

Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?

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Abstract

There are at least two views within investment arbitration about how to respond to legitimation problems associated with inconsistent rulings, latitudinal interpretations, and arbitral bias and conflicts of interest. Some prefer to keep the regime on course and not respond to these outside perturbations. Others prefer to take into account external influences, such as human rights and environmental commitments, in the course of investment treaty interpretation. Both understand that, whatever the response, these questions will be determined by lawyers, scholars, and arbitrators operating within the system of international investment law and not by actors operating outside of it. Both views, in other words, are congenial to systems-theoretic accounts. As articulated by Teubner, there is a proliferation of functional legal sub-systems, developing autonomously of states, each of which, in the course of maximizing internal rationality, potentially is on a collision course with other operative sub-systems. These can only be forestalled if sub-systems act reflexively by devising strategies of self-limitation that selectively internalize objections emanating from external spheres. As this maps on to self-understandings of actors operating within investment arbitration, this paper takes up systems theory as a heuristic for assessing the regime's responsiveness to outside influences. In order to take stock of the degree of reflexivity, the paper examines the direction investment law is taking in a few key areas: first, in the shift in emphasis away from expropriations (the 'takings rule') to the fair and equitable treatment standard, which is performing similar functions; second, in the attempt to merge global standards by embracing World Trade Organization Appellate Body decision making; and third, the hesitant embrace of proportionality doctrine as a means of weighing public interests into the equation. These moments of reflexivity turn out to be modest in reach and so unlikely to calm objections emanating from states and social movements. What likely will be necessary is

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intervention into and steering by states of the regime, an intervention that is anathematic to Teubner's system-theoretic account.

Key words

Reflexivity, international investment law, systems theory, Legitimacy.

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Introduction

Despite the rapid world-wide proliferation of international investment treaties, doubts remain about the sustainability of the international investment arbitration in the contemporary world. Inconsistent and conflicting jurisprudence (Schneiderman 2010a), latitudinarian interpretations (Sornarajah 2008), Northern bias in investment arbitration outcomes (Sornarajah 2008b, cf. Franck 2009), arbitral conflicts of interest (Van Harten 2007, cf. Park 2010), and doubtful benefits in terms of new inward foreign investment (Yackee 2008, cf. UNCTAD 2009a) are generating an increasingly vocal critique. A few states even have begun to check out. The government of Ecuador, for instance, has withdrawn from the convention that grants jurisdiction to the International Center for the Settlement of Investment Disputes (ICSID) (ICSID 2009), has denounced eleven bilateral investment treaties (BITs) that have proven less than fruitful to the Ecuadorian economy (UNCTAD 2009b, p. 32) and is likely to denounce another thirteen BITs with countries such as the U.S. Germany, France, the United Kingdom and Canada (Alvaro 2009). Throwing a wrench into investment rules works more generally, the new Ecuadorean constitution provides that no jurisdiction will be ceded to international arbitration concerning commercial and contractual disputes (Art., p. 422). South Africa is reconsidering its bilateral investment treaty framework. South Africa's Department of Trade and Industry observes that the current model of investment treaty, borrowed from the United Kingdom, has disserved South Africa's constitutional project of societal reconciliation in the face of stubbornly persistent economic inequality (DTI 2009). The ongoing global recession not only emboldens critics but generates the conditions for change of unprecedented proportions. "Investment arbitration is in crisis," declares Sornarajah (2008, p. 73).

Actors operating within the regime of international investment arbitration will, of course, have taken note of these developments. They have developed two views (though there may be others) about how the regime should respond. Some take the view that investment treaties are *lex specialis* and so confined to determinations only of whether investor rights have been violated. Other considerations, such as human rights norms unconnected to property rights or multilateral environmental commitments cannot weigh in to that equation. This is a view we might associate with writers who tend to characterize international investment law as a "system" or a "regime" (Douglas 2003, Salacuse 2010). Arbitrators, according to this account, simply are giving effect to international agreements, whose object and purpose are the promotion and protection of foreign investment, irrespective of their consequences for conflicting rationalities (Paulsson 2005, p. 363). It is not that municipal law or international law does not play a role in investment treaty arbitration – they perform certain functions and on occasion fill vacuums, to be sure – but resort to these sources of law will be had sporadically. The hope, as the late Thomas Wälde put it, is that international investment law will, with the "fullness of time . . . have less recourse to other, external sources of law," though, he admits, international investment law "cannot be completely isolated" (2007, p. 118). The commonly-expressed concern about the fragmentation of international law (ILC 2006) –discrete specialized regimes each giving expression to their own embedded preferences (Koskenniemi 2007, Koskenniemi and Leino 2002) – generates little anxiety in this camp.¹

Others are more open to influences entering into international investment treaty interpretation from outside of the regime's particular object and purpose. McLachlan, for instance, describes investment treaties not as self-contained regimes but as informed by, and in conversation with, "general international law"

¹ As the late Thomas Wälde put it, international investment law is a "novel 'hybrid/mixed' form" of dispute settlement that, with the "fullness of time will develop its own *jurisprudence constante* [so as to limit tribunal inconsistency], and have less recourse to other, external sources of law," though, Wälde admits, international investment law "cannot be completely isolated" (2007, p. 118).

(2008, p. 369).² The editors of the recent volume entitled *The Backlash Against Investment Arbitration* (2010), similarly describe the “investment arbitration regime” as “in listening mode and ready to adapt” (Waibel *et al.* 2010, p. xxxix). According to this view, international investment arbitration must open itself up to outside influences. This will be done, however, on international investment law’s own terms using the regime’s own lexicon and logic (i.e. Brower 2003b, Dupuy 2009, Van Aaken 2006). McLachlan draws on the principle of “systemic integration” in treaty interpretation (McLachlan 2005, p. 318)³ as a means of “taking into account” (International Law Commission 2006, paras. 415, 419) the broader normative environment in which international investment law operates. Having resort to this broader normative universe performs a “systemic function . . . linking specialized parts to each other and to universal principles” (International Law Commission 2006, para. 475). This is a technical device that provides no definitive answers to regime collision. Rather, it is a style of management that delegates responsibility for acknowledging and accommodating the broader environment to legal technicians operating within international law’s discrete domains (Klabbers 2007, p. 161).⁴

I want to suggest that both views share an insistence on structuring encounters with the outside normative universe on international investment law’s own terms – the terms of their interaction cannot be dictated, in other words, by actors operating from outside of the system. On either view, then, it will be international investment lawyers, arbitrators, and scholars who will determine the extent to which conflicting, non-investment-promoting considerations get let in. States, of course, have a role to play to the extent they incorporate such concerns into treaty practice. As I suggest below, we should not, however, overstate the capacity of states to depart from the expert advice given to them by international investment norm-entrepreneurs who have the ear of those having authority over this dossier.

Both responses, as a descriptive matter, resonate in system-theoretic terms. That is, they both comprehend international investment law as a sub-system of rules and institutions with its own logic and system of policing interactions with other, even competing, sub-systems of law – the hallmarks of legal autopoiesis. Common to both camps, then, is an account of international investment law as developing autonomously from (though intimately related to) other norm-producing systems and that it is potentially on a collision course with other sub-systems of law that are organized around logics other than that of promoting foreign investment. This is an account congenial to Teubner’s analysis of global law and societal constitutionalism, as I argue below. In Teubner’s account, when confronted with the opposing logic of a conflicting system, system actors can act reflexively and selectively respond to these external “irritations” (Teubner 1986). In this paper I ask whether international investment arbitrators might also be considered to be acting reflexively when confronted with systemic conflict – a reflexivity prompted by nagging concerns about the ongoing legitimacy of the investment rules regime.

