the rights of foreign investors against the actions of 'host' states.

Whether the investor invests their capital at home or exports it abroad, we are concerned in this chapter with the interplay between the actions of an investor (someone with capital who wishes to make a profit) and the actions of a state (a body which, in democratic theory, claims to be the legal avatar of 'the people'). The legal relations between these actors—contractual, tortious, constitutional etc—cannot be understood in purely formal terms. Rather, following Goldoni and Wilkinson,[1] we argue that it is only through a materialist analysis (and in the broadest legal context a material constitutionalist analysis), emphasizing the role of power and political economy, that we can unpack the ways in which the constitutional order shapes and is in turn shaped by the figure of the (international) investor.

We argue in this chapter that investment law must be understood in the context of struggles between capital exporters and states, where investors seek to protect their individual property rights against the actions of political authorities. At the domestic level, the 'legitimacy' and 'proportionality' of state action are frequently key to determining whether or not a particular intervention that impacts an investor's property will be deemed legal and/or compensable, and to what degree. IIL, on the other hand, is more agnostic about the 'public good', frequently requiring compensation in cases where state actions are in some way justifiable with reference to non-economic or communitarian values, and at levels set without regard to the impact on the public purse and the ability of the state to fulfil its broader social responsibilities. In this, IIL

[1] Marco Goldoni and Michael A. Wilkinson, 'The Material Constitution' (2018) 81 *Modern Law Review* 567.

differs from the practice of both domestic constitutional law and international human rights law, where not every interference with a right is necessarily a violation of that right, and where the legitimacy of the aim of the interference, its means, and its extent are all relevant in determining whether a right has been violated, and, if it has, the amount of compensation due to the victim.[2]

In effect, IIL internationalises the protection of property and contract rights over and above other competing rights and obligations of the state, and prioritises the protection of investors over and above that of ordinary citizens. IIL does this in part by drawing on and relying on formal constitutional concepts such as equality, non-discrimination, and the rule of law, but uses these concepts differently to how they are used within national constitutional orders. This comes as no surprise, once we acknowledge the very different material context within which IIL has been created, developed, practiced, enforced, and re-created.

These tensions between IIL and public policy have not gone unnoticed. Indeed, IIL is currently undergoing something of a 'constitutional crisis', as states in both the global North and South bristle against the restrictions they have imposed on themselves and on each other in the hope of attracting investment and stimulating economic growth. Extensive criticism of the inconsistent decisions of arbitral tribunals; the perceived bias and conflicts of interest of arbiters; broad interpretations of investor protections and consequent limitations of policy space; increasingly massive awards; and a lack of evidence regarding the benefits of the system have created a backlash and spurred a number of different reform efforts. Much of the discussion has focused on substantive and procedural tweaks to the formal constitutional order of IIL, in order to make it more consistent, less biased, and more attentive to states' 'right to regulate' and investors' obligations to their host states.

However, in this chapter, we argue that we cannot simply rearrange the legal formalities and expect meaningful systemic change. Rather, an analysis of the material constitution of IIL reveals that it is an order bound up in fundamental ways with the history of imperialist expansion; the inscription of the particular rights of the investor class as general and international; and a desire to protect capital and markets from state interference. Section 2

[2] The European Court of Human Rights, for example, takes the position that it will not interfere with a state's decision regarding the level of compensation to be paid in the event of an expropriation unless it is 'manifestly without reasonable foundation.' *Lithgow v United Kingdom* (1986) 8 EHRR 329, 373. Likewise, the Court's general view is that the level of compensation should be relative to the public purpose of the measure. *James v United Kingdom* (1986) 5 EHRR 35, 147.

briefly maps the *formal* constitution of IIL: its origins, its development; its texts; and its institutions. In Section 3, we adopt Goldoni and Wilkinson's four ordering forces of *material* constitutionalism—political unity, institutions, social relations, and fundamental political objectives—to draw attention to the distinct ordering principles of this international regime. In doing so, we demonstrate the impact of an international legal order that self-consciously uses the language of constitutionalism to introject political objectives and a conception of social relations at odds with a substantive conception of democracy; that re-casts a set of rules and institutions designed to further the interests of capital-exporters as international rights claims; that does so on behalf of an investor-subject afforded protection purely as a function of its transnational economic activity; and that is produced and reinforced by means of institutions of meagre democratic legitimacy in a political unity that, unlike the state, does not consist of a physical territory, but precisely of a non-physical 'international' space, outwith the borders and beyond the control of governments. We conclude that though the various calls for reform may well improve certain serious flaws in the formal system of IIL, material constitutionalist analysis reveals inherent features of the system that cannot be reformed without a fundamental reconfiguration of the material relations between international capital and state constitutional orders.

2. The formal constitution of international investment law

The question of whether, to what extent, and in what context it is appropriate to use the language of constitutionalism to describe and engage with non-state legal orders is not settled. Though widely accepted in some international contexts (such as in that of the European Union), the 'project'[3] of transplanting constitutionalism from the statist frame to other global frames has met with more resistance. For present purposes, the 'global constitutionalism' debate of the 2000s and 2010s[4] is not important: IIL is certainly not a constitutional legal order such as that of a state in the formal sense. It is not autochthonous or self-standing, and it is so partial in its sectoral coverage that it lacks the breadth and overarching nature associated with constitutionalism proper. Nevertheless, the concept of constitutionalism, and its vocabulary, are used here as a discursive framework that throws some important issues of formal law into

[3] David Kennedy, 'The Mystery of Global Governance' in Jeffrey L. Dunoff and Joel P. Trachtman (eds) *Ruling the World? Constitutionalism and Global Governance* (Cambridge: CUP 2009), 40.
[4] See, e.g., Jeffrey L. Dunoff and Joel P. Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: CUP 2009).

sharper relief than would be the case without constitution-talk: democratic legitimacy, equality before the law, institutional independence and much else besides. We are not alone in using constitutional tools to assess IIL: by specifically adopting methods, norms, processes, and language commonly associated with constitutionalism, the architects and practitioners of IIL themselves have been actively trying to constitutionalise the IIL regime for years; just as critical scholars have been deploying those same tools to contest its power and legitimacy.[5]

a. Sources of the constitution

Having clarified this context, we can now turn to setting out the three main sources of the formal constitution of IIL.

