

CONFLICT OF LAWS, CONSTITUTIONALISM AND THE AMERICAN ORIGINS
OF THE INTERNATIONAL INVESTMENT REGIME

A thesis submitted
to Brasília University in partial
fulfillment of the requirements for the
degree of Doutor em Direito

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March 2018

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ABSTRACT

This thesis attempts to uncover how an American debate about legal unity is at the origins of the international investment regime. Although it is impossible to claim a univocal continuum from more than a century of professional experience in international law, this thesis attempts to show that there are continuities with today's current debate on the constitutionalization of international law and, particularly, of the regime of international investment.

Taking systems theory as its point of departure, this research adopts a concept of constitution that is the meaningful articulation of a prohibition of denial of justice. The procedural line that is activated by the articulation of the prohibition of the denial of justice is marked by a series of decisions that were empowered by legal norms, all of them loosely coupled to one another and to other social systems, making it possible to understand them in their historical context.

The historical analysis begins, thus, with the very first moment where the concept of the prohibition of denial of justice emerged, and it explores the link between this concept and international law. In developing the development of federalism, the American Constitution created incentives for the Supreme Court to solve conflicts by establishing new empowering norms. Later on, this experience proved to be fundamental for the articulation, now on the international scene, of a concept of "denial of justice." Finally, in light of this specific interpretation of constitutional norms within and beyond the states, the thesis claims that it is the principle, not a norm, of denial of justice that is at the heart of the current regime of international investment as a specific program designed by states to guarantee, in the transnational space, the structural coupling of law and economics—that is, property.

By stressing that the concept of constitutionalism in the international scene can only be manifested through loose couplings, the very limits of this specific regime comes to light. International investment law is not necessarily a novelty within legal theory, which can account for its unity even in a pluralist setting, but this unity, as only loosely coupled with politics, is less open to inclusionary practices.

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DEDICATION

À Maria Pia.

AGRADECIMENTOS

Esta pesquisa não seria possível sem a estimulante orientação do Prof. George Galindo. Em suas aulas, discutimos diversos problemas que estão nas entrelinhas de cada uma das ideias apresentadas nesta tese. De igual modo, esta tese foi influenciada pelas pesquisas do Prof. Marcelo Neves que não apenas apresentou-me de forma aprofundada a teoria dos sistemas – juntamente com as teses Prof. George Galindo, um dos marcos teóricos deste trabalho – como também incentivou-me a identificar seus limites. Agradeço aos professores e amigos da Universidade de Brasília que, pelo exemplo e pelo debate de ideias, ajudaram-me a refinar os temas de pesquisa.

Contei com o apoio e os fantásticos recursos de pesquisa do *Max Planck Institute for Comparative Public Law and International Law*. Agradeço à Profa. Anne Peters e ao Prof. Stephen Schill que puderam debater algumas das ideias aqui desenvolvidas. Agradeço o convite para ir a Heidelberg e poder dedicar-me exclusivamente à redação da tese. Agradeço, ainda, a valiosa ajuda que recebi dos amigos que lá estavam: Paula, Patrícia e Carlos Eduardo.

Aos colegas de trabalho no Supremo Tribunal Federal, agradeço a paciência de suportar minhas ausências em períodos tão intensos para todos nós e a doçura com que me acolhem no convívio diário. Agradeço, em especial, ao Ministro Edson Fachin, um grande incentivador da pesquisa acadêmica.

Aos amigos de Brasília que trouxeram Curitiba para o Planalto Central, agradeço pelo debate de ideias, pela acolhida e pelo apoio constante. Fernando, Danyla, Gabriel, Sun, Miguel, Stephanie, Luciana, Juliano, Noa, Desdêmona e Gabriel, muito obrigado.

Ao Rodrigo Cadore, agradeço pelo refinamento das discussões sobre teoria do direito e pelas indicações às referências à Kelsen.

Agradeço a meus pais o exemplo de uma vida dedicada aos estudos e à família de Brasília e de Curitiba por compreenderem as ausências.

Finalmente, como as páginas que suportam o texto, ninguém ouviu com mais atenção e dedicação as ideias que informam cada linha desta pesquisa do que Maria Pia. Obrigado pelo carinho paciente sem o qual nada seria possível.

INTRODUCTION

Fragmentation and Legitimacy in International Investment Law

More than ten years ago, in its famous report on the fragmentation of International Law, the International Law Commission (ILC), under Martti Koskenniemi¹, drew attention to the emergence of independent and highly specialized legal mechanisms dealing with human rights, international trade, monetary policy, and European law. Particularly striking in its account of the dispersion of specialized knowledge is the reference to an exotic regime, still in many ways underdeveloped at the time the Commission researched it: that of International Investment Law (IIL). The distinctive feature of this regime was the mixture of Public International Law and commercial arbitration in treaty provisions that allowed private investors to sue States in international arbitration courts. After the report, other references for this “exotic” combination have

¹ Matti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission," (UN General Assembly, 2006). at paras 1–15. The use of the term “regime,” which was firstly developed by Krasner, is due here more to a common practice, as in the titles of many monographs on this subject (see, for instance, Alvarez’s, cited in the References of this thesis), rather than a reflexive use. According to Krasner, the concept designates “sets of governing arrangements that include networks of rules, norms, and procedures that regularize behaviour and control its effects,” Stephen D Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International organization* 36, no. 2 (1982). At 186. As it will later be shown in the discussion of Teubner’s *Constitutional Fragments*, the concept does not take into account the environment that sets the stage for “regimes.” On this, see, Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012). At 59.

surfaced underlying its uniqueness: “the platypus of international law”² or investment law as a “hybrid regime”.³

“Hybridity”, “exotic” and “uniqueness”, in here, point to the difficulty in deciding whether or not investment law is a public or a private regime. On the one hand, investment law is formed by a bundle of international treaties to which only states are parties, which engage in forms of review over public laws. On the other, dispute settlement relies on arbitration mainly through private chosen arbitrators. Moreover, litigation is set in motion by corporations which, under this mechanism, are subjects of international law⁴.

Legal doubts notwithstanding, these features have attracted many firms, and even investment funds now provide financing for taking States to court. Since the release of the report, International Investment Law has evolved to become a discipline in its own right, and many law schools now showcase courses about it.⁵ But the ascent of IIL has also been met with criticism. Jose E. Alvarez⁶, for one, described a legitimacy crisis within the field, emerging from problems of democratic accountability, inequality among

² Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System," *American Journal of International Law* 107, no. 1 (2013).

³ José E Alvarez, "Is Investor-State Arbitration 'Public?'," *Journal of International Dispute Settlement* 7, no. 3 (2016).

⁴ Not, to be sure, as states, but as holders of economic rights. "Are Corporations Subjects of International Law?," *Santa Clara J. Int'l L.* 9 (2011). At 34. See also "Rights and Duties in Investment Protection Law," in *Beyond Human Rights: The Legal Status of the Individual in International Law*, ed. Anne Peters and Jonathan Huston, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2016). At 282.

⁵Stephan W Schill, "W (H) Ither Fragmentation? On the Literature and Sociology of International Investment Law," *European Journal of International Law* 22, no. 3 (2011).

⁶ José E Alvarez, "Why Are We" Re-Calibrating" Our Investment Treaties?," *World Arbitration and Mediation Review* 4, no. 2 (2010).

States, ideology, and rule of law. The problems that he pointed out provide a good summary of the criticisms many academics have espoused.

The lack of democratic accountability, for example, mainly derives from the institutional design of international arbitration. Unlike trade, investment treaties do not have a multilateral base of legitimacy, nor do they have an international organization solely devoted to harmonizing treaties' open texture. Instead, investment treaties are usually negotiated bilaterally, and their enforcement mechanism relies on arbitration centers. Investment arbitration rules are similar to commercial ones, and arbitrators have a commercial background. But even if secrecy among commercial adjudicators is required under industrial property regimes, when applied to public law settings, it becomes highly contested.⁷

These concerns have been echoed in the studies of Canadian scholars Gus Van Harten⁸ and David Schneidermann.⁹ Van Harten has been the first in describing investment arbitration as a mechanism for international review of public policies. In his

⁷ The *Methanex* case is a good illustration (Methanex Corporation v. United States, NAFTA Arbitration, UNCITRAL Arbitration Rules, Final Award in Merits, 3 Aug. 2005). After extensive environmental research, California authorities decided to ban the use of the gasoline additive MTBE, a product developed and sold by the Canadian Methanex Corporation. As the ban directly undermined expected profits, Methanex claimed that the regulation was "tantamount to expropriation" and sued the United States under Nafta's Chapter XI, claiming damages of up to US\$ 900 million. Despite the fact that the Tribunal ultimately dismissed the claims, the mere possibility of challenging health and environmental policies defined by democratically elected representatives presented a danger that few had envisioned.

The major concern of these developments is not exclusively linked to a lack of democratic accountability. Countries may become increasingly insecure about enacting regulations that could be challenged internationally. As a response to *Methanex*, for instance, the United States moved swiftly to alter its BIT (Bilateral Investment Treaties) model. The trend has also been seen in other States. Australia has recently declared that it will not use investor dispute settlement mechanisms within its investment treaties. Norway is reviewing its own BITs, too.

⁸ Gus Van Harten, "Investment Treaty Arbitration and Public Law," *OUP Catalogue* (2007).

⁹ David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008).

view, the regime of international investment is not too far off from trade review mechanisms, and he claims that both can aid States in improving institutional settings. He is doubtful, however, of settlement disputes centers. The lack of tenure for arbitrators is, in his view, what causes instability in the decision process. He proposes, instead, an international Tribunal for investors, which could control for the problem of structural bias, as arbitrators would not have to balance the case selection with their interest in future appointments. Drawing on some of Van Harten's ideas, Schneidermann argues that investment arbitration poses a challenge for constitutional norms, since they provide for the protection of property with almost the same wording as constitutions. Thus, he advises a move away from the current regime, by changing treaty provisions with insurance mechanisms.¹⁰

The problem with horizontal legitimacy may also raise concerns about the future prospects of IIL. To be sure, inequality between litigants has long been described in legal literature, but the sheer proportion of some of the cases brought to light by international investment arbitration are cases in point. In *Occidental*¹¹, for instance, ICSID awarded Occidental Petroleum more than US\$ 2 billion in compensation, a sum larger than the

¹⁰ Van Harten's and Schneidermann's claims are center-stage now that the Transatlantic (TTPI) and the Transpacific Trade and Investment Partnerships (TPP) are being discussed. Yet, as Alvarez has pointed out, "the internal discourse in international investment law perceived this critique largely as an outside perspective that did injustice to the concern of investment treaty arbitration and investment law to provide a neutral, independent, and impartial forum for the resolution of disputes between foreign investors and a host state outside the latter's own courts." Alvarez, "Why Are We" Re-Calibrating" Our Investment Treaties?." At 899

¹¹ *Occidental Petroleum Corporation v The Republic of Ecuador*, Award, ICSID Case No. ARB/06/11 (Oct. 5, 2012), par. 306.

annual budget of the health sector in Ecuador.¹² Be that as it may, States often win at ICSID Tribunals, and political inequality should not be taken as a proxy for assessing winning chances.¹³

Setting aside political inequalities does not trump the political question of the ideology behind IIL. This is where the question of purpose arises. Against Van Harten and Schneidermann, Santiago Montt has described the role of international investment arbitration as a balance between the interests of investors and those of host states.¹⁴ He calls for an updated version of the Calvo doctrine, one in which investment treaties would be read in light of domestic law. Others, such as Kate Miles,¹⁵ call for deeper reforms. Be that as it may, the question of design seems to be aimed at better institutional policies, something that is conspicuous from a functionalist perspective on international organizations¹⁶. However, many of the concerns voiced under the ideological matrix are rather misplaced: advocates for mainstreaming international investment law know that

¹² Critical approaches to International Law find in the gap between rich and poor exceptional material for analysis. Their focus is mainly a political one. Third World Countries have a hard time finding sources of finance for development. In addition, they usually have poor institutional settings to jumpstart economic growth. See ODUMOSU, Ibrionke Tinuola, *ICSID, Third World Peoples and the Re-construction of the Investment Dispute Settlement System* (PhD Thesis). Vancouver: University of British Columbia., 2010. As a result, they fall pray to strong-arm treaty negotiations and, consequently, are left with little room for domestic policies. See, on this topic, Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, vol. 86 (Cambridge University Press, 2011).

¹³UNCTAD, "Investment Policy Hub," <http://investmentpolicyhub.unctad.org/ISDS>.

¹⁴ Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the Bit Generation* (Bloomsbury Publishing, 2009)..

¹⁵ "The infusion of a culture among legal decision-makers in the investment field that is more appreciative of host state policy space, the public international law character and context of investment law, and notions of investor responsibility will be essential if any such transformation is to occur". Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, vol. 99 (Cambridge University Press, 2013). At 388.

¹⁶ Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge University Press, 2015). At 3.

the question of balance between domestic and international law is at the center of ICSID courts.

Constitutionalization as a Problem and as a Solution

The quest for legitimacy has recently taken a different, more abstract, path. In an editorial for *The Journal of World Investment & Trade*, Stephan Schill argued that constitutional law could be used to develop consensus “on the normative foundation of investment law reform.”¹⁷ This could occur because international investment norms are functionally equivalent to constitutional ones, since both guide politics in achieving specific goals.

One should be careful, however, in seeing a “steering” function in the legal system. As any positive normative theory would claim, law can only establish conditional programming for the realization of its own operations,¹⁸ which means that purposes such as “helping sustainable development” must be carefully designed so as to avoid replacing political or even technical expertise for the arbitrator’s expertise. Judging by the goal that is taken into account and by the problems described by the literature, one may be under the impression that a constitution is a solution to a feeble symbolic effect of the international norms that constrain states’ activities in international investment treaties. The concept of “symbolic effect” is derived from Grimm’s identification of the two functions of a constitution: that of promoting integration and that of regulating the

¹⁷ Stephan W. Schill, "Editorial: Towards a Normative Framework for Investment Law Reform," *The Journal of World Investment & Trade* 15, no. 5-6 (2014).

¹⁸ Niklas Luhmann, *Law as a Social System* [Das Recht der Gesellschaft], trans. Klaus A. Ziegert (Oxford University, 2004). At 198.

creation and exercise of political power.¹⁹ Whereas the former is called integrative function, the latter is the normative function. Grimm acknowledges that these functions are viewed as separated, but because a constitution also decides on the legality of the exercise of power its normative function always have to some extent an integrative dimension.²⁰

But if that framing is indeed the case, to what extent can a constitutional norm help solve the legitimacy problem in international investment law? Or, to use Grimm's terms, can an investment constitution have an integrative effect? To answer these questions, it is necessary to look beyond a theory of pure normative scope and to consider "how one characterizes the method by which social integration takes place."²¹

To be sure, it is possible to argue that, either through domestic, comparative or international parallels, normative hierarchies can be construed so as to balance investors' and states' rights. The problem with these approaches is that they have already been criticized when they were raised in other subfields of international law—and the criticism is compelling.

The starting point of global constitutionalism seems linked to Germany.²² Under various approaches, German literature has coined such terms as "constitutionalization of

¹⁹ Dieter Grimm, "Integration by Constitution," *Int'l J. Const. L.* 3 (2005).

²⁰ *Ibid.* at 195. Grimm uses systems theory approach to define a constitution as an evolutionary achievement. See Niklas Luhmann, "La Costituzione Come Acquisizione Evolutiva," in *Il Futuro Della Costituzione*, ed. Gustavo Zagrebelski, Pier Paolo Portinaro, and Jorg Luther (Torino: Einaudi, 1996).

²¹ Grimm, "Integration by Constitution." at 193.

²² Rainer Wahl, "In Defence of "Constitution", in *The Twilight of Constitutionalism*, Oxford Constitutional Series (New York: Oxford University Press, 2012). For a synthesis of the main arguments of German

international law,”²³ “compensatory constitutionalism,”²⁴ “constitutionalism beyond the state,”²⁵ “the constitution of the WTO,” and others.²⁶ These works tend to collect evidence of general applicable norms, such as rules on immunities, humanitarian intervention, and international criminal jurisdiction, as evidence of a shift toward new subjects of rights in international law—an indication, in their view, of major shifts in international law.

As Rainer Wahl summarizes, the underlying assumptions are that: (i) there is a “international community,”²⁷ since international law is no longer based on states; (ii) as a consequence of destatalization, values and principles take prominence; (iii) *ius cogens* embodies an emergent hierarchization of norms within international settings; (iv) states are part of a community and the community has primacy; and (v) the individual is considered the “final purpose” of international law.

Of course, these are bold statements. That international law is undergoing significant changes is something that even critics acknowledge.²⁸ What seems difficult to

scholarship, see Armin Von Bogdandy, “Constitutionalism in International Law: Comment on a Proposal from Germany,” *Harv. Int’l LJ* 47 (2006).

²³ Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009).

²⁴ Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures,” *Leiden journal of international law* 19, no. 3 (2006).

²⁵ Neil Walker, “Taking Constitutionalism Beyond the State,” *Political Studies* 56, no. 3 (2008).

²⁶ For a full account of these uses, see Wahl, “In Defence of ‘Constitution’.”

²⁷ “The core of a constitutionalised international law is the general acceptance of a common interest of mankind that transcends the sum of individual interests” in: Brun-Otto Bryde, “International Democratic Constitutionalism,” in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, ed. Ronald St. John Macdonald Douglas M. Johnston (Leiden: Martinus Nijhoff, 2005).

²⁸ Among them Marting Loughlin, “What Is Constitutionalisation?,” in *The Twilight of Constitutionalism*, ed. Martin Loughlin and Petra Dobner (New York: Oxford University Press, 2012). Dieter Grimm, “The Constitution in the Process of Denationalization,” *Constellations* 12, no. 4 (2005). Marcelo Neves, “(Not) Solving Constitutional Problems: Transconstitutionalism Beyond Collisions,” *Lua Nova: Revista de*

square, however, is whether or not this change is qualitative or simply quantitative of international law's structure. For Rainer Wahl, an overarching theory of normativity cannot function without institutions and organizations that are charged with realizing the "constitution," something that could only happen with "the institution of constitutional jurisdiction."²⁹ Moreover, the concept simply lacks a "people" to whom the fundamental question of why one should obey a norm is addressed. For Wahl, constitutions embody a constellation of components (principles, values, shift of mentality among rulers toward legal justification, formation of institutions, anchoring on the people, guarantee of basic rights), but at the international level, only principles and values seem to justify the claim that some authors have made. Dieter Grimm is even more suspicious of the term constitutionalism. As he sees no prospect of democratic legitimation and responsibility, "the aspiration contained in the concept of constitutionalism can therefore not even be approximately realized on the global level."³⁰

The use of the constitutional vocabulary for dealing with legitimacy problems is understandable. After the end of the cold war, every national government has come to be seen as constitutionally founded,³¹ which means that countries rely on a universal model comprised mainly of judicial independence and reliance on international norms as

Cultura e Política, no. 93 (2014). For a more nuanced perspective see Michel Rosenfeld, "Is Global Constitutionalism Meaningful or Desirable?," *European Journal of International Law* 25, no. 1 (2014).

²⁹ Wahl, "In Defence of "Constitution"." At 233. He cites in particular the example of German Constitutions: "the German constitutions since the beginning of the nineteenth century differ from today's fundamentally in that the former, without constitutional jurisdiction, were only semi-effective constitutions that were raised to the level achieved today only after 1949 with the victory of the Federal Constitutional Court" (at 233).

³⁰ Grimm, "The Constitution in the Process of Denationalization."

³¹ Paul Blokker and Chris Thornhill, "Sociological Constitutionalism," in *Sociological Constitutionalism*, ed. Paul Blokker and Chris Thornhill (Cambridge: Cambridge University Press, 2017).

standards of interpretation.³² It is also understandable that the move toward constitutions has been met with increasing scholarly attention.³³ Hence, not only are there a significant number of constitutional or quasi-constitutional norms on the international stage—as clearly evidenced by its hierarchical precedence—but the very vocabulary of constitutionalism has been widespread.

One could be surprised to see that constitutionalism, either in the context of investment treaties or in other regimes of international law, has been pointed as a solution for the problems of fragmentation.³⁴ But this movement has a simple explanation: in modern states constitutions were the source of the unity of the legal system. Finding a functional equivalent, however abstract it would be, seems to be a solution for plural societies. If international constitutionalism is understood in these terms, then other possible solutions against the fragmentation would be global governance³⁵ and cosmopolitanism³⁶.

Traditional international law theory is lost in this debate. For the problem of unity, it only offers the theory of sources. The investment regime offers a good illustration of these limitations. At the heart of the regime lies the fair and equitable

³² This is maybe the reason behind Schill's call for domestic, comparative, and international bases for constitutional analogies with investment treaties. Schill, "Editorial: Towards a Normative Framework for Investment Law Reform."

³³ Günter Frankenberg, "Comparing Constitutions: Ideas, Ideals, and Ideology—toward a Layered Narrative," *International Journal of Constitutional Law* 4, no. 3 (2006).

³⁴ Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis," *European Journal of International Law* 15, no. 5 (2004). At 931.

³⁵ David Kennedy, "The Mystery of Global Governance," in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009).

³⁶ Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State," *ibid.*

treatment clause³⁷, which is usually written in very general terms such as “each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security”.³⁸

Although it is usually established in a treaty, interpreting this clause in light of the Vienna Convention is of limited use. The clause is written in too general terms and the history of its development does not give any indication of its meaning. In fact, fair and equitable treatment was only a residual clause, since, by the time BITs begin to be developed, the major concern among foreign capital exporting countries was with expropriation.

Another solution, still under traditional international law, is to look upon customary sources of international law. This approach has surfaced, for instance, under NAFTA investment tribunals, who have claimed that fair and equitable treatment is just the embodiment of the customary minimum standard³⁹. But even if it is considered a custom, it is possibly less clear than the clause itself, not to mention that it is much more contestable.

Traditional international lawyers are then left with their last resource: principles of international law. This approach has been used by many tribunals, as the ILC has

³⁷ José E Alvarez, *The Public International Law Regime Governing International Investment*, Ail-Pocket (France: Triangle Bleu, 2011). At 177.

³⁸ Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, signed in November 2005.

³⁹ *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, NAFTA, Award on Damages 31 May 2002, par. 20 ff.

recently identified⁴⁰. They have seen in fair and equitable treatment an openness to apply proportionality, legitimate expectations and good faith. Of course, principles resemble an empowerment norm allowing judges or arbitrators the flexibility for deciding the cases where they would not be able to do so. Therefore, it is not rare to shift the debate from the meaning of the clause to the legitimacy problems pointed to the regime.

The theory of sources has to cope with impossible demands. Judges are authorized to decide cases because legislative authority has been given to them. All they have to do is “to find” what the law is. But when there are *lacunae*, they must decide whatever it takes. Their authority derives, thus, both from being “bouches de la loi” and from having been granted liberty to decide. The same logic underlies international law, only this time legislative authority stems from sovereignty.

Analytical philosophy calls this “authorization” rules of recognition, as in Hart, or basic norms, as in Kelsen. Yet, even in Kelsen, this duality seems difficult to reconcile. Authority can be viewed both as bindness and empowerment.⁴¹ Both positions shift when Kelsen engages with the different points of view over the legal system as “static” or “dynamic”: while the former focuses on the remedial process, hypothesized in the sanction norm, the later reveal the process of norms creation, or the empowerment to issue norms.⁴²

⁴⁰ Marcelo Vazquez-Bermudez, "Report of the International Law Commission," (New York: International Law Commission, 2017).

⁴¹ Stanley L Paulson, "The Weak Reading of Authority in Hans Kelsen's Pure Theory of Law," *Law and Philosophy* 19, no. 2 (2000).

⁴² *Ibid.* at 136.

As it is difficult to put in more concrete terms the meaning of these abstract norms, constitutional norms seem to function as though secondary or basic norms. Therefore, at the centre of the problem with the current regime lies a quest for balancing that seems at odds with a search for unity in pluralistic settings. The constitutional vocabulary has been a traditional semantics for articulating the unity of the legal system. In defining one of these particular modes of the constitutional parlance, Wouter Werner has defined it:

as an attempt to explain existing developments in international law in terms borrowed from domestic constitutionalism, with the aim of furthering a normative agenda of internationalism, integration and legal control of politics. This way of using the language of constitutionalism is based on two desiderata: to remain within the boundaries of positive law, and to contribute to a normative, internationalist project. While international constitutionalism thus aims to uphold the distinction between 'law as it is' and 'law as it ought to be', it also tries to make sense of developments in international law from a clear normative preference: the furtherance of legal unity, international integration and fundamental human rights, an anti-nationalistic understanding of sovereignty, a relaxation of the requirement of state consent and the regulation of political power through legal institutions.⁴³

The problem with these approaches is that they seem to rely on a "grand narrative of progress".⁴⁴ One could posit if the idea of progress should be rejected, but that would come with the price of disregarding equality which is at the center of the constitutional project.⁴⁵ In other words, there lies a contradiction in the constitutional concept as applied to international law. It is not surprising, thus, that this contradiction enables uses of history for legitimizing present institutions, as if lawyers could rely on history to grant

⁴³ Wouter Werner, "The Never-Ending Closure: Constitutionalism and International Law," in *Transnational Constitutionalism*, ed. Nicholas Tsagourias (Cambridge: Cambridge University Press, 2007). At 330.

⁴⁴ George Rodrigo Bandeira Galindo, "Constitutionalism Forever," in *Finish Yearbook of International Law*, ed. Jan Klabbbers (Oxford: Hart Publishing, 2013). At 170.

⁴⁵ *Ibid.* at 171.

them authority for their arguments: “the ‘historical origins’ or ‘the historical background’ of a specific issue are presented to give space to the author’s main argument.”⁴⁶

Of course, given these constraints, one could simply acknowledge that the search for unity in the legal system is simply vain: that there is no way to reconcile unity with pluralism.⁴⁷ This seems to be the perspective taking by the so-called Third World Approaches to International Law.⁴⁸ As George Galindo has indicated, such literature brings something new, especially for the history of international law, because it treats seriously and considers indispensable a close relationship between history and theory”.⁴⁹ An example of this approach has been recently done by Sornarajah in conceptualizing “change” in international law. He emphasizes arbitrators have an ideological perspective that is consciously or unconsciously linked to neoliberalism⁵⁰. The rise of ideology, in turn, is linked to moments where hegemony dominates international relations. Resistance against concrete manifestations of the dominant ideology engenders the possibility of changing whenever it is articulate as an appeal to justice: “the search for accommodation itself is change”.⁵¹

⁴⁶ George Bandeira Galindo, "Force Field: On History and Theory of International Law," *Rechtsgeschichte* 20 (2012). At 100.

⁴⁷ Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Mich. J. Int'l L.* 25 (2003).

⁴⁸ George Rodrigo Bandeira Galindo, "Splitting Twail," *Windsor YB Access Just.* 33 (2016). At 42.

⁴⁹ Bandeira Galindo, "Force Field: On History and Theory of International Law." At 100.

⁵⁰ Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015). At 21.

⁵¹ *Ibid.* at 418.