In the first part of the paper, I review some of the salient features of reflexive law through an autopoietic lens as articulated by Teubner, building upon Luhmann’s

² By general international law, McLachlan is referring to the International Law Commission Report (2006) (to which he provided assistance) which admits that, general international, though not well articulated or understood, refers to general customary international law as well as “general principles of law recognized by civilized nations” and might also refer to “principles of international law proper and to analogies from domestic laws” (2006, p. 254). The report also develops the notion of “self-contained regimes” (*ibid.* at paras. 123-37).

³ McLachlan describes the term as his contribution to the International Law Commission’s (ILC) report on fragmentation (International Law Commission 2006).

⁴ It should be emphasized that Koskeniemi, chair of the ILC study group on fragmentation, aims to politicize international law (“giving voice to those not represented in the regime’s institutions”) and so moves away from its penchant for expert rule and managerialism (2007, p. 29). One does not get that international law should be moving in a less technical direction from McLachlan’s related contributions (see McLachlan 2005; 2008).

systems theory (1994, 2004). This is undertaken not as an endorsement of autopoiesis as an accurate description of the world⁵ or a normatively desirable end point for it. Rather, it is conscripted here as a heuristic for describing the self-understanding of the relevant actors operating within international investment law's spheres of jurisdiction. In order to take stock of the degree of reflexivity apparent in investment arbitration, the second half of the paper examines the direction investment law is taking in a few key areas: (1) in the shift in emphasis away from expropriations (the 'takings rule') to the fair and equitable treatment standard, which is performing similar functions; (2) in the attempt to merge global standards by embracing World Trade Organization Appellate Body decision making; and (3), the hesitant embrace of proportionality doctrine as a means of weighing public interests into the equation. There certainly are other features of the investment law regime that are undergoing change as a result of these system conflicts (i.e. an emphasis on procedural innovations having to do with increasing transparency and qualified standing of NGOs at dispute hearings) that could have been the focus for discussion.⁶ I concur with Vagts, however, that "the heart of the backlash relates to the substance of BITs" (Vagts 2010, p. xxv) and so a focus on the outputs associated with investment treaty arbitration smokes out some of the discrete ways that the regime reveals a degree of "reflexive legitimacy" (Banakar 1998). It might, admittedly, seem curious to turn to systems-theory as a way of thinking about investment arbitration reflexivity. This is a methodological device, after all, that operates at a high degree of generality – subjects, as agents of change, virtually drop out of the picture (Frankenberg 1992, p. 20). The approach does capture, however, dominant thinking about investment arbitration. By deferring to the self-conceptions of legal actors and theorizing legal change via orderly internalization that minimizes disturbances, (Frankenberg 1992, p. 20), systems theory describes well how the system drags its heels but nevertheless is feeling pressure to change.

Before proceeding with this discussion, permit me to say one last thing about legitimacy. In an age when national states increasingly are giving up policy space to other institutional actors, legal forms no longer can simply rely on the coercive authority of the national state to shore up their legitimacy (Weber 1968, p. 314). Whatever legitimacy may have been generated by the initial grant of consent to these institutions (i.e. Habermas 2006, p. 81), the claim wears thin as these regimes take on constitution-like functions (Schneiderman 2008). For some, legitimacy will rest on the reputation and authority of arbitrators (Wälde 2007) or on the power of the regime's normative framework (Brower 2003a). In a time of seeming dissensus about the authority of and normative pull of markets, something more is needed. In the language of systems theory, to the extent that the regime has significant effects beyond the reproductive operation of the system itself then, in order to address but not fully resolve legitimacy problems, the regime's agents will increasingly have resort to innovations of various sorts, including some of those canvassed below.

1. Reflexive Law

Taking a neo-evolutionary approach to legal development (Habermas 1979, p. 141), Teubner closed in on the reflexive element in modern law. This he contrasted with formal and substantive rationalities of modern legality. Formal legal rationality contributed to individual autonomy and freedom – formalities "facilitate private ordering" (1983, p. 252). Substantive rationality shifted modern law's focus "from autonomy to regulation," observed Teubner (1983, p. 253). Law takes on a purposive orientation as legal functions shift to achieving substantive aims via legal methods. The idea that purpose-driven legislation could emancipate legal subjects,

⁵ Though, as the ILC notes, it complements well their fragmentation hypothesis (ILC 2006, para. 133).

⁶ An emphasis on proceduralization is one of the hallmarks of reflexive law (Wiethölter 1989).

associated with the rise of the welfare state, had now been exhausted (Scheuerman 2001, Calliess and Zumbansen 2010, p. 52). Teubner arrives, then, at his third form, reflexive rationality, focusing on law's coordinating function which "retreats from taking full responsibility for substantive outcomes" (1983, p. 254). Instead, reflexive law "tends to rely on procedural norms that regulate processes, organization, and the distribution of rights and competencies" (1983, p. 255). Teubner claimed that reflexive rationality captured contemporary legal processes in the face of claims that the welfare state was in crisis (Habermas 1987, p. 364).⁷

Taking up Luhmann's systems-theoretic approach,⁸ Teubner diagnosed the capacity of reflexive structures to learn and adapt and to "resolve conflicts between function and performance by imposing internal restrictions on given sub-systems so that they are suitable as components of the environment of other subsystems" (Teubner 1983, p. 273).⁹ Though sub-systems are "normatively closed," they respond to their environment by being "cognitively open" (Luhmann 2004, p. 106). Autopoietic systems – sub-systems operating within the larger social system – self-reproduce with reference to their own operating elements (or media of communication) rather than those of other competing sub-systems (Teubner 1988, p. 3, Luhmann 2004, p. 80-81). Despite this boundary policing, they are, nevertheless, open to communications from other sub-systems. These "perturbations" are capable of being internalized according to the language of the irritated sub-system. This is in contrast to the "structural coupling" between law and politics, for instance, which has the effect of channelling influences between these two sub-systems on an ongoing basis (Luhmann 2004, p. 382). It is this openness – a new "self-restraint" – that Teubner appears to emphasize in this early diagnosis. Reflexive law is sensitive to "outside effects" in the course of maximizing internal rationality and so has the ability to identify opportunities to self-correct without "irreversibly destroying valued patterns of social life" (1983, p. 274, 278).

As did Luhmann, Teubner underscored the futility of attempting to unify different operative social systems. "Centralized social integration is effectively ruled out today," he observed (1983, p. 272) – abandoning any concern with the contemporary fragmentation of international law (Koskenniemi and Leino 2002). This legal pluralist orientation has been helpful in thinking about the proliferation of global legal orders in the post-Cold War era. (Berman 2007). For instance, drawing on the transnational commercial law of *lex mercatoria*, customary law developed by commercial arbitration and practice, Teubner theorized the provocative claim that a "global law" was developing in "relative insulation" from (or "without") the state (Teubner 1997, p. 3). This was because the "structural coupling" between law and politics under the supervision of national constitutional orders now "had no correspondence on the level of world society" (Teubner 1997, 6 quoting Luhmann 2004, p. 487-88). Condemning the narrowness of "methodological nationalism" (Beck 2005, p. 22), legal norm production (defined by the binary legal/illegal) could now be observed proliferating outside of common national institutions. These observations precipitated Teubner's later formulation regarding "societal constitutionalism," which describes the emergence of autonomous legal orders proliferating at the global level. International organizations, trade unions, NGOs and multinational corporations are all authors in the construction of societal

⁷ "The more the welfare state goes beyond pacifying class conflict lodged in the private sphere of production and spreads a net of client relationships over private spheres of life, the stronger are the anticipated pathological side effects of a juridification that entails both a bureaucratization and a monetarization of core areas of lifeworld" (Habermas 1987, p. 364).