First, there are around 3,000 IIAs currently in force,[6] most notably including Bilateral Investment Treaties (BITs) and treaties that contain provisions or chapters covering investment, such as some modern Free Trade Agreements (FTAs). There are also sectoral agreements, such as the Energy Charter Treaty, which protect investors' rights in particular economic fields; as well as other treaties that contain certain protections for the rights of investors, though this may not be their central function, and they may or may not contain the 'common core' of rights generally found in IIAs. Examples of this latter sort of treaty are the WTO's General Agreement on Trade in Services (GATS) (in particular mode 3 commitments regarding commercial presence) and Agreement on Trade-Related Investment Measures (TRIMS); the EU Treaties insofar as they concern the free movement of capital and the right of establishment; and regional human rights treaties such as the European Convention on Human Rights (ECHR) insofar as they concern the protection of property rights.

Second, IIL is to be found in the procedural rules, institutions, and treaties governing international investment arbitration. The International Centre for the Settlement of Investment Disputes (ICSID) Convention (also called the Washington Convention) and the New York Conventions lay down much of the legal framework in this respect, supplemented by the provisions of individual IIAs; and institutions such as ICSID and the UN Commission on International Trade Law (UNCITRAL), amongst others, provide significant forums, personnel, and expertise for arbitration. The vast majority of IIL disputes are brought by private actors, empowered to make claims against national governments through investor-state dispute

[5] See, e.g., David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: CUP 2008).
[6] A regularly updated database can be found at: <https://investmentpolicy.unctad.org/international-investment-agreements>.

settlement (ISDS) provisions in IIAs. Such claims are heard by ad hoc investment tribunals modelled after private commercial arbitration mechanisms, staffed with a mix of lawyers, arbitrators, and academics. Arbitration takes place outside the jurisdiction of the state and its courts, which—importantly—are *presumed* to be potentially biased against foreign investors and subject to pressure from national actors, in contrast to 'de-politicised' and 'neutral' international forums.[7]

Third, the vast and varied jurisprudence of arbitration tribunals constitutes a source of law in its own right. While the decisions of these tribunals have no formal precedential value or binding effect beyond the parties themselves, they can be influential, and well-crafted decisions can have persuasive value. Around 700 such decisions are known, however the real figure may be much higher, as not all are made public.[8]

To these three major sources of the formal constitution of IIL, we can add a range of supplementary sources, including customary international law (eg rules regarding the protection of aliens, rules of treaty interpretation); national legal practices and rules; investor-state contracts; and related areas of international law such as international tax agreements; finance and debt arrangements; ILO and OECD codes of conduct, and many others.

b. Rules and principles of the constitution, and their malleability

In terms of their substance, while IIAs vary greatly in terms of their precise content, they generally follow a common format, typically including rules regarding non-discrimination on grounds of nationality; prohibition of expropriation without compensation; and 'fair and equitable treatment' (FET). Other protections may be added to the mix as well—capital transfer rights and protection against breach of contract through 'umbrella clauses', for example, are also common. These protections are frequently cast in the language of *rights*, and are sometimes analogised to protections found in human rights law: denial of justice, the right to a fair trial, the right to property, due process, and non-discrimination are deployed by both the IIL and human rights regimes to defend natural and legal persons against the actions of the state.[9] However, the terms of the protections afforded by IIAs are vague, leaving wide latitude

[7] See S. Puig, 'No Right Without a Remedy: Foundations of Investor-State Arbitration (2013-2014) 35 *University of Pennsylvania Journal of International Law* 829.
[8] For a current list of known disputes, see: <https://investmentpolicy.unctad.org/investment-dispute-settlement>.
[9] See Mārtiņš Paparinskis, 'Analogies and Other Regimes of International Law' in Zachary Douglas, Joost Pauwelyn, and Jorge E Viñuales (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: OUP 2014).

for arbitrators to interpret their meaning, and making arbitral decisions notoriously unpredictable.[10]

To provide just one example, the prohibition of expropriation or nationalisation without compensation includes not only 'direct' expropriation (the mandatory legal transfer of property or outright physical seizure), but also 'indirect' expropriation (measures 'tantamount to' or 'equivalent to' expropriation, where the investor is deprived of the use and enjoyment of their property while retaining formal ownership). This latter category has, at its most expansive, been interpreted as including any action 'depriving the owner, in whole or in significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State,'[11] a sweeping definition that could cover nearly *any* state action that diminished the value of the investment. Most tribunals have not gone quite so far, requiring a 'substantial deprivation' of property to have taken place before a measure will be found expropriatory.[12] However, the uncertainty that is built into the ad hoc arbitration system means that it is difficult to predict *ex ante* where a particular tribunal will stand on such questions, leaving open the possibility for investors to threaten suits in order to dissuade governments from taking actions contrary to the investors' interests.[13]

Such strong-arm tactics are particularly concerning given that the category of 'indirect expropriation' has sometimes been interpreted to cover so-called 'regulatory takings'. As the tribunal stated in *Santa Elena v Costa Rica*, in the context of a challenge by a tourism resort developer to a decision by the state to convert the resort's intended location into a coastal wildlife reserve:[14]

> Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[15]

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[10] This has long been discussed as a problem undermining the legitimacy of tribunals. See, e.g., Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 75 *Fordham Law Review* 1521.
[11] *Metalclad v Mexico*, 5 ICSID Reports 209, Award, 30 August 2000, para. 103.
[12] *Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL Award, 26 January 2000.
[13] The notion of 'regulatory chill' is widely discussed in the literature.
[14] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award, 17 February 2000.
[15] Ibid, para. 72.