The quest for reconciling legal history with legal theory, however, depends on doing away with the concepts of “consciousness” and “progress”.⁵² This is not to treat the contributions of the Third World Approaches as marginal. On the contrary, understanding their commitment to legal theory and history is a starting point. To be sure, TWAIL is a critical perspective in the sense that it attempts to describe progress and consciousness as Walter Benjamin’s depiction of Klee’s *Angelus Novus*⁵³. As Hauke Brunkhorst has put it, “critical theory is about the paradox of reason within an unreasonable, brutish and random history”.⁵⁴

Beyond the “once upon a time” of historicism, history needs, thus, to account for the *jetztzeit*. Social theory does this with the concept of evolution. “Everything is evolution”, tells us Brunkhorst, and “because everything is evolution, evolution is a quasi-transcendental that is itself part of evolution”.⁵⁵ Transcendence in here means that if *x* is constitutive of *y*, then it limits and enables the knowledge of *y*. It is, therefore, a dialectical negation that creates variation which, in turn, can cause changes in social structures.

⁵² Bandeira Galindo, "Force Field: On History and Theory of International Law." At 100. More than an objective of the research, forging different conceptions of time is a methodological requirement. The unity of the legal system is sociologically constructed, which means that the self-description of the legal system is context dependent. With this realization, one should be cautious to see in the constitutionalization of international law a universal point of view where politics or power has no place.

⁵³ Walter Benjamin, "Illuminations: Essays and Reflections, Ed. Hannah Arendt, Trans. Harry Zohn," *New York: Schocken Books* 2007 (1968).

⁵⁴ Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (Bloomsbury Publishing USA, 2014). At 1.

⁵⁵ *Ibid.* at 9 and 11.

Constitutions can thus be seen as the normative constraints on adaption.⁵⁶ It is difficult to circumscribe this idea within the formal model of public law to which lawyers are accustomed. Sociologists, on the other hand, have renewed their interest in the understanding of constitutionalism and, more specifically, in the meaning of constitutional norms.⁵⁷ Today, it is possible to claim that the emergence of constitutional sociology or sociological constitutionalism can be signalled out as one “line of socio-legal research,” whose representative authors are Marcelo Neves, Gunther Teubner, Hauke Brunkhorst, and Chris Thornhill.⁵⁸

These authors’ sociological approach raises relevant methodological implications through the themes that they study. In an attempt to draw more general terms for their contributions, Thornhill has posited that this methodology (i) is historically oriented toward the comprehension of constitutions; (ii) shows an awareness of the evolution of constitutional norms; (iii) is embedded in a dualistic imaginary, formed by constraining

⁵⁶ Ibid. at 43.

⁵⁷ Oft-cited examples of this renewal are the works of David Sciulli, who synthesized Habermas, Fuller, and Parson’s procedural concepts to develop a non-Marxist critical theory. David Sciulli, “Voluntaristic Action as a Distinct Concept: Theoretical Foundations of Societal Constitutionalism,” *American Sociological Review* (1986). *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge University Press, 1992). Understandably, his position would have to be rather abstract, but that does not mean a disregard for substantive concern. Rather, Sciulli presupposes that the practice of social life “remains substantive” and hypothesizes that “collegial formations must be present in at least some sectors of a modern society in order for arbitrary power to possibly be restrained in either the sociopolitical or socioeconomic orders, and in order for genuinely integrative social action to be a possibility in practice.” “Voluntaristic Action as a Distinct Concept: Theoretical Foundations of Societal Constitutionalism.” At 759.

⁵⁸ Blokker and Thornhill, “Sociological Constitutionalism.” At 6. The works cited as evidence of the methodological turn are the following. Marcelo Neves, *Transconstitutionalism* (Bloomsbury Publishing, 2013). Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*. Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*. Chris Thornhill, *A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective*, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2011).

and liberating approaches to power and instrumental and symbolic rationality; (iv) has pluralism as one of its key themes; and (v) “reflects an understanding that social knowledge and social reality are constructed through processes of meaning-giving by social actors themselves.”⁵⁹ The similarities notwithstanding, there is no encompassing theory of societal constitutionalism.

The Methodology and Objectives of this Thesis

Drawing from the methodological concepts developed by this line of research, this thesis attempts to uncover how an American debate about legal unity is at the origins of the international investment regime⁶⁰. The emphasis on the American experience is justified because not only it exemplifies the first constitutional document, but also because it is a practical experience. As Brunkhorst observes, at the heart of constitutionalism lies a tension between inclusionary forces and systemic stabilization.⁶¹ The role of systemic stabilization is usually performed by the *work* of the law, i.e., by the

⁵⁹ Blokker and Thornhill, "Sociological Constitutionalism." At 19.

⁶⁰ Although restricted to a rather particular and exotic regime of international law, the question posed has implications to other legal regimes. In this perspective, it is also an attempt to answer the call for research projects proposed by George Galindo in not only uniting theory a history in a systematic constructivism. Charles Tilly, *Explaining Social Processes* (New York: Routledge, 2016). At 198.

⁶¹ He calls it a tension between a Kantian mindset and the constitution as structural coupling. Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*. At 43 ff. Although the methodology is different, the concepts used by Brunkhorst resembles the dynamics of resistance and change evoked by Sornarajah. Inclusionary forces are usually performed by the political system, although the legal system can react to this through the articulation of claims of legal validity. The problem is that the reference to international law is used as a normative constraint, since the plurality of legal orders leans towards a managerial mindset, because the time references of validity claims occurs in different dimensions, thus making synchronicity almost an impossible feature. The only possible way is precisely constitutionalism as further developed in American: forging the legal unity through how courts are usually operating. International law makes revolutions less likely and legal inclusionary changes even less so. International law, as Foucault remarked in the concept of Europe, seems to depend on a balance of powers. Michel Foucault, *Security, Territory, Population: Lectures at the Collège De France, 1977-78*, ed. Michel Senellart, trans. Graham Burchell (Palgrave Macmillan, 2009). At 316.

legal community and the organizations that articulate legal communications. This practical emphasis on the constitutional experience is clearly observable by the presentations of proposals of a world constitution. Germany, as we have already seen, is usually credited as the birthplace of international constitutionalism, but the United States, through its defense of a world court recalled American constitutionalism as an experience in international organization. In the eyes of James Brown Scott and other leading actors of the *American Society of International Law*, international law should mirror the American constitutional experience.

The Society exerted enormous influence in the research of international law, having not only financed European activities in the *Institut de Droit International* but also united many leading politicians who would later shape American foreign policy in the formative years of international institutions. If states disagreed on the political design of the first international organizations, as the participation of Rui Barbosa in the Hague Conference demonstrates, their relevance and autonomy preserved the first ideas that surfaced in the debates held in the *American Society of International Law*. Although it is impossible to claim a univocal continuum from more than a century of professional experience in international law, this thesis attempt to show that there are continuities with today's current debate on the constitutionalization of international law and, particularly, of the regime of international investment.

By using the methodology recently developed by sociologists, it is possible to shed light on this experience in its historical and functional settings, not only as an historical construct, but as an effort to understand the current debate on constitutionalism.

There are at least five reasons why societal constitutionalism—in its use, according to Thornhill, as a methodological framework—seems fit to lay the groundwork of this research.

First, international constitutionalism based on international law lacks a clear autonomous institutional apparatus, as already claimed by Wahl. Therefore, the UN charter, although in principle universally valid, ends up mixing political and judicial claims because it has no encompassing judicial institution to which a prohibition of denial of justice could apply,⁶² which is exactly what the concept of a constitution attempted to solve in the first place. Moreover, the argument for a cosmopolitan constitution, not to be founded on a specific polity, but on a global community, must take into account the problem of fragmentation, already alluded to in this work.⁶³

A second reason in favor of a societal constitutionalism-based approach is that the regime itself is caught in between two distinct functional systems: that of politics and economics. For this reason, it is necessary to account not only for the historical development of constitutional norms, but also to take into consideration an evolutionary approach, such as that developed under systems theory. In other words, one has to account for the limitative and the integrative effects of constitutional norms at the same

⁶² The relationship between international law and international politics is one key theme in the study of international law. A particular discussed view is that of Martti Koskenniemi, "The Politics of International Law," *Eur. J. Int'l L.* 1 (1990). Of course, one could claim that the Security Council could perform such a role. However, as Mauricio Resende has demonstrated, far-sighted and unlikely institutional reforms would be necessary to make credible the claim that the Security Council could be an institution of last resort. Mauricio Palma Resende, "Gazes at the Monster : Courts, Ngos, and the Un Security Council" (Universidade de Brasília, 2016).

⁶³ See note 1. The solution for international problems would thus have to assume a variation on the "conflict of laws" themes, either through private international mechanisms or through public ones. See Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*. At 13.

time. In the context of investment treaties, in no place is this more clearly established than in the famous clause of “fair and equitable” treatment, which is the very heart of international investment law.⁶⁴ The typical wording of such clauses provides that “each contracting party shall at all times ensure fair and equitable treatment to investments,”⁶⁵ which is not any different than the other legal standards, such as “equality” and “justice” themselves. The interpretation rendered by investment tribunals expounded upon the wording of these provisions to consider “the basic expectations that were taken into account by the foreign investor to make the investment”⁶⁶ and to reject any regulatory overhaul if it “deprives investors who invested in reliance on those regimes of their investments’ value.”⁶⁷ As is clear from these statements, an international decision on a given treaty faces the paradox of undecidability, perhaps more acutely than any other court. Law can only make decisions that are to be applied in future cases, which is why it is always conditionally programmed as a future rule to be applied *if* the factual is analogous.⁶⁸ Therefore, requiring arbitrators to decide whether a given regulation should have been anticipated by a prospect investor or whether a given regulation has no justifiable public concern ends up placing their political or economic view *in lieu* of that of the legal system.

⁶⁴ Alvarez, *The Public International Law Regime Governing International Investment*. At 177.

⁶⁵ Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, 1997 Australian Treaty Series, no. 4, signed on 23 August 1995, entered into force on 11 January 1997.

⁶⁶ Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case no. ARB (AF)/00/2, para. 154.

⁶⁷ *Eiser Infrastructure Limited and Enregía Solar Luxembourg S. À R.L. V. Kingdom of Spain*, (2017). para 382.

⁶⁸ Luhmann, *Law as a Social System*. At 196.

But the placement of the regime within the boundaries of two differentiated social systems can be evidenced by another peculiar circumstance. According to UNCTAD investment data, as of 2016, there were 817 known cases,⁶⁹ of which 278 were pending and 528 were concluded.⁷⁰ The numbers reveal an already staggering use of this mechanism, possibly vindicating one of the most frequently used claims in international court, second, obviously, to human rights cases.⁷¹ The noticeable and rapid expansion of this form of litigation seems to echo Luhmann's intuition with regard to the possibility of having the political system conditioned by the economic system through the contract mechanism, which could be gauged by "a statistically measurable higher volume of litigation."⁷² This is even more alarming if one takes into account that the first bilateral treatment award was only delivered in 1990.⁷³

A third reason rests on the rationality behind the regime. One could trace a historical account of this type of regime,⁷⁴ or simply discuss it in light of the movement behind a New International Economic Order⁷⁵; whatever the origin, the claim is universal: investment law protects foreign property and, thus, establishes compensation

⁶⁹ As it is known, some arbitration may rely on secrecy, the reason why these cases cannot even be accounted for.

⁷⁰ UNCTAD, "Investment Policy Hub".

⁷¹ As of comparison, the WTO mechanism had received less than half of those filed under investment disputes, whereas the ICJ only 168 cases have been reported. See WTO, "Dispute Settlement Statistics," https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm. and ICJ, "Cases," <http://www.icj-cij.org/en/cases>.

⁷² Luhmann, *Law as a Social System*. At 401.

⁷³ Asian Agricultural Product Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case no. ARB/87/3, Final Award, 27 June 1990.

⁷⁴ Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley California: University of California Press, 1985).

⁷⁵ Sornarajah, *Resistance and Change in the International Law on Foreign Investment*.

for damages as a rule with international standing. As Luhmann once again demonstrates, the ruling out of illegal expropriation marks the process of differentiation between the economic system and the legal system.⁷⁶ Through this process “the structural coupling between the legal system and the economic system became the medium for the medium of political power.”⁷⁷ Uncovering the dynamics between a coupling and its political counterpart, which is clearly absent in the international realm, at least as a functional equivalent to democracy,⁷⁸ depends on an assessment not only of the legal system, but of a yet unidentified constitutional dynamic on the international scene.

Another reason is the pluralism that is at the core of the regime. This is most evident in the problem of juridical pluralism, by which is meant the overlapping of concurrent jurisdiction over the same subject area. To be sure, this is a common characteristic of investment law, mainly manifested in the large network of investment treaties. Although the International Centre for the Settlement of Investment Disputes is the most used forum, there could be as many fora as the number of treaties, since there are treaties with ad hoc arbitration clauses or with ICJ compulsory jurisdiction.⁷⁹

Moreover, investment, as a subject area in international law, has common traits with other international regimes. The trade regime centered around the World Trade Organization, for instance, shares with investment treaties a large regulatory framework

⁷⁶ Luhmann, *Law as a Social System*. At 392.

⁷⁷ *Ibid.* at 402.

⁷⁸ Pablo Holmes, "The Politics of Law and the Laws of Politics: The Political Paradoxes of Transnational Constitutionalism," *Indiana Journal of Global Legal Studies* 21, no. 2 (2014).

⁷⁹ Alejandro Faya Rodriguez, "Most-Favored-Nation Clause in International Investment Agreements-a Tool for Treaty Shopping, The," *J. Int'l Arb.* 25 (2008).

that is directly applicable to both which could make for another possible venue of jurisdictional pluralism.⁸⁰ More recently, there were authors who even attempted to evidence a “convergence” between the two regimes.⁸¹

Even sociological pluralism might be studied in light of investment treaties, mainly because the claim that it is part of public law has been systematically attacked by authors who have favored a private accounting of the sociological regime.⁸² Under their view, an exclusively public form of interpretation runs the risk of losing touch with the hybrid nature of investment norms and their adjudicatory mechanisms.⁸³ Just as some variations of societal constitutionalism have claimed,⁸⁴ investment law also shares a deep suspicion of total constitutions.

Finally, the chosen methodology needs to take into account that there is political strife over who defines concepts and how they are defined.⁸⁵ With this point, it is possible to set aside critical Marxist theories that simply ascribe to ideology the purported neutrality of legal norms and, following Sciulli, develop a critical stance through social systems theory. In the field of sociological constitutionalism, such a position would probably mean taking seriously Luhmann’s ironic stance with regard to the fact that

⁸⁰ Marc L Busch, "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade," *International Organization* 61, no. 4 (2007). On the topic of jurisdictional globalization see Paul Schiff Berman, "The Globalization of Jurisdiction," *University of Pennsylvania Law Review* 151, no. 2 (2002).

⁸¹ Joost Pauwelyn, "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus," *American Journal of International Law* 109, no. 4 (2015).

⁸² Jose E Alvarez, "The New Dispute Settlers:(Half) Truths and Consequences," *Tex. Int'l LJ* 38 (2003).

⁸³ Alvarez, "Is Investor-State Arbitration ‘Public’?."

⁸⁴ Poul F Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge, 2014).

⁸⁵ Blokker and Thornhill, "Sociological Constitutionalism."

functional differentiation might emerge by happenstance in rich countries and, thus, explore if and how functional differentiation evolved at different paces.⁸⁶

In synthesis, there can be no doubt that, inasmuch as constitutional-like norms are beginning to appear in the international arena, contemporary society still relies on national structures, as is evident in the case of investment law. However, if these norms are to be assessed in a constitutional framework, it is necessary to account for their political use and for the pluralist context after which they are moulded. In other words, the question of whether integrative forces can be unleashed through a constitutional description of investment treaties seems to be approachable via sociological constitutionalism.⁸⁷

But even if sociological constitutionalism can provide the underpinnings for the research question, it is still necessary to fine-tune its conceptual framework. Because the investment regime has not been the focus of the major strands of sociological constitutionalism and because none of them present a universal framework of analysis, it is necessary to expand on some of the premises adopted by these writers.

⁸⁶ Marcelo Neves, "Paradoxes of Transconstitutionalism in Latin America," in *Sociology of Constitutions: A Paradoxical Perspective*, ed. Alberto Febbrajo and Giancarlo Corsi (New York: Routledge, 2016). Systems theory offers yet another methodological advantage. Through using the differentiation between problem and function it generates analysis. This occurs because theory is required for defining a problem and the function of a given solution. This is not a mere comparison between a set of possible solutions. It is a form of observation and also a communication. System theory is, therefore, a form of analysing connecting communications.

⁸⁷ For another version of the argument that will follow, one should keep in mind that Grimm's integrative effect of the constitution does not appear automatically, as if it were summoned, nor is integration accessible only through constitutional norms. Grimm, "Integration by Constitution."

A first approach toward expanding the premises of system theory to investment law has been recently developed by David Schneiderman.⁸⁸ He attempts to describe investment law as a distinct field pertaining to the economic system and argues that legal irritants within the formal structure are not suitable for checking economic expansionary (and destructive) forces. This is particularly the case, he points out, with human rights obligations, which can only enter the system through legal irritants. In his final remark, he left open the very same question this research is attempting to answer: whether or not investment regime legitimacy can survive intact “without further drastic changes.” Although based on a precise account of Teubner’s *Constitutional Fragments*, Schneiderman’s approach overlooks some difficult challenges in accounting for a regime that only partially possesses features of the economic system.

In order to better approach the methodological claim advanced here, it is necessary to keep in mind some key features of the investment regime. It is formed by a vast network of bilateral treaties, and, hence, it is mainly shaped through public international norms. Some of these treaties (especially the older treaties still in force) have provisions on compulsory adjudication to the International Court of Justice.⁸⁹ For the most part, arbitration procedures are the standard means of conflict settlement, and many states are now part of the Convention that established the International Centre for the Settlement of Investment Disputes. In case of a dispute, states can nominate

⁸⁸ David Schneiderman, "On Suffering and Societal Constitutionalism: At the Border of International Investment Arbitration and Human Rights," in *Boundaries of State, Boundaries of Rights. Human Rights, Private Actors, and Positive Obligations.*, ed. Tsvi Kahana and Anat Scolnicov (Cambridge: Cambridge University Press, 2016).

⁸⁹ As the conflict between the United States and Italy in the *Elettronica Sicula S.p.A. (ELSI)* case.

arbitrators to a panel, a feature that clearly resembles other arbitration mechanisms, such as that of commercial arbitration. This mixture of public law substance with private law dispute settlement avowedly gives the regime a hybrid nature, the question of whether such a nature is desirable or intended notwithstanding.

This loose combination of private and public features raises doubt, as has already been demonstrated, about the stability and the contingency of the investment regime. The argument is that with no public regime for defining the arbitrators' roles, no minimum theory of *stare decisis* could ensue. That concern, however, seems misplaced. The contention that the "prohibition of denial of justice" has no place in international law due to a lack of an institutional apparatus must face the reality of the social practices that underpin adjudication at the international level. As Prosper Weil has long demonstrated, "the view prevailing among writers is that there is no room for *non liquet* in international adjudication because there are no lacunae in international law."⁹⁰ But if arbitrators do indeed follow such a pattern, then international investment is also, in part, judge-made law.⁹¹

From the point of view of states, the regime clearly articulates safeguards for economic organizations in the international space, thus expanding domestic constitutional protection, but also, to some extent, protecting economic sectors from political forces.⁹²

⁹⁰ Prosper Weil, "The Court Cannot Conclude Definitively... Non Liqueur Revisited," *Colum. J. Transnat'l L.* 36 (1998).

⁹¹ Jan Paulsson, *Denial of Justice in International Law*, vol. 17 (Cambridge University Press, 2005).

⁹² Markus Wagner, "Regulatory Space in International Trade Law and International Investment Law," *University of Pennsylvania Journal of International Law* 36, no. 1 (2014).

In addition, as is apparent from the backlash against the investment regime,⁹³ civil society and non-governmental organizations are attempting to resist what they perceive as the manifestation of the destructive forces of globalization.⁹⁴ Therefore, they are now devising mechanisms to “insulate society, and its political system, against this process.”⁹⁵ Following Thornhill, it is thus possible to argue that international investment law also touches transnational space, being the subject matter of a transnational constitution.⁹⁶

To be sure, both states and tribunals involved in the application of these norms, inasmuch as they generate authority, possess a distinctive constitutional character, producing decisions and obtaining compliance for laws, as Thornhill’s concept of constitution states.⁹⁷ If one is to understand the mechanisms that are set in motion through this separation and control of political power, one must take into account the specific historical dynamics of this process.

Scholars usually argue that the origins of investment treaties date from the articulation of a customary norm for a minimum standard of treatment of aliens.⁹⁸ Taking

⁹³ Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime," *Harv. Int'l LJ* 50 (2009).

⁹⁴ Joseph E Stiglitz, *Globalization and Its Discontents*, vol. 500 (New York Norton, 2002).

⁹⁵ Chris Thornhill, "Introduction," in *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure*, ed. Chris Thornhill, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2016). At 8.

⁹⁶ *Ibid.* at 8-9.

⁹⁷ *Ibid.* at 2.

⁹⁸ There is vast body of literature for the commencement of the investment regime. Perhaps a better a summary of the studies developed to this point could distinguish between two strands of scholarship. The first is represented by mainstream authors whose works have been used as reference for adjudicatory bodies and who tend to stage this history through models of bilateral treaties. An example of this scholarship is Kenneth J Vandavelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010). The other stream sees the regime as a continuation of colonial exploration through other means. This strand has a dual focus. For some, the regime starts with strong-arm techniques used by American foreign policy to assert a customary international norm. See Sornarajah, *Resistance and Change*

a different view, this thesis argues that the commencement of the regime is seen in the legitimization discourse over government intervention for the safeguarding of investment, which begins with the idea of an international principle on the prohibition of denial of justice.

As is known from American constitutional experience, denial of justice ultimately means a differentiation between legislation and adjudication and marks the use of a judicial apparatus to control the very norms of legal creation⁹⁹. Following the constitutional experience, entrusting courts with the function of applying justice means that courts themselves, when asked to resolve the constitutionality of a given statute, will have to develop self-reflexive mechanisms to assess not only what has been asked of them, but also whether non-politically accountable functionaries can strike down laws that have been democratically established. Still, under this constitutional experience, the establishment of a principle of “prohibition of denial of justice” has been translated into a procedural form.¹⁰⁰

in the International Law on Foreign Investment. For others, it is simply the same power inequality that marked the difference between colonial powers and third world states. See Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, 99.

⁹⁹ In Brunkhorst’s terms, denial of justice is a negativity that sets a dialectical process in motion. It is, however, a very particular negativity since it questions the autonomy of the legal system. See Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*. At 25 ff.

¹⁰⁰ Luhmann states this very clearly: “The fact that courts have to decide is the point of departure for the construction of the juridical universe, for legal reasoning, for juridical argumentation. Therefore, ‘legitimation’, in the sense of a value relation, which transcends law, ultimately cannot play any role in law. Therefore, everything depends on the fact that earlier decisions, which can be used for guidance, prevail if they are not changed. Therefore, *res judicata* is unappealable unless rules of exception, which are provided by law, can be applied. And therefore, law must be understood as a closed universe which refers to itself, in which ‘pure juridical argumentation’ can be practiced even under extreme social tensions. And this argumentation decides for itself which scale of interpretation it can afford and when it has reject a distortion that is asked of it”. Luhmann, *Law as a Social System*. At 289-290.

The question of a denial of justice on the international scene, however, sheds light on problems that legal theory has difficulty in settling. Is there only one final decision-maker to which all others must abide, or is this a question of plurality of jurisdiction? Should a two-tier order be devised so as to account for the difference between domestic and international norms? If so, how does one account for the unity of the legal system?

This is where a difference of emphasis between the strands of sociological constitutionalism can be identified. For Teubner, “a constitution emerges not in the political system, as imagined by Luhmann, but rather in each social system provided its reflexivity is supported by secondary norms.”¹⁰¹ This means that there is no unity in the constitutional concept, be it in Schmitt’s or Kelsen’s terms.¹⁰² In other words, the principle of the prohibition of denial of justice would be read as a simple jurisdictional conflict over regime-collisions.¹⁰³

The defense that Marcelo Neves makes of the primacy of the political system in the constitutional principle must also be seen as an objection against the dissolution of the unity of the legal system, not in the sense of a universal rule, but that of the unity of the legal order in a constitutional arrangement. Therefore, instead of the expansion of sectorial constitutions, he claims that only transversal rationality can be entangled

¹⁰¹ Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*. At 105.

¹⁰² “Constitutional Drift: Spontaneous Co-Evolution of Social ‘Ideas’ and Legal ‘Form’,” in *Constitutionalism Beyond Liberalism*, ed. Michael A. Wilkinson and Michael W. Dowdle (Cambridge: Cambridge University Press, 2017). At 79.

¹⁰³ Writing with Fischer-Lescano, Teubner argues that: “rather than secure the unity of international law, future endeavours need to be restricted to achieve weak compatibility between the fragments”. See: Fischer-Lescano and Teubner, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law.” At 1045.

between different and autonomous legal orderings. The plurality of legal orders can only be accounted for by differences in its programs (legal acts, norms and procedures), not by changes in the coding of the law.¹⁰⁴ This is, according to Neves, precisely what Transconstitutionalism entails. While Teubner demonstrates a concern for the autonomy of the respective social systems, Neves demonstrates a commitment toward the autonomy of political systems, especially in the face of polities not yet seen as autonomous.¹⁰⁵ In this sense, Neves' definition of a constitution is linked to that of Thornhill, for whom a constitution entails "the legally articulated form of a society's inclusionary structure."¹⁰⁶

Back to the question of unity in the legal system, one could perhaps inquire whether that idea of unity should finally be discarded, or if there is any room left for it. The point of international law is precisely to provide a critical point of view in relation to destructive political dynamics.¹⁰⁷ To be sure, both Teubner and Neves are fully aware of international law's potential, which is why Teubner calls for a differentiation between *le politique* and *la politique*, whereas Neves defends a methodological mutual understanding of transrationalities.

Taking systems theory as its point of departure, this thesis adopts a concept of constitution that is the meaningful articulation of a prohibition of denial of justice, or, to put it in different terms, the meaningful articulation of the autopoiesis of the legal system. As thus expressed, the concept uses a paradox, since the concept of autopoiesis can be

¹⁰⁴ Neves, *Transconstitutionalism*. At 74.

¹⁰⁵ "(Not) Solving Constitutional Problems: Transconstitutionalism Beyond Collisions."

¹⁰⁶ Thornhill, "Introduction." At 7.

¹⁰⁷ Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics," *The Modern Law Review* 70, no. 1 (2007).

only given by the legal system itself. The problem, then, is how to designate the unity of the legal system. The concept of legal validity serves exactly for this context. In Luhmann, it is “the synchronicity of all factual operations of the social system and its environment.” Synchronicity, in turn, means that “it is impossible to know and to affect what is happening and it means that one is reduced to making assumptions, suppositions and fictions.”¹⁰⁸ The test of validity is then success of its own autopoiesis: “without convincing evidence one cannot but presuppose that at any given moment other operations in the legal system and its social and psychological environments activate the symbol of validity as well.” But in what *court* should one present such evidence? Or, to put in more precisely, with which structures it is possible to judge meaning?