⁸ In his work on legal autopoiesis, Teubner took up the innovative project of conjoining legal theory with Luhmann's systems theoretical approach (a subject which Luhmann had himself addressed). It is not my object to trace Teubner's intellectual trajectory here. Instead, it might be helpful to draw on more recent work for the purpose of highlighting some continuities of thought that will have relevance to the discussion that follows.

⁹ The imposition here, presumably, is self-authored by the system upon itself and imposed via its own media of communication.

constitutions – a constitutionalization of separate global sub-systems “without the state” (2004, p. 8, 15).

These sectoral constitutions have been developing for a long time (2010a, p. 4) “in underground evolutionary processes” (2004, p. 18). They are now beginning to have a presence, though “invisible to the naked eye” (*ibid.*) on a global scale because of the increasing complexity and functional differentiation of society on multiple scales (2010a, p. 4). The constitutive rules developed autonomously by these various societal actors are increasingly, however, coming into conflict. In language reminiscent of Polanyi’s double movement (Polanyi 1944, p. 138-39),¹⁰ Teubner describes “counter-movements . . . now appearing which form *limitative rules*, in order to countervail self-destructive tendencies and to limit damage to social, human and natural environments” (2010a, p. 6). “It is only a matter of time,” writes Teubner, before liberated energies of an autopoietic systems “have destructive consequences of such proportions, that the resulting societal conflicts push for drastic change of constitutional politics” (2010a, p. 19). The task today, then, is to “identify the real structures of the existing global constitutionalism, to criticise its shortcomings and to formulate realistic proposals for limitative rules” (Teubner 2010a, p. 6). This is a strategy of devising “internal limitations” to sub-systems, inhibiting their compulsion to growth (Teubner 2010b). They can then suitably correspond, and will not do damage to, their social environments (Teubner 1983, p. 273). It is worth pausing to underscore here that Teubner’s prescriptive account does not include doing away with any of these fragments of constitutionalism, rather, the impulse is reformative: it is not about building up something new, but “transform[ing] what is an already existing constitutional order” (2010a, p. 6, cf. Frankenberg 1992).

2. Reflexive Investment Law?

Having described, some of the key elements of reflexive law, we are now in a position to assess how well Teubner’s analysis fits with self-conceptions of the actors in international investment law. We might say, firstly, that the dominant content of investment rules exhibit elements of formal, and not reflexive, law. The regime is intended, after all, to provide stable legal environments to facilitate the movement of capital across national boundaries (CMS 2005, para. 274). The extent to which international investment law can be characterized as reflexive, therefore, will depend on the degree to which investment arbitration contributes, as a sensory device, to learning processes by which investment rules will evolve. It is doubtful that it can be said that investment arbitration has embraced reflexivity by retreating from taking “full responsibility for substantive outcomes” and focussing instead on more open-ended outcomes (Teubner 1983, p. 254).¹¹ It might be more accurate to say that, rather than having reached the “highest” stage of legal rationality, the regime concurrently exhibits features of all three dominant legal rationalities Teubner identified in 1983.¹²

Secondly, it can be said that many of the actors operating within international investment law view the regime as an autonomous, norm-producing sub-system that is focussed principally on its own self-production and so, in this way, is “normatively closed” but “cognitively open” (Luhmann 2004, p. 106). The extent to which actors view the system a referring principally to its own norms and logic as developed via treaty text and arbitral jurisprudence, rather than relying on outside

¹⁰ Teubner subsequently acknowledged this connection to Polanyi (2010b, text associated with fn. 51).

¹¹ Yet it also is the case, Fischer-Lescano and Teubner observe, that “global private regimes” increasingly are creating their own substantive law (2004, p. 1010).

¹² It probably is fair to assume that this will be the case for many of the sub-systems of law that autopoiesis theorists would want to take up for discussion.

sources of law (Wälde 2007, p. 118), then the regime exhibits, from this point of view, some of the classical features of a social sub-system. This is not to say that the regime will be closed to external influences (the “backlash” problem identified above suggests otherwise), only that in so far as it is responsive to its own shortcomings those responses will be determined by the regime’s own principal players (lawyers, arbitrators, academics). These actors will respond in accordance with the regime’s own embedded preferences employing the regime’s own terminology and typically not according to the logic of competing sub-systems, such as international environmental or human rights law.

It could not be said, thirdly, that the regime is uncoupled from the state and politics. We should qualify the immediately preceding paragraph by saying that states that are party to investment treaties, generating the constitutional architecture for the regime’s operations, shape the sub-system’s operations by negotiating specific treaty text and by modifying those texts or, as in the case of NAFTA’s Free Trade Commission (FTC) (an interstate cabinet level body), issuing interpretive directives (Roberts 2010). Even here, however, state influence in the ongoing operations of the system is limited. Though investment treaties exhibit some variance, and despite their vaunted flexibility (Schneiderman 2009), there remain a standard set of core constraints that most every investment treaty will exhibit. Nor have interpretive notes, such as those issuing out of the NAFTA FTC, proven entirely effective in taming the exercise of arbitral discretion. Indeed, in the case of an interpretive note intended to narrow the scope of the minimum standard of treatment requirement to that provided under customary international law, NAFTA tribunals have been resistant to being so confined (*Pope & Talbot* 2002, para. 59, *Mondev* 2002, para. 124, Schneiderman 2008, p. 81-82).¹³ As this discussion suggests, then, it cannot be said that the investment rules regime is a species of global law without the state. States are deeply implicated in the construction of the regime – with over 2,700 BITs signed, they are its principal architects and authors – and to the extent that they continue to tolerate incursions into policy domains previously unchecked by international institutions, are key to sustaining the regime’s operations. Rather than being a species of pristine non-national law, the regime’s rules are generated in specific locales and intended to replicate specific national experiences (Schneiderman 2008, p. 44-45). They, consequently, are a prime example of what Santos calls “globalized localism” (Santos 2002, p. 179) – local rules that have had global lift-off. Even Teubner’s claims about the autonomy of *lex mercatoria*, the system of international commercial law and arbitration that has served as a device for measuring the existence of global law,¹⁴ seem extravagant. There is no question, for instance, that *lex mercatoria* has had a “productive relationship with national contracts law” (Calliess and Zumbansen 2010, p. 32, 59), that state authority authorizes its enforcement (Cutler 2003, p. 237), and that the shape it takes will be determined partly by the response of national states (Zumbansen 2002, p. 402, Dezalay and Garth 1996).¹⁵

We might acknowledge, fourthly, that the investment rules regime, as self-understood by its relevant actors, generates a version of societal constitutionalism. Constitutionalism is a plastic term and serves sometimes conflicting purposes in the contemporary literature on global law. For Teubner, it would appear that constitutionalism, at a minimum, refers principally to the capacity of autonomous

¹³ And so interpreting the requirement as “evolving” to include a standard of “fairness” which the Note was intended to foreclose.

¹⁴ Calliess and Zumbansen describe *lex mercatoria*, for this reason, as a “methodological problem” and so a device for reflecting “on the nature and possibility of transnational law” (2010, p. 31, 33).