But here too there is contrary practice from other tribunals. Consider the following, from *Methanex*:[16]

> [N]on-discriminatory regulation for a public purpose, which is enacted in accordance with due process, and which affects, *inter alios*, a foreign investment, is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to refrain from such regulation.[17]

Subsequent decisions have not resolved this issue: the line between a compensable expropriation and a 'legitimate' regulation which does not give rise to a claim for compensation remains unclear.

Even murkier is the interpretation of the nebulous and frequently litigated FET standard, and the extent to which compensation should be paid when governments undermine the 'legitimate expectations' of a foreign investor. Tribunals reading this standard broadly have found compensable harms in situations including a state's refusal to issue or renew a permit required for a business to operate, the regulatory phase-out of an environmentally harmful business, and the withdrawal of a tax exemption. They have even—at their most extreme—read the standard as implying an obligation to maintain 'regulatory stability',[18] thus clearly limiting the possibility of domestic actions that undermine the interests of international investors. Others have read the obligation more narrowly, as protecting only 'legitimate' and 'reasonable' expectations, such as where specific representations were made to the investor to induce the investment.[19]

Tribunals taking the narrower approach have sometimes noted the need to balance investors' expectations against the legitimate regulatory activities of host countries.[20] This importation of

[16] *Methanex Corporation v United States of America*, UNCITRAL Final Award 3 August 2005.
[17] Ibid at Part IV para. 7
[18] *Tecmed v. Mexico*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003.
[19] *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No ARB/04/19, Award, 18 August 2008; *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case No ARB/14/1, Award, 16 May 2018.
[20] *Saluka Investments BV (The Netherlands) v. Czech Republic*. UNCITRAL Rules, Partial Award, 17 March 2006; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009;

'proportionality'[21] or 'reasonableness'[22] analysis into IIL has been advocated by some scholars as a way of addressing legitimacy concerns, and in light of the growing list of clashes between IIL and domestic regulation over issues relating to, e.g., environmental protection and public health.[23] However, many scholars continue to view IIL through the traditional lens of private commercial law, arguing that its 'public' character is overstated,[24] and that these disputes remain, at their heart, commercial ones. To date, use of proportionality analysis by tribunals remains inconsistent and of variable quality, raising further questions about its value as a means of imbuing IIL with legitimacy.[25]

The stakes of these *constitutional* debates in IIL are made much higher by the eye-watering awards that can come with successful ISDS claims. Bonnitcha and Brewin have found more than 50 cases in which compensation exceeded USD 100 million, the largest of which was an award of $40 billion in a case involving the nationalization of Russian oil company Yukos.[26] Awards of this nature seriously impact national budgets, and affect the ability of states to take action for the benefit of their citizens.

Illustrative of the potential pitfalls is the case of *Tethyan Copper v Pakistan*,[27] in which an Australian mining company filed a successful ICSID arbitration against Pakistan regarding the denial of an expected mining license. The tribunal ultimately found that Tethyan had a legitimate expectation that the mining license would be granted, and that due process was not followed: the denial therefore violated the rights of the investor. It awarded Tethyan $4 billion plus interest in compensation, taking into account the *future* income the investment *would have* earned (or, rather, *might have* earned) over its 50-year operating cycle if it had in fact been

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[21] Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2011) 2 *Transnational Dispute Management*; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge: CUP 2015).
[22] Valentina Vadi, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration* (Edward Elgar 2018).
[23] See, e.g., Ana Maria Daza-Clark, *International Investment Law and Water Resources Management* (Leiden: Brill 2016); Valentina Vadi, *Public Health in International Investment Law and Arbitration* (London: Routledge 2012); Jorge E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge: CUP 2012).
[24] José E. Alvarez, 'Is Investor-State Arbitration Public?' (2016) 7 *Journal of International Dispute Settlement* 534.
[25] See, e.g., David Schneiderman, 'Global Constitutionalism and Its Legitimacy Problems: Human Rights, Proportionality, and International Investment Law' (2018) 12 *The Law & Ethics of Human Rights* 251; Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford: OUP 2015).
[26] Jonathan Bonnitcha and Sarah Brewin, *Compensation Under Investment Treaties* (Winnipeg, Canada: International Institute for Sustainable Development 2020).
[27] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (July 12, 2019).

built (even though the investor's original outlay was only $150 million).[28] This award was nearly as large as the $6 billion bailout package that the IMF and Pakistan had agreed a few months earlier:[29] the perverse result is that two thirds of the bailout went straight into the pockets of an Australian mining company.

In an effort to reign in the potentially broad scope and unpredictable interpretation of IIL protections, some states have begun to include preambles, exceptions, and carve-outs that seek to protect non-economic interests and the right to regulate in new generation IIAs. Others have begun to exit the system, terminating IIAs and withdrawing from ICSID. The EU has sought to move away from ad hoc arbitration and toward a more formalised Investment Court System, or potentially even a Multilateral Investment Court. Even UNCITRAL is currently debating ISDS reform.[30]

But such reform efforts can, at best, improve the perceived legitimacy of IIL's doctrinal and institutional architecture. To understand the structural limitations of such formal constitutional change, we must look to the material forces at work in the undergrowth of IIL that created this legal world, and which these institutions and constitutional debates reflect and reproduce.

3. Mapping the material constitution of international investment law

a. Political unity

i. Development

IIL's history is a long one, and is deeply embedded in the imperialist expansion of European commercial interests beginning in the seventeenth century.[31] Early treatments of the (European) law of nations held that foreign traders, once admitted to a state's territory, should be treated no worse than nationals.[32] Friendship, Commerce, and Navigation (FCN) treaties

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[28] The use of the so-called 'discounted cash flow (DCF) method' to calculate an investment's expected future income over its entire life cycle is frequently used as a basis for awarding compensation. See Bonnitcha and Brewin (n 26).

[29] IMF, Press Release No. 19/264, 'IMF Executive Board Approves US$6 billion 39-Month EFF Arrangement for Pakistan' (3 July 2019) https://www.imf.org/en/News/Articles/2019/07/03/pr19264-pakistan-imf-executive-board-approves-39-month-eff-arrangement.