Therein is where values are, says Luhmann. Quoting from Douglas Hofstadter, he claims that they form a supertangling web, such as that of structural couplings, to create a new inviolate level. This level, however, is not intended to provide grounds for action, but merely guarantees communications, by giving systems of meaning new presuppositions.¹⁰⁹

Moreover, this thesis draws on the American constitutional experience to posit that law can create programs that augment both variation and redundancies in the legal system. Redundancies, here, should not be taken in its ordinary, mainly derogatory, meaning, but in the sense used by cybernetics.¹¹⁰ This means that social systems perform

¹⁰⁸ Luhmann, *Law as a Social System*. At 131.

¹⁰⁹ *La Sociedad De La Sociedad*, trans. Javier Torres Nafarrate (Mexico: Editorial Herder, 2006). At 266.

¹¹⁰ Robert M Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation," *Wm. & Mary L. Rev.* 22 (1980).

specific observations to identify an information, which is conceptualized as a new communication.¹¹¹ In other words, redundancy presupposes that in the self-reflexive operations of the system, a re-entry occurs, and that re-entry is thus acknowledged by the system. The very concept of justice can be read, for instance, in terms of a redundancy: “if justice is given by the consistency of decisions, we can also say: justice is redundancy.”¹¹² Thus, Justice is meaning within the legal system.

Redundancies are used for identifying errors within the legal system. When an appeal is filed, it is not a new case that is presented, but the very same one, this time with a new decision to be made. Redundancy designates, therefore, the observation being made by the decision-maker in that particular moment: is it truly a new case, or are there precedents to settle it?

Redundancies are also used for avoiding biases in a given forum, where two are competent with regard to the same subject. A case in point is the jurisdiction of American diversity,¹¹³ but this phenomenon is also observable in every single case of forum shopping.

The procedural formalization that was put in place by the principle of the prohibition of denial of justice is, however, a special form of redundancy because it allowed new information while establishing itself as a redundancy. The prohibition of

¹¹¹ Martin Shapiro, "Toward a Theory of" Stare Decisis", *The Journal of Legal Studies* 1, no. 1 (1972).

¹¹² Luhmann, *Law as a Social System*. At 319.

¹¹³ Larry Kramer, "Diversity Jurisdiction," *BYU L. Rev.* (1990).

denial of justice can be translated into a normative expectation, namely that there are no everlasting conflicts. War cannot be expected to last indefinitely.

This can be seen from the perspective of the discussions of the Federalists in the United States. One of the most relevant features in the new Constitution had to do with managing the question of intervention. As Hamilton argued in the Federalist papers, the major difference between the Constitution and the Confederation Compact had to do with sanctions. Law, he argued, relies on the punishment of illicit conduct. If federal legislation, under the Articles, were to be enforced, only through a civil war could the Union rely on the execution of its objectives because the law was directed to the states.¹¹⁴ The Constitution, however, did not have this problem because it relied on a distinguishing mechanism. The law was now directed towards the individuals living in the states. Enforcement could be thus targeted towards the individual.¹¹⁵

But how could a Constitution achieve this? The answer Luhmann gives in an earlier study is through procedures. The formation of a national unity meant, in fact, that a very large and complex web of social relations would have to be ruled by collective decisions, at least in the beginning of modernity. As an agreement on the content of the resulting decision seems every more unlikely, procedures came to be seen as the only way of legitimizing collective decision-making.¹¹⁶

¹¹⁴ Alexander Hamilton et al., *The Federalist*, vol. 43 (Hackett Publishing, 2005). At 82.

¹¹⁵ Bradford R Clark, "The Eleventh Amendment and the Nature of the Union," *Harvard Law Review* (2010). At 1900.

¹¹⁶ Niklas Luhmann, *Legitimation Durch Verfahren*, vol. 443 (Suhrkamp Frankfurt aM, 1983). At 28.

In legal terms, this process occurs through the use of empowering norms, i.e. norms that confer a legal power on certain individuals “to create legal norms or to apply legal norms”¹¹⁷ in a sequential program. Procedures, therefore, correspond to a sequential program through which law can, at the level of second-order observation, assess the legality of a given decision. In other words, this outcome is not only the normative effect of the constitution,¹¹⁸ but also, through the ensuing prohibition of denial of justice, its integrative effect¹¹⁹. Of course, because they were created before fully differentiated systems emerged, by the time the American Constitution was approved, this distribution of powers entailed nothing but a loose-coupling between organizational systems.¹²⁰

Loose-coupling denotes the level of independence of one system in relation to another.¹²¹ It is contrasted with that of structural coupling, where interactions between

¹¹⁷ Hans Kelsen, *General Theory of Norms* (Oxford [England]; New York: Clarendon Press ; Oxford University Press, 2011). At 102.

¹¹⁸ Grimm, "Integration by Constitution." At 193.

¹¹⁹ Ibid. One must carefully differentiate the concepts of Integration and Inclusion. In Luhmann's *Law as a Social Organization*, integration is a limitation on the degrees of freedom, whereas inclusion means that a lesser integration is possible, thus augmenting the degree of freedom. The point for Luhmann is that negative integration is almost perfect: that is if you do not have a name, you are not listed in governmental social programs and you are not entitled to food. In contrast, nothing is more integrated than the archetypal exclusionary institution: the prison. Luhmann, *Law as a Social System*. At 489. For a different perspective see Marcelo Neves, "Entre Subintegração E Sobreintegração: A Cidadania Inexistente," *Dados* 37, no. 2 (1994).

¹²⁰ Luhmann, *Law as a Social System*. At 321. In the United States, because of the peculiar alignment of political parties in the political system, this structure, as it will be demonstrated in the first chapter, remained almost unchanged, which means that functional differentiation had, in the end, to be operationalized by and through this very means. It is true that this process poses extreme pressures on the legal system. As Luhmann demonstrates, law can only rely on conditional programs, but the welfare state progressively relied on purpose-specific programs, whose teleology is ultimately inaccessible by the legal system. This why inclusionary demands tend increasingly towards the maximum simplification of law's programs, making it become a mere bundle of competency rules. All in all, the Yale school of legal process is not too far off in claiming a transnational process as the constitutive trait of international law. See Harold Hongju Koh, "Transnational Legal Process," *Neb. L. Rev.* 75 (1996).

¹²¹ Robert B. Glassman, "Persistence and Loose Coupling in Living Systems," *Behavioral Science* 18, no. 2 (1973).

systems are routinized. Whereas structural couplings are used to define the very idea of a constitution, loose-coupling might serve to designate the relationship between the Parliament and the Judiciary as both independent and connected organizations (but only through institutionalized channels are irritations sensible). Loose-coupling is not a fixed value; there are degrees of looseness even in loose-coupling. As a sequential program, the more dependent a given decision is on a prior one, the more certainty—in other words, the less variety—will be found in the outcome. In contrast, the less integrated the chain of decision-makers are, the more freedom all of them will enjoy in the respective decision. In other words, loose-coupling engenders more variation.

The procedural line that is activated by the prohibition of the denial of justice is marked by a series of decisions that were empowered by legal norms, all of them loosely coupled to one another and to other social systems. If this is so, then the unity of the legal system might not yet be discarded, if by unity we describe a somewhat loose concept.¹²² Seen from this perspective it is possible to posit, just as Robert Cover did with

¹²² In more sophisticated way, Ladeur claims that these procedural lines are actually interwoven in a network of loosely coupled norms. Karl-Heinz Ladeur, "Towards a Legal Theory of Supranationality - the Viability of the Network Concept," *European Law Journal* 3, no. 1 (1997). And Karl-Heinz Ladeur, "The Relationship between Public Law and Social Norms in Constitutionalism: Domestic, European and Global," *University of Brasilia Law Journal (Direito. UnB)* 3, no. 1 (2016). At a deeper lever this is the point where Luhmann departed from Kelsen's *Grundnorm* and Hart's *rule of recognition*. He claimed that the theory of levels of different norms cannot answer the question of the unity of a plurality. He then advises, as Walrdon has recently done, to examine the language "that is practice used by lawyers", to propose his own definition of validity: "all law is valid law", which is given by "the synchronicity of all the factual operations of the social system and its environment". See Luhmann, *Law as a Social System*. At 131. Jeremy Waldron, "Who Needs Rules of Recognition?," in *The Rule of Recognition and the US Constitution*, ed. Matthew Adler and Kenneth Einar Himma (New York: Oxford University Press, 2009). We will return to his proposition in the conclusion of the thesis.

federalism, that jurisdictional pluralism is just a particular mode of an arrangement within the legal system through loose-couplings.¹²³

If, in interpreting or amending the constitution, a court or legislature can enlist other bodies to take part in procedures, be it through rights-giving or simply by recognizing other organizations and their respective powers, then more sectors of society are entitled to participate. Its meaning, therefore, depends on the operations of other functional systems. Ideally, one could claim that more participation might be desired, but the price paid is an indefinite postponing of conflict resolution. This is the tension that lies at the heart of constitutional dynamics.

In an analogous way, the search for similar dynamics in international law might entail a formulation of the very features of the legal system in global society. Using the illustrations already given for the uses of redundancies, it is possible to imagine some direct applications for checking part of the criticism that points to problems of consistency. A more detailed account of the legal dynamics in the international scene might, on the other hand, help to better locate the very question of legitimation to which the parlance of a global constitution seems an answer.

In summary, this thesis can be seen as a contextual analysis of the sequential normative programs that were engendered by the American use of the concept of the prohibition of denial of justice. In this sense, it aims to follow Luhmann's call for

¹²³ Contrary to Teubner, this thesis claims that the concept of loose coupling is not only measurable by the duration of the coupling, but mainly from the strength of its bond. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*. At 105.

research to uncover “structural conditions that were set by the prohibition of the denial of justice”.¹²⁴ To do so, it will shed light on how social practices were activated and how they were settled by the proceduralization of the prohibition of denial of justice at three moments in time, each of them the subject of a corresponding chapter.

Organization

In the first chapter, this thesis analyzes the very first moment where the concept of the prohibition of denial of justice emerged, and it explores the link between this concept and international law. In developing the sequential program of federalism, the Constitution created incentives for the Supreme Court to solve conflicts by establishing new sequential programs. The fantastic variation of norms among the American states, a civil war notwithstanding, did not seem to pose a threat to integration dynamics, something that is partly due to the use of conflict of laws methods, a doctrine transplant mainly proposed by Justice Joseph Story. Conflict of law and new conditional programs were also set in motion by law, so as to allow even greater integration with other functional systems. In fact, law articulated the structural coupling through the channels established by loose-couplings.

The second chapter examines how this experience proved to be fundamental for the articulation, now on the international scene, of a concept of “denial of justice.” If this is a concept that is strongly linked to the idea of a constitution, then the title for the founding fathers of international constitutionalism would be found on the western side of

¹²⁴ Luhmann, *Law as a Social System*. At 285.

the Atlantic. Men like James Brown Scott, Elihu Root, and Edwin Borchard not only symbolized the internationalist and pacifist ideals of the time, they also advocated for an international order that would closely resemble that of the American states. James Brown Scott, in particular, authored two monographs on the American experience as an international organization and the role of the Supreme Court in solving conflicts between states. Of course, deeply imbued in their plans was a proposition for the creation of an International Court, something partly achieved during their time, but which gained prominence after 1945. Another key feature of their project was the development of the standard of protection of aliens, the viewpoint through which denial of justice became known in international law.

Finally, in light of this specific interpretation of constitutional norms within and beyond the states, the third chapter aims to analyse the current regime of international investment as a specific program designed by states to guarantee, in the transnational space, the structural coupling of law and economics—that is, property. But as we have already posited in this introduction, if the concept of constitutionalism in the international scene can only be manifested through loose couplings, then the very limits of this specific regime should come to light.

CHAPTER 1

From International Law to Constitutional Law: How International Law Moulded Constitutional Interpretation in the Antebellum Years of the American Republic

What seems to be key to understanding the normativity of the constitution is to evaluate the usefulness of norm articulations for adapting the nascent state to a rapidly differentiated and complex society.¹²⁵ If this is the case, then what is of special relevance in the constitutional experience of the United States was the fact that, as Hamilton claimed in Federalist 78, the very idea of constitutional power, the intent of the people, was to be protected by American judges: “As a result, the first emergence of a national legal/political system, able to overarch the territories and people forming the American nation, was mainly driven, not by primary acts of national will formation, but by the extension of the judicial apparatus.”¹²⁶

Understanding this particular constitutional experience might shed light not only on the concept of constitution, but also on how constitutional norms can be internationally articulated, in the case of this thesis, for the regime of international investment. To be sure, historical accounts of the beginning of the international regime have been given by many legal scholars.

¹²⁵ Chris Thornhill, "The Sociology of Constitutions," *Annual Review of Law and Social Science* 13, no. 1 (2017). At 42.

¹²⁶ *Ibid.* at 48.

In his PhD thesis on *The First Bilateral Investment Treaties*,¹²⁷ Kenneth Vandevelde, for instance, begins his history of the post-war friendship, commerce, and navigation treaty program by contrasting the differences between the new treaties that were being discussed in the State Department with the very first ones, dating from the independence years. The differences highlighted by him show that the early treaties were mainly designed for recognizing the new independent state and subsequent ones attempted to protect commerce with other nations. Up to the Truman administration, almost 130 treaties of this kind were negotiated by the United States.¹²⁸

The detailed account that Kenneth Vandevelde subsequently gives is one that depicts the innovation of those treaties as closely linked to the institutional ones underway at the same time in America. The birth of the regulatory state would, as he claims, also cast its shadow over the regulation of foreign trade and investment.¹²⁹ In the period of almost two centuries that stretches from independence to the Second World War, many juridical innovations were established in the United States, and mostly important, their significance underscored the legal concepts that the drafters of the new treaty program were envisioning.

One of these early drafters, Herman Walker Jr., would emphatically write about the main innovation he saw in the treaties that were being drafted: the protection of

¹²⁷ Kenneth J Vandevelde, *The First Bilateral Investment Treaties: Us Friendship, Commerce and Navigation Treaties in the Truman Administration* (University of California, San Diego, 2012).

¹²⁸ Herman Walker, "Provisions on Companies in United States Commercial Treaties," *American Journal of International Law* 50, no. 2 (1956).

¹²⁹ Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1993).

American corporations abroad. He quoted then Deputy Assistant Secretary of State Harold Linder in his testimony before a Subcommittee of the Committee on Foreign Relations as saying that the articles on the rights of corporations were “perhaps the most striking advance” effected by the treaties.¹³⁰

To be sure, Kenneth Vandavelde argues accordingly that the provisions on corporations were, in fact, “the most important innovation” and that they were akin to a right of establishment. The significance of this right was that it provided access to courts on a non-discriminatory basis, which amounted to a guarantee of due process closely linked to the provision that authorized dispute resolution before the International Court of Justice.¹³¹ This provision was, moreover, differentiated from that which protected property: a right of access was thus distinguished from a right to security.

If a history of the people who drafted either the treaties or its main provisions were sufficient, the conclusion of Vandavelde’s thesis—that these were men were imbued with the same institutional experimentation drive that forged the legal mindset of the New Deal—would settle the case. These, however, were not simple innovations, nor mere experimentalism.

Granting rights to corporations amounted to giving rights to a creature solely existent in the legal system. And this, in turn, would have to be dealt with by mutual recognition of sovereign legal orders. Of course, private international law was available

¹³⁰ Walker, “Provisions on Companies in United States Commercial Treaties.”

¹³¹ Vandavelde, *The First Bilateral Investment Treaties: Us Friendship, Commerce and Navigation Treaties in the Truman Administration*. At 99.

much earlier than when this particular program started, but the corresponding rights that appeared within American treaties take advantage of the long experience the United States had accrued in dealing with different conflict of law cases in its legislation and in its jurisprudence. These conflicts span entire social sectors, from the economic to the political systems.

For instance, corporations as “creatures of law” were established under the contract and commerce clause of the American Constitution, a litigation route through which the Court took part of the economic power from states and handed it to the national assembly.¹³² The interpretation of this specific constitutional provision was the product of a long evolution in the Supreme Court and in doctrinal analysis that spans the entire nineteenth century.¹³³ Legislation on this subject was subsequently forged under the limits settled by the Court and these cases helped, in turn, to shape not only the legal, but also the managerial, structures of American corporations.¹³⁴

Also of significance during the first years of Court operations was the extension of federal powers, which included the powers the federal judiciary would have. The

¹³² In fact, this series of cases emerged from suits mainly brought by corporations that were questioning the extension of state rights under American federalism. The argument usually involved contestation against state legislation, a contentious topic during the first years of the Court.

¹³³ Famous precedents on these clauses were, respectively, the Dartmouth College case, *In Re Ward*, 17 US 518 (1819). and *Bank of Augusta V. Earle*, 38 US 519 (1839). Nearly every generation of constitutional scholars has grappled with the “dormant commerce clause.” The reference to a “dormant” clause exists because the American Constitution does not afford express powers to the regulation of commercial affairs by Congress. The clause was first articulated in *Gibbons V. Ogden*, 22 US 1 (1824). For an overview, see Mark Tushnet, “Rethinking the Dormant Commerce Clause,” *Wis. L. Rev.* (1979). Adrian Vermeule, “Does Commerce Clause Review Have Perverse Effects,” *Vill. L. Rev.* 46 (2001). Randy E Barnett, “New Evidence of the Original Meaning of the Commerce Clause,” *Ark. L. Rev.* 55 (2002).

¹³⁴ Tony Allan Freyer, *Harmony and Dissonance: The Swift and Erie Cases in American Federalism* (New York University Press, 1981).

Marshall court would lean, in these cases, toward the establishment of a restricted jurisdiction, but with the more relevant task of administering justice over commerce and trade, as already mentioned. In other words, through an interpretation of economic institutions (property, contracts, and corporations), the Supreme Court struck a balance that turned out to be decisive for the balance of powers in the U.S. As property and contracts remained a matter of state legislation, the federal judiciary would only oversee claims alleging a break with the commerce clause. After a long series of precedents, this interpretation came to serve as the model for the diversity jurisdiction of federal courts.¹³⁵ This arrangement closely resembles that which the drafters of the new program would finally craft. From the articles written by Herman Walker and his colleagues, it is possible to infer not only that the arguments raised echoed the legal tradition from which they had come from, but also that the references and cases cited were the very ones that ended up forging the American interpretation of the commerce and contract clause.¹³⁶ Moreover, those were the cases that would transfer to a “neutral jurisdiction,” i.e., one in which states would be less able to interfere in the suits and actions moved against it.¹³⁷

¹³⁵ Kramer, "Diversity Jurisdiction." Diversity jurisdiction designates the possibility of foreign corporations (foreign in relation to a particular state, not necessarily to the country) using federal courts instead of state courts. Diversity derives from “diverse citizenship,” which designates that parties do not necessarily reside in the same jurisdiction. In *Swift V. Tyson*, 41 US 1 (1842)., the Supreme Court had established that, in cases such as these, federal courts were to apply “federal common law,” a position that was severely criticized, but that has proved to be of fundamental relevance for the rising merchant class. To put it in other terms, diversity jurisdiction has allowed corporations to act strategically (forum shopping).

¹³⁶ Walker himself expressly cites *Bank of Augusta* to sketch a possible solution for the interpretation of a right of citizenship for corporations. See Walker, "Provisions on Companies in United States Commercial Treaties."

¹³⁷ Tony Allan Freyer, *Producers Versus Capitalists: Constitutional Conflict in Antebellum America* (University of Virginia Press, 1994).

Federal jurisdiction over state laws on property and contract is not a mere analogy to the way the treaty program was developed. In the beginning of the twentieth century, internationalism would sweep the minds of the major crafters of American statehood. Elihu Root and Edwin Bochar, for instance, would later argue the case for a world court on the very same model of the American Supreme Court. Of course, there are discontinuities in both cases, but if analogy already suggests a possible functional equivalence, the reference that the artifices of the international public law program of the United States make to the same developments in federal and state jurisdiction compels one to dig deeper into comparing both approaches to legal pluralism.

Although the question of pluralism will be developed later in this thesis, it is important to remark now that it is precisely pluralism that is at the heart of both the program on foreign investment and the large enterprise of nation building that took place in America after the revolution. Whereas the former involves the protection of rights that might not even be granted in foreign territories through a common formula of access to justice, the latter used that very formula to affirm rights previously not contained in the text from which they emerged.

To organize the presentation of these ideas, this thesis examines in chronological order each of these historical moments. The scope of nation building through constitutional interpretation is the subject of the present chapter. It will examine how a constitutional interpretation relying on international law methods helped the court to forge the unity of the country. The claim made in the introduction of this thesis, namely that relevant dynamics in law are activated by the prohibition of denial of justice, can be

made visible with the proceduralization that such a process entailed. Empowering norms can only be derived from other empowering norms, Kelsen's *Grundnorm* itself being a typical case¹³⁸. The tendency to identify in the Constitution the prototypical type of an empowering norm depends on describing the constitutional text as a self-referential paradox, an autological norm that describes and prescribes its own application. The Constitution, however, was not the first text in historical experience to have these features. The Declaration of Independence was also autological, as Derrida demonstrates.¹³⁹ Historical experience seems to have oriented around norm articulation in the first years of the Republic.¹⁴⁰ In so doing, it did not create constitutional interpretation out of nothing, but out of international law. How much it did so is less important than inquiring about what could form the unity of a legal system when constitutional interpretation does not seem to be based on territorial limits.¹⁴¹

The chapter is divided in three sections. The first provides a reading of the Declaration of Independence in light of the constitutional debates that were about to

¹³⁸ As almost always with Kelsen's concept, the very definition used here is contestable. For an overview of the debate, see the special issue of *Law and Philosophy*, curated by Stanley L. Paulson and Bert van Roermund, "Kelsen, Authority and Competence: An Introduction," *Law and Philosophy* 19, no. 2 (2000).

¹³⁹ Jacques Derrida and Elizabeth Rottenberg, *Negotiations: Interventions and Interviews, 1971-2001* (Stanford University Press, 2002).

¹⁴⁰ Or, as Waldron remarks, this may be simply a feature of the common law, where no rules of recognition exist other than those of change. See Waldron, "Who Needs Rules of Recognition?." Even if Waldron's claim is contestable, by raising the idea of a constitutional experience without rules of recognition, it points back to the argument that these regulatory regimes, and even the European Union, are merely "juridification". Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*. At 106.

¹⁴¹ As Ladeur has put it, the question might be to inquire about a particular feature of law "which consists in its not being 'patternless' and in its establishing a defined impersonal 'management of rules' and a network of connection constrains and possibilities for controlling uncertainty that extends even beyond the boundaries of territorially established law". Ladeur, "The Relationship between Public Law and Social Norms in Constitutionalism: Domestic, European and Global." At 22.

ensue. Based on a reading of international law scholarship available at that time, it claims that the paradoxes in the Declaration that awed the world were replicated in the concepts that were used to describe sovereignty: treaty power, the Articles of the Confederation, and independence. The second section attempts to describe how these problems were dissolved in the constitutional text and externalized through judicial adjudication. The last section attempts to uncover the techniques used by the Supreme Court to solve pressing constitutional problems that had been postponed during the revolutionary years.

1.1 The Declaration of Independence and the Articles of Confederation

One year before the American Declaration of Independence was written, Richard Henry Lee, a representative of the Virginia delegation, moved a resolution in Congress to legitimate the combats that were taking place. A civil war needed to turn into an international one. The colonies would be “absolved from all allegiance to the British Crown, and all political allegiance between them and the State of Great Britain is, and ought to be, totally dissolved,”¹⁴² as the Declaration finally stated. The resolution would be, thus, the first act of independence.

Congress acted swiftly and created three interlocking committees that, as David Armitage has shown, shared both personal and political purposes.¹⁴³ Each committee had a specific responsibility. One was charged with drafting a declaration of independence, which took a little more than a year to complete. Another was charged with designing the

¹⁴² David Armitage, *The Declaration of Independence: A Global History* (Harvard University Press, 2007), p. 34-35.

¹⁴³ *Ibid.*, p. 34-35.

model treaties for commerce and alliance, and the last one was responsible for the Articles of the Confederation, the main juridical norm that was designed to tie the thirteen colonies together.

If the declaration was a necessary step towards independence, so too were the other two documents. As it was ultimately stated in the closing part of the Declaration, being independent meant the “full power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”¹⁴⁴ In order to no longer be rebels in revolt and to fill the vacuum left by the British Crown, founding a “State” could only mean forging alliance with other nations.

The reason for this might have been doctrinal.¹⁴⁵ Vattel’s *The Law of Nations* defined a sovereign state rather narrowly as a “nation that governs itself, under what form soever.”¹⁴⁶ Moreover, being independent meant having the ability to “govern itself by its own authority and laws.”¹⁴⁷ As Armitage puts it:

No writer on the law of nations before Vattel had so consistently—and persistently—emphasized freedom, independence, and interdependence as the condition of states in their relations with one another. The authors of the American Declaration would soon adopt his repeated insistence that states were “free and independent” as the conception of their own states’ condition. By doing so, they enacted Vattel’s central contention that—in the words of his contemporary English translator— “independence is ever necessary to each state”; to secure that independence “it is sufficient that nations conform to what is required of them by the natural and general society,

¹⁴⁴ United States and Thomas Jefferson, *The Declaration of Independence* (Encyclopedia Britannica, 1952), p. 87.

¹⁴⁵ Armitage, *The Declaration of Independence: A Global History*., p. 39.

¹⁴⁶ Emmerich De Vattel, "The Law of Nations or the Principles of Natural Law," *Washington, DC: Carnegie Institution of Washington* (1758)., p. 26.

¹⁴⁷ *Ibid.*, p. 26.

established among all mankind.” In due course, this would become the standard modern definition in international law of independence as “the capacity to enter into relations with other states.”¹⁴⁸

The reference to Vattel is not the only reference to European thinking in the Declaration. Even at the time, Vattel represented a dated mode of thinking, in which the organization of affairs between states were a logical step from the laws of nature.¹⁴⁹ The charges Thomas Jefferson systematically imposed against Britain in the Declaration could only be levied by contrasting the acts of the King against the natural rights that people are endowed with “by virtue of their birth.” What seems to be of relevance in invoking Vattel, however, is that his ideas were used to present the case: the basis upon which a whole enterprise of the “United” States could be built.

The very idea of “unity,” as in “United,” may have been justified by Vattel’s ideas. Conscious that their claim was a daunting one, Congressmen not only relied on legal constructs, but also seemed to have been inspired by specific precedents. Among them, the Dutch independence from Spanish rule, in which references to “the united provinces” of the Netherlands were sometimes translated in English as “united states.”¹⁵⁰ The reference to the Netherlands will be even more relevant later, for the development of the constitutional doctrine.¹⁵¹ As will be shown later in the text, when attempting to solve the

¹⁴⁸ Armitage, *The Declaration of Independence: A Global History*., p. 40. The references to Adam’s library were also taken from Armitage’s exposition.

¹⁴⁹ Koskenniemi, "The Politics of International Law.", p.4.

¹⁵⁰ *Ibid.*, p. 47.