¹⁵ Stone Sweet describes the system as “parasitic” on state authority, using state authority “where necessary, essentially for enforcement purposes, while otherwise working to reduce the reach of sovereign control over transnational business” (2006, p. 627). He appears to lose sight of the myriad ways in which states prove to be important allies in the sturcturation of transnational business law (see Dezalay and Garth 1996).

groups to organize themselves into self-functioning associations, in much the same way as the British political pluralists described political life in the early part of the twentieth century (Hirst 1989). For instance, Teubner describes the “constitutional emancipation” of the WTO (2010a, p. 15), which suggests a deepening of the constitutional account generated by John Jackson (1997). Teubner now speaks of systems that not only engage in norm production but that also exhibit certain “constitutional properties” (Teubner cites Peters 2006, p. 585, see also Cass 2005, p. 19, Walker 2002, p. 343). There are limits to the constitutional analogy, Teubner admits, however. They are confined to specific domains of international law and so have no correspondence to achieving the constitutional effects of national states, in performing a redistributive function, for instance. They have no capacity to “constitutionalis[e] other global spheres” (Teubner 2010a, p. 13)¹⁶ and instead are characterized as “islands of constitutionality” (Teubner 2010a, p. 14). There are only “occasional couplings [rather than structural couplings] as and when social problems demand” (ibid.).

Yet, the investment rules regime, in contrast, has significant effects beyond the reproductive operation of the system itself. Work I have done elsewhere on the constitution-like features of the investment rules regime suggests that it exhibits features I associate with a constraining model of constitutionalism (Schneiderman 2008, p. 37). This is a classical model of constitutionalism distrustful of exercises of power by public (but not private) authorities (McIlwain 1947, p. 21) and in which, more specifically, the state is expected to recede from regulation and redistribution (Hayek 1982). It is this diminished version of constitutionalism that has been described as emerging at the transnational level in the form of a “new constitutionalism.” New constitutionalist proposals, writes Gill, are “intended to ‘lock in’ commitments to liberal forms of development, frameworks of accumulation and of dispossession so that global governance is premised on the primacy of the world market” (Gill 2008, p. 254). It is noteworthy that this constraining version of constitutionalism bears little resemblance to reflexive legal rationality that Teubner associates with global law without the state. Rather, it reflects the legal rationality of individualism which Teubner associates with the formal aspects of law.

If it is correct to claim that the self-understanding of relevant actors operating in investment law’s domains correspond well to a system-theoretic account, we should then also ask if the regime exhibits any signs of reflexivity. Does it respond well to the perturbations introduced by competing social sub-systems? Have the liberated energies of the investment rules regime led to “self-destructive tendencies” such that ensuing societal conflicts are resulting in the introduction of new limitative constitutional norms within the regime itself, as Teubner recommends (2010a, p. 6)? I want to suggest, in the next part of the paper, that what can be described as modest evidence of reflexivity can be mapped out. There is some learning and adapting to systemic collisions – the movement to embrace proportionality, for instance, is emblematic of this move toward reflexive legitimacy – but overall the regime’s sensors are rather faulty. Employing this legal autopoietic frame underscores that, in so far as the investment rules regime is limited to initiatives that result only in the system’s self-reproduction exclusively on its own terms – self-limitation strategies can only succeed, Teubner writes, “within, and not outwith, the logic specific to a subsystem” (2010a, p. 21) – then inter-societal collisions are not likely to result in transformative change. The question then becomes whether the regime nevertheless remains sustainable going forward. I turn, in the next part, to a consideration of the ways in which the investment rules regime might be considered responsive to its social environment.

¹⁶ Teubner makes a similar observation about the limits of global administrative law (GAL). It is “concerned with the internal constitutions of the regulatory agencies; they cannot function as constitutional norms in the regulated spheres” (2010, p. 13).

3. Regime Openness

In order to measure system responsiveness, I look below for innovations developed by arbitration tribunals. These, it might be said, have been encouraged or prompted by critiques issuing out of states and social movements regarding the system's deleterious effects on state capacity and social and environmental degradation. I examine, (i) the shift in emphasis away from expropriations (the 'takings rule') to the fair and equitable treatment standard, which is performing similar functions; (ii) the attempt to merge global standards by embracing World Trade Organization Appellate Body decision making; and (iii) the hesitant embrace of proportionality doctrine as a means of weighing public interests into the equation. In the course of this discussion I make some modest empirical observations drawing on the Oxford International Investment Claims database comprised of all reported investment tribunal decisions, as of 1994.¹⁷

3.1. Shifting Grounds

Taking the 1994 North American Free Trade Agreement (NAFTA) as our point of departure, it is fair to say that, though many elements of the regime prompted cautious concern or criticism, there was an overriding anxiety focussed on the clause prohibiting expropriation and nationalization, direct or indirect, or measures tantamount thereto (the "takings clause") (Banks 1999, Been and Beauvais 2003, Dumbery 2001, Robinson 1993, Schneiderman 1996, Wagner 1999). This made some sense as the prohibition most resembled the takings rule in U.S. constitutional law, which had been described as a "mess" and "conceptual morass" (Dana and Merrill 2002, p. 163-64, Poirier 2002, p. 138, Sax 1964, p. 46). Analogizing the takings clause to its constitutional progenitor transformed the regime into a transnational constitutional code for the protection of property. This made it an easy target for social movement and academic critique, though these dangers were resisted by others (see e.g. Soloway 1999, Wilson 2000). Though it can be said that tribunal interpretation has evinced latitudinarian tendencies (Sornarajah 2008, p. 68-73),¹⁸ numbers of arbitrators have been reluctant to find takings to have occurred (Newcombe and Paradell 2009, p. 346, Reinisch 2008, p. 451, e.g. *Methanex* 2005).

We might surmise, then, that arbitrators have been cautious in their approach to the takings clause in the face of legitimacy concerns about its overbreadth and potential ability to frustrate socially desirable legislation. The separate opinion [SO] of Bryan Schwartz in *S.D. Myers* suggests that this is no mere intuition.¹⁹ There, Schwartz admitted that the imprecise nature of NAFTA's takings rule had precipitated vocal opposition to NAFTA and associated fears and anxieties about the decline of state sovereignty and democratic accountability. Acknowledging that, on the facts, Canada's conduct may have amounted to the expropriation of the claimant's goodwill (*S.D. Myers* [SO] 2001, para. 218) – it may have qualified as a "severe deprivation, upsetting an owner's reasonable expectations" (*S.D. Myers*

¹⁷ Oxford Investment Claims can be found at <http://www.investmentclaims.com>. The site provides full text of awards and decisions to non-subscribers in a PDF format. The year 1994 is taken up as the starting date for searches as it is the date on which the North American Free Trade Agreement entered into force and the point in time at which investment arbitration appeared to take off.

¹⁸ As when the *Metalclad* tribunal (2001) labelled as compensable takings "covert or incidental interference which deprive owners, "in whole or 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" (*Metalclad* 2001: para. 103), going well beyond even U.S. takings doctrine (Been and Beauvias 2002). Paulsson and Douglas provide an alternative, and unconvincing, reading of the *Metalclad* in which a subsequent determination would have been made by the tribunal of whether the taking required compensation under NAFTA (2004, p. 149).

¹⁹ The dispute concerned a successful challenge to the Government of Canada's ban on the export, for 16 months, of PCBs to the U.S. For detailed discussion, see Schneiderman (2008, p. 86-92) on which this paragraph draws.