[30] UNCITRAL, 'Working Group III: Investor-State Dispute Settlement Reform' https://uncitral.un.org/en/working_groups/3/investor-state.

[31] Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: CUP 2013).

[32] The idea that there is a freedom to trade on a non-discriminatory basis can be found back as far as Vitoria, Grotius, and de Vattel. Francisco de Vitoria, *De Indis et De Iure Belli: Relectiones* (orig. 1532, Ernest Nys ed. 1964), Part 2; Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (orig. 1625, J.B. Scott ed., F.W. Kelsey trans., 1925) at Book II, Chapter II, XXII; Emmerich de Vattel, *Law of Nations* (orig. 1798, J. Chitty trans.) Book II, Chapter VIII, s108-109.

built on this foundation, establishing networks of treaty-based protections for the property of expatriates, sometimes reciprocal, but often—especially in non-European contexts—on the basis of 'enforced compliance' and unequal treaties.[33] International customary law developed an 'international minimum standard' for the treatment of aliens that prohibited bad faith and 'outrageous' conduct by the state,[34] as well as a rule prohibiting the expropriation of alien property except where for a public purpose, where not arbitrary, and where 'prompt, adequate, and effective' compensation would be paid (the so-called 'Hull formula').[35] Failure to uphold these standards triggered international responsibility, and the home states of sufficiently powerful and well-connected investors might choose to espouse the claims of wronged nationals, leading to arbitration between the capital-exporting and -importing states, or, if this failed, to so-called 'gunboat diplomacy' or outright military intervention, a tactic eventually outlawed by the Drago-Porter Convention in 1907.[36]

This gradual spread of international property rules did not go uncontested. Beginning in the 1860s, Latin American states began to resist the 'diplomatic protection' system used to enforce the rights of investors in their territories, and presented an alternate theory of what the 'fair treatment' of investors and their property should entail. Under this new 'national treatment' standard, known as the Calvo doctrine[37], investors were to be treated no worse but also no better than the nationals of the host state. This position was unattractive to capital-exporters because it meant that if the state were to treat its own investors in a disagreeable manner, it could treat foreign investors in this manner too: indeed, the Soviet Union relied on the Calvo doctrine to justify its refusal to compensate a gold mining venture expropriated in 1917.[38]

This history of imperialism and resistance sits at the heart of the modern system of investment law. The rise of IIAs must be understood in significant part as a reaction to post-colonial, socialist, and other state interventions that put international property rights in jeopardy. Decolonisation in particular created risks for investors, as property acquired and rights established under colonial regimes were challenged by new governments seeking to

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[33] Miles (n 31) 25 et seq. See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP 2012).
[34] *Neer Claim*, 1926 4 RIAA 60
[35] Cordell Hull, Letter, 'The Secretary of State to the Mexican Ambassador (Castillo Nájera)' Washington, 21 July 1938, available at <https://history.state.gov/historicaldocuments/frus1938v05/d662>
[36] Hague Convention II—Limitation of Employment of Force for Recovery of Contract Debts (Drago-Porter Convention), Oct. 18, 1907, art. 1(1).
[37] Carlos Calvo, *Derecho internacional teórico y práctico* (Paris: Amyot, 1868).
[38] VV Veeder, "The Lena Goldfields Arbitration: The Historical Roots of Three Ideas" (1998) 47 *International and Comparative Law Quarterly* 747.

redistribute wealth, re-assert sovereignty over natural resources, and exercise national control over their economies. Nationalisations and the retraction of concessions were important tools for these newly independent governments: one study found 875 recorded expropriations across 62 countries between 1960 and 1974.[39]

Socialist and post-colonial states made several attempts to assert what they saw as their economic rights and to create a new international standard for the protection of investments. The 1962 UN General Assembly Resolution on Permanent Sovereignty over Natural Resources recognized the right of the state to expropriate private interests on payment of 'appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law'[40]—a far more flexible standard than the Hull formula favoured by capital-exporters. The 1974 Declaration on the New International Economic Order[41] recognised the right to expropriate without paying fair market value and stated that '[n]o State may be subjected to economic, political, or any other type of coercion to prevent the free and full exercise of this inalienable right.'[42] Similarly, the 1974 Charter of Economic Rights and Duties of States attempted to abolish the 'minimum standard' on the expropriation of alien property and replace it with domestic law, in accordance with the Calvo doctrine.[43]

Capital-exporting states, spurred by the efforts of 'norm entrepreneurs' from the banking, business, and legal sectors,[44] responded by creating the modern system of international investment law. Following several failed attempts to create a multilateral investment law framework,[45] which fell apart due to disagreements between capital-exporting and capital-importing states over investor protection standards, individual capital-exporting states instead

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[39] O. Thomas Johnson Jr. and Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P. Sauvant (ed) (2012) *Yearbook on International Investment Law & Policy 2010-2011*, 675 (quoting Permanent Sovereignty Over Natural Resources Report of the Secretary General, UN Doc. A/9716 (1974)).
[40] G.A. Res. 1803 (XVII), reprinted in (1963) 2 *International Legal Materials* 223.
[41] Resolution 3201 (S-VI).
[42] Ibid, para 4(e).
[43] GA Res 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, UN Doc. A/9631 (Jan. 15, 1974), reprinted in 14 I.L.M. 251 (1975).
[44] Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (Oxford: OUP 2021).
[45] See, e.g., Havana Charter for an International Trade Organization (1948), UN Conference on Trade and Employment, UN Doc. E/CONF.2/78; International Chamber of Commerce, International Code of Fair Treatment of Foreign Investment (1948); International Law Association, Draft Statute of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court (1948); Abs and Shawcross, Draft Convention on Investments Abroad (1959); OECD, Draft Convention on the Protection of Foreign Property (1967).