¹⁵¹ James Weinstein, "The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America," *The American Journal of Comparative Law* 38, no. 1 (1990).

jurisdictional conflicts that emerged in America, Joseph Story used the doctrine developed by Dutch jurist Ulrich Huber over how to solve conflicts of law.¹⁵²

And that seemed understandable. As the Dutch had gained independence in Westphalia, their jurists had to devise an explanation for the application of the rules of other provinces in a unified manner. Legal theory at that time simply held that uniformity was to be given by the law of the Empire,¹⁵³ while Dutch jurists clung on to the conviction that provinces were, according to Bodin, sovereign in their own right. Foreign rules could only apply by a matter of *comitas gentium*, the courtesy neighbors owe each other in return for an expectation of reciprocity from one another. Ulrik Huber,¹⁵⁴ perhaps one of the most influential jurists in that period, at least in the United States, had emphasized the character of the rule of comity: “the examples we shall use belong principally to the category of private law but their treatment rests exclusively on principles of public law, and they must be defined accordingly.”¹⁵⁵ Moreover, by an Ordinance of 4 December 1781, the American Congress pledged an allegiance to the law of nations, as if it were then practice in Europe, an idea that must have accounted for the conclusions James Kent reached in the first edition of America’s equivalent to Blackstone, Kent’s *Commentaries on American Law*:

¹⁵² Ernest G Lorenzen, "Huber's De Conflictu Legum," *Ill. LR* 13 (1918)., p.375. One ought to be careful with an interpretation that simply argues that the conflict of laws doctrine in America was a direct legal transplant from the Netherlands. See in this line Watson, A., 1992. *Joseph Story and the Comity of Errors*. University of Georgia Press.

¹⁵³ Arthur Nussbaum, "Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws," *Columbia Law Review* 42, no. 2 (1942).

¹⁵⁴ Other written variations on the spelling are registered as *Ulrich Huber* and *Ulricus Huber*.

¹⁵⁵ Hessel E Yntema, "The Comity Doctrine," *Michigan Law Review* 65, no. 1 (1966). At 9.

When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law. During the war of the American revolution, Congress claimed cognizance of all matters arising upon the law of nations, and they professes obedience to that law, “according to the general uses of Europe.” By this law we are to understand that code of public instruction, which defines the rights and prescribes the duties of nations, in their intercourse with each other. The faithful observance of this law is essential to national character, and to the happiness of mankind.¹⁵⁶

To be sure, these ideas per se were not enough to materialize the claim of independence, since deriving legal rights from nature was, in fact, “nonsense upon stilts,” an “anarchical fallacy,” as Bentham remarked.¹⁵⁷ If independence was to be taken seriously, it could only be on the basis of the recognition of its status by other nations, through the establishment of diplomatic ties, as the manuals of the laws of nations dictated. To be more precise: treaties would have to be made with sovereign friends—hence the Model Treaties.

But what to model them on? John Adams wrote: “the Committee after as much deliberation upon the Subject as they chose to employ, appointed me, to draw up a Plan Report. Franklin had made some marks with a pencil against some Articles in a printed Volume of Treaties, which he put in my hand. Some of these were judiciously selected, and I took them with other which I found necessary into the Draught and made my report

¹⁵⁶ James Kent and Charles M Barnes, *Commentaries on American Law*, vol. 1 (Little, Brown, 1884).

¹⁵⁷ Jeremy Bentham, *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1996). Be that as it may, as Article VI of the Constitution later established, treaties have come to be seen as “law of the land”, a point Marshall clearly made in the first years of the Constitution: “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains” in: *Murray V. Schooner Charming Betsy*, 6 US 64 (1804).

to the Committee at large, who after a reasonable Examination of it, agreed to report it.”¹⁵⁸

The Volume he referred to was “a compleat collection of all the articles and clauses which relate to the marine, in the several treaties now subsisting between Great-Britain, and other kingdom and states” that Benjamin Franklin had in his library.¹⁵⁹ These prior treaties were possibly the model for the first one, which the colonies entered into with France. Franklin himself was one of the signatories of the treaty, the others being Silas Deane and Arthur Lee.

The typical wording of such treaties provided for “free commerce,” which was to be understood as the granting of powers to the parties of treaties so that they “may and shall go, enter, and sail, in and to the Kingdoms and Dominions aforesaid; and the cities, towns, havens, shores, sea-roads, and territories of the same; and with carriages, horses, burdens, ships loaden or to be loaden, to bring in merchandizes to buy or sell, as much as they will [...],”—as the seventeenth-century treaty between England and Portugal had established. Although the language of the model was straightforward, the powers Congress claimed were still far from attainable. Of course, by Article IX, Congress had the power to “enter[] into treaties and alliance,” but on the condition that “no treaty of commerce shall be made whereby the legislative power of the respective States shall be

¹⁵⁸ John Adams, *Diary and Autobiography*, vol. 3 (Belknap Press of Harvard University Press, 1961), p. 338, cited by Edwin Wolf and Kevin J Hayes, *The Library of Benjamin Franklin*, vol. 257 (American Philosophical Society, 2006), p. 210.

¹⁵⁹ *The Library of Benjamin Franklin*, 257.

restrained from imposing such imposts and duties on foreigners, as their own people are subject to.”

For America, moreover, signing one treaty with one nation was just as nonsensical as it was to derive independence from natural rights. To be sure, the signing was a *de facto* recognition, but the *de jure* recognition would only come from Britain five years later, with the Paris Treaty of 1783.

How, then, should the treaty of 1778 be interpreted? Was it just a mere declaration of intent, as with the Declaration itself? The question did not escape the doctrinal debate. Johann Cristoph Steck, for instance, argued that the signing had no effect until recognition was given by Britain.¹⁶⁰ For Georg Friedrich von Martens, in his *Summary*, the Declaration itself could amount to an act of war.¹⁶¹ The answer of course depended on how and when independence would be considered legal.

The question of how many treaties were needed before a *de facto* independence became a righteous one is a matter not even settled today. From the United States to Kosovo, declarations, as von Martens has noted, became case studies in international law. Tellingly, however, in the U.S. case, is that together with a copy of the American Declaration, in G. F. von Martens *Summary*, there was also a copy of the Articles of Confederation, originally viewed as an international agreement between the states.¹⁶²

¹⁶⁰ Armitage, *The Declaration of Independence: A Global History*, p. 86.

¹⁶¹ Georg Friedrich von Martens and William Cobbett, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* (1986). The reference is cited in Armitage, *The Declaration of Independence: A Global History*.

¹⁶² Akhil Reed Amar, *America's Constitution: A Biography* (Random House, 2012).

The Articles, as they were written, supported that analysis. States would have to get consent from the United States in Congress to enter into a treaty either with foreign nations or with themselves, but they were not barred from it. Treaties designed by states could even interfere with national matters, provided that they did not interfere with the treaties proposed at the time to France and Spain. No other article, however, was as clearly stated as the second one: “each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”

It looks as though the three juridical concepts of independence, treaties, and confederation were articulated in the Declaration to solve the paradox of independence. The paradox derives from the fact that a declaration is a special kind of act: it does what it says it does. As Derrida noted, nowhere is this more evident than in the phrase “are and ought to be” independent, in the closing part of the Declaration, as the phrase is both a contestation and a prescription: “*and* is God: at once creator of nature and judge, supreme judge of what is (the state of the world) and of what ought to be (the rectitude of our intentions).”¹⁶³

One does not need to delve into the questions proposed by Derrida on his discussions of independence to understand the way this paradox was managed through the declaration. Sovereignty resided in the states and in Congress, which together sought

¹⁶³ Derrida and Rottenberg, *Negotiations: Interventions and Interviews, 1971-2001.*, p. 52.

international recognition of other sovereign nations. The paradox was thus solved by recourse to the rather mysterious notion of international law.

This, at least, is how the federalists later describe it. It might be the case that the differences between the Constitution and the Declaration of Independence are not so stark as to be noticeable. Be that as it may, the tying together of treaties, confederation, and independence seemed strong and stable enough to propel states through a war. The last article of the Articles read that they “shall be inviolably observed by every State, and the union shall be perpetual.”

Yet, less than one year after independence, representatives from the New Hampshire Grants followed Jefferson’s example and declared the independence of Vermont. This state would only join the Union, the first independent republic to do so, after the Constitution was approved. The paradox of independence, which had awed the world, now baffled Americans.

For their part, the Federalists refused to play by the framework developed under the Articles of Confederation.¹⁶⁴ They held secret meetings and discussed a new constitution to replace the loose arrangement established under the Articles. By September 1787, the Confederation had already been revolutionarily reformed.¹⁶⁵ The

¹⁶⁴ Bruce Ackerman and Neal Katyal, "Our Unconventional Founding," *The University of Chicago Law Review* 62, no. 2 (1995), p 479.

¹⁶⁵ *Ibid.* 477.

Constitution would reshuffle the institutional balance. In their favor was the spirit of the nation, which soon perceived the Articles to be a decisive failure.¹⁶⁶

Their main argument was that, to them, the coordination and organizational problems were a weakness and would undermine the position of the United States in the world. Drawing on the work of David Armitage, David Golove and Daniel Hulsebosch have remarked that “the framers [...] embedded a set of interrelated and innovative mechanisms into the text of the Constitution to ensure that the new republic would comply with its obligations under treaties and the law of nations.”¹⁶⁷

1.2 A More Perfect Union: Federalism in the Shadow of International Law

After the treaty with the British, recognition was a *fait accompli* and, as the example of Vermont made it clear, territorial integrity seemed the most pressing political issue on the agenda. The long list of the King’s misdeeds and natural rights violations were suddenly less relevant than the powers the Declaration of Independence had granted to the United States in its closing remarks. Even the Federalist papers, designed to explain and support the Constitution, cited the Declaration only once.¹⁶⁸

In the Constitution, no reference to the “sovereignty” of the States was made. They were forbidden to enter into any “Treaty, Alliance, or Confederation,” a power that

¹⁶⁶ Michael J Klarman, *The Framers' Coup: The Making of the United States Constitution* (Oxford University Press, 2016). At 597.

¹⁶⁷ David M Golove and Daniel J Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," *NYUL Rev.* 85 (2010). At 105.

¹⁶⁸ Armitage, *The Declaration of Independence: A Global History*. p. 92.

was instead vested in the Presidency¹⁶⁹. A judicial body would have the responsibility of applying and interpreting both law and international law.

The significance of these changes lies at the very core of the modifications proposed at the Convention in Philadelphia. Notwithstanding the other changes in the Constitution, these were the only points of the text that George Washington deemed worth noting in the Letter of Transmittal to the President of Congress. A different organization was necessary, according to the first President, because “the friends of our country have long seen and desired that the power of making war, peace, and treaties [...] should be fully and effectively vested in the General Government of the Union.” The sovereignty that was recognized in the Articles seemed now impracticable. Instead, George Washington claimed that those who take part in a society must give up a share of liberty in order to achieve a greater good, “perhaps our national existence.”

These closing remarks are a testimony to the fact that those in Philadelphia knew that they were not playing by the rules¹⁷⁰ (since, under Article XIII of the Articles, amendment could only come from the Congress dully assembled), and approbation by every state looked unlikely then.¹⁷¹ The necessity of the Constitution and the impracticability of the Articles would hopefully do the trick, and the perpetuity of the Articles would last a little more than a decade.

¹⁶⁹ One should also note that due to secessionist fears, a high quorum was established for the approval of treaties. I thank George Galindo for this apt observation.

¹⁷⁰ Klarman, *The Framers' Coup: The Making of the United States Constitution*.

¹⁷¹ The problem was that not only would the Federalists face opposition from Congress, they would also have to struggle with state constitutions, because a new Constitution would in practice revise each state's constitutions. Instead, they attempted to call new conventions in each state. See Ackerman and Katyal, "Our Unconventional Founding." p. 486.

Abridged as they were, the Constitution and the letter written by Washington were further developed in the Federalist Papers. John Jay, for instance, argued in the first Paper, that the violation of treaties was cause for a just war. Taking into account that six treaties were by then established, people in America would be safer if treaty-making power rested on one national authority.¹⁷² In Paper No. 5, he appeals to the “candid men” to decide whether security in a turbulent world would be better afforded by “the division of America into any given number of independent sovereignties.”¹⁷³

Hamilton, in turn, recalled the problems in Vermont when he admonished against the dangers of disputes among the states of the Union.¹⁷⁴ Thus, he makes the case in Paper No. 9 that a firm union would be a barrier against domestic faction and insurrection.

But it was Madison’s papers, still regarded as the staunchest defence of the Union against the risks of strife—mainly domestically, but also internationally—that made a lasting contribution.¹⁷⁵ His argument is almost philosophical in the sense that, instead of illustrating the challenges the new Constitution was about to face, as his fellows did in

¹⁷² Hamilton, A., Madison, J. and Jay, J., 2009. Federalist No. 3. In *The Federalist Papers* (pp. 41-43). Palgrave Macmillan US.

¹⁷³ Hamilton, A., Madison, J., Jay, J. and Pole, J.R., 2005. *The federalist* (Vol. 43). Hackett Publishing, p. 20.

¹⁷⁴ Hamilton, A., Madison, J., Jay, J. and Pole, J.R., 2005. *The federalist* (Vol. 43). Hackett Publishing, p. 28.

¹⁷⁵ Larry D Kramer, "Madison's Audience," *Harvard Law Review* (1999)..

the preceding papers, he conveys a series of concepts in order to describe the underlying thinking behind the Constitution.¹⁷⁶

A literal reading of Madison's thesis could possibly convey the idea that his defense of the republican government was a brilliant response to the bitter criticisms the constitutionalist project faced domestically. It is intriguing, however, that his paper followed others whose topics were mainly international in character. A recent reading of this puzzle has claimed that a limitation on congressional powers was not the only reason behind the framer's intentions. The very form of republican government itself was also seen as problematic: "the lesson that leading framers derived from the controversies over compliance with the Treaty of Peace in the mid-1780s was that representative institutions could not always be relied upon to uphold international obligations, especially when their members were drawn from small districts and were subject to frequent elections."¹⁷⁷ As Thornhill aptly remarked, "the early American republic, thus, utilized judicial review both to legitimize and stabilize itself, distinctively, against the English crown and against the more volatile acts—the 'various and interfering interests' and the 'spirit of party faction' examined by Madison in *Federalist* 10."¹⁷⁸

¹⁷⁶ It is simply wrong, however, to conclude that Madison was not referring precisely to the conflicts that were taking place at his time: "the compromises undertaken in Philadelphia also illustrate the extent to which the Constitution was a product of clashing interests rather than dispassionate political philosophizing" (...) "the federalists had simply different interests." Klarman, *The Framers' Coup: The Making of the United States Constitution*. At 600.

¹⁷⁷ Golove and Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition." At 108.

¹⁷⁸ "States, Rights and the Revolutionary Form of Power," in *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*, ed. Chris Thornhill, Cambridge Studies in Law and Society (Cambridge: Cambridge University Press, 2011). Thornhill further observes: "Madison warned in the Convention against 'equality of suffrage' (Farrand 1911: I, 37). In *Federalist* 10, Madison

In explaining what a constitution entails, the Papers thus attempted to make a defense of the political innovations they were proposing. Their main objective was to give an account of where sovereignty resided.¹⁷⁹ It is a question that concerns the timing of the debate and the audience to which it was addressed. To make their case, they turned to distinctions, not to demonstrate that they were right, but as if they were forging an identity.

The distinctions that the Federalists envisioned were obviously those that would set the American system apart from the British system. Unrestricted and unlimited sovereignty in Britain resided in the King-in-Parliament, the fusion of all three estates and a virtual embodiment of the People itself.¹⁸⁰ Through this concept, the British managed to combine three forms of government (monarchy, aristocracy, and democracy), in what Akhil Amar called “an Aristotelian means of means.”

America’s response relied first on the very defense many had raised during the struggles for independence. As the British constitution also applied to them, the distinction they had proposed relied on individual rights as a source to limit government.

described democracy as liable to suppress “both the public good and the rights of other citizens.” He concluded that “popular government” could only exist if governmental power were entrusted to popular representatives who were not the people.”

¹⁷⁹ Amar, A.R., 1986. Of sovereignty and federalism. *Yale Lj*, 96, p.1425. The analysis of the concept of sovereignty and its application to the structure of the early years of American government derives mainly from Amar’s article. It is, nonetheless, now too uncomplex a description. As the objective of this chapter is to describe how legal concepts were construed and applied in that period, simplifications are useful, but they paint only a modest picture. For a fuller account of the uses of the American Constitution, see Kalman, L., 1998. *The strange career of legal liberalism*. Yale University Press. A complete historical account, albeit a little outdated, as the author himself notes in the introduction, is best referenced in Wood, G.S., 2011. *The creation of the American republic, 1776-1787*. UNC Press Books. For a less polarized view on the debates of the time, see Appleby, J., 1985. Republicanism and ideology. *American Quarterly*, 37(4), pp.461-473.

¹⁸⁰ Albert Venn Dicey, *The Law of the Constitution*, vol. 1 (OUP Oxford, 2013)..

Individual rights were the substantive legal principles to which a legitimate government ought to abide.¹⁸¹

As the reaction was predictably unwelcoming, Americans drew analogies to the corporation. They claimed that political power would be limited by a constitution, as corporations were bound by their charters, and they relied on judges to uphold the constitutions when laws ran contrary to them,¹⁸² since, as Hamilton mentioned on Paper No. 78, judges are not representatives.¹⁸³ With this line of reasoning, they forged a new concept of sovereignty. Sovereignty now rested with the people, and government had only power, meaning that it was to be restricted and controlled. As Madison famously stated in No. 10, representation was at the center of the notion of a Republic.¹⁸⁴

Arguably, this notion of sovereignty is the everlasting contribution from the constitutional debates of the early nineteenth century. From its origins in the sixteenth century,¹⁸⁵ the concept of sovereignty had been used to mark the independence of territorial states against the emperor or the Pope, so as to protect religious minorities against the judgments of a nobility. With the American Constitution, even this formula seemed arbitrary.¹⁸⁶ Government could only take place if it represented the people.

¹⁸¹ Akhil Reed Amar, "Of Sovereignty and Federalism," *Yale Lj* 96 (1986). p.1432.

¹⁸² Stephen Holmes, "Precommitment and the Paradox of Democracy," *Constitutionalism and democracy* 195, no. 195 (1988).

¹⁸³ Hamilton, A., Madison, J., Jay, J. and Pole, J.R., 2005. *The federalist* (Vol. 43). Hackett Publishing, pp. 411-418.

¹⁸⁴ Hamilton et al., *The Federalist*, 43.

¹⁸⁵ Holmes, "Precommitment and the Paradox of Democracy."

¹⁸⁶ Luhmann, *Law as a Social System*. p. 409.

Representation and separation of powers were at the core of the founding of the new Republic.

Be that as it may, one ought to be cautious with this affirmation. As Joyce Appleby said in her 1985 paper, republicanism was also “discovered” in this narrative.¹⁸⁷ This reading of the constitution and the defenses made by the Federalists are not to be read as evidence of an everlasting structure. They are, at best, a suggestion, as alluded to by Larry Kramer: “the historical evidence suggests that the Framers’ idea of separation of powers was unformed and tentative, and that they had few fixed institutional arrangements in mind beyond the basic principle that there should be a separation.”¹⁸⁸ If, in an anachronistic description, republicanism seems to have being enacted by the Constitution, then the real meaning of this event seems restricted by the efforts at forging a strong union, not in the sense of a superpower or of the narrative of American exceptionalism, but rather, more modestly, in the sense of a union that would have a central government mighty enough to counter secessionist endeavors. As, Klarman has noted, “nothing about the process that produced the Constitution was inevitable.”¹⁸⁹

Perhaps a better way to approach the constitutional innovations are through a description of the unfolding paradoxes that the enactment of the Constitution entailed. What seems, then, to be truly unique in the American proposition was that the Constitution promoted a *coupling* between the political system and the legal system.

¹⁸⁷ Joyce Appleby, "Republicanism and Ideology," *American Quarterly* 37, no. 4 (1985)..

¹⁸⁸ Kramer, "Madison's Audience.", p.287.

¹⁸⁹ Klarman, *The Framers' Coup: The Making of the United States Constitution*. At 596.

Through this coupling, the organization of the state—its political organization—now depended on positive law, and at the same time, the boundaries of political activity depended on constitutional law.¹⁹⁰ This effectively meant that only if government conformed to constitutional law would its collective decision-making be deemed valid. Another way of considering this achievement is by understanding that, under the “republican principle,” other positions that had been used to legitimize collective decision-making were simply null: wealth, money, legal status, or positions.

Thus, describing what the constitution entailed allows one to surmise that this outcome with regard to the relationship between the political system and the legal system could not have been intended or designed: it was due to the “concern [...] with filling the vacuum, which derived from independence from the United Kingdom.”¹⁹¹ This referred, firstly, to sovereign organization at the national level.¹⁹² Secondly, it could only be prescribed by an autological text, in an analogous way to what happened with the Declaration. As both a description and a normative prescription, the Constitution opens to the future as the only source for legislation that would conform to it.

Another way of looking into what the Constitution could then have meant is to examine the debates in which the Federalists were involved. In attempting to explain the novelties they had envisioned, the founders would inevitably face opposition from the states themselves. An anti-Federalist movement was sometimes seen as just as strong as

¹⁹⁰ Luhmann, *Law as a Social System.*, p. 404.

¹⁹¹ *Ibid.*, p. 405.

¹⁹² Terence Ball and John Greville Agard Pocock, *Conceptual Change and the Constitution* (University press of Kansas, 1988)..

that of the Federalists. Their best argument was, without a doubt, for the bypass of the amendment procedure. Be that as it may, “the Federalist succeeded in shifting debate forward in time, exploiting recent developments [...] to project the inevitable transformation of the American states into hostile sovereignties.”¹⁹³ The enactment of the Bill of Rights just after the approval of the Constitution is a testimony both to the relevance of the anti-Federalist debate and to the success of the Constitution in projecting in time the solution of political strife.^{194,195}

Again, that the results were unintentional, as Luhmann describes, is conspicuous in the language the Federalists used to describe the paradox of democracy. To be sure, the future was opened to new legislation and new collective forms of decision-making, but the Judiciary was called into the public debates to ensure that the future would remain tied to the Constitution. Of course, this paradox could also be read as an attempt to

¹⁹³ Peter S Onuf, "State Sovereignty and the Making of the Constitution," *Ball/Pocock (1988)* (1988), pp.78-98.

¹⁹⁴ Klarman, *The Framers' Coup: The Making of the United States Constitution*. At 587. On how the Bill of Rights, whose name was not even used at that time, were embedded with anti-Federalist arguments, see Gerard Magliocca, *The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights* (Oxford University Press, 2018).

¹⁹⁵ The reference to this defect of the Constitution would later help Joseph Story to design the interpretation of judicial conflicts that he had envisioned for the American Constitution. In his *Commentaries* he affirms: “among the defect which were enumerated, none attracted more attention, or were urged with more zeal, than the want of a distinct bill of rights, which should recognise the fundamental principles of a free republican government, and the right of the people to the enjoyment of life, liberty, property, and the pursuit of happiness.” He made this point to praise the values that the Constitution had embraced: “the promptitude, zeal and liberality, with which the friends of the constitution supported these amendments, evince the good faith and sincerity of their opinions, and increase our reverence for their labours, as well as our sense of their wisdom and patriotism”.

restrict the unrestricted power of sovereignty, but this is just another formula for hiding the paradox.¹⁹⁶

The center of the arguments resided with the utility and the practicality of binding the future generation. “Binding” and “tying” were words that evoked the myth of Ulysses.¹⁹⁷ The views put Jefferson and Madison in opposition with each other, because for the former it was simply irrational to deprive future generations of deciding their own future, whereas the latter thought it impractical to periodically review rights that, as the case of public debt and property law demonstrated, could in effect bind the future, be it through international law or through conventional norms.¹⁹⁸ More precisely, as constitutional law also became positive law, its unchanging features could only be thus explained by the recourse to private law concepts. That no term such as Elster’s “imperfect rationality” was used is perhaps a sign of the times, an observation that can only be fully grasped in hindsight. Constitutional law is less dependent on what the substance of the norms in a constitution are than on what a constitution does. It is a coupling of law and politics, but a coupling in which the dynamics of both systems are accelerated in as much as they are limited. A separation of law and politics can only be understood as a source for the externalization of law’s paradox to that of politics and

¹⁹⁶ One should also be careful in envisioning a rupture across many fields. Although in terms of authority—or of the concept of sovereignty, for that matter—independence created a vacuum, court organization remained on the very same basis as the British had allowed it to be. The true meaning of a constitution, at least at the organizational level, was not so much as a point of departure towards the future, but as a bridge linking the abbreviated present time. On Court Organization see Roscoe Pound, *Organization of Courts* (Boston: Little, Brown and Company, 1940).

¹⁹⁷ Jon Elster, “Ulysses and the Sirens: Studies in Rationality and Irrationality,” (1979)..

¹⁹⁸ Holmes, S., 1988. Precommitment and the Paradox of Democracy. *Constitutionalism and democracy*, 195(195), p. 219.

vice-versa. This externalization is, at once, both limiting and enabling because it grants both systems their own autopoiesis.

But how does such a coupling happen? In the United States, at least in the early years of the Constitution, the answer lies within the Supreme Court as an organization. As Luhmann puts it, “structural couplings are consequences of functional societal differentiation,” and “they are located at the level of social system.” However, their very possibility depends on organizations “that can gather information and bundle communications and thus ensure that the persistent irritation of the functional system created by structural coupling is translated into connectivity.”¹⁹⁹

Organizations that are the center of social systems—such as the Supreme Court for the legal system and the Central Bank for the economic system—always have to decide if they must decide or, in Luhmann’s terminology, if they are “endowed with self-competence.” This “decision,” in turn, always affects their task of interpretation.²⁰⁰ Whenever the Court must decide whether to strike down a law, it must always answer the question of whether the political intention is to strike down a democratically-approved norm. This is how a Constitutional Court, although it is part of the legal system, necessarily ponders what is happening in the political system. In so doing, the Court bundles information together, preparing decisions that provide mutual irritation dynamics.

¹⁹⁹ Luhmann, N., 2000. Die Organisation der Organisation. In *Organisation und Entscheidung* (pp. 302-329). VS Verlag für Sozialwissenschaften.

²⁰⁰ Niklas Luhmann, "Die Organisation Der Organisation," in *Organisation Und Entscheidung* (Springer, 2000).

Decisions, the main form of communication for organizations, are a special form of observations. They observe with the help of a distinction that Luhmann calls alternatives. Like every decision, alternatives see the two sides, but presupposes that both are attainable. As Luhmann points out, this distinction does not rule out the fact that the other side of a division remains unattainable. What is happening precisely is that an alternative creates an environment. This is the operation done by organizations: when pondering the alternatives, organizations create a range of mutually exclusive marks, a process of bundling considerable information together. Although such an operation does not eliminate the distinction, the unit of the decision cannot be broken, “but it is easier to ignore.”²⁰¹ This is how a supreme court may hide the paradoxes of the constitution.