[SO] 2001, paras. 212, 213) – Schwartz declined to find a breach of NAFTA's investment chapter. The removal of economic rights was not "lasting" but temporary, nor was there a clear transfer of wealth from S.D. Myers to the government or to Canadian competitors (*S.D. Myers* [SO] 2001, paras. 220, 221). A finding of expropriation, on the other hand, "might contribute to public misunderstanding and anxiety" about the decision and the wider implications of NAFTA (*S.D. Myers* [SO] 2001, para. 222). Recognizing that the breadth of the takings rule has "resulted in real anxiety on the part of academic critics" (*S.D. Myers* [SO] 2001, para. 202, citing Wagner 1999) and directing his opinion not only to the parties but "to the wider public" (*S.D. Myers* [SO] 2001, para. 34), Schwartz preferred to decline to exercise this jurisdiction. Moreover, it would make no practical difference if the action were labelled an expropriation as damages likely would be the same if the tribunal found for the claimant on other grounds, namely, national treatment or fair and equitable treatment.²⁰

Tribunals have not merely declined to find regulatory takings, however. As the S.D. Myers tribunal suggests, other treaty provisions have emerged to serve as functional equivalents. Dolzer has suggested that fair and equitable treatment "is in its substance closely related to the more specific standards of an indirect expropriation" (2005, p. 87, Dolzer and Schreuer 2008, p. 104). The Waste Management tribunal (2004) observed that fair and equitable treatment has been invoked repeatedly "alongside" claims that there has been an expropriation, as an "alternative and overlapping" basis for compensation (Waste Management 2004, para. 86).²¹ This is not to suggest that all denials of fair and equitable treatment can be considered equivalent to regulatory takings, only that the fair and equitable treatment rule is performing some of the functions served by a regulatory takings rule. This is particularly the case in so far as both grounds are attentive to compensating for failed investment-backed expectations (Fietta 2006). In CMS, for instance, the tribunal found that the Government of Argentina's policy reversal (abandoning conversion of both utility rates from pesos to US dollars and semi-annual adjustments in accordance with the US Producer Price Index) in response to the country's economic meltdown in 2001 amounted to a denial of fair and equitable treatment. The tribunal treated the license under which the public utility operated, together with its operative legal framework, as if they guaranteed a rate of return on its investment that was unjustifiably denied to the company (*CMS* 2005, p. 161). This, Schill rightly observes, amounts to treating CMS' investment as if it were in the nature of a property right (2006, p. 7).

The likelihood of overlap makes sense in light of the regulatory takings doctrine developed by the U.S. Supreme Court in *Penn Central* (1978). U.S. courts are directed to consider a number of factors: whether the diminution in value is attributable to the government conduct, the character of the government action, and the extent to which the regulation interferes with distinct (later modified to reasonable) investment-back expectations (1978, p. 124-25). The last of these three appears to have been drawn from the agenda-setting paper by Michelman (1967). In describing how courts do the work of determining when government action merits just compensation under the takings rule (1967, p. 1250), Michelman concluded that the question to be asked is "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation" (1967, p. 1233). The requirement of compensation, Michelman argued, was premised on the assumption that property consisted of "several discrete 'things'" (the classical understanding of property-as-a-bundle-of-rights) (Singer 2000, p. 9-13) and that deprivation of one of these things was "attended by a pain of a specially acute or demoralizing kind" (1967, p. 1234). Retroactive changes, then, were more likely to

²⁰ Two of three tribunal members found a breach of fair and equitable treatment (*S.D. Myers* 2001, para. 266, following Mann 1981, p. 243-44).

²¹ As suggested in Newcombe and Paradell (2009, p. 351).

raise demoralization costs worthy of some compensation. The legitimate expectations branch of the standard of fair and equitable treatment appears to be standing in for the sort of constitutional discipline that would have been served by a robust regulatory takings rule.

Fietta wonders whether tribunals will prefer (as did the *S.D. Myers* tribunal) to find breaches of the fair and equitable treatment in these circumstances over the "more fundamental and demanding expropriation standard" (2006, p. 385). One tribunal suggests this precisely should be the case. The *Sempra* tribunal found a denial of fair and equitable treatment, as did *CMS* on identical facts, and acknowledged that:

on occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin ... In case of doubt, however, judicial prudence and deference to State functions are better served by opting for a determination in the light of the fair and equitable treatment standard. This also explains why the compensation granted to redress the wrong done might not be too different on either side of the line (*Sempra* 2007, para. 301).

The tribunal's reasons are somewhat opaque. They suggest that fair and equitable treatment is to be preferred because it is more "deferential" to state functions and so, perhaps, will be viewed by states as less stinging a rebuke. The available data suggests that this may indeed be the preferred course of action for tribunals. Figure #1 reveals that, where both grounds are available to tribunals, arbitrators have increasingly preferred to find a denial of fair and equitable treatment rather than an expropriation. Figure #2 suggests that, of fair and equitable treatment claims preferred in Figure #1, many will concern the legitimate expectations doctrine (the corresponding element that is commonly a part of determining whether a regulatory taking has occurred).

Figure #1

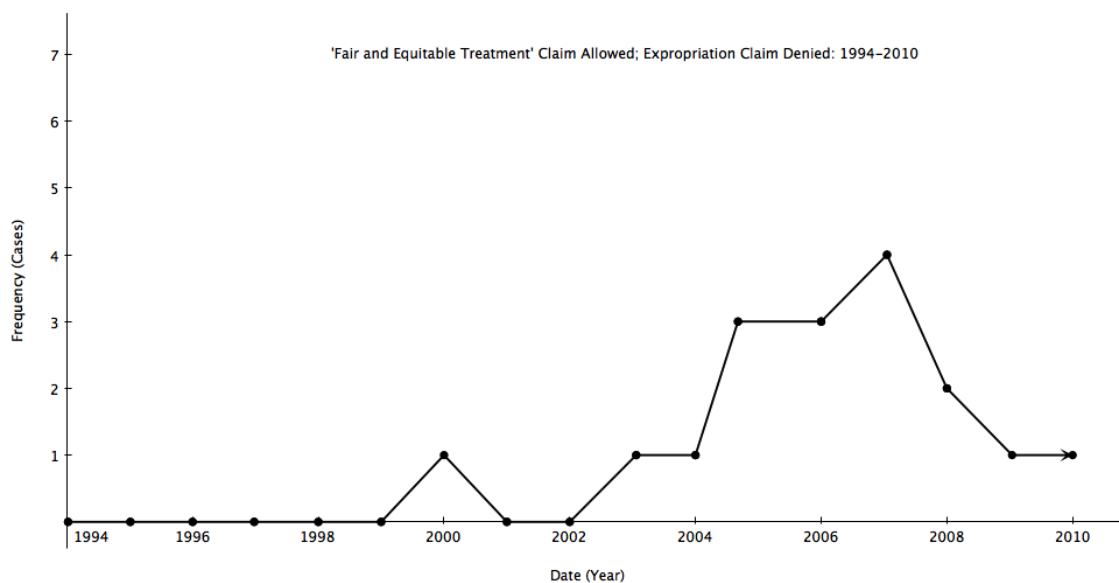
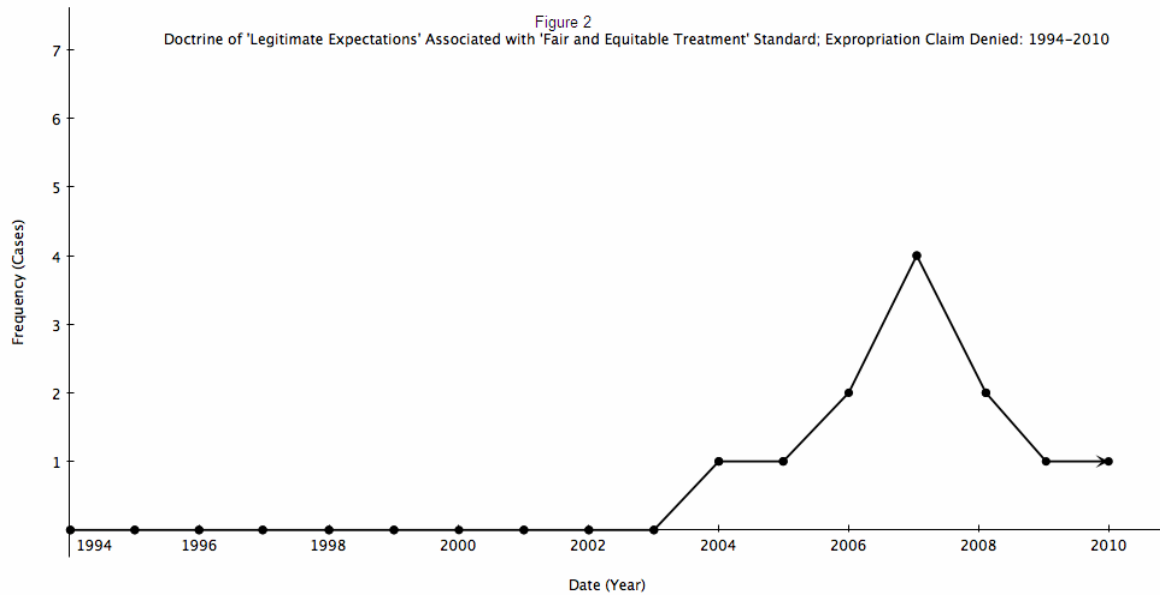