divided and conquered, turning to bilateral negotiations, and laying the foundations for modern IIL. The first BIT was signed between Germany and Pakistan in 1959,[46] ICSID was established as part of the World Bank Group in 1966 to provide a set of rules and a de-localised forum for hearing investment disputes, and the web of treaties slowly began to build. It was not until 1989, however, that IIL really began to blossom. The fall of the Soviet Union brought with it the need for states around the world (post-Soviet and otherwise) to attract capital, and the end of the Cold War led to a decline in foreign aid budgets. At the same time, the debt crisis of the 1980s reduced the availability of private lending; export-led growth strategies in Asia seemed to demonstrate the successes of liberal economic policies; and the general climate of 'end of history' thinking in political and intellectual circles was evident in the Washington Consensus, which regarded 'a restrictive attitude limiting the entry for foreign direct investment' as 'foolish' behaviour motivated by 'economic nationalism'.[47]

These ideas were pushed in particular by capital-exporting states and international financial institutions, including via conditionality mechanisms,[48] but were also taken up enthusiastically by capital-importing states convinced of the promise of economic growth; convinced of the perceived need to compete for scarce investment capital; and eager to reap the benefits.[49] From the democratic perspective, it is notable that this flurry of treaty-making and institution-building in the 1990s took place 'virtually unnoticed', with mid-level government officials negotiating and concluding the agreements largely without scrutiny by parliaments, the media, or the public,[50] and with little attention to the potential consequences of the commitments being made aside from the promised increases in international investment.[51]

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[46] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 November 1959, (1963) 457 UNTS 23 (entered into force 28 April 1962).
[47] John Williams, 'What Washington Means with Policy Reform' in John Williamson (ed) *Latin American Adjustment: How Much Has Happened?* (Institute for International Economics 1990).
[48] Asha Kaushal, Note, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50 *Harvard International Law Journal* 491.
[49] Andrew Guzman suggests that poorer states face a prisoners' dilemma 'in which it is optimal for them, as a group, to reject the [adequate, effective, and prompt compensation rule], but in which each individual LDC is better off "defecting" from the group by signing a BIT that gives it an advantage over other LDCs in the competition to attract foreign investors.' Andrew T. Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639, 666-667.
[50] Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: OUP 2017) (quoting Daniel C Etsy).
[51] A recent survey of government officials from 13 developing countries, for example, found that 'all officials, including stakeholders, noted that they had been unaware of the far-reaching scope and implications of BITs during the 1990s, when the treaties proliferated.' Lauge N. Skovgaard Poulsen and Emma Aisbett, 'When the Claims Hit: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 *World Politics* 273, 281-282.

It is from this history of conflict over the extent to which capital markets should be shielded from state intervention that the political unity of the material constitution of IIL has come into being.

ii. Territory

Goldoni and Wilkinson write that '[a] constitutional order … represents a certain conception of political space (which, in the political form of the modern state, is conceived as a territory)'.[52] But the material constitution of IIL specifically and deliberately does *not* conceive of its political space as a physical territory: on the contrary, it conceives of it in *opposition* to physical territory, precisely because IIL is the means by which capital exporters can escape from the jurisdiction of the state while still maintaining an emplaced physical or legal presence within the state. Such escape is to an imagined non-physical, liminal space of internationality, outwith and beyond the direct control of states. Here, disputes regarding physical assets, legal rights, or agreements with foreign investors are removed to the metaphysical plane of IIL (this is all despite the fact that the actual panels themselves are physically located within the very real territory of seats of international economic power, such as London, Geneva, Paris, and Washington, DC). The deterritorialization of international law and the shift from 'territoriality' to 'functionality' as 'an organizing principle for regulatory authority'[53] are fully on display in this context, as are the associated questions of democratic legitimacy and control. Deterritorialized IIL therefore presents acute problems of 'social dis-embeddedness',[54] as it regulates conflicts between 'legality and market rationality, competition and solidarity, and between opposing political and social [and economic] forces'[55] in a jurisprudential context far removed from democratic norms as developed within the territorial state.

However, as Arcuri and Violi rightly emphasize, territoriality and the territorial state remain key to the (oppositional) spatiality of IIL.[56] This is true in the prosaic sense that IIAs define their scope in terms of territorial limits, but more importantly through IIL's reliance on the apparatus of the state for the enforcement of judgments. It is also true in the sense that states

Commented [mg1]: Where do arbitrational panels sit? It might be worth exploring the possibility that in most cases they sit in the same places (Switzerland?, London?, Stockholm?) and why. I might be wrong, but my (naïve) impression is that there could be a pattern

[52] Goldoni and Wilkinson (n 1) 581.
[53] Catherine M. Brölmann, 'Deterritorialization in International Law: Moving Away from the Divide between National and International Law' in André Nollkaemper and Janne E. Nijman (eds) *New Perspectives on the Divide Between National and International Law* (Oxford: OUP 2007) 84, 87.
[54] Goldoni and Wilkinson (n 1) 586.
[55] Ibid.
[56] Alessandra Arcuri and Federica Violi, 'Reconfiguring Territoriality in International Economic Law' in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International law 2016: The Changing Nature of Territoriality in International Law* (The Hague: Asser Press 2017) 175.

are ultimately the source of IIL's legality and legitimacy. Though we have emphasized that IIL is a means by which capital exporters can remove themselves from state law and jurisdiction, it must also be noted that IIL is not only a creation of a capital-owning class imposed on innocent and unwitting states, but is also a creation of states themselves—and not only capital-exporting states. As David Schneiderman notes, 'states paradoxically are conceding space to the rules and institutions of transnational economic law … authoring the very rules and institutions that bind them well into the future.'[57] Note, here, the dualistic element at work: IIL relies on the (constitutionally-derived) authority of the state for its creation, operation, enforcement, perpetuation, and expansion; while simultaneously impeding the (constitutionally-derived) mandate of the state to act. In this sense, it is not so much that IIL constrains the state, but rather that it is a means by which the state constrains *itself*, exercising its authority to reduce its authority, and to fundamentally alter the conditions under which democracy is supposed to operate at the national level. It is through this sleight of hand that transnational IIL defends its democratic credentials, relying on the political voluntarism of treaty-making as grounding for its legitimacy.