But what the constitutional development did in America was something even more drastic. During its first years, the Supreme Court dealt with increasingly complex issues. As the powers granted to the national body were enumerated, but far from exhaustive, the Court had to devise new empowering norms to expand the powers of the federal union. That very expansion of federal powers, however, was increasingly met with resistance and, in the case of the Civil War, violent opposition. Another source of concern for the Court was with states that were beginning to launch extraterritorial claims for their respective legislation, a power that had also been “dormant” under the Constitution. In other words, the creation of a federal judiciary and of a Supreme Court did not settle the constitutional debates that were held in Philadelphia. The solution

²⁰¹ Ibid. 131.

would necessarily entail devising new procedures for loosely linking the recently born organizations.

But that was not all. This ability also increased the complexity of both system, liberating politics from the dynamics of the legal system and the legal system from that of the political. This point is all the more important as the legal system prepared itself to depart from the ties it had with the economic system.

As Forrest McDonald notes, “one cannot leap from the framers’ belief in the sanctity of private property to the conclusion that they advocated either capitalism or a free market economy.”²⁰² Far from it: the use of property was itself an instrument for justifying the paradox of democracy, for in the beginning of the constitutional era only landowners were citizens.²⁰³ That concept would have to be adapted to later developments in American society.

In order to become a capitalist economy, the U.S. not only had to separate law from politics, but also the economy from law. A capitalist society could thus be defined

²⁰² Forrest McDonald, "The Constitution and Hamiltonian Capitalism," *How Capitalistic Is the Constitution* (1982). At 50.

²⁰³ A statement that was made very clear by the Court itself when judging Dred Scott’s case *Dred Scott V. Sandford*, 60 US 393 (1857). In the words of Chief Justice Taney: “When the Constitution was adopted, they were not regarded in any of the States as members of the community which constituted the State, and were not numbered among its ‘people or citizens.’ Consequently, the special rights and immunities guaranteed to citizens do not apply to them. And not being ‘citizens’ within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States, and the Circuit Court has not jurisdiction in such a suit.”

as a functionally different economic system from both the legal and the political system.²⁰⁴

To do so, the United States needed something conspicuously lacking in the Federalists' discussion: freely transferable property, no discrimination against commercial property in favor of land, and development instead of passive enjoyment as the legitimate mode of using capital.²⁰⁵ Moreover, it also required an acceptance of the idea that economic growth was possible and desirable and that the means for achieving it was through the guarantee of private entrepreneurship. Finally, it also required respect for the market, as a source of economic value and as a legal and institutional apparatus to turn credit into money.²⁰⁶

The articulation of a language for constitutional matters, a self-referential one, proved to be the means through which legal discourse could recognize property and contract. In the end, a functional but separated economy derived from treating these two juridical concepts as another coupling, now within the economic system. The reason for this outcome lies with the political conflicts that were taking place in America and the peculiar way of arranging them within the federal system. The conflicts between producers and merchants, for instance, was also seen as a dispute between states, where local producers could have sway over the legislature, and the federal union, which would

²⁰⁴ Schimank, U., 2015. Modernity as a functionally differentiated capitalist society: A general theoretical model. *European Journal of Social Theory*, 18(4), pp.413-430. See also Niklas Luhmann, "The World Society as a Social System," *International Journal of General Systems* 8, no. 3 (1982).

²⁰⁵ McDonald, "The Constitution and Hamiltonian Capitalism."

²⁰⁶ *Ibid.* At 50.

lean towards big business.²⁰⁷ The very organization of political power was done across party lines, which, in turn, reflected the division between states and the union. This distinction was at the heart of the struggle over resources and political power, and the Supreme Court would inevitably have to arbitrate these disputes. The problem was that only sparse references to these kinds of conflicts were made in the text of the Constitution, so no argumentation could sufficiently hide the paradoxes of power-sharing.

The problem these types of disputes engender can only be gauged in the sparse and careful references caught in the blank spaces between the letters of the dicta. The relevance of *Marbury v. Madison*²⁰⁸ notwithstanding, it is surprising how little was actually achieved by the decision, at least in terms of the case itself. The language the Court used for designating a “lost case” can only mean that the term was strategically conceived of in order to consign some cases to be settled as a future precedent, as no law had at that point been declared unconstitutional. In *Hunter Lessee*,²⁰⁹ a case in which the very authority of the Court was been challenged, one of the Justices said the rules of the Constitution as interpreted by the Supreme Court were binding because courtesy so willed it.

Be that as it may, the Court eventually found a solution. The way it did would perhaps puzzle those who today call for private international law mechanisms for

²⁰⁷ Freyer, *Producers Versus Capitalists: Constitutional Conflict in Antebellum America*.

²⁰⁸ *Marbury V. Madison*, 5 US 137 (1803).

²⁰⁹ *Martin V. Hunter's Lessee*, 14 US 304 (1816).

arbitrating regime-collisions²¹⁰ because the conflict over power-sharing between states was dealt with through the use of the Dutch theory of conflict of laws. In the case law of the antebellum years, “comity,” however loosely defined, served to counter states’ claims to extraterritoriality, while also forging concepts such as diversity jurisdiction. In other words, conflict of laws served as the mechanism for legal integration.²¹¹ In conceptual terms, conflict of laws can be understood as a sequential conditional program in which many empowered organizations took part. The fact that it was done by the Supreme Court, as an instance of last resort in charge of guarding the “prohibition of denial of justice,” proceduralized conflicts throughout other organizations within the legal system²¹². In a sense, conflict of laws works not as rigid central/periphery scheme, but as a network, in which “nodes” are loosely coupled throughout the system.²¹³ To put it bluntly, as Joseph Story wrote on his commentaries to the American Constitution, “the power to construe the constitution is a judicial power.”²¹⁴

²¹⁰ Indeed, a vast body of literature now spans over this topic. Teubner’s articles are among the first to use system-theory paradigm, but the works span across different methodological lines. Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012). Ralf Michaels and Joost Paulwelyn, "Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law," *Duke J. Comp. & Int'l L.* 22 (2011). Alex Mills and Joost Paulwelyn, "The Identities of Private International Law: Lessons from the Us and Eu Revolutions," *ibid.*, no. 3 (2012).

²¹¹ Peter Hay, Ole Lando, and Ronald Rotunda, "Conflict of Laws as a Technique for Legal Integration," in *Integration through Law: Europe and the American Federal Experience*, ed. Mauro Cappelletti, Monica Seccombe, and Joseph Weiler (Berlim, New York: Walter de Gruyter, 1985).

²¹² One should keep in mind that the use of denial of justice in this context is through a theoretical construction, possible under the framework of this research, and not necessarily through the actual use of the terminology.

²¹³ Ladeur, "Towards a Legal Theory of Supranationality - the Viability of the Network Concept." At 48: “The network is constructed by a process which is based not on a pre-determined construction plan, but one which ‘writes’ itself through application by continually recombining the individual ‘nodes’ and their relationships.”

²¹⁴ Story, J., 1858. *Commentaries on the Constitution of the United States* (Vol. 2). Little, Brown, p. 343.

Therefore, by analyzing the story behind the cases that were brought to the Supreme Court, one can thus recast the history of the emergence of capitalist society. This is all the more relevant if we keep in mind that the men who were actively participating in this process were not keen on theorizing their view; rather, “they were simply guided by the conception of efficiency prevailing at the moment.”²¹⁵

This lack of a liberal position meant that a solution would have to be found within the Judiciary.²¹⁶ The concept of propriety that was pervasive during the years of constitution-making was that represented by the maxim *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another). The rule implied that only the lowest common denominator could provide a useful defense against injury claims.²¹⁷ The unique ways in which the Supreme Court articulated these problems, through a series of decisions made in the first years of its existence, shaped not only constitutional interpretation, but also the building of a nation. As Robert Cover has argued, “it is a daring system that permits the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of its courts.”²¹⁸

²¹⁵ Horwitz, M.J., 1973. The Transformation in the Conception of Property in American Law, 1780-1860. *The University of Chicago Law Review*, 40(2), pp.248-290.

²¹⁶ Horwitz, M.J., 1977. *The transformation of American law, 1780-1860*. Harvard University Press, p. 36.

²¹⁷ Horwitz, M.J., 1977. *The transformation of American law, 1780-1860*. Harvard University Press, p. 32.

²¹⁸ Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation." At 682.

1.3 Making the Constitution: Private International Law or Conflict of Laws in the Antebellum Years²¹⁹

The challenges the Supreme Court faced at its inception were not easily solvable. To be sure, the court was not immediately effective after the approval of the Constitution, and the first chief justice saw the task of commanding it as more of a civil burden than a challenging task.²²⁰ But as soon as the Court began its activities, the pressure of its enormous challenges always forced it to compromise on the many hard issues of the time.²²¹

To imagine that the role of the Court was simply to interpret an almost God-given text in way that mostly fended off political interference is obviously a historical fallacy.²²² The pressures that the justices faced were challenging in such a way that the very of organization of the court was put to the test as the result of deep constitutional conflicts.

The conflicts were varied. Constitutional interpretation was not even settled around one very simple notion: what is the nature of the Constitution? The problem was that for many states and their respective representatives the new text was simply a better

²¹⁹ The use of “conflict of laws” and “private international law” as synonyms underscore the emphasis on the American tradition. To be sure, they do not designate the same institutions in other legal settings, but the fact that Joseph Story or even Joseph Beale used them interchangeably reveals that the incorporation of international law in constitutional norms and, later, the transplant of this evolution to international organizations might tell us more about the current discussion on the constitutionalization of international law.

²²⁰ David P Currie, "The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835," *The University of Chicago Law Review* (1982).

²²¹ Klarman, *The Framers' Coup: The Making of the United States Constitution*. At. 629.

²²² David H Fischer, *Historian's Fallacie* (Harper Collins, 1970).

replacement for the old, and clearly dysfunctional, Articles of the Confederation.²²³ At the center of the debate was the question of how much power should be vested in the Union, and not only those who attended the Assembly were skeptical about it, but also those who would later have to ratify the Constitution. The result was that a Bill of Rights, mainly designed to protect state interests, had to be devised as part of the process of constitutional ratification, which did not otherwise welcome any improvements to the text.²²⁴

The conflict over the nature of the text was later translated into one between Federalists, on one side, and Democratic-Republicans, on the other, and the main line of dispute was, again, around the distribution of the powers between the spheres of government. Federalism was also on the agenda with regard to another contentious field in the antebellum period: slavery. American expansion and the entire economic system in the southern states relied on what Justice Story described as an “abhorrent” form of work. The problem with slavery, however, was not so much that it was contrary to minimum standards of dignity, but that it represented, for northern states, an unjust form of economic activity,²²⁵ whereas for southerners it represented their very sovereignty over their own property.²²⁶

Also at issue was the clash of an emergent class with the old form of production, which had mainly been based on local producers. Merchants who explored commerce

²²³ In a certain sense, the Federalist papers were precisely targeted against the opposition.

²²⁴ Klarman, *The Framers' Coup: The Making of the United States Constitution*.

²²⁵ Barbara Holden-Smith, "Lords of Lash Loom and Law*: Justice Story Slavery and Prigg V. Pennsylvania," *Cornell L. Rev.* 78 (1992).

²²⁶ Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press, 1975).

among the different states quickly saw in the rapid expansion of the United States toward the Pacific an opportunity with regard to the buoyant internal market. Their interests frequently opposed those of smaller producers, confined as they were to their respective states. The resolution of this conflict once again relied on the interpretation the Supreme Court attributed to Federalism and the meaning it ascribed to the dormant commerce clause.²²⁷ To each of these conflicts we now turn.

In his *Constitutional Law*, Thomas Sergeant took a strikingly different approach to book organization than other authors, such as James Kent or Joseph Story, did a couple of years later. He begins his book with what was possibly the most significant group of cases for those attempting to take a systematic approach to America's constitutional law: the Courts of the United States.²²⁸

The Constitution did not provide for jurisdiction under federal rules. It only gave Congress the power to create inferior courts to the Supreme Court. It was the extent of the power conferred to Congress that, in turn, would reduce the powers of the states, a power that was—and in many cases still is—controversial.

By the Judiciary Act of 1789, Congress had created a three-tiered court structure composed of one Supreme Court, a state system with its own highest court, and district courts to hear federal jurisdiction cases from citizens who lived outside the boundaries of the state. From the debates in the legislative branch, it is possible to observe that the text

²²⁷ Freyer, *Producers Versus Capitalists: Constitutional Conflict in Antebellum America*.

²²⁸ Thomas Sergeant, *Constitutional Law: Being a Collection of Points Arising Upon the Constitution and Jurisprudence of the United States, Which Have Been Settled, by Judicial Decision and Practice* (A. Small, 1822).

reflected a compromise to ward off concerns over the extension of federal powers.²²⁹ By granting powers to state courts to hear federal cases of its own citizenry, the act could gain support in both houses. The curious arrangement provided that each district court would be composed of two Supreme Court justices. One should not underestimate the political significance of this arrangement. To borrow a turn of phrase from Ralph Lerner, obliging Supreme Court Justices to sit in circuit courts as lower federal judges transformed them into the “republican schoolmasters.”²³⁰

This setup meant that these justices were the only federal officials with regular contact with all regions in the country.²³¹ At the beginning of the juries, they would explicate the new law, and particularly the Constitution, to the citizens, something that possibly caused them to begin “thinking of themselves in political terms.”²³² Another consequence of this arrangement seems to be the reinforcement of justices’ ties with other founding members of the federal government. In other words, the act gave justices a semipolitical assignment.²³³

²²⁹ Maeva Marcus, *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* (Oxford University Press on Demand, 1992).

²³⁰ Ralph Lerner, “The Supreme Court as Republican Schoolmaster,” *The Supreme Court Review* 1967 (1967).

²³¹ It is curious to note that an homogenous elite such as America’s Supreme Court Justices was also responsible for forging a united country in Brazil. The difference, however, was that a much broader role was assigned to Brazilian officials who not only held positions within the Judiciary, but also much more relevant roles in all the other branches of government. For the construction of the Brazilian Union, see José Murilo de Carvalho, “A Construção Da Ordem/Teatro De Sombras,” *Rio de Janeiro: Civilização Brasileira* (2003).

²³² Maeva Marcus and Emily Field Van Tassel, “Judges and Legislators in the New Federal System, 1789-1800,” *Judges and Legislators: Toward Institutional Comity* 31 (1988). At 32.

²³³ *Ibid.* at 32.

Be that as it may, the concerns over the powers of the federal system seemed justifiable. A decade later, John Adams signed the Judiciary Act of 1790 granting sweeping powers to the district courts. The background of this change was ripe with political conflicts. Federalists had taken control over both houses during the Adams' presidency, and support for the extension of federal jurisdiction gained momentum. The basic idea was to augment the number of district courts, so as to favor federal jurisdiction over states beyond the compromise achieved in 1789.

The problem with such an approach was that it raised bitter concerns with Jeffersonian Republicans, who feared not only the invasion of states' prerogatives, but also the extension of federal jurisdiction over alien and sedition acts, a subject over which many of their supporters were being persecuted. The fact that Republicans had won the majority in the election and that Jefferson himself would soon to become President ushered Adams into signing the new act just three weeks before the end of his term.²³⁴

If the significance of the extension of federal power was demonstrated by the sheer number of new placements created, the promptness with which the vacancies were filled made the new appointees come to be known as "midnight judges." Of course, following Jefferson's inauguration, the Act was repealed in 1802, and the multi-tier jurisdiction previously established was reintroduced.

²³⁴ Kathryn Turner, "Federalist Policy and the Judiciary Act of 1801," *The William and Mary Quarterly: A Magazine of Early American History* (1965).

The conflict is well reported and provided the background over which the famous *Marbury v. Madison*²³⁵ decision was given. More important, however, than discussing the concept of judicial review is to understanding that the conflicts that provided the setting for *Marbury* were far from settled in the antebellum years. In reality, they anticipated a profound doctrinal dispute between compact theory and dual federalism.²³⁶

In fact, the power of federal jurisdiction was always a matter of controversy because it related to the power Congress had over state authorities. The fact that these powers were established under the Constitution provided only a preliminary guarantee at the time of the Constitutional convention. It did not take too long, however, for conflicts over the amount of power Congress could amass to begin to appear before the Court. As Robert Cover aptly described, “since 1789 the overwhelmingly consistent element in the relationship between these federal courts and the state court systems has been concurrency or overlap of jurisdiction.”²³⁷

In *McCulloch v. Maryland*,²³⁸ for instance, the Court had to decide whether a law passed in Maryland could be enforced against a corporation chartered by the United States Congress. The law effectively levied a tax burden on banks not chartered by the legislature of Maryland. James McCulloch, a manager within the branch of the American Bank in Baltimore, refused to pay, so a suit was lodged by John James, who would collect the tax. In the Supreme Court of the State, the plaintiff argued that, because the

²³⁵ *Marbury V. Madison*.

²³⁶ Michael Burgess, *Comparative Federalism: Theory and Practice* (Routledge, 2006).

²³⁷ Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation." At 640.

²³⁸ *Mcculloch V. Maryland*, 17 US 316 (1819).

Constitution was silent with respect to banks, the state legislature had the power to impose a tax on it.

The state's jurisdiction was invoked in Jeffersonian terms, by arguing that Congressional authority was granted by the states. An argument that Marshall rejected:

There is nothing in the Constitution of the United States similar to the Articles of Confederation, which exclude incidental or implied powers.

If the end be legitimate, and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.

The power of establishing a corporation is not a distinct sovereign power or end of Government, but only the means of carrying into effect other powers which are sovereign. Whenever it becomes an appropriate means of exercising any of the powers given by the Constitution to the Government of the Union, it may be exercised by that Government.

If a certain means to carry into effect of any of the powers expressly given by the Constitution to the Government of the Union be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

The Bank of the United States has, constitutionally, a right to establish its branches or offices of discount and deposit within any state.

The State within which such branch may be established cannot, without violating the Constitution, tax that branch.

The State governments have no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers.

The States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national Government.

The debates here were thus mainly centered on the question of whether or not federal courts had jurisdiction over civil cases and how far such powers extended. In the end, it was a question of legal validity, understood in Luhmanian terms as “successful communication within the legal system.” In other words, the question that was being answered in this period was: what counts as valid law? That the laws of England could not apply seemed obvious. As St. George Tucker affirmed in Blackstone's Commentaries, “but to infer from hence, that the common law of England is the general

law of the United States, is to the full as absurd as to suppose that the laws of Russia or Germany, are the general law of the land.”²³⁹

The theory of implied powers embraced by Marshall forged one of the venture points through which harmonization could take place, albeit in the powers of the national authority, i.e., Congress.

This point is evident enough in another series of cases, namely those that dealt with economic problems. In a not yet fully developed economy, the clauses of the Constitution did not seem to pose that much of a risk. Property, for instance, was seen as a matter of state legislation, mainly because it required registering. As public records were a matter of state legislation, it fell under the full faith and credit clause.

Contracts, on the other hand, were the object of a specific point in the Constitution, in which states were barred from passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts. Under the express *dicta*, the Supreme Court found no difficulty in declaring unconstitutional, for the first time, a grant revoked by the State of Georgia. In *Fletcher v. Peck*, the Court stroke down a piece of Georgia legislation that offered at bargain prices the entire lands of what is today Alabama and Mississippi. Following the Treaty of Paris, the legislation took over French lands and offered them to two corporations. They subsequently sold them to small owners. The interesting thing is that the whole piece of legislation was approved because of bribes

²³⁹ St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia: In Five Volumes, with an Appendix to Each Volume, Containing Short Tracts Upon Such Subjects as Appeared Necessary to Form a Connected View of the Laws of Virginia as a Member of the Federal Union* (Lawbook Exchange, 1996). At 252.

paid to the congressmen, and the outcry was so violent that the next legislature revoked the law, declaring null and void the contracts that had been made by the corporations. It was this new law that was struck down by the Court on the grounds that under the contract clause no legislation could nullify a contract, even if it was founded on bribery.²⁴⁰

It was one thing, however, to rely on the sanctity of contracts, and quite another to consider that a contract entered into by the state in a previous legislature would have to bind that public body indefinitely, a point fiercely defended by Justice Johnson in his dissent opinion.²⁴¹ Yet that very line of reasoning that was held by the majority and was sustained in another landmark case, which is regarded as one the first decisions on corporate law.²⁴²

In *Dartmouth College v. Woodward*,²⁴³ a New Hampshire legislature attempted to modify the charter approved before the existence of the state in order to interfere with the nomination process of its trustees. The problem, however, was that the trustees were not, in reality, the persons who had entered into the contract in the first place. Marshall, here, recognized an “implied contract” between the parties and their heirs.

²⁴⁰ *Fletcher V. Peck*, 10 US 87 (1810).

²⁴¹ In his words: “To give it [a contract] the general effect of a restriction of the State powers in favour of private rights is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the States in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.”

²⁴² One should be careful, however, in drawing parallels from here to the current legal configuration of the moral person. Corporations, by that time, were publicly chartered, which is part of the reason why Marshall could borrow jurisprudential quotes from the King’s Court.

²⁴³ *In Re Ward*.

If jurisdictional constructions such as these, however creative, were not that challenging for the first years of the Marshall court, their very line of reasoning nevertheless contrasted with the emergent interests of the new merchant class. As the interests of commerce gained currency, what had initially been a matter of local interest increasingly came into the purview of the national union.

This occurs because these precedents, in effect, represented a bar against competition. This was in fact the reason why corporations were publicly chartered in the first place.²⁴⁴ Corporations, or the granting of corporations, represented a contract; whether or not they served a public purpose should not have been questioned by the court. As such, those contracts presented a right that could not be impaired. The combination of that right with the prevailing view on the concept of property, which, borrowing from Blackstone, entailed a monopoly over its use,²⁴⁵ proved to be an incentive for private gain at the expense of the public.

The conflict between private and public begin to take shape in *Gibbons v. Ogden*;²⁴⁶ the case concerned a privilege given by the New York State Legislature to a steamboat ferry line in water under its jurisdiction. The company attempted to use the same tactics across different jurisdictions in an attempt to build a monopoly over that commercial enterprise. Concerns over the loss of competition, mainly voiced by rivals, were articulated in terms of a violation to the commerce clause. In his opinion, Marshall

²⁴⁴ Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, Studies in Legal History (United States of America: Harvard University Press, 1977). At 122.

²⁴⁵ *Ibid.* at 110.

²⁴⁶ *Gibbons V. Ogden.*

demonstrated a preoccupation with the case and repealed the act, claiming that it had interfered with the dormant commerce clause. But he did so through the principle of pre-emption and not because he understood that Congress' powers really included complete regulatory powers over commerce.²⁴⁷

Only after Marshall retired, however, did the Court fully confront the division between public and private purposes. The case in which it did so, namely *Charles River Bridge*,²⁴⁸ was still marked by his presence, and the case itself did not comport too stark a distinction for the Court to reject what it had stated in *Fletcher*. The proprietors of Charles River Bridge were complaining because, having been granted a license to build a toll bridge, a competitor had also been given a similar permission. Thus, the juridical question was whether or not Charles Bridge was entitled to compensation for this economic injury.

Chief Justice Taney wrote the opinion for the Court. He attacked head on the nature of the legislation: "the power to regulating all these franchises which are *publici juris*, is in the government." Diverting a bit from *Fletcher*, Taney relied on a careful interpretation of the text of the charter and, through this reading, what can thus be derived "by necessary implication." By this, he meant that there could not be implied from the property rights transferred through contracts any right or privilege to a monopoly: "every man has a natural right to buy and sell these articles; but when this right, which is common to all, is conferred on one, it is a monopoly, and as such, is justly odious." He

²⁴⁷ Tushnet, "Rethinking the Dormant Commerce Clause."

²⁴⁸ *Proprietors of Charles River Bridge V. Proprietors of Warren Bridge*, 36 US 420 (1837).

then went on to explain that bridges and ferry were all public franchises in the sense that “they belong to the sovereign.” The difference, however, only emerged when these franchises were granted to individuals or corporations because then no claim of monopoly could be raised: “they are not in derogation of common right.”

It is difficult to overstate the relevance of this *dictum*. Scholars usually point to Story’s bitter dissent²⁴⁹ to present the novelty of this case. To be sure, even Story conceded that grants could not imply a monopoly, but he protested not only against the ensuing insecurity over investment (“the millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy”), but also against the conferring of a strict interpretation to the charter, because it could “create a ruinous competition.” This last point was precisely what was a stake: in *Charles River*, by finding a natural right to commerce, the court founded an economic privilege: that of allowing “deliberate harm to others in the context of competition.”²⁵⁰ In other words, the economic system could function without being constrained by the legal system.

Although it is possible to claim that this achievement signals the coupling between two social systems, one should be careful in envisioning here the process of a double reflexivity that, with time, would develop its own constitution.²⁵¹ As Teubner claims, for a constitution to happen in other societal regimes, it is essential that the

²⁴⁹ Horwitz, *The Transformation of American Law, 1780-1860*. At 118.

²⁵⁰ Luhmann, *Law as a Social System*. At 400.

²⁵¹ The concept of double reflexivity is used by Teubner to designate the constitutionalization of regimes. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*. At 104.

reflexivity of both law and economics be supported by Hart's concept of secondary norms.²⁵² Waldron has already questioned the usefulness of this formula for common law countries, arguing, instead, for research on how lawyers actually think about rules of change.²⁵³ But Luhmann's concern is for a fundamentally different order, and it demonstrates how troublesome the claim of deriving constitutional claims from other societal regimes is. In fact, what the Court did in those cases was, in reality, a change to the very structure of legal validity, which in legal terms can only be grasped in reference to other social systems. Validity is not given by secondary norms, but by mere circularity, that is, by the simple connection of operation in the legal system. It is, therefore, the assumption that the decision-maker has to make about the synchronicity of operations in other social systems.²⁵⁴

To understand how the Supreme Court was able to perform this operation, it is necessary to look at how norms were articulated, not as a product of intended or desired activity, but in a contextualized way: its decisions were, in part, the product of "underlying social forces and evolutionary trajectory."²⁵⁵ In the first years of the American Republic, not only was a quest for independence indispensable, so too was the problem of money. Short on reserve supplies, the nation's distant location and the political bickering over the charter for a national bank forced the economy to develop a market for bills of credit. In legal terms, these problems were translated into a

²⁵² Herbert Lionel Adolphus Hart and Leslie Green, *The Concept of Law*, Clarendon Law Series (Oxford: Oxford University Press, 2012). At 100.

²⁵³ Waldron, "Who Needs Rules of Recognition?."

²⁵⁴ Luhmann, *Law as a Social System*. At 122-127.

²⁵⁵ Blokker and Thornhill, "Sociological Constitutionalism." At 7.

constitutional protection of property and contracts, which meant, as capital was in short supply, that those who had property or had entered into contracts should have sufficient guarantees of an expected return.

Charles Bridge was thus a case in point. Having been granted the toll revenue, it seemed fair that, with regard to the term of the grant, it should last as long as necessary for the investment costs to be fully recovered. But this happened fast, and what was initially perceived as a right soon came to be regarded as an “odious” privilege.²⁵⁶ Indeed, as development began to take shape in America, those who had been granted privileges now seemed to be too well off.