Figure #2



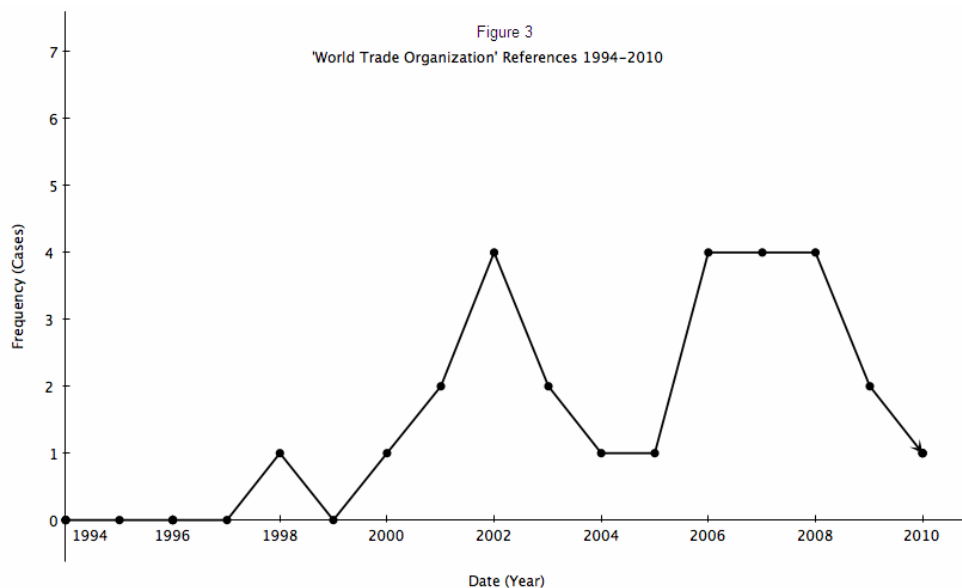
Whatever the case, *Sempra* underscores that the fair and equitable treatment is serving similar functions as the ground of expropriation, but without having to meet the more substantial and lasting deprivation typically associated with a compensable taking (*Pope & Talbot* 2000, paras. 100-102). Does this shifting terrain, moving complaints from the takings clause to another investment treaty discipline, exhibit some of the features of reflexive law? Though it does not seem an entirely effective strategy – critics simply will relocate the basis for their objections – it does help to make less transparent the substance of what is going on under the cover of investment treaty arbitration, at least in the short term. Moreover, it might prove less objectionable to ground this sort of claim in an evolving and omnibus international law standard, which includes a variety of other attributes in addition to reasonable investment-backed expectations (*Mondev* 2002, p. 123).

3.2. The WTO System

Yet another measure of responsiveness is an investment tribunal's cognitive openness to related regimes. International investment law prefers to self-identify as a sub-species of public international law, representing the codification of customary international law (Wälde and Kolo 2001, p. 846). In which case, one will find, not surprisingly, references to influential International Court of Justice rulings and to the "general principles of law recognized by civilized nations" (McLachlan 2008, p. 395-98)²² More instructive, perhaps, will be references to interpretations of the Uruguay-round GATT by WTO panels and appellate boards. This regime of international trade law has been emerging alongside the rise of the international investment regime and increasingly tribunals are having recourse to its evolving jurisprudence. There has been a discernible upward trend in tribunal references to WTO case law. Of 26 awards that make reference to the WTO, a significant majority of 18 (almost 70 per cent) cite WTO cases with some measure of approval. There also has been a significant uptake of approving WTO references in recent years, suggesting a measure of consensus about the utility of resorting to this sort of persuasive precedent (see Figure #3).

²² Statute of the International Court of Justice, Art. 38(1)(c).

Figure #3



Typically, these references to WTO case law will be in support of procedural matters, regarding the national treatment standard or, as in the recent case of *Continental Casualty* (2008) discussed next, with reference to the availability of exceptions (Newcombe and Paradell 2008, p. 170-74, 495-506). Kurtz describes investment tribunal reference to WTO national treatment as “inconsisten[t],” “incoherent[t],” and amounting to a “misreading” (2009, p. 750). He attributes this “misuse” as “*the* controlling factor” that explains “critical inconsistencies in the legal tests” applied by tribunals in the consideration of national treatment (Kurtz 2009, p. 251). Though early tribunal decisions (*Pope & Talbot* 2001, *S.D. Myers* 2001) engaged in comparison “reasonably well,” he describes more recent engagements (*Occidental* 2004, *Methanex* 2005) as “selective” and “misleading” (Kurtz 2009, p. 763-64). This misreading is attributed to a lack of expertise on the part of investment arbitrators, an absence that can be remedied through learning (2009, p. 770). “This functional and institutional separation is no longer feasible or desirable,” Kurtz observes (also Dolzer and Schreuer 2008, p. 185). It might also have the benefit of forestalling “deeper forms of backlash” (Kurtz 2009, p. 770-71). Recent tribunal appointments – Kurtz singles out the appointment of former WTO Appellate Board member Professor Giorgio Sacerdoti to preside over the *Continental Casualty* dispute – can result in a “careful and sophisticated use of WTO exceptions jurisprudence,” he maintains (2009, p. 771). By contrast, a comment in the *Yale Law Journal* described the *Continental Casualty* tribunal’s approving reference to WTO jurisprudence in hyperbolic terms: as having “pervert[ed]” the doctrine and “watered down” protections for investors; an “alarming” and “dangerous precedent” which “muddle[d] the doctrine and will have costly ramifications” (Claussen 2009, p. 1546, 1548, 1555).

Let me briefly discuss *Continental Casualty* (2008) before returning to this debate. Three earlier tribunals (including *CMS*) had similarly struggled with the question of whether Argentina could take advantage of the treaty exception or customary defence of necessity. Only the *LG&E* (2006) tribunal had found the

necessity defence available (Schneiderman 2010a).²³ *Continental Casualty* joined issue with these earlier decisions by learning from the WTO experience. Applying a more relaxed standard of review, the tribunal granted a “significant margin of appreciation” to Argentina in determining whether a state of necessity prevailed (2008, para. 181).²⁴ The WTO/GATT jurisprudence suggested availability of the defence of necessity where another measure was not reasonably available (2008, para. 195). This was the case here, as the emergency measures were “inevitable, or unavoidable, in part indispensable” and undoubtedly had a “genuine relationship” between ends and means (2008, para. 197).