iii. Collectivity

If 'the formation of political unity requires a material process of political integration … of a collectivity',[58] the collectivity in question here is a diverse and sometimes unselfconscious one, consisting of three broad and sometimes overlapping categories of actor: *states* (capital-exporting and capital-importing), *investors*, and those whom we will call here *practitioners*. We can begin by noting that the two categories of *state* in the collectivity overlap: while we can distinguish in a general sense between countries that export capital and countries that import it, all countries are recipients of inward investment flows, and even the poorest countries may also be home to (sometimes very) rich individuals and firms that engage in capital export.[59] By *investors* we mean natural and (especially) legal persons with the means and the desire to engage in international investment. By *practitioners* we mean the disparate network (sometimes tight-knit, sometimes very loose) of national and international politicians, industrialists, lobbyists, lawyers, intellectuals, bureaucrats and others who actually *run* and

[57] David Schneiderman, 'Global Constitutionalism and International Economic Law: The Case of International Investment Law' in Marc Bungenberg et al. (eds) *European Yearbook of International Economic Law 2016* (Springer 2016), 29.
[58] Goldoni and Wilkinson (n 1) 581.
[59] B.S. Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law* 17.

sustain and *develop* the system.[60] This is the epistemic community that provides the political impetus for IIAs, that staffs arbitral institutions, and that engages in the IIL discourse of 'rights', 'justice', 'fairness' and 'equality'. This is, in the Gramscian sense, the hegemonic class who obtain the consent of the dominated by projecting their own particular interests as general interests.[61]

IIL is one means by which this loose collectivity organizes economic and social relations in accordance with its (perceived) interests, insulating the economic from political interference. IIL uses the mechanism of investor rights to constrain state power, claiming that states are free to regulate the economy as they see fit *within the confines of the rule of law*.[62] The 'rule of law' here is given a particular and contingent interpretation, as part of the project of introjecting a set of investor- and property-friendly values into the pre-existing discourse of constitutionalism.

iv. Constitutionalisation and entrenchment

Commented [W2]: Is this meant to be the sub-heading title? Perhaps it could be renamed, something like 'entrenchment' or 'constitutionalisation'

IIAs make domestic policy decisions regarding investments difficult (read: expensive) to reverse in future, essentially attempting to insulate them from democratic control. It is important to note that this is exactly what national constitutions try to do when they entrench fundamental norms. In some cases constitutions attempt to make certain norms entirely permanent and unamendable,[63] but more usually the amendment or repeal of constitutional rules is made subject not to the procedure for ordinary law-making outlined in the constitution (whatever that may be) but to a special procedure for constitutional amendment (often one requiring a parliamentary super-majority).[64] Constitutions vary widely in their degree of entrenchment, and in which parts of themselves, if any, they designate as fundamental and thus part of some unalterable core. IIL has successfully transposed this logic of entrenchment from the field of national constitutionalism to that of the regulation of international capital flows, placing property rights and investor protections 'beyond (ordinary) politics', and successfully

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[60] Compare Leslie Sklair's transnational capitalist class (TCC), which she describes as including '[transnational corporation] executives and their local affiliates (corporate fraction); globalizing state and inter-state bureaucrats and politicians (state fraction); globalizing professionals (technical fraction); and merchants and media (consumerist fraction).' Leslie Sklair, *Globalization: Capitalism and its Alternatives* (Oxford: OUP 2002) 99.
[61] Antonio Gramsci, *Selection from the Prison Notebooks* (New York: International Publishers, 1971).
[62] See Stephen W. Schill, 'International Investment Law and the Rule of Law' in Jeffrey Lowell, J. Christopher Thomas and Jan van Zyl Smit (eds), *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (Singapore: Academy Publishing 2015) 81; Peter-Tobias Stoll, 'International Investment Law and the Rule of Law' (2018) 9 *Goettingen Journal of International Law* 267.
[63] Eg Art 79(3) of the German *Grundgesetz*.
[64] See Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: OUP 2019).

generalising this logic across a broad range of states. The intention here was explicit: the elevation of managerialism and technocracy to the status of constitutional modes and norms of governance was described by the World Bank as a process of 'locking in good policies',[65] whereby constitutional, legal, and political inflexibility are deliberately chosen and perpetuated in order to achieve long-term economic goals.[66]

Commented [W3]: Interesting. Perhaps a brief mention here of the managerialism and technocracy inherent in the 'economic constitution' might help to tie it to other related debates. Or even just a reference to e.g. Gill's new constitutionalism or similar

It is therefore through the historical, political, and material processes outlined above that the collective subjects of IIL have created a loose but powerful form of political unity. The organisation of this unity gravitates around the distinction between centre and periphery (crudely, between North and South, between West and the rest), but it also oscillates between these two rough poles: it is increasingly the case that the capital-exporting states of the global North and West are beginning to chafe under the rigours of a system they played a major role in designing, which suited them only for so long as it did not unduly restrain them. Moreover, there is also oscillation within states, and not just between them, such as when we see discontent and disaffection within less-privileged parts of the citizenries of rich states, blamed in part on exactly the processes of globalisation and neoliberisation that form the fundamental aims of IIL.

Commented [mg4]: Would it make sense that the organisation of political unity gravitates around the distinction between centre and periphery (west and rest of the world?)?

b. Institutions

As with national political unity, the material order of IIL depends on the work of formal and informal institutions. The formal system is comprised of the range of international institutions, treaties, and tribunals, described in Section 2, that perform the substantive legwork of creating and recreating the norms of IIL, and of embedding them ever further within national and international systems of law.