They were especially too well off for *local* communities. This is not difficult to fathom. Investments in the early years meant large, mainly public, localized improvements: turnpikes, bridges, roads, and ferries. It was the citizens living within these communities who were more inclined to complain to their local politicians about financial excesses. That, in turn, fuelled political parties, which were then divided by one contentious problem: how much power should be taken away from the states so that the union could prosper. *Charles Bridge* were the first dividing cases over which Taney would preside. He was a Justice appointed by President Jackson after having loyally and staunchly defended his democracy platform as an attorney general. His presidency marked the turn of the courts toward more power for states and, mainly, for states

²⁵⁶ Horwitz, *The Transformation of American Law, 1780-1860*. At 119 et sq.

legislatures. Thus, *Charles Bridge* was not so much a victory for competition, as it arguably is now, but for state legislative power.

This issue was also at the center of Story's dissent. The claim of natural rights and natural justice, who might seem blurred to the positivists of the twentieth century, then seemed not to be relevant. The key question was how the court could hold such different views in *Fletcher* and in *Charles Bridge*? In other words, how could the extension of the powers of the state and of the union be normatively articulated?

Implied powers, however, were only a tentative scheme for beginning to deal with the cases that started to come before the Supreme Court. A much more fruitful approach, and one that took years to develop fully, was that of conflict of laws. The development of this theory in the United States Courts is not easy to summarize, for at least two reasons: America's experiment with it was much more practical than theoretical, and, as a result, the use of the principles of conflict of laws was non-systematic, especially in the initial years of the antebellum program.

The challenging experience of American Federalism is that it combined two key features for solving concerns around legislative powers. Union powers were subject-matter and were enumerated. State powers were territorially-based and residual. As we have seen, in order to understand the powers the Union had, the Supreme Court applied concepts such as "implied powers" in an attempt to deduce from the dictionary meaning of a word the "purpose" of a given clause, the difficulty of deriving meaning from these general clauses notwithstanding. With state powers, the question was different. As they were territorially limited, the Supreme Court had to decide to what point it could claim

jurisdiction. The answer also relied on subject-matter competences. Were it for property, for instance, the law of domicile would apply. Were it for obligations, where they were established or where they were to have an effect would be taken into consideration. If the question concerned none of these, then the court could out of comity decide which law apply.

But about movable property? More precisely, what about that human property brought mainly from Africa? The answer Justice Story gave is tellingly not because he abhorred slavery—although this itself is another story—but because comity would provide an answer. In other words, slavery was a political problem not from the perspective of the slave, but from that of the relationship between the union and the states.

Comity was a concept that was loose enough to forge the law's validity: it was used to forge a union among states around perhaps the most difficult remaining.²⁵⁷ In this respect, the essence, for want of a better word, of the American Constitution at that particular time was precisely the question of slavery and how a Constitution that was based on contracts, property, and commerce could bind all states alike, those that held

²⁵⁷ This point is clearly made by Cover: “on a theoretical level, then, choice of law presented no challenge to a positivist view of law and sovereignty. The authority for ‘lawmaking’ for creating rules of decision, is plenary in the polity of the forum court whether or not there are multistate dimensions. However, when such multistate dimensions are present, the forum court may, and ordinarily will, look to the law of another state for the content of its rule of decision. But this practice is one of comity, not compulsion. [...] How does a court know when to comply with the ordinary practice of comity and when to refrain? Principles and rules of choice-of-law begin to answer such question. [...] Since choice-of-law principles are designed to determine fairly which of conflicting local law rules are to govern, it was deemed necessary to construct those choice-of-law rules out of the universal of jurisprudence underlying all law.” In: Cover, *Justice Accused: Antislavery and the Judicial Process*. At 84. It bears a striking similarity to Hart’s concept of secondary rules.

slavery legal and those that did not. However fragile such an arrangement was, as it indeed proved to be, the daunting task faced by the Supreme Court was to bridge unbridgeable differences.

The flexibility of the concept was, nevertheless, not only at issue in America. It was, firstly and usefully, argued before English courts in the notorious case of James Sommersett. Having been born a slave, Sommersett had travelled with his master to Britain. After a period in London, he argued that he could no longer be a slave, as slavery in Britain had been outlawed. This case against slavery was sustained by Lord Mansfield on the grounds that it was morally and politically objectionable, and therefore English courts were under no obligation of international comity to respect that kind of a claim of property from a foreign citizen.²⁵⁸

In the United States, the very same argument first appears—and the author insisted on this point himself—in Samuel Livermore’s *Dissertation on the questions*

²⁵⁸ The use of the concept by Lord Mansfield is directly linked to the studies of Ulrik Huber. Their reception in Scotland, however, seems more of a happenstance. As the result of the independence war in the late fifteenth century, Scots were banned from Oxford and Cambridge. Although in later years they would open their own University, there remained a tradition for sending youngsters to study in Europe, mainly at Dutch universities. This is probably how Lord Mansfield came into contact with Huber’s doctrine, while giving little emphasis to other relevant authors. See Alan Watson, *Joseph Story and the Comity of Errors* (University of Georgia Press, 1992). At 80.

According to Huber, the rules of conflict of laws depended exclusively on three rules: a) the territoriality of state norms; in other words, the rules a state makes cannot have effect beyond its borders; b) whoever finds himself within the limits of a government are subjected thereof; c) due to comity, sovereigns will recognize the acts produced in another state, provided they conform to the rules produced within its borders. The interpretation of this topic relies on another passage by Huber, who seemed to suggest that it was not out of a political decision that the rule of comity ought to be interpreted, but as a discretion directed to the courts. He claims that comity derived “not exclusively from the civil law but from convenience and the tacit consent of nations.” Lorenzen, “Huber’s De Conflictu Legum.” At 376 and 378.

For a more contemporary interpretation, Joel R. Paul understood Hubner’s maxims as stating that “the forum court was free to decide whether allowing foreign law to operate in its territory was consistent with the power and rights of the forum state and its citizens.” See Joel R Paul, “The Transformation of International Comity,” *Law & Contemp. Probs.* 71 (2008). At 23.

*which arise from the contrariety of the positive laws of different states and nations, in which he claimed that “comity is to be exercised by those who administer the supreme power.”*²⁵⁹ Such a duty, he seems to suggest, was not bestowed upon judges.

Livermore would later have the chance to present his argument before the Supreme Court of Louisiana. In *Saul v. His Creditors*, he argued the appeal for the syndics of the insolvent as appellant. The facts of the case were summarized by the Court: “that Saul and his wife intermarried in the State of Virginia, on the 6th of February, 1794, their domicil being then in that state; that they remained there until the year 1804, when they removed to the now state of Louisiana; that they fixed their residence here, and continued this residence up to the year 1819, when the wife died; that after their removal from Virginia, and while living and having their domicil in this state, a large quantity of property was acquired, which at the death of the wife remained in the possession of her husband, the insolvent.”²⁶⁰

The children contended that they had, as acquests and gains, a right to one-half of the property. However, the appellants claimed that, as the marriage had taken place in Virginia, and by Virginia law there were no inheritance rights, the property belonged exclusively to the surviving husband.

After stating the facts, the Court went on to ascertain that the laws of Louisiana did not apply to the case, the reason being that the marriage was contracted out of the

²⁵⁹ Samuel Livermore, *Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations. By Samuel Livermore... N. I. Containing Two Dissertations* (B. Levy, 1828).
5 Mart.(n.s.) 569, 1827 WL 1936 (La.), 16 Am.Dec. 212.

state and before the applicable laws were effective. The Court, then, examined the Spanish law that was purportedly applicable, since Louisiana had only recently gained independence, and decided that an analysis of the laws enacted by the government were insufficient for grasping the common law of the country, what it referred to as “jurisprudence.” It was the construction given to a given statute, that came “recommended and fortified by every sanction that can give it value in the minds of those who sit in judgment; and whose duty is, to pronounce what the law is, not what it ought to be.” Although such construction was not necessarily binding, it touches the comity of nations, “on which the opinions of writers not living in Spain, are entitled to equal weight with those who professedly treat of her laws.”

But comity, the Court recalled, “is, and ever must be uncertain.” It added:

It must necessarily depend on a variety of circumstances, which cannot be reduced within any certain rule. That no nation will suffer the law of another to interfere with her own, to the injury of her citizens: that whether they do or not, must depend on the condition of the country in which the foreign law is sought to be enforced – the particular nature of her legislation – her policy – and the character of her institutions. That in the conflict of laws, it must be often a matter of doubt which should prevail, and that whenever that doubt does exist, the court which decides, will prefer the law of its own country, to that of the stranger.

The choice of illustration to present this point could not be more telling: the laws of slavery--“Suppose the individual subject to it is carried to England or Massachusetts; – would their court sustain the argument that his state or condition was fixed by the laws of his domicil of origin? We know, they would not.”

Although relevant to the purposes of this chapter, these arguments did not seem to reflect the primary focus of the solution to the case. Of course, the Court had to respond to the claim that the case, had it been presented elsewhere, would perhaps entail a

different solution. However, “how the question would be decided in that country, if an attempt were made the authority of French and Dutch courts, and lawyers, to make them abandon a road in which they have been travelling for nearly three hundred years, we need not say.” For the question, the Court argued, would be centered on whether or not a tacit contract had been entered into by the parties.

Comity did not take too long to be presented before the Supreme Court. The first case in which the Supreme Court dealt with the question was in *Martin v. Hunter’s Lessee*,²⁶¹ in which a British national contested the confiscation of his property by a piece of Virginia legislation that stated that Loyalists in the American Revolution were liable to forfeiture. Virginia’s Supreme Court had upheld the confiscation, claiming that the treaty with Britain did not apply to the case. The Supreme Court disagreed and remanded the case back to Virginia so as to have it decided according to the treaty.

The Supreme Court of Virginia, for its part, refused to comply, stating that “the appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the Constitution of the United States.” The U. S. Supreme Court then reversed the judgement in an opinion written by Joseph Story. He firstly dismissed the claim that state courts, as part of the sovereignty of states themselves, were not bound by the decisions of the Supreme Court because the text of the Constitution declares that it was ordained “by the people of the United States.” Thus:

The Constitution was not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions, for the powers of the States depend upon their own Constitutions, and the people of every State had the right to modify and restrain them

²⁶¹ *Martin V. Hunter’s Lessee*.

according to their own views of the policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the State governments by their respective Constitutions remained unaltered and unimpaired except so far as they were granted to the Government of the United States.

This construction, he added, is also based on the text of the Bill of Rights. After dismissing the claim that the Constitution granted absolute sovereignty to the states, Story rejected the possibility of having a limited jurisdiction, because the constitution had, in his view, directly commanded the powers to the courts.

In his concurrence opinion, Justice William Johnson brought up a curious argument. Virginia's court was obliged to follow the ruling of the Supreme Court not because of mandatory imposition, but out of comity: "there is one claim which we can with confidence assert in our own name, upon those [state] tribunals—the profound, uniform and unaffected respect which this court has always exhibited for state decisions, gives us strong pretensions to judicial comity."

In comity appeared once again, in a more contextualized fashion, in *La Jeune Eugenie*,²⁶² a case in which a vessel was captured off the African coast allegedly engaged in slave trading. As is well known, the United States had, at the beginning of the nineteenth century, passed laws that forbade slave trading. The vessel, sailing under the French flag, had been seized by Lieutenant Robert Stockton and was brought to Boston, where the Districted Attorney filed a libel for the forfeiture of the property. The French consul responded on behalf of the alleged owners and of his government to recover the property. After appeal, the case was heard by Joseph Story, who, riding the circuit of

²⁶² *United States V. La Jeune Eugenie*, William P. Mason (1821).

Massachusetts, wrote the opinion in which he simply dismissed jurisdiction out of respect to France's property claims, which, if so enforced, would have to be given by the United States.

Story, however, did have a chance to consider some of the arguments presented by the libellants:

The argument on the part of the libellants proceeds on some, or all of these grounds. (1) The law of nations is founded on the principles of justice and humanity. This law must forbid slavery, because slavery is inhuman and unjust. (2) The law of nations, if it does not forbid slavery, universally, forbids the African slave trade; because, that trade is unjust, inhuman, and barbarous. (3) The municipal prohibitory laws of our own nation and of the nations of Europe, the recent negotiations in Europe, and the treaties, which have followed them, are evidence that the slave trade is illegal by the law of nations. It is insisted, that the slave trade has been wrong for six hundred years; that it ought now to be broken up, and by judicial sentence. If slavery is illegal by the law of nations, that fact will appear by the usage and customs of nations. If it does not appear from custom and usage, to be so, nothing but international treaties will show it to be so.

Story agreed with them:

I have come to the conclusion, that the slave trade is a trade prohibited by universal law, and by the law of France, and that, therefore, the claim of the asserted French owners must be rejected. That claim being rejected, I feel myself at perfect liberty, with the express consent of our own government, to decree, that the property be delivered over to the consular agent of the king of France, to be dealt with according to his own sense of duty and right.

This point has been clearly made by Joseph Story in his commentaries on the American Constitution. After a long discussion of the history of the Constitution, Story attempted to show that its nature ought to be understood as different from that of the Articles. His objective was to argue against Jefferson, who had interpreted it as a compact between states. According to Story, the Constitution could only have been interpreted through its own language, since it is, as it says itself, a law.

Story then explains why the Supreme Court should have an absolute authority over other branches of government. He first recalls Hamilton, on Federalist No. 33, to acknowledge that, due to the distribution of powers clause, whenever a functionary is to

use his power, he must first decide upon the limits of so doing. In other words, he has to decide if “the act can be done.”²⁶³ The same procedure holds for collective groups, such as Congress. Thus, the different governmental functions were all independent and sovereign to decide on their own competences.

Story highlights that this view is somewhat different than the one held by Jefferson, who claimed that these rights was not even bound by a judicial authority.²⁶⁴ But again, he responds with the language used by the constitution itself. According to articles 6 and 3, “the constitution is the supreme law; the judicial power extends to all cases arising in law and equity under it; and the courts of the United States are, and, in the last resort the Supreme Court of the United States is, to be vested with the judicial power.”²⁶⁵ Here is where he derives his well-quoted inference that “the power to construe the constitution is a judicial power.”

Be that as it may, Story might have used the case to settle a dubious objective. The case acquired high significance in the Monroe administration, as can be grasped by the reference Story makes in his opinion to the letter the President had sent him. The solution he drew appealed both to proslavery states, by recognizing France’s rights, and to northern states, through his harsh criticism of slavery.²⁶⁶

²⁶³ Joseph Story, *Commentaries on the Constitution of the United States*, vol. 2 (Little, Brown, 1858). § 374.

²⁶⁴ It is worth noting that, in the Federalist papers, this argument is subtler. Madison, for instance, in Paper 44, explains that a violation of the State constitution would seldom be noticed because it is up to their own authority to check any violation of its own rules.

²⁶⁵ Story, *Commentaries on the Constitution of the United States*, 2., § 376.

²⁶⁶ Story himself was keen on presenting this opinion as a harmonious solution to a conflict over the status of slavery, although it has also been claimed that the decision was linked with concerns over French and

Thus, as the concurrence of Justice Johnson in *Hunter's Lessee* indicates, comity seemed to provide an ambiguous ground on which to justify paradoxical constructs, almost as if vindicating what A. V. Dicey would, years later, call a capricious form of decision.²⁶⁷

Story himself would have the chance to best present his argument. In his *Commentaries on the Conflict of Laws, Foreign and Domestic*,²⁶⁸ he attempted to interpret Huber's maxims in light of the decisions earlier held by the Court in which he served. He cited Livermore's definition, but also remembered a specific passage of Huber in which, according to Story, the rule of comity was better explained: the matter of comity

is to be determined, not simply by the civil laws, but by the convenience and tacit consent of different people; for since the laws of one people cannot have any direct force among another people, so nothing could be more inconvenient in the commerce and general intercourse of nations, than that what is valid by the laws of one place should become without effect by the diversity of laws of another; and that this is valid by this is the true reason of the last axiom, of which no one hitherto seems to have entertained any doubt.²⁶⁹

Story places the exceptions made to the personal statute, i.e., the rule that ought to apply out of allegiance to the country of origin, in the second maxim, stating that these exceptions are well grounded in the laws of nations. Citing Blackstone, he concurred with his view, which explains the applicability of extraterritoriality of personal positions:

American relations. DU See, "International Norms and Politics in the Marshall Court's Slave Trade Cases," *Harv. L. Rev* 128, no. 2 (2015).

²⁶⁷ Albert Venn Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons, Limited, 1896).

²⁶⁸ Joseph Story, *Commentaries on the Conflict of Laws: Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Little, Brown, 1872).

²⁶⁹ *Ibid.*, p. 30.

Natural allegiance is, therefore, a debt of gratitude, which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance. An Englishman, who moves to France, or to China, owes the same allegiance to the king of England there, as at home, and twenty years hence, as well as now.²⁷⁰

But Story construed the argument as though it meant a principle of harmonization because he conceded that every sovereign nation had a “right to bind its own native subject everywhere,” a point that ought to be interpreted as a “claim and exercise of sovereignty over them, and not of its right to compel or require obedience to such laws on the part of other nations.” The rule of comity, then, derived from the exceptions to the *statuta suo clauduntur territorio*.

However, that claim was not concerned with defining how a foreign law could have extraterritorial effect in any given case. Every state had a right to do so. It could simply state that no foreign law was to be applicable within its territory, or only some. If either laws or custom provided which rules would be held applicable, then every person bound by its laws would have to be compelled to follow them. But “when both are silent, and then only, can the question [of comity] properly arise, what law is to govern in the absence of any clear declaration of the sovereign will.”

It was not enough for him to have the same solution as the one presented, for instance, by Boullenois in his *Traité des Statuts*, in which, in such cases, the interpreter would have to search for the solution to a given case, determining whether the statute was predominately related to subjects—in which case it would be a matter of the original

²⁷⁰ Ibid., P. 22.

legislations—or to things, in which local rules applied. This, again, was mainly because this arrangement was not a solution for cases regarding slavery.

The only firm ground on which to build a foundation was to be found in “a sort of moral necessity to do justice”: “The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.”²⁷¹

That, in turn, is a judgement left to each nation. In case of silence on the matter, “courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its own policy, or prejudicial to its interests.”²⁷²

It is only through such a detailed account of Story’s argument that his concept of law of nations might be grasped:

It was not until the revival of Commerce on the Shores of the Mediterranean, and the revival of Letters and the study of the Civil Law by the discovery of the Pandects, had given an increased enterprise to maritime navigation, and a consequent importance to maritime contracts, that any thing like a system of international justice began to be developed. It first assumed the modest form of commercial usages; it was next promulgated under the more imposing authority of royal ordinances; and it finally became by silent adoption a generally connected system, founded in the natural convenience, and asserted by the general comity of the commercial nations of Europe. The system, thus introduced for the purposed of commerce, has gradually extended itself to other objects, as the intercourse of nations has become more free and frequent. New rules, resting on the basis of general convenience, and an enlarged sense of national duty, have been, from time to time, promulgated by jurists, and supported by courts of justice, by a course of juridical reasoning, which has commanded almost universal confidence, respect, and obedience, without the aid, either of municipal statutes, or royal ordinances, or international treaties.²⁷³

²⁷¹Ibid., p. 34.

²⁷² Ibid., p. 37.

²⁷³ Ibid., p. 5.

To be sure, comity was much more than what it became on continental Europe. It was the very glue that banded together many aspects of human life and, consequently, of constitutional and international law. Moreover, because “commerce is now so absolutely universal among all countries [...] that without some common principles adopted by all nations in this regard there would be an utter confusion of rights,” no treaties nor royal ordinances nor even municipal statutes could apply: the sanctity of the contract and the security of property rested on a hypothesized community, one that resembled the one by which Americans had established their own constitution.

Thus, the jurisprudence arising from the conflict of the laws of different nations, in their actual application to modern commerce and intercourse, is a most interesting and important branch of public law. To no part of the world is it of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent, states necessarily creates very complicated relations and rights among the citizens of those states, which calls for the constant administration of extra-municipal principles. This branch of public law may aptly be denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons and rarely to the dignity of national negotiations or national controversies.²⁷⁴

To use the conflict of laws axioms as a source of constitutional interpretation might seem confusing nowadays. But Story had a different conception of what makes a

²⁷⁴ Ibid., p. 9.

Constitution. In his famous *Commentaries on the Constitution*,²⁷⁵ Story attempted to define a Constitution through differentiating it from the other legal instruments.²⁷⁶ In order to understand his argument, it is important to notice that his objective, in describing the nature of a Constitution, was to provide a theoretical framework for the nature of a Constitution: the parties to it, who made it, who ratified it, what its obligation entail, how is it to be dissolved, who will determine its validity and construction, and who is to decide whether or not it has been violated.

Some years later, James Brown Scott did not even need to allude to comity to claim what Story had envisioned. In 1918, he published a book in which he argued that the experience of the American States, in their proclamation of freedom and independence in the Declaration of Independence, “would be of value in any attempt to strengthen that larger union of States which we call the Society of Nations”.²⁷⁷

One could perhaps wonder whether these are different views altogether and, if so, whether they entail an evolutionary view held by Story. If the two concepts seem contradictory now, it is perhaps a question more closely related to the way that comity was received later in the nineteenth century.

What is also striking is that this view on comity actually amounted to a negotiated solution rather than an imposition, if this differentiation is meaningful. Claims of comity

²⁷⁵ *Commentaries on the Constitution of the United States*, 2.

²⁷⁶ This reading of Story's Conflict of Laws with that of his constitutional oeuvre has already been suggested before. William R Leslie, "The Influence of Joseph Story's Theory of the Conflict of Laws on Constitutional Nationalism," *The Mississippi Valley Historical Review* 35, no. 2 (1948).

²⁷⁷ James Brown Scott, *Judicial Settlement of Controversies between States of the American Union: An Analysis of Cases Decided in the Supreme Court of the United States* (The Lawbook Exchange, Ltd., 1919)..

often came with the requirement that the reasons given would have to show due respect for the rules enacted in a given state. This is remarkable if one analyzes Wächter's defense of a vested rights principle within the federal body "because a state is required to make sure that rights established within one of its subunits are recognized everywhere within the state."²⁷⁸

All this remains, now, part of an entrenched history of the concept. In continental Europe, mainly through the influence of Savigny,²⁷⁹ *comitas gentium* won the day over Joseph Story's work.

The importance of Story, however, cannot be overstated, particularly if his texts are read in tandem with his opinions. In his book on the *Swift* case, Tony A. Frayer claims:

[...] Story's opinion represented an effort to provide federal judges with what amounted to a theory of conflict of law. In the Van Reimsdyk case of 1812, he had unsuccessfully tried to do the same thing by holding that "extraterritorial" issues were not to be governed by section 34. More than 30 years later, Story elaborated in more detail virtually the same idea in his *Commentaries on Conflict of Laws*.

[...]

Whether the Court actually intended that the concept of general law should function as a theory of conflicts is, of course, disputable. But given the uncertainty of the nation's local law, and the unique role of the federal courts in ameliorating this uncertainty, when federal judges decided cases according to the general law their logical process would resemble that described by Story as "comity." In a mercantile dispute the judge must consider principles that composed the jurisprudential amalgam known as international private law. His authority for doing so would be based on the right of discretionary judgement lodged, as Wallace said, in all courts when deciding commercial cases. The criterion for the selection of the appropriate principle (as it was in *Swift*) must be the utility, as defined by the necessities of mercantile practice and the standards of jurisprudential reasoning. The fact that Court's opinion in the Alabama Bank Cases in 1839 cited Story's *Commentaries on Conflict of Laws* shows that the justices deciding *Swift* were familiar with the concept of comity. Certainly the language of *Swift*, the line of reasoning in Story's treatise, the justice's other writings on commercial law, and the conception of law presented in *Hunt's* and the *North American Review* agree on this point.

²⁷⁸ Ralf Michaels, "Encyclopedia of Private International Law," in Wächter, *Carl Georg Von* (2017).

²⁷⁹ "Public and Private International Law: German Views on Global Issues," *Journal of Private International Law* 4, no. 1 (2008).

Whatever relationship there may have been in the minds of the justices between the concept of general commercial law and that of comity, it seems that *Swift* gave federal judges a theoretical foundation for applying discretionary judgement in commercial cases, where no such theory had existed before.

In summary, this chapter attempted to describe what constitutional interpretation through Supreme Court rulings meant in the antebellum years. To be sure, nothing in the decision or in the writings of the main authors of the time can be read as an inclusionary structure, if by this word we mean right-granting for large segments of the population. For some, particularly those who could now rely on the federal judiciary, the programs that the precedents enacted were empowering. Law could achieve this by simply delegating authority for other states or even for private individuals, provided that they were included in the economic system. This experience shows that law could achieve unity in a plurality of jurisdictions without necessarily being inclusive. In this sense, *Dred Scott*²⁸⁰ is both the worst decision that the Court could make,²⁸¹ but also its most representative.²⁸²

²⁸⁰ *Dred Scott V. Sandford*.

²⁸¹ Cover, *Justice Accused: Antislavery and the Judicial Process*.

²⁸² Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*. At 286. As part of this long precedential history one could also cite *The Antelope* case, in which a Supreme Court had held that possession of a slave on board of vessel was evidence of property, with a lament made by Justice Marshall on the inevitability of the legality of the trade and on *Prigg v. Pennsylvania*, in which comity was used to bar Pennsylvania anti-slavery laws from having territorial effect. See. *The Antelope*, 23 US 66. And *Prigg V. Pennsylvania*, 41 US 539 (1842).

This federalist structure largely remained the same until the present.²⁸³ Inclusionary decisions took too long to be felt. *Brown v. Board of Education* was decided almost a century after *Dred Scott*. To be sure, the progressive era of the last decades of the nineteenth century would eventually force both the enactment of Sherman Act and the demise of the *Swift* doctrine in the *Erie* case.²⁸⁴ However significant these achievements were, they paled before slavery. A unity without inclusion might have cost America a civil war. To borrow from an oft-cited article by Robert Cover, this was not justice accused, but justice denied.

²⁸³ Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation."

²⁸⁴ *Erie R. Co. V. Tompkins*, 304 US 64 (1938).

CHAPTER 2

From Constitutional Law to International Law: How Constitutional Law Shaped International Public Law

Following the claim that the principle against the prohibition of denial of justice engendered self-reflexive practices that required that the legal system evaluate its own validity, which, in turn, externalized the law's paradox toward a proceduralization, the previous chapter pointed to the theory of conflict of laws to claim that, in the constitutional experience of the United States, state courts, although formally independent of each other, were asked to apply precedents and legislation from other states. In other words, the question of legal validity and common law became intermingled because the Supreme Court created procedures, or Hart's rule changes, that told courts to understand as law norms that were created elsewhere or, simply, were foreign norms. Of course, the prohibition of denial of justice allowed courts sufficient room to adapt precedents, if cases so required, which is how they ultimately forged a unity.