Returning to the debate over recourse to WTO jurisprudence in investment tribunal decision making, what is revealing about the arguments are their operative presuppositions that resonate in systemic terms. Claussen’s student comment understands the two systems as distinct: one is principally “member-driven,” the other about protecting investors in specific contexts.²⁵ Each has “developed the exercise of judicial activity such that each is specific to its environment” (Claussen 2009, p. 1553). Kurtz, on the other hand, understands that there is an environment existing beyond the borders of each system, in which case, “much can be learned within both systems” (2009, p. 770). Though overly hyperbolic, the student comment is instructive in the degree to which its author exhibits dominant understandings about the regime that are undergoing change, as Kurtz urges, and which may help to sustain its legitimacy. Tribunals, as Kurtz would have it, are being more open and responsive to perturbations emerging from outside of the system and responding by having resort to a regime that appears to lend a hand of legitimacy.

It is worth underscoring that having resort to the WTO system is to seek out reinforcements entirely in sync with the project of spreading economic liberalism world wide. Having recourse to world trading regime precedent is to look for a reliable and steady ally whose internal rationality differs little from the investment rules regime. It also is worth noting that it is a little ironic to consider the investment regime looking to the WTO system to enhance its legitimacy. After all, the WTO has been undergoing its own legitimacy crisis. The cure, for some, has been to claim WTO functions rise to the level of a supra- or global constitutional order (McGinnis and Movsevia 2000, Petersmann 1996-97). If the WTO were likened to national constitutional orders this could have the effect of securing the WTO’s legitimacy well into the future – it would become “irreversible, irresistible and comprehensive” (Howse and Nicolaidis 2001, p. 228). Others argue that conceiving of the WTO as constitutionalized is a counterproductive response to the WTO’s legitimacy crisis. Though not opposed to “constitutionalism in the long run,” Howse and Nicolaidis argue that, rather than raising WTO dispute settlement to a ‘higher law’ that is above the fray, what is needed is more politics, namely, greater democratic accountability, not less (2001, p. 228-229, 248, Dunoff 2006). It could be said, however, that the WTO system has to date weathered its legitimacy storm better than has the investment rules regime (Cottier 2008).²⁶ The system, though hampered by the continuing oversight of national states (Gallagher, Low and Stoler 2005), continues arguably to grow in strength (China having joined its ranks) and does not appear to suffer, at least on the surface, from the threat of various state parties checking out of the world trading system. Even if I have overstated the

²³ With a member of the *LG&E* tribunal (Van den Berg) joining a subsequent tribunal that concluded otherwise (*Enron* 2007) giving rise to concerns about inconsistent and irreconcilable rulings on identical facts (see discussion in Schneiderman 2010a).

²⁴ This was “a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight” (2008, para. 181).

²⁵ Claussen denies however that investor protections should be understood in regime terms: “Attention given to any concept of an investment regime is secondary,” she writes (Claussen 2009, p. 1553).

²⁶ Though not in every respect: the TRIPs agreement has come in for stinging rebuke for preferring developed country interests over developing ones (Correa 2000) and for potentially impairing access to life-saving drugs (Correa 2006).

degree to which the WTO has successfully weathered these storms, international investment lawyers appear to believe there is some benefit to be gained by hitching the investment horse to the world trading system post.

3.3. Proportionality

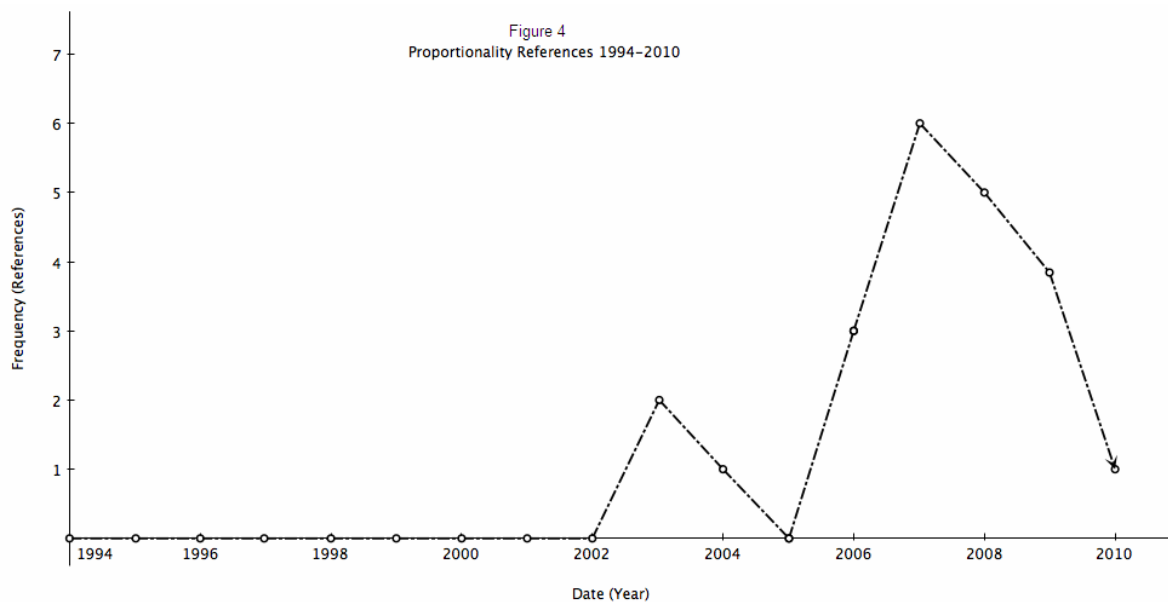
Though sporadic, arbitrators increasingly are resorting to standards associated with the work of national and regional high courts around the world, namely, proportionality. This standard of review typically, with its focus on ends-means analysis (Barak 2006, p. 255),²⁷ is singled out as evidence of an emerging world-wide consensus in constitutional matters (Beatty 2004, Kumm 2009, Stone Sweet and Matthews 2008). It serves as a reliable device by which judges can balance competing interests while remaining faithful to the hierarchy of norms represented by constitutional rights. Exacting a seemingly neutral, almost mathematical, point of view from judicial decision makers (Barak 2007, p. 374-76)²⁸, proportionality review has proven to be a wildly popular means of sustaining, if not enhancing, judicial legitimacy in an age in which rights conflicts, based on the fact of reasonable pluralism typically give rise to intractable disputes without soluble resolution (Rawls 1993, p. xvi). In which case, we are living not only in an age of rights but "in an era of proportionality," proclaims former Supreme Court of Israel President, Aharon Barak (2010, p. 14). It is little wonder, then, that it also is being taken up and, on occasion, embraced by investment tribunals (Krommendijk and Morijn 2009, Newcombe and Paradell 2008, p. 363-365).²⁹ By our count, there has been increasing reference to proportionality in submissions made by the parties and some openness to applying these considerations in the context of resolving investment disputes. A total of 23 decisions were returned where proportionality was mentioned expressly or impliedly in tribunal decisions. Of these, in only 13 decisions did tribunals approvingly invoke proportionality analysis in discussing the law and, among these, only 8 tribunals actually applied some semblance of a proportionality analysis. As Figure #4 reveals, there is a sharpe increase in references to proportionality after 2005 and a drop off in references in 2010.