However, IIL does not only play out at the international level. Under the ICSID and New York Conventions, if a state refuses to pay compensation following an investment award, the investor can bring actions for enforcement before the courts of any other member state, and have any commercial assets of the state in that jurisdiction seized and attached to the judgment. We see here the quite fundamental—indeed, parasitic—way in which IIL depends on states: as described above, it is states that negotiate and sign IIAs, it is the institutions of states that

[65] World Bank, *World Development Report 1997: The State in A Changing World* (Oxford: OUP 1997), 50-52.
[66] Stephen Gill, 'New Constitutionalism, Democratisation, and Global Political Economy' (1998) 10 *Pacifica Review: Peace, Security & Global Change* 23, 34

enforce these treaties and the arbitration systems set out thereunder, and it is states that legitimize the system of IIL by injecting it with an element of democratic authorization (the system of IIL having been 'freely' entered into by states), even as IIL reduces the scope of state action. For this reason, David Schneiderman argues that IIL is essentially ordoliberal, assigning the state 'a special role to play in the structuration of free markets by laying down the rules of the game via an economic order'.[67] Observing this 'special role', Wolfgang Streeck notes the 'drama of democratic states being turned into debt-collecting agencies on behalf of a global oligarchy of investors'.[68]

This relationship between IIL and domestic legal orders is an interactive one, with national norms (such as doctrines of US constitutional law[69]) filtering upstream to the IIL level, and norms of IIL filtering downstream to the national level. The transformation of host state legal systems and institutions is a specific goal of IIL; as Stephen Schill writes: 'investment treaties aim at binding states into a legal framework that gives them an incentive and a yardstick for transforming their legal systems into ones that are conducive to market-based investment activities and provide the institutions necessary for the functioning of such markets.'[70] Proponents of IIL see this as a significant benefit, arguing that IIL promotes the rule of law and 'good governance' domestically, and thus not only protects investors, but also creates 'spill over' effects that improve state administrative practices to the good of national citizens, as well.[71] However, as Mavluda Sattorova has shown, this 'spill over' does not seem to play out on the ground: IIL appears to have had little impact in terms of promoting *ex ante* compliance with 'good governance' standards, with domestic responses instead tending toward the ambiguous, reactive, and bureaucratic.[72]

Informal processes are also at work here, encouraging not only the spread of IIL, but also the narrative of IIL as necessary for development, as a tool for promoting the rule of law and good governance, and as essential for protecting the rights of investors against abuses by the state

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[67] David Schneiderman, 'Global Constitutionalism and International Economic Law: The Case of International Investment Law' in Marc Bungenberg et al. (eds) *European Yearbook of International Economic Law 2016* (Switzerland: Springer 2016), 31.
[68] Wolfgang Streeck, 'The Crises of Democratic Capitalism' (2011) 71 *New Left Review* 5, 28.
[69] David Schneiderman, 'NAFTA's Takings Rule: American Constitutionalism Comes to Canada' 46 *University of Toronto Law Journal* 499, Gill (n 66), 34.
[70] Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: CUP 2009) 377.
[71] Roberto Echandi, 'What Do Developing Countries Expect from the International Investment Regime?' in Jose E. Alvarez et al (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford: OUP 2011) 13.
[72] Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford: Hart 2018).

(and thus as a sibling regime to human rights law). Of particular importance to this diffusion of norms and discourses are the networks through which investors, capital-exporting states, and practitioners co-ordinate their actions and frame their interests as general rather than sectoral: chambers of commerce, industry lobbying groups, political party funding, and so forth; but also law schools, professional networks, and scholarship that adopt and reproduce the language and assumptions of IIL.[73] Moreover, the Venn diagram of the personnel involved is a complex one, as lawyers become arbitrators become lawyers become judges become academics. These individuals, defined above as part of the 'practitioner' constitutency of the collectivity of IIL, play a crucial role, as the adjudicative moment is at the core of the system. The whole array of norms and institutions of IIL are mere paper tigers until they show their non-paper teeth, and it is precisely at the moment of adjudication, when awards are handed down and made legally binding, that IIL demonstrates its credentials as a truly *legal* order, and not as a mere instance of institutionalised diplomacy or international politics.

Commented [mg5]: This perhaps deserves a bit more of analysis. Isn't the adjudicative moment crucial for the protection of investments? Are alternative dispute resolution mechanisms the institutional core of the material constitution?

IIL is therefore a sophisticated system of norm-diffusion, whereby concepts, practices and ideas from one legal order or physical territory can be transplanted to others by the rotation of personnel, and their acculturation to an international habitus that regards the system of IIL as not merely legally sound and economically useful, but as a moral good.

c. Social relations

IIL embodies and reproduces a very specific and particular vision of social relations, and as such enacts particular processes of subjectivation.[74] The subject, as constituted by IIL, is a *homo economicus* in the purest sense, existing only insofar as it is economically active, with no inherent value beyond this material calculus.[75] Rights are afforded to the investor-subject as a function of its economic status—if it ceases to 'invest', it is once again rendered invisible to IIL. Likewise, the investor is a specifically *international* subject, and is protected only insofar as it acts as such. Citizens (whether legal or natural) of a state cannot use IIL to protect their rights unless and until they reconstitute themselves as transnational economic actors; it is

[73] Perrone (n 44).
[74] Goldoni and Wilkinson (n 1) 587.
[75] See René Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (Leiden: Martinus Nijhoff 2012) 53.

through the transfer of capital across state borders that the investor-subject is made legible to and gains the protection of IIL.[76]

If IIL is a 'constitutional' order, it is one that exists for the benefit of these investor-subjects. As a collective, the investor class is imagined by IIL to be disempowered, vulnerable, and subject to the whims of powerful host state governments, who may at any time expropriate their property, discriminate against them, or act arbitrarily against their interests. The rights extended to investors provide protection against these threats, placing them on an equal footing with states, and the institutional system of IIL is deployed to ensure that investors are granted *ex post* compensation in the event of any harm. Note that while the rights of investor-subjects are analogous to those provided by human rights law, IIL provides these protections only to the economic actor *as* economic actor. The result of a violation is monetary damages—IIL does not deal in specific performance, cannot force domestic legal change, and provides no relief to anyone other than the complainant. Whereas a national constitutional court may (or may not) be able to strike down a statute that breaches constitutional rights, or may compel a government department to adopt or reverse a particular decision or policy (and thus have legal effects that ripple outwards from the complainant to the citizenry as a whole), IIL sees only the bottom line. In this way, IIL also subjectivizes the state itself as an economic actor, relying on the calculus of rational cost-benefit maximization to *incentivize* (rather than to legally *compel*) governments to act without prejudice to investors' interests. Non-investors (such as citizens of the host state who may be impacted by investment activity) are largely invisible to IIL, except insofar as they are imagined as the general beneficiaries of economic development, good governance, and the rule of law.