By the turn of the century, Americans seemed confident enough to boast about their constitutional experience as being on par with other "civilized nations," as the Supreme Court seemed to suggest in *Dred Scott*.²⁸⁵ And this seemed to be a central point. Having inherited a British court system that no longer could not rely on British

²⁸⁵ Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*. At 286.

precedents as part of a *stare decisis* doctrine, the theory of comity made the American judiciary more porous to foreign precedents.²⁸⁶ In *Paquete Habana*,²⁸⁷ a confident Court could now proclaim that “international law is part of our law, and must be ascertained by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”

International law, as with that practiced by lawyers nowadays, was what in Europe was described as Private International Law. Public International Law was not even practiced, and the courses on this subject were mainly offered by History departments.²⁸⁸ The works of, first, the pacifist movement and, later, of the people involved in the American Journal of International Law founded the discipline as it is known today.

But in order for that to occur, the American position in the world would have to be presented in legalistic terms. And this was done by showcasing the unity of the legal system as a product of its ability in solving integration problems. Conflict of laws, then, was part of this program.

There are many venture points through which it is possible to study the influence of the American conflict of laws theory on international public law. This is mainly

²⁸⁶ As Pound remarks, in the formative era (the antebellum years), judicial organization was defined by three characteristics: a inherited court system that was almost the same as that of the British, a need for a rapid adaptation of the common law tradition to make it closer to that of America, and also a need to decentralize the “administration of justice and making it accessible to all under the pioneer rural conditions” that prevailed by the time of independence. Pound, *Organization of Courts*. At 91. See also Cover, *Justice Accused: Antislavery and the Judicial Process*. At 84.

²⁸⁷ *The Paquete Habana*, 175 US 677 (1900).

²⁸⁸ Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (Oxford University Press, 2016). At

because the concepts used to analyze the development of international public law at the beginning of the twentieth century were tightly connected and thus the beginnings of a professional organization were noticeable. Both reasons deserve closer scrutiny.

If an alien on foreign soil had entered into a contract or acquired property or even contracted marriage, the rules that would apply should a conflict emerge were to be dictated by private international law, or conflict of laws, as the discipline later became known in America. The problem that had begun to appear in the second half of the nineteenth century was of a different kind. Courts and mixed commissions were being asked to decide whether, by applying the *lex fori* of international law, it was possible to simply disregard any consideration of the laws of the state from which the alien was a national²⁸⁹.

As shown in the first chapter of this thesis, the answer given by conflict of laws would simply depend on comity: only courtesy and respect toward a foreign legislation would allow a court to apply foreign law. Against this position, which, for many, was not a secure form of adjudication, international lawyers began arguing that a minimum standard ought to apply. The standard was international in character, so courts would have to apply it if domestic legislation did not grant aliens sufficient protection.

²⁸⁹ As Edwin Borchard put it in the preface of his book: “practice has demonstrated that the mere fact that aliens have been granted the rights authorized by local law, and equality of treatment with natives, is not necessarily regarded as a final compliance with international obligations, if the local measure of justice and administration in a given case falls bellow the requirements of the international standard of civilized justice, although it is always a delicate proceeding, in the absence of extraterritoriality, to charge that a rule of municipal law or administration fails to meet the international standard.” Edwin Montefiore Borchard, *The Diplomatic Protection of Citizens Abroad, or, the Law of International Claims* (Banks law publishing Company, 1915).

Defining the content of a minimum standard of treatment was at the center of many international debates, both in academia—as evidenced by the articles published in the *American Journal of International Law*—and in practice, as it became a touchy issue in international relations. Among the rules attributed to this standard was the right to property, as understood in American legal practice through both a right of redress and a right of non-discrimination.

But the definition of a minimum standard was not the only means of discussing the same problem that frequently caught the attention of experts. The minimum standard was only the parameter through which the international responsibility of states for damages done within the territorial limits of jurisdiction could be asserted. This is because illegal acts done by a private individual could also entail international responsibility if it were proven that the state did not act according to the international standard.

That non-performance was, in turn, a “denial of justice,” a concept whose function was to define the acts through which conflict resolution by a state, be it through the judiciary or any other adjudicatory body in the other powers, would entail international responsibility if measured according to the minimum standard.

Conversely, the state to whom the injured alien was a national was entitled to protect its subjects both in cases when discriminatory measures were taken by a foreign state and when they were the victim of gross injustice. These measures of protection became known as “diplomatic protection,” and they could be invoked by the state, even if the individual right-holder did not consent to them.

In sum, the treatment of aliens became part of international *public* law and, so too, the limits of jurisdiction. But this problem was even harder to square, as jurisdiction was defined either by nationality or by citizenship or, most often, by territory. In all cases, the limits of jurisdiction were increasingly seen as being international, rather than national, in character.

The internationalization of jurisdiction was manifested in the concept of citizenship. To be sure, every state had the right to define according to its own laws who was to be a national. International law required only that whatever the definition, a minimum protection was to be afforded to aliens. Territory, however, was rather polemical. Every state had a right to its own territory, provided that it could *de facto*, or effectively, rule over it.

This overriding principle of efficiency, to use the well-known formulation of Antonio Cassese, was, in turn, used to provide a basis for the ultimate sanctions in international law: intervention and denial of recognition. Intervention was seen as justified whenever a state did not respect the property of, or denied justice, to an alien from an intervening country. In cases where intervention proved contentious, or even impossible, to apply—as in Soviet Russia or in Mexico—denial of government recognition was seen, by some authors, as justified.

All of these terms—minimum standard, international responsibility, denial of justice, diplomatic protection, jurisdiction, statehood, nationality and citizenship, territory, intervention and recognition—were closely linked to the problem identified here. The use of these terms was not settled, notwithstanding the fact that many of these

concepts are still contentious. However, the contextual analysis of how they were articulated not only reveals the conflicts to which they were being proposed as a solution, but also a constitutional dynamic akin to that of the United States, which, through the use of conflict of laws, had organized the complex relationship of these relatively unsettled legal terms. In the end, the ultimate answer would be provided via the very definition of the state, a definition that could only be given constitutionally.

But this is not to say that Americans were the first to develop the theory, or that the problem was only just emerging by the beginning of the twentieth century. Defining a concept of “denial of justice” is essential to any legal theory; it entails a precise separation between legislation and jurisdiction, and it is of fundamental relevance to the autonomy of the legal system.²⁹⁰ In International Law, this difference appears in the discussions over the legal or political nature of the discipline, so aptly described by Koskenniemi.²⁹¹ In the last quarter of the nineteenth century, a different perspective over the same question began to take shape in the question of compulsory arbitration.²⁹² For European states, mainly represented in the Hague Conference and in Institute of International Law, proper legal mechanisms would be used for justiciable demands, whereas non-justiciable claims would be better dealt with through the political system. In summarizing the understanding of the time, Lauterpacht indicates the basic elements of the theory:

²⁹⁰ Luhmann, *Law as a Social System*.

²⁹¹ Koskenniemi, "The Politics of International Law."

²⁹² Hersch Lauterpacht, "The Doctrine of Non-Justiciable Disputes in International Law," *Economica*, no. 24 (1928).

- (a) Legal disputes are such differences between states as are capable of judicial settlement by the application of existing and ascertainable rules of international law;
- (b) Legal disputes are those in which the subject-matter of the claim relates to questions of minor and secondary importance not affecting the vital interests of states, or their external independence, or internal sovereignty, or territorial integrity, or honor, or any other of the interests usually referred to in the so-called restrictive clauses in arbitration conventions;
- (c) Legal disputes are those in regard to which the application of existing rules of international law is sufficient to ensure a result that is not incompatible with the demands of justice between states and with a progressive development of international relations.²⁹³

It should be remarked that Lauterpacht himself expressly rejects the claim that if there is no previously ascertained law, there is no legal dispute. He remarks that there is “no case on record in which an international tribunal refused to adjudicate on a matter on the ground that there was no law applicable to the question.” But even if the concept of justiciability were to be rejected as unscientific, the position of American jurists on the topic that there should be a permanent and mandatory court to adjudicate international law gave rise to the claim of an “American” school of thought.²⁹⁴

As this concerns the very theory of international law, it is thus best to summarize the tenets of the American position. The concept of justiciability merely means that there should be enough redundancies that international adjudication can perform its function autonomously. The lack of redundancies, in turn, means that, should a decision be handed down, the law will be perceived as not secure enough and, thus, as less just. Be that as it may, how much is “enough” with regard to the question of redundancies is ultimately what the American enterprise entailed. The fact that the key international lawyers of that time were attempting to mirror American Federalism only shows how close the

²⁹³ Ibid. at 288-289.

²⁹⁴ "The So-Called Anglo-American and Continental Schools of Thought in International Law," *Brit. YB Int'l L.* 12 (1931).

interpretation of international law was to a constitutional dynamic. Another way of stating this same problem is through the concept of denial of justice.

As it has been shown in the first chapter, the prohibition of denial of justice can be seen as the separation of legislation from adjudication, a process that, in America, took the shape of new judicial organizations that were entitled to decide cases on the basis of comity. Comity was an exclusively judicial competence, as had been made clear by the courts.²⁹⁵ Thus, the articulation of such a principle in international law would necessarily engender that a separation between legislation and adjudication, or between “political” and “legal,” would also be made. This was precisely what “the doctrine of the limitation of the judicial process,” as Lauterpacht called it,²⁹⁶ aimed to do. If “denial of justice” was what ultimately gave the law an autopoietic system through a constitutional norm, then one must reckon that the founding fathers of an international constitutionalism were drawn from the generation that first called for an international court of justice.

More than an idea that was launched at international conferences, the project of a world court was deeply rooted in the American constitutional experience. One of the leaders of this generation, if not its most representative name, was James Brown Scott, who, at around the time of the Hague Conferences, edited two volumes on *The United States of America: a Study in International Organization and Judicial Settlement of Controversies Between States of the American Union*. The objective of these publications

²⁹⁵ Cover, *Justice Accused: Antislavery and the Judicial Process*. At 86: “the judge had a body of law to guide him, but it was case law, not statute”.

²⁹⁶ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: OUP Oxford, 2011). At 5.

was plainly indicated by the author himself: “to many it seems that the Court of the American Union [...] is the prototype of that tribunal which they would like to see created by the Society of Nations.”²⁹⁷ The court had such a function because the “essence, function and limits of judicial power” lay in “the distinction between judicial power and [...] political power.”²⁹⁸

This world view was also reinforced through the formation of a professional organization dedicated not only to the study of international law, but also to its practice. Presenting the role the United States played as a union of sovereign states was done not only by academic professionals, but by people who were directly involved in state building. Men like Secretary of State Elihu Root, President Woodrow Wilson, and James Brown Scott were not only theorists, but the prototype of American wise man.²⁹⁹

As Martti Koskenniemi has put it, “the social theory of these men was profoundly influenced by the technological and socio-economic change they witnessed around themselves and the possibilities it seemed to offer for the spread of welfare, humanitarianism and liberal-democratic government.”³⁰⁰ Moreover, these “wise men” were the first advocates for a minimum standard, claiming that any rule of comity—namely how property ought to be treated—would have to mirror their nation’s policy. Their view on the minimum standard effectively meant the transposition of the concept of

²⁹⁷ Scott, *Judicial Settlement of Controversies between States of the American Union: An Analysis of Cases Decided in the Supreme Court of the United States*. At viii.

²⁹⁸ *Ibid.* at vii.

²⁹⁹ Walter Isaacson and Evan Thomas, *The Wise Men: Six Friends and the World They Made* (Simon and Schuster, 1997).

³⁰⁰ Martti Koskenniemi, "International Law's Futures—Yesterday, Today, Tomorrow," *Law Beyond the State: Pasts and Futures* 18 (2016). At 74.

property to the international stage, since, for them, the requirement of protection was, precisely, just compensation.

This chapter aims to analyze both the context and the organizational structures through which the main legal arguments gravitate toward the idea of an international denial of justice. In so doing, it will first address how America's view on international law was globally articulated, mainly by reviewing its proposals for an international court of justice. It will then attempt to uncover a functional equivalent for the concept of comity, i.e., a legal operator that could help law to forge its own unity, a problem that seems to have mostly been articulated in the notion of "civilization."³⁰¹ The last part of this chapter will examine how these concepts were used in the few judicial occasions in which they appear: arbitrations over the rights of aliens abroad. This last point is mainly organized through discussions of Edwin Borchard's book on the *Protection of Citizens Abroad*. Although the subject has appeared in many instances, within the works of many international lawyers, Borchard was the first to dedicate an entire book to the topic and the first to publish a paper in the *American Journal* on the subject. In many ways, Borchard's ideas became the basis for future doctrinal studies over the formative period of public international law.

³⁰¹ *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001). At 127.

2.1 A More Perfect Society of Nations: The United States of America as a Study in International Organization

Alfred Verdross is frequently credit as the father of an idea of an “international constitution,” from his well-known book *Die Verfassung der Völkerrechtsgemeinschaft*.³⁰² The reason for this is not only the reference in the very title of his work to the constitutional idea, but also his effort, through the book, to describe the unity of the legal system. But, as one of the early commentators on the book remarked, the most relevant discussion was not on the concept of constitution, but that devoted to the concept of community.³⁰³ To be sure, Verdross also developed the idea of *jus cogens*,³⁰⁴ which would eventually find its way into the Vienna Convention on the Law of Treaties. Through this concept, a hierarchy of norms could be conceived, therefore making plausible the claim of an international constitutional order³⁰⁵--that is, if constitution is understood to refer to a hierarchy of norms. Be that as it may, Verdross’ thesis offered an answer to the question of legal unity as an object of analysis in legal

³⁰² Alfred Verdross, *Die Verfassung Der Völkerrechtsgemeinschaft* (J. Springer, 1926). For the claim of Verdross’ significance for international constitutionalism, see Bruno Simma, "The Contribution of Alfred Verdross to the Theory of International Law," *Eur. J. Int'l L.* 6 (1995). A more recent claim on fatherhood has been made by Thomas Kleinlein, "Alfred Verdross as a Founding Father of International Constitutionalism," *Goettingen J. Int'l L.* 4 (2012).

³⁰³ William I. Hull, "Die Verfassung Der Völkerrechtsgemeinschaft. By Dr. Verdross Alfred . Vienna and Berlin: Julius Springer, 1926. Pp. X, 230. Index. Rm. 15," *American Journal of International Law* 21, no. 4 (1927).

³⁰⁴ Alfred Von Verdross, "Forbidden Treaties in International Law: Comments on Professor Garner's Report on" the Law of Treaties", *The American journal of international Law* 31, no. 4 (1937).

³⁰⁵ The hierarchical claim is, to be sure, one of the strongest arguments to sustain the existence of international constitutional norms, as even the staunchest critiques of the idea seem to agree. Wahl, "In Defence of “Constitution”." At 242.

theory, but only to the extent that the constitutional problem had seemed to be already settled.

For Americans, that such a unity was possible was a solved question now a century old. The real challenge was asking whether legal unity in international law was worth raising at all. This is because legal unity, out of a sense of practicality, required that courts face the paradox of having to decide what they cannot decide. This, in turn, depended whether—and to what extent—an international judicial function could have its place in international society.

Of all German theorists,³⁰⁶ Hersch Lauterpacht was the first to notice the significance of the American challenge. He called the “question of the prohibition of denial of justice” the “doctrine of the limitations of the judicial process in international law,” a doctrine he equated with the difficult question of validity in international law. This is because, contrary to domestic legal orders where validity is imposed from outside, i.e., the international community, international law had no outer side. The question of sovereignty thus provided a dual avenue for answering the problem: it was both an argument in favor of obligatory arbitration and also a defense against it, since in international relations not all questions could be justiciable.

Lauterpacht then traced the origin of the modern version of the doctrine to three events: (i) the arbitral decision in the Alabama claims, a famous award in the Anglo-

³⁰⁶ Martti Koskenniemi, in the introduction he wrote for the new edition of Lauterpacht's *The Function of Law in the International Community*, is not referring, obviously, to Lauterpacht's nationality, but to his intellectual affiliations. See Lauterpacht, *The Function of Law in the International Community*. At xxxv. The German heritage, however, seems fading in the Lauterpacht of the second half of the twentieth century.

American Mixed Claims Commission established after the Civil War; (ii) the draft article on a procedure of international arbitration developed by the Institute of International Law; and (iii) the Hague Conventions. He seems to concede, though, that the key question of legal theory appeared in the treaties, and he dedicated the entire volume to answering it.

Americans indeed approached the question differently. For them, international arbitration, as the Anglo-American experience had demonstrated, could be a profitable venture, especially because Americans were preparing their own expansionary adventures.³⁰⁷ It seemed imperative, then, that international law should be made by lawyers themselves. The problem was that international public law was not even a discipline in law schools' curricula, and as Coates observes, if they were to resemble mere pacifists, their odds of gaining the ears of ruling elites would be diminished.³⁰⁸

Educating the "new popular masters of diplomacy," as Elihu Root referred to lawyers,³⁰⁹ was one the first projects James Brown Scott had envisioned. In 1902, he published the first case-law book in international law, a volume that has been reissued many times. In a series of articles, he defended the new discipline, arguing for its

³⁰⁷ Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*. At 60. Coates' argument pertains to some of the traditional historical assessment of the legacy of the American peace movement. For a more nuanced view on its legacy, see Valarie H Ziegler, *The Advocates of Peace in Antebellum America* (Macon, Georgia: Mercer University Press, 2001).

³⁰⁸ Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*. at 60. A possible reason for this is that the peace movement, at least in Britain, was mainly formed by small shop owners who had an ambiguous status in the new industrial society. Though not workers, they could not participate in the political affairs in the country, which is why opposition to war seemed a reformist plea against their perceived exclusion. See Eric W. Sager, "The Social Origins of Victorian Pacifism," *Victorian Studies* 23, no. 2 (1980). At 222.

³⁰⁹ Elihu Root, "The Basis of Protection to Citizens Residing Abroad" (paper presented at the Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917), 1910). At 273.

relevance for legal practice. In answering why international law should be taught in legal courses, he explained that international law was like constitutional law: “in like manner, International Law is administered in our courts when a suitor whether he be a sovereign or a private citizen knocks at the door of the court to secure by litigation the right he claims.”³¹⁰ As he stated in his speech at the Second Hague Conference: “it is a familiar doctrine [...] that lawyers and jurists of reputation are pre-eminently qualified to deal with questions relating to the organization and development of a court of justice.”³¹¹

The most remarkable achievement, to be sure, is the foundation of the *American Society of International Law* in 1906. After attending elite events in New York, Scott came into contact with people who, like him, desired a legalistic mindset for the peace movement.³¹² A significant improvement would come in the next few years, as Scott became the secretary of the Andrew Carnegie Endowment for International Peace.³¹³ Through the Endowment, Scott not only funded American legalistic institutions, such as the Society and its *Journal of International Law*, but also the *Institut de Droit International*.^{314, 315} As Scarfi remarked, the Endowment “brought together figures from

³¹⁰ James Brown Scott, “International Law in Legal Education,” *Columbia Law Review* 4, no. 6 (1904). At 419.

³¹¹ *The Status of the International Court of Justice: With an Appendix of Addresses and Official Documents* (New York: Oxford University Press, 1916). At 61.

³¹² Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*. At 66.

³¹³ *Ibid.* at 67.

³¹⁴ *Ibid.* at 97.

³¹⁵ A conspicuous sign of the relevance that pacifism had in elite circles was given by Coates’s speech at the Second Hague Conference. He began his presentation by citing a letter from President Roosevelt to Mr. Carnegie that read: “I hope to see adopted a general arbitration treaty among the nations, and I hope to see the Hague Court greatly increased in power and permanency, and the judges in particular made permanent and given adequate salaries as to make it increasingly probable that in each case that may come before

the US political and academic establishment, most of whom were closely tied to Carnegie himself and to the Republican Party, notably Root, Scott, and Nicholas Murray Butler.”³¹⁶ Through the Endowment, Scott managed much more than the establishment of a legal discipline or of an academic journal: the very projection of his country abroad could be done through a conservative stance.

What brought these men together is usually described as a utopian and pacifist ideal.³¹⁷ And to a certain extent, that is right. The pacifist movement dated from the early antebellum years, and their main line of defense was a religious ideal towards peace. As such, it was much more of a “second-class reform.”³¹⁸ With the progressive era, however, as new segments of the population went to the urban centers, a demand for social rights was articulated within the vocabulary of that very same pious religious movement. This time, however, the demands were more complex and some, such as the People’s Council of America for Democracy and the Terms of Peace, were more radicalized. It seems, thus, that when the first generation of lawyers embraced the peace movement it was more

them they will decide between nations great or small, exactly as a judge within our own limits decides between the individuals, great or small, who come before him.” In: Scott, *The Status of the International Court of Justice: With an Appendix of Addresses and Official Documents*. At 55.

³¹⁶ Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (Oxford: Oxford University Press, 2017). At 34-35.

³¹⁷ Mark W Janis, *The American Tradition of International Law: Great Expectations, 1789-1914*, vol. 1 (Oxford: Oxford University Press, USA, 2004). At 134.

³¹⁸ C Roland Marchand, *The American Peace Movement and Social Reform, 1889-1918* (Princeton University Press, 2015). At 389 ff.

out of a concern for affiliating with a specific version of that movement than out of a radicalized notion.³¹⁹

Scott's introduction to William Ladd's *An Essay on a Congress of Nations for the Adjustment of International Disputes without Resort to Arms*³²⁰ also points to that conclusion. The printing of the decades-old book relied on funding from the Carnegie Endowment. In his text, Scott sees in Ladd's work ominous signs of the struggle that the men in the American Society for International Law were beginning to undertake toward building an international court of justice.

Although it is impossible to demonstrate what the actual motivations behind the movement were, there are at least two possible concerns. The first is with political tensions within the United States. The Lochner era was marked by a series of protests and revolts against the judicial bench. The key accusation was that judges simply had no regard for the interests of the population at large, and as a result, progressive doctrines began to emerge.³²¹ In contrast with popular sentiment, lawyers remained steadfast to their professional. They professed an independent stance, unwavering in the face of political bickering, which translated into a reverence for the judicial activity that could be carried over into international relations.³²² Telling were not only Elihu Root's and Joseph

³¹⁹ It seems that in consequence of these pressures on political inclusion, the Constitution, under siege, externalizes its limits in order to use international law not as a check to democratic empowerment, but as an escape from it. If political pressures required inclusion, lawyers attempted to be included elsewhere.

³²⁰ William Ladd, *An Essay on a Congress of Nations for the Adjustment of International Disputes without Resort to Arms* (The Lawbook Exchange, Ltd., 1916).

³²¹ Morton J Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992). At 31.

³²² Marchand, *The American Peace Movement and Social Reform, 1889-1918*. At 55.

Choate's conversations on international law as an avoidance technique for how to "handle irate American public opinion," but also the very fact that two of the most conservative Supreme Court Justices had a seat on the board of the American Society: Fuller and Brewer.³²³

The second issue came from a concern with the legal profession. As part of the revolt against the judiciary, political measures were being discussed in order to curb what was perceived as an activist court.³²⁴ In voicing these concerns, lawyers drew analogies with the Supreme Court of the United States.

James Brown Scott frequently published papers on this subject. The introduction of Ladd's book was a case in point. In it, Scott had summarized all the previous European experiences with an international congress and all philosophical accounts in favour of settling justice in an international order. He cited Emerie Crueé, Grotious, Rousseau, Bentham, and, of course, Kant. On the European experiences with a Congress of Nations, he mentioned the Holy Alliance and Utrecht, only to conclude that: "the various projects which have been outlined in passing [...] made little or nor impression upon the public at large." By public, he meant "public opinion."³²⁵ This, in turn, was Ladd's ability: "[Ladd] accepted nations as actually constituted" because "he realized the necessity of following

³²³ Ibid. at 55.

³²⁴ Ibid. 61.

³²⁵ The reference to public opinion, but also to the moral obedience a state owes to Supreme Court rulings, was at the center of the analogies made by Scott. That international law had no sanction, as John Austin pointed out at the turn of the century, was simply a non-problem. In the United States, obedience to the rule of law did not depend on sanctions. James B. Scott, "The Legal Nature of International Law," *Columbia Law Review* 5, no. 2 (1905). At 128 ff. It is possible, though, that Scott's defenses of the American model were not primarily targeted against John Austin, but against Theodore Roosevelt. Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*. At 89.

public opinion, and the spirit of his project was that an educated public opinion might in time force itself upon the government of its choice.”³²⁶ For Scott, Ladd outlined at once “the policy of his Congress and the actual program of the Hague Conferences.” Scott’s introduction seemed, thus, targeted not for the casual reader of Ladd’s proposal, but to his colleagues in the *American Society of International Law*. Given that the document was written in 1916, after the failure of the proposal for an international court and in the middle of a great war, Scott called on his friend to keep their commitment to the project, because although Ladd’s ideas were bold, “he believed that his plan was practical, and believing, likewise, that it was wise and just, he felt that it could wait years, if need be, for its realization, and that repeated failures would not prevent ultimate triumph.”³²⁷

The words must have resonated in the minds of his colleagues. After all, what had united them was precisely the desire to see on the international stage a court similar to the one they had at home. They had mustered all their resources to present the case at the Hague Conference of 1907.³²⁸ On that occasion, American arguments were presented by Joseph Coates and James Scott Brown. Impressive though they were, Rui Barbosa, one of

³²⁶ Ladd, *An Essay on a Congress of Nations for the Adjustment of International Disputes without Resort to Arms*. At xxxviii.

³²⁷ *Ibid.* at xlv.

³²⁸ Judging only by the traditional account of the history of international law, one might get the impression that it was the Europeans, not the Americans, who pushed for an international court. That same impression took hold of Barão de Rio Branco, then the Brazilian Minister of Foreign Affairs. But in a telegram sent by Rui Barbosa, the Brazilian delegate at the Conference, he told him the origin of the plan: “Your Honour is mistaken by pointing to the Europeans as owners of this invention. Capital responsibility belongs to the Americans followed by Germany determined to soothe its reactionary position against principles of mandatory arbitration.” In: Centro de História e Documentação Diplomática (CHDD), *Li Conferência De Paz, Haia, 1907: A Correspondência Telegráfica Entre O Barão Do Rio Branco E Rui Barbosa*, ed. Maria do Carmo Strozzi Coutinho (Brasília: FUNAG, 2014). At 19. Scott later conceded that one of the causes of the failure was that the only delegation that was prepared for the proposal was the American one. Scott, *The Status of the International Court of Justice: With an Appendix of Addresses and Official Documents*. At 38.

the members of the Brazilian delegation, did not seem to acquiesce to the analogies being made. Instead, he defended the idea of sovereignty, claiming that only by this right were states able to be seen as equals in an international community.³²⁹

Judging by the impression Rui Barbosa made, which won him the nickname of “the Eagle of the Hague,” one might get the impression that Brazilian opinion had won the day. Scott, however, presented a different view. Assessing the results of the conference in a book published in 1916, he conceded that the problem was that states wanted a judicial assembly, not a court of a limited composition. Since each state wanted to be represented, “the difficulty was mathematical, and no satisfactory method was found at the time to reduce forty-four to fifteen without excluding judges from some of the states.”³³⁰ But the reports published after the conference had an even more optimistic tone; the American one said: “it is evident that the foundations of a Permanent Court have been broadly and firmly laid; that the organization, jurisdiction and procedure have been drafted and recommended in the form of a code which the powers, or any number of them, may accept, and by agreeing upon the appointment of judges call into being a court at once permanent and international. A little time, a little patience, and the great work is accomplished.”³³¹

In hindsight, it looks as though patience prevailed. To be sure, Barbosa’s objections were never targeted against the very existence of the Court, but only against its

³²⁹ Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*. At 92.