²⁷ Proportionality analysis is structured to consider objective, rationality, necessity, and proportionality in the narrow sense. Suffice it to say that ends-means analysis, part of the last two inquiries, is the dominant part of the analysis.

²⁸ Justice Barak here discusses the *Beit Sourik* case where the Israeli High Court of Justice found that the route of the planned fence dividing Israel and the West Bank was not proportional based on the last branch of the proportionality inquiry.

²⁹ Typically, these will arise in respect of expropriation claims (*Temed* 2003, para. 122), denials of national treatment (*GAMI* 2004, para. 114), and fair and equitable treatment (*Saluka*).

Figure #4



The *Tecmed* case is oft-cited as important precedent in this regard. The *Tecmed* tribunal found there to have been a compensable taking of a Spanish investor's hazardous waste site by reason of the Mexican federal government denying renewal of the permit to operate the site. Though the license had been renewed annually in the previous two years (it had previously been a license of infinite duration), the government denied the third application. The government relied, in part, on numerous transgressions of environmental standards by the company and, obliquely, Mexican federal law requiring that hazardous waste dumps be located at least 25 kilometres distance from any municipality, under which the *Tecmed* site was exempt (Orellana 2007, p. 775). The operation of the site, which was about 13 kilometres from state of Sonora's capital, Hermosillo, had prompted a great deal of citizen movement opposition. Nevertheless, the government's actions, the tribunal ruled, "fully and irrevocably destroyed" the investment and so amounted to an expropriation (*Tecmed* 2003, para. 117). Not content with examining only the effects of a measure on the investor (what has been called "sole-effects" doctrine) (Dolzer 2002, p. 79), the tribunal sought to determine whether the measure was proportional in its effects in light of the government's objective.³⁰ The question, as framed by the tribunal, was "whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of those who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure [sic]" (*Tecmed* 2003, para. 122).³¹ Tipping the scales decidedly against the state in the application of this

³⁰ The tribunal purported to be following the direction of the European Court of Human Rights in *James* (1986).

³¹ Though having already found the measure to be a taking, the analysis began with the "due deference" that is owed to the state when it takes measures in the public interest (*Tecmed* 2003, para. 122). Among the factors to be considered in assessing proportionality, the tribunal added, was the "size of the ownership deprivation" and whether compensation was offered (*ibid.*). Also weighing into the proportionality analysis, added the tribunal, is "that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because investors are not entitle[d] to exercise political rights reserved to the nationals of the state, such as voting for the authorities that will issue the decisions that affect such investors" (*ibid.*).

proportionality test (Schneiderman 2010b, p. 918-19), the tribunal ruled that state failed to satisfy this burden of proof. Though there were minor regulatory transgressions and other public health concerns, the tribunal concluded, these were not the real reason for the failure to renew. Rather, there were “socio-political” reasons having to do with the proximity of the site to the local municipality (*Tecmed* 2003, para. 148). Despite the intensity of the local opposition, it was not “in any way massive or went any further than the positions assumed by some individuals or the members of some groups that were opposed to the landfill” (*Tecmed* 2003, para. 144). Some surmise that had the situation been more intense, proportionality analysis might have given way to a different result (Krommendijk and Morijn 2009, p. 439). But given the manner in which the tribunal rather strictly applied proportionality doctrine – by having “sole effects” doctrine play a predominant role within the proportionality analysis and by invoking political process concerns (investors are not “represented”) not borne out by empirical analyses (i.e. Desbordes and Vauday 2007), this seems an unlikely outcome.³²

Arguing that investment arbitration’s embrace of proportionality is inevitable given the trend toward its “judicialization” (Stone Sweet and Grisel 2009), Stone Sweet complains that the few rulings that discuss the standard “exhibit a[n un]sophisticated understanding of proportionality analysis” and invoke it “timidly” (Stone Sweet 2009b, p. 68). The sequence of Argentina cases where the availability of the defence of necessity was in play, Stone Sweet argues, cried out for proportionality analysis. He prefers, therefore, the way in which the *Continental Casualty* tribunal engaged in this exercise by adopting what he calls a “mature form of proportionality analysis” (Stone Sweet 2009b, p. 74).³³ Unlike the earlier Argentinian cases, in which arbitrators proceeded “with a heavy thumb pressed permanently down on the investor’s side of the scales in cases with very high political stakes,” the tribunal in *Continental Casualty* conferred some margin of appreciation to the state. It would “seem suicidal,” he concludes, for arbitrators to proceed in any other way (2009b, p. 75, 2009a).

The future legitimacy of investment arbitration also motivates an important intervention by Kingsbury and Schill. Writing within the emerging paradigm of global administrative law, the authors aim to bring some of the “best practices” associated with administrative law to bear on international investment arbitration. They too conclude that arbitration tribunals may have “little choice” but to adopt proportionality analysis (Kingsbury and Schill 2009, p. 230). Proportionality has the advantage, they find, of being “open to different strands of political theory and different substantive preferences on investment protection” (Kingsbury and Schill 2009, p. 275). By conscripting proportionality analysis into international investment law – and endorsing the way that the *Tecmed* tribunal went about doing this work³⁴ – tribunals will have adopted standards “congruent with an emerging set of public law principles for global regulatory governance,” thereby enhancing the regime’s legitimacy (Kingsbury and Schill 2009, p. 230): “Intense concerns about legitimacy in the system . . . should drive a rapid adoption of proportionality analysis as a standard technique” (Kingsbury and Schill 2009, p. 276). These authors make clear that the increasing embrace of proportionality analysis within investment tribunal decision making, though faulty and timid, represents perhaps the vanguard in investment arbitration’s response to ongoing legitimacy concerns.

³² *Ibid.* For a fuller discussion of these point, and an analysis of the *Tecmed* case more generally, see Schneiderman (2010b).

³³ *Continental Casualty* “is a rich piece of jurisprudence, far more sophisticated than the awards produced in the four previous cases” (Stone Sweet 2009b, p. 74).

³⁴ They point to the decision in *Tecmed* as “illustrat[ing] well the use of a proportionality analysis to manage tensions between investment protection and competing public policies” (2009, p. 33).

4. Conclusion

This paper has tried to elucidate some of the ways in which arbitrators in investment disputes are attempting to reconcile the regime of investment disciplines with pressures emanating from outside the regime from both state and civil society actors. I have suggested that a systems-theoretic understanding of international investment law suits well these actors' self-understandings about how the regime operates – as normatively closed but cognitively open systems. This heuristic generates some evidence of how both ongoing resistance and qualified openness to change operates within the regime's internal structures. Arbitrators, I have argued, are acting reflexively to the extent that they are responding to these external critiques by shifting grounds, embracing WTO Appellate Board jurisprudence, and incorporating proportionality analysis. Researchers would be well advised to look for other accounts of this limited engagement with critique.

I also have expressed doubt that the investment rules regime can be fully accounted for by a systems-theoretic approach. It is doubtful, for instance, that one can describe the regime as a fully autonomous sub-system functioning independently of the political system. Nor is it likely that the timid, *ad hoc* response I have described in this paper will be enough to sustain the regime going forward. The remaining question is whether states will tolerate the selective internalization of these pressures or whether they might intervene more directly. If states are the principal authors and subjects of this regime (Roberts 2010), the most effective means of limiting the regime's external effects is by having states intervene directly. This, however, would be anathematic to functioning autopoietic systems, in which case, we will decidedly have reached the border of the analytical utility of systems theory.

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