Excluded from this world are any other subjectivities an investor may inhabit (as, for example, a human being), any other subjectivities the state may inhabit (as, for example, a democratic institution), and other ways of conceiving the relationship between them.

d. Fundamental political objectives

In the words of the World Bank:

[76] In many cases this is true whether or not the internationalization is 'real' or a legal fiction. For example, in *Tokios Tokelés v Ukraine*, an investment Tribunal found that a company incorporated in Lithuania could make use of the Lithuania-Ukraine BIT to bring a claim against Ukraine, despite the fact that it was controlled and 99% owned by Ukrainian nationals. *Tokios Tokelés v Ukraine*, Case No. ARB/02/18, 29 April 2004.

> [A] greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade.[77]

The explicit teloi of IIL are therefore two: protecting investors, and encouraging and accelerating economic growth. The standard story sees these two teloi as intertwined: investment leads to economic development (both immediately and in the longer term by promoting 'good governance'); and, in order to get investment, (developing) states need to prioritise property rights so that investors will feel secure. Countries make such commitments via IIAs, which, through ISDS, raise the cost of discriminating against an investor or acting in ways that would damage the value of their investment. This, then, is the grand bargain by which IIAs claim to provide benefits both for investors and their home states, and for host states and their people.

While the first objective—protecting the rights of investors—has been a 'success' of IIL, the second objective—contributing to economic development—is open to question. To begin with, the basic link between strong IIAs and attracting investment has not been borne out by empirical studies: the evidence for whether IIAs and ISDS really do promote investment is mixed at best, with most studies finding either no effect or limited effects.[78] To take but one example, Brazil has long refused to include ISDS in its Cooperation and Investment Facilitation Agreements, and yet was the sixth largest global destination for foreign direct investment in 2019.[79] The link between IIAs and 'good governance' has also been challenged, with studies finding little impact on domestic administrative practices, and the biggest impacts coming in terms of restricting domestic policy space and national budgets.[80]

In keeping with its lopsided focus on protecting the interests of investors, IIL spreads a particular vision of the proper relationship between state and market. IIL has embraced a vision of protecting investors, investments, and markets from political interference, and of preventing 'populist democracy', corruption, 'bad governance', or simple change of heart from undermining individual property rights. In this sense, IIL is a key instrument in the service of

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[77] World Bank Group, 'Guidelines on the Treatment of Foreign Direct Investment,' *Legal Framework for the Treatment of Foreign Investment*, Volume 2: *Guidelines* (1992) 35-44, (preamble).
[78] Lauge E. Skovgaard Pousen, *Bounded Rationality and Economic Diplomacy* (Cambridge: CUP 2015).
[79] UNCTAD, 'Foreign direct investment', <https://stats.unctad.org/handbook/EconomicTrends/Fdi.html>.
[80] Sattorova (n 72).

market expansion and the process David Harvey has called 'accumulation by dispossession', by which new spaces and assets are opened for exploitation and profit through commodification, privatization, and the management of public and private debt.[81] IIL provides legal security for this process, ensuring that privatized assets cannot be re-nationalized without significant cost, preventing countries from enacting capital controls or other mechanisms that would undermine the value of investors' property rights, and generally dissuading public authorities from changing the regulatory environment to the detriment of international investors. BS Chimni makes explicit the way that these processes of accumulation by dispossession manifest the integral links between capitalism and imperialism, and specifically the new 'global imperialism' that characterizes the era of globalization.[82] IIL drives the 'internationalization of property rights' and contributes to the 'loss of economic sovereignty' that are key components of global imperialism.[83] It inscribes a protective barrier around the market activities of its investor-subjects in part through its adoption and co-option of the grammar of constitutionalism and human rights, and thereby serves to benefit 'those segments of the capitalist class in the advanced capitalist economies and emerging economies that gain from the globalization process at the expense of the subaltern classes in both the First and Third Worlds.'[84] This is also how IIL has come to be a double-edged sword for capital-exporting states, and has in recent years also begun to render states of the global North and West vulnerable to the reduced regulatory space that results: a case not so much of the empire striking back, as of the empire backfiring.

4. Conclusion

All four ordering forces of the material constitution—political unity; institutions; social relations; and telos—can be seen at work in the ongoing controversy over the legitimacy of IIL in general and ISDS in particular. The formal constitution of IIL could be revised to encompass the kind of proportionality, reasonableness or balancing rules that national and international courts might follow. IIAs could be amended to impose obligations on investors. Appellate systems could be set up to correct for inconsistent ISDS decisions and the more general problem of variable quality in terms of tribunal reasoning. Such reforms would no doubt

[81] David Harvey, *The New Imperialism* (Oxford: OUP 2003).
[82] Chimni (n 59).
[83] Ibid. at 28-31.
[84] Ibid. at 19.

counter some of the criticisms of IIL—specifically by injecting into it concepts and structures drawn from administrative and public law contexts.

Reforming this formal constitutional structure, however, will not alter the underlying material commitments of IIL: its logic of market expansion; projection of market subjectivities; constitutionalization and entrenchment of property and contract rights; and inscription of a strong and—ideally—irreversible constitutional line between the political and economic spheres. Understanding IIL in terms of material—rather than formal—constitutionalism reveals it is a para-constitutional system designed to entrench permanent constraints on governments' ability to intervene in the market, and to privilege the needs of transnational business above democratic choice. Material constitutionalist analysis provides an opening through which we can at least begin to subject this constitutional order for transnational capital to democratic scrutiny.