³³⁰ Scott, *The Status of the International Court of Justice: With an Appendix of Addresses and Official Documents*. At 40.

³³¹ *Ibid.* at 40-41.

composition. Brazil had voted in favor of the clause of permanent arbitration, provided it did not “affect the vital interests, the independence or the honor of any of the said States,” as the Article 16a stated. The problem was with Article 16f, which read that “it is understood that arbitral awards, in so far as they relate to questions coming within the jurisdiction of national courts, shall have merely interpretative force, with no retroactive effect on prior decisions.” This is because Brazil “does not mean to assume the obligation to submit to arbitration disputes referring to international stipulations, the application and the interpretation of which come within the jurisdiction of the national courts.”³³² In the end, however, the American proposal was reflected in the Statute of the Permanent Court established under the League of Nations.³³³ The appointment procedure, after much debate, was approved.

In the meantime, Scott’s legacy in the *American Journal of International Law* and in the publications funded by the Endowment help to forge an image of an international law similar to that of a constitutional unity. In was in this period that Scott published the works that were destined to present the Supreme Court as a model for the new world court. The readings are demanding. In *A Study in International Organization*, more than 500 pages long, Scott recasts American history from independence to the Constitution, stressing each key feature of the organization he aimed to see projected in the world

³³² *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts*, vol. 2 (New York: Oxford University Press, 1921). At 102.

³³³ As Lauterpatch claimed, the text adopted in Article 38 of the Hague Convention of 1907 for the Pacific Settlement of International Disputes had the same text as that which eventually ended up in the Statute. More importantly, the very text of this article marks the formal recognition of a principle of denial of justice. Lauterpatch, *The Function of Law in the International Community*. At 33.

court: the nature of judicial power, the nature of the Supreme Court, what is a case, and the immunity federal states had from suits. In the closing of the book lay his functional approach to international law. He presented what he perceived as the greatest hurdle towards a “more perfect society of nations”: “renouncing in the common interest the exercise of certain sovereign rights, while retaining unimpaired the exercise of all sovereign rights not so renounced.”³³⁴ But there was reason to be optimistic. When confronted with the same challenge, the founding fathers had made a constitution: “the delegates to that memorable assembly established in fact and in form, a union for legislative purposes, a union for administrative purposes, and a union for judicial purposes, which, taken together and acting in cooperation as they must, since each depends upon the other, form a more perfect Union than that of the Society of Nations.”³³⁵ Although Scott knew that a Congress of Nations could never be established, “delegates of the Nations may in conference assembled establish a court of the Nations, for which they have a precedent in the Supreme Court of the American Union, which can declare and apply the law of Nations now existing or as made by their delegates in conference and ratified by each of the Nations.”³³⁶

In another publication, dedicated to the Supreme Court Justices, Scott collected a series of cases in which the Supreme Court proved to be the precedent he had claimed it to be. He remarked that “the Supreme Court of the United States is, in its origin, and in

³³⁴ James Brown Scott, *The United States of America: A Study in International Organization* (The Lawbook Exchange, Ltd., 2002). At 467.

³³⁵ *Ibid.* at 467.

³³⁶ *Ibid.* at 468.

fact, an international tribunal,” which was the only institution that existed “between the breakdown of diplomacy on the one hand, and the outbreak of war on the other”.³³⁷

Presented thusly, one might have the impression that the American constitutional experience was linear, coherent, and progressive. This is paradoxically both true and false, as has been shown in the first chapter. A particularly striking distinction can be gleaned from the opinion Story wrote in *Hunter’s Lessee*³³⁸ or from Marshall’s *Marbury*.³³⁹ The opinions of the Court were binding not because of comity, but because it was thus commended by the people, the one and only constitutional subject. In this sense, Scott’s depiction of the Supreme Court was in dissonance with that of American Justices. The problem, however, is that not even the Court really meant that “people” referred to every single American. In reality, those included were a very small segment of the population. As such, the unity of the legal system could be forged just as Scott had claimed it did.

2.2 Justice without a Court: International Law between Private and Public

One should not rule out, obviously, that these lawyers had genuine interests to be advanced. Be that as it may, it is with these conflictual problems in mind that the proposal for an international court should be read. Of course, just as the British pacifists had done in the nineteenth century, it could be that their American counterpart was also

³³⁷ *Judicial Settlement of Controversies between States of the American Union: An Analysis of Cases Decided in the Supreme Court of the United States*. At vii.

³³⁸ *Martin V. Hunter’s Lessee*.

³³⁹ *Marbury V. Madison*.

expressing, in a conservative way, their limited take on international politics.³⁴⁰ Whatever intentions the Americans had in the project of an international court, the challenges for legal theory persisted: how can international law be law, if it had no sanctions? For Scott, this was more than a legal answer: it was a legal case, and there were precedents to settle it. The precedents, not surprisingly, were derived from the American constitutional experience: not only were there constitutional norms that had no sanctions attached to them, the very structure of common law was customary. The synthesis of Scott's defense is well known,³⁴¹ but it has rarely been observed that the analogies he drew—beginning with the Supreme Court—were central to his position.

An exception, at least from the theoretical viewpoint, was Lauterpacht's argument on the function of international law. Lauterpacht's argument was solely devoted to answering the question of whether it was meaningful to have maintained a distinction between legal and political disputes. But the American claim was not a theoretical one, nor was Scott's position the essence of the American thinking.

In parallel to the discussions of an international court, there was another instance in which the question of denial of justice began to appear: the proceedings of the

³⁴⁰ Sager, "The Social Origins of Victorian Pacifism."

³⁴¹ "It is submitted that the usages and customs of International Law are for the very reasons that they are the usages and customs of the Law of Nations, an integral part of the Municipal law of each and every member of the family of nations; that the Municipal Courts of such nations either consciously or unconsciously administer and enforce principles of international law whenever the particular case involving a question of such law of nations comes before them for adjudication; that a sanction, even the strict legal sanction of the analytical jurist is present in such cases; that cases involving an abstract right in issue between two nations in their representative capacities are settled in accordance with the common law of nations and that this obedience is compelled either by the public opinion – that is, international opinion – or by the last and most formidable sanction known to nations and mankind – War." In: Scott, "The Legal Nature of International Law." At 149-150.

American Society of International Law. Mainly inspired by Society President Elihu Root, then Secretary of State to President Roosevelt, the discussions on the topic of denial of justice united almost the entire generation of American lawyers at the Society.

Right in one of the very first volumes of the *American Journal of International Law*, Elihu Root published an article entitled *The Real Question Under the Japanese Treaty and the San Francisco School Board*. In this article, Root reported a case of a complaint lodged by the Japanese ambassador against a Resolution from San Francisco barring Japanese from public schools. After explaining the rights to which an alien was entitled, which he thought were very much like those of a national, he explained that the responsibility for these rules lay with the federal government. He voiced, then, his concern that the treatment of aliens was, in reality, a problem with the American people, who were at times unruly and revengeful.³⁴² The article was the transcription of the very first speech he gave as President of the *American Society of International Law*.

Elihu Root is usually credited as the first person who stated the minimum standard for the treatment of aliens.³⁴³ But before the classical formulation of the standard, published in an article about the protection of citizens abroad,³⁴⁴ Root and his

³⁴² Elihu Root, "The Real Questions under the Japanese Treaty and the San Francisco School Board Resolution," *The American Journal of International Law* 1, no. 2 (1907).

³⁴³ Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013). At 46.

³⁴⁴ Root, "The Basis of Protection to Citizens Residing Abroad." The standard was stated as thus: "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a

colleagues at the *American Journal* made interesting contributions to understanding the extension of the standard. In one of these articles, Root explained that international law was like domestic law: “for the great mass of mankind laws established by civil society are enforced directly by the power of public opinion, having, as a sanction for its judgments, the denial of nearly everything for which men strive in life.”³⁴⁵ In the last part of his text, Root clearly aims to launch onto the international stage the same structural conditions that had ensued from the prohibition of denial of justice:

The most certain way to promote obedience to the law of nations and to substitute the power of opinion for the power of armies and navies is, on the one hand, to foster that “decent respect to the opinions of mankind” which found place in the great Declaration of 1776, and, on the other hand, to spread among the people of every country a just appreciation of international rights and duties and a knowledge of the principles and rules of international law to which national conduct ought to conform; so that the general opinion, whose approval or condemnation supplies the sanction for the law, may be sound and just and worthy of respect.³⁴⁶

Root later sustained that sovereignty was only voluntarily limited by a standard of international conduct to which the nations conform. This chief principle means that a sovereign is always willing to do what is just.³⁴⁷ Just, in this case, referred to the outcome of a judicial decision. Thus, the obligation implied the creation of a court jurisdiction. But what if the judicial decision of a foreign country erred? Root argued that when a court was not impartial, or when it was subjected to political pressures or dependent upon other

satisfactory measure of treatment to its citizens.” At 21. In fact, *The Basis of Protection* is the fourth consecutive text published in the Proceedings of the ASIL. A full account of all these reference is indispensable for contextualizing the standard.

³⁴⁵ “[the Sanction of International Law],” *Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917)* 2 (1908). At 17.

³⁴⁶ *Ibid.* at 20.

³⁴⁷ “[the Relations between International Tribunals of Arbitration and the Jurisdiction of National Courts],” *Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917)* 3 (1909). At 19.

agencies, these were all “unsatisfactory methods of concluding the search for justice.”³⁴⁸ For cases like this, the United States were fortunate enough not only to have diversity jurisdiction, but also a constitution: “the whole world owes too much to the Constitution of the United States to think too little of its example.”³⁴⁹ The Supreme Court was, for him, the prototype of an arbitral tribunal, which is why he recommended that “the better rule would be, to avoid the dangers of denial of justice, [...] by submitting in the first instance to an impartial arbitral tribunal” in which the problem might arise.

In the same annual meeting in which Root had launched the famous concept of the minimum standard, Eugene Wambaugh said that denial of justice “connotes the instrumentalities whereby normally justice is secured.”³⁵⁰ He summarized American state practice, but hoped it would not be relevant in the near future as states were preparing to enter into a new era of international arbitration. In another debate, there were attempts not only to define to whom protection could be granted,³⁵¹ but also why there seemed to be doubts in ascertaining citizenship.³⁵² In this last case, John Latané purported to explain how to solve disputes over the question of citizenship. He conceded that a state has a right to protect its citizens abroad, but the problem was that citizenship is a question of municipal law. In other words, defining who was entitled to be a citizen in whose name justice could not be denied was to be solved by conflict of laws rules.

³⁴⁸ Ibid. at 21.

³⁴⁹ Ibid. at 22.

³⁵⁰ Eugene Wambaugh and Walter S. Penfield, "The Place of Denial of Justice in the Matter of Protection," *ibid.* 4 (1910). At 129.

³⁵¹ Raleigh C. Minor and Harry Pratt Judson, "The Citizenship of Individuals, or of Artificial Persons (Such as Corporations, Partnerships, and So Forth) for Whom Protections Is Invoked," *ibid.*

³⁵² John H. Latané et al., "The Question of Domicile in Its Relation to Protection," *ibid.*

Everett Williams, for his part, claimed that the controversies between states and foreign citizens were causes of wars; therefore, “inasmuch as the whole object of the movement for international arbitration is to prevent war, and since wars have been frequently occasioned to this tribunal [...] it would seem obvious that we should at least attempt to facilitate the adjudication of such controversies before the international tribunal at the Hague.”³⁵³

Of all the international lawyers of the American Society, Edwin Borchard would launch the most detailed account of the protection of citizens abroad. What follows is an attempt to summarize his ideas, in order to later envision what sense of unity could ensue from the combination of an international court of justice and the concept of the prohibition of denial of justice. The questions that seemed to guide Borchard’s work were mainly two: who is an alien, and what accounts as diplomatic protection?

The distinction between an alien and a national can only take place with the emergence of the national state. Doctrinally, at least in America, this doctrine expounded from the decisions of the Supreme Court in its insular cases.³⁵⁴

These cases marked the beginning of the American venture into imperialism.³⁵⁵ The background of the cases is well known. The United States had gained territory from Spain in the Pacific (the Philippines) and in the Caribbean seas (Puerto Rico), and many

³⁵³ Everett P. Wheeler and Christian L. Lange, "A Permanent Court of International Justice," *ibid.* 6 (1912).

³⁵⁴ Robert Treat Crane, *The State in Constitutional and International Law* (Johns Hopkins Press, 1907). The very decision of the case seems to vindicate Thornhill’s concept of the Constitution: “the nation became the basis for the functions of the political system only insofar as the nation was translated into rights.” Thornhill, "The Sociology of Constitutions." At 65.

³⁵⁵ Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*.

cases began to emerge over the applicable laws within these territories. American elites were chiefly concerned with the possibility of granting Congress legislative competence over the territory, thus restricting their sovereignty within the federal clause. In the first cases, such as that of *Downes v. Bidwell*,³⁵⁶ the Court had to decide the status of Puerto Rico: was it a state within the Union, or was it a foreign country? The answer the Court gave was simply that it was a territory, but with that response, it recognized that only Congress would have competence for regulating its affairs.

But if it was a territory, what about the citizens living in it? To what rights would they be entitled? To this the Court answered that as Congress had competence to rule over the territories acquired by the United States, pursuant to its treaty-making power, some rights of the Constitution could be limited by the legislative authority.³⁵⁷ Moreover, one should bear in mind that during these years Roosevelt had implemented a new immigration policy, one not only designed to curb new waves of immigrants, but also to forge an American identity.³⁵⁸

Legislative reform and the insular cases—even though the cases were only finally settled later—provide the background through which the concepts of citizenship must be analyzed. The doctrinal variations notwithstanding, even Borchard's voluminous book

³⁵⁶ *Downes v. Bidwell*, 182 US 244 (1901).

³⁵⁷ *Balzac v. Porto Rico*, 258 US 298 (1922).

³⁵⁸ Leroy G Dorsey and Rachel M Harlow, "'We Want Americans Pure and Simple': Theodore Roosevelt and the Myth of Americanism," *Rhetoric & Public Affairs* 6, no. 1 (2003).

seems as though it were organized to answer to the same questions that the Court was attempting to solve.³⁵⁹

Be that as it may, the conceptual evolution that the legal system had to achieve in order to perform such a role is significant. As Borchard observed,³⁶⁰ there were three distinct legal relations concerning this protection: the relation between the state and its own citizens; that with the aliens residing in a given state; and the relation between states with respect to the treatment they give to aliens.³⁶¹

As he also remarked, “the history of the legal relation between the state and individuals, its own citizens and aliens, is largely a history of the transition from the system of personal laws to the territoriality of law, accompanied both by a growing control of a central power over the individuals within its jurisdiction and by the appearance of certain characteristics, territorial independence and sovereignty, as essential qualifications for admission of a state into the society of states.”³⁶²

Borchard insistently rejected the definitions given by the philosophers of the last century. However, the argument he developed in the article published in the *American Journal* is not clearly presented, and the book, from which the theme was drawn, presents it in an unsystematic fashion. He claims, for instance, that the Thirty Years War had put

³⁵⁹ Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*.

³⁶⁰ One should be careful in not underestimating the importance of Borchard’s work, deemed by Stowell as “the best work on interposition for redress of wrongs to nationals” and “a veritable mine of information.” See Ellery Cory Stowell, *Intervention in International Law* (J. Bryne, 1921). At 474. The same author, however, advises caution on Calvo: “superficial and prejudiced and not always reliable, as Calvo is, he has nevertheless exercised a considerable influence”.

³⁶¹ Edwin M Borchard, "Basic Elements of Diplomatic Protection of Citizens Abroad," *The American Journal of International Law* 7, no. 3 (1913).

³⁶² *Ibid.* at 497.

an end to the principle of personality as the unifying legal concept and, in its place, inserted territoriality. Territoriality, moreover, would have to be understood as opposed to imperialism, with the idea there was no longer any superior authority to any state. The relationship between the individual and the state would thus be marked by the rules laid out by a sovereign act, the supreme and unconditional will of the state, as manifested in its laws, that defined which individuals would be subjected to its rule. Citizenship was thus a matter of municipal legislation.³⁶³

Territoriality was nonetheless relative. What did pertain to Westphalia was the limit of state power—jurisdiction: “Jurisdiction [...] has [...] become territorial.” Thus, it seemed, jurisdiction was the ultimate answer for why citizenship would be territorially bound.

But Borchard later conceded that “a territory is not in fact an essential element of sovereignty,” nor of jurisdiction, as the consular cases of jurisdiction demonstrated, and that “the state may declare its laws binding on its citizens even when abroad and by virtue of which its obligations to those non-resident citizens continue to exist.”³⁶⁴ Citizenship as the legal and political link that an individual has with the state does not seem to depend on what Westphalia had established.

³⁶³ This view echoes the arguments presented early on the *American Journal*. See WW Willoughby, “Citizenship and Allegiance in Constitutional and International Law,” *American Journal of International Law* 1, no. 4 (1907).

³⁶⁴ Borchard, “Basic Elements of Diplomatic Protection of Citizens Abroad.” at 502.

It perhaps would have been easier if he had defined the problems of double citizenship or of protections of citizens abroad as a “public” case of conflict of laws. The reason he did not shows a little more about what he had attempted to hide.

Borchard seemed in some passages to have been almost persuaded by André Weiss, who claimed that “the bond of nationality is a contractual one; and that the bond which unites to the state each of its citizens is formed by an agreement of their wills, express or implied.”³⁶⁵ Borchard, however, acknowledged that this position has been severely criticized and then went on to define it as a “sui generis” relationship. He cites the Supreme Court in *Inglis v. Sailor's Snug Harbor*:³⁶⁶ “the doctrine of allegiance [...] rests on the ground of a mutual compact between the government and the citizen or subject, which it is said, cannot be dissolved by either party without the concurrence of the other.” In other words, citizenship is not a contract; it is a compound, just as Locke, Montesquieu and Rousseau had claimed.

But then again, Borchard rejects the philosophers’ definition. He ultimately cites the authority of Ludwig von Bar, in which he reckons that the ultimate definition of nationality is dependent upon the obligation of the state “to receive its own citizens expelled by other states, or repatriation.” As banishment was practically abolished, “no state can legally require other states to receive its banished citizen, and if they were to

³⁶⁵ *Ibid.* at 504.

³⁶⁶ *Inglis V. Trustees of Sailor's Snug Harbour in City of New York*, 28 US 99 (1830).

refuse him admission, it would be obliged to accept him again as a resident member of the national community.”³⁶⁷

It could be inferred from what has been said thus far that there are no international rights per se, only rights that are recognized by the state of citizenship. Borchard, however, attempted to argue that some rights, which he deemed either human or international rights, accrue to the individual irrespective of the state where he might be. Indeed, the whole book is a testimony to that enterprise.

To make such a case, as it concerns the concept of citizenship, Borchard relied on a difference between the principle of territory and that of domicile. Territory is related to nationality and citizenship, albeit confusingly, whereas domicile regards the law of the situation, i.e., the place in which the alien currently resides. He reckons that the alien ought to respect the rules of the nation where he currently resides, but that the state has also some obligations to him. Among them is to treat him in a similar manner in which he would have been treated in his country of origin, since although he is in a different place, he still owes allegiance to his home country.

From this fundamental fact, Borchard derives the “true” function of the state: the guarantee of the collective security of the nation, the personal security of the individual, and the promotion of social welfare:

It is entirely consistent with the principle of independence, when it is recalled that the latter, as an attribute of states, is only recognized by international law on the theory that it is the best means of accomplishing state functions. Its basis being practical, international law permits it to be set aside when it is misapplied, by the diplomatic interposition of those states whose interests, through their citizens, have been prejudiced by the delinquency. It thus conforms with the aim of international

³⁶⁷ "Basic Elements of Diplomatic Protection of Citizens Abroad." At 515.

organization - the advancement and perfection of those rights which the modern development of international law, by custom and treaty, has recognized as inherent in the individual.

This thinking is not easy to summarize. Borchard seemed to have been taking the path of a collage of different European authors and then focusing on the similarities between them, as in any typical doctrinal study of the time. Perhaps a safer guide for understanding his remarks is an analysis of the authorities he cites and also those passages where he does not seem to cite any of them. Among the latter is that of the scope of "human rights":

The alien, it has been observed, possesses other than human rights. These other rights, e.g. copyright, trade-mark rights and commercial rights generally, are derived either from the municipal law of the state of residence or from treaties and conventions concluded for his benefit by his home government. It is only the latter class of rights, which are not enjoyed by aliens generally under the municipal law of the state of residence, that he may properly be regarded as possessing by virtue of his nationality. The alien thus has rights as an individual and as a member of definite social group. While, therefore, we must look far beyond his nationality to find a guide to the complete source of the alien's rights, it is nevertheless true that in giving effect to and providing a sanction for his rights, his nationality is the most important factor, for it is by virtue of the bond of nationality that he is entitled to invoke the aid of a specific protector and that a definite member of the international society of states has the right to interpose in his behalf to secure a guarantee for his rights and reparation for their violation.³⁶⁸

Along this line of reasoning, Borchard suggests that these ideas were already present in the discussion over the position of the individual in international law. Borchard refers to this discussion later, analyzing the work of a significant group of authorities. One of these is Westel W. Willoughby's article on citizenship published in the *American Law Journal*.³⁶⁹ After expending on the difference between constitutional and international law, Willoughby emphasizes the most relevant distinction between the two: whereas constitutional law depends on the political system as a source of legitimation,

³⁶⁸ Borchard, *The Diplomatic Protection of Citizens Abroad, or, the Law of International Claims*. At 15-16.

³⁶⁹ Willoughby, "Citizenship and Allegiance in Constitutional and International Law."

international law relies on effectiveness to assess the legality of a nation claim. Thus, the paradox identified by Borchard appears to be solved by recourse to the nation with greatest physical power.³⁷⁰

In order to avoid war, some rules would then have to be developed: “Chief and fundamental among these international principles thus developed is that according to which it is held that some one governing power is held to have general control over each portion of the earth’s territory, and, reciprocally, is held ultimately responsible for what occurs there.”³⁷¹

Here is where the presumption of the claimant state to have jurisdiction over a certain territory needs to be proved *de facto* effective. The test is analogous to the one over which recognition is internationally given: “in a civil war, or a war of secession, as soon as the old government is overthrown, or its inability to prevent the secession is demonstrated, the other nations as a matter of course recognize the new government as the *de facto* one to be dealt with.”^{372, 373}

Thus, just as Borchard had noticed, the territorial principle was never intended to be absolute. But if it is not absolute, what are its limits? The territory. The principle of territoriality was, therefore, absolute in character, “except for those limitations created by

³⁷⁰ Ibid. at 925.

³⁷¹ Ibid. at 926.

³⁷² A point which was later made by Kelsen by separating the political act of recognition from the judicial, which, in his terms, was simply establishing a fact. Hans Kelsen, "Recognition in International Law," *ibid.* 35 (1941).

³⁷³ Following this line of reasoning, Theodore Roosevelt had recognized the State of Panama as the *de facto* authority to be dealt with in regards to the Central American isthmus. See Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*. At 54.

the doctrine of “intervention” under which one state is, according to international law, held justified in intervening in the domestic concerns of another.”³⁷⁴

With regard to the difference between an alien and a citizen, Willoughby explains that there is no international rule differentiating both classes, but municipal law is free to choose which would best fit the state’s interests. This is why a different treatment can be internally assigned to each class of citizens, as the Supreme Court had settled in the insular cases. The problem international law faces is, in summary, the fact that some rules are only municipally defined, and conflict of laws is internationally settled by the overriding notion of effectiveness:

In conclusion of this paper it may be pointed out that, given an international world of states, each claiming absolute and exclusive legal authority over all persons and property situated within their respective territorial limits, and at the same time asserting the right to protect, in certain respects, its citizen-subjects when abroad, conflicts of jurisdiction are unavoidable conflicts which necessarily have to be settled by international agreements expressed either in the form of general custom or specific treaties. These conflicts have, however, been made unnecessarily frequent by the unfortunate fact that the nations of to-day have not been able to unite upon one general rule for determining citizenship. Nor are they in agreement with reference to the subjects of expatriation and naturalization. Furthermore, there is not a little indefiniteness with reference to the circumstances under which one state will interfere to protect its citizens residents abroad, as well as to the extent to which they are released from the control of local law, as, for example, compulsory service in the army.

Borchard’s departing point is precisely to settle debate on a word of multiple meanings, the minimum applied standard. The reference made by Willoughby to the limit of intervention might shed some light on the strategy used by the Yale professor. The question of intervention, as a background for understanding the minimum standard so defined, also opens up an entire field of inquiry and directly touches upon many of the other references used by Borchard.

³⁷⁴ Willoughby, "Citizenship and Allegiance in Constitutional and International Law." At 927.

In fact, the right of intervention was perhaps one of the most hotly debated topics in international law at the turn of century, especially if judged by the discussions held at the *Institut de Droit International*.³⁷⁵ To be sure, , many causes were identified under the umbrella of intervention, and even the question of whether there were multiple causes was disputed. For instance, Wheaton argues that the right of intervention resided in the concept of balance of powers. Every state had a right to increase its wealth, territory, and dominions if it was done by lawful and peaceful means. The problem that the concept of balance attempted to solve was what would happen if a nation were to develop an “undue aggrandizement” that disturbed hers neighbours. Thus, intervention was justified whenever “an excessive augmentation of its military and naval forces may give just ground of alarm to its neighbours.”³⁷⁶

Theodore Woosley, on the other hand, not only recognized the significance of interference for solving the problem of balance of powers, but also for preventing revolutions and on the score of religion and humanity.³⁷⁷ Given such narrow reasons for a legal intervention, it should not surprising, then, that when Calvo³⁷⁸ defended his famous theory, the grounds over which a right of intervention could be claimed was not precisely coincident with what Borchard had in mind.

³⁷⁵ For a brief history of the founding of the Institut, see Martti Koskennjemi, "Gustave Rolin-Jaequemyns and the Establishment of the Institut De Droit International (1873)," *Rev. BDI* 37 (2004).

³⁷⁶ Henry Wheaton, *Elements of International Law* (Sampson Low, 1864). At 117-118.

³⁷⁷ Theodore Dwight Woolsey, *Introduction to the Study of International Law: Designed as an Aid in Teaching and in Historical Studies* (Sampson Low, Marston, Low & Searle, 1875).

³⁷⁸ Carlos Calvo, *Le Droit International Théorique Et Pratique* (Durand, 1872).

In fact, Calvo made a precise point when he claimed that the instances in which such a right had been invoked were dissimilar to the pattern of intervention of European countries in Latin America. Although argued persuasively—Calvo had mapped with details a great number of such instances—his argument was later incorporated by other authors not as an example of an equality between states, but as proof of a practice with regards to another form of intervention: that of protecting private property.

Indeed, in one of the very first numbers of the *Revue du Droit International*, Gustave Rolin-Jaequemyns, the first president of the Institut, wrote that there were only two grounds in which intervention could be righteously claimed.³⁷⁹ The first is as an absolute necessity. It takes place when the *institutions* of one state act in such a manner that it renders impossible a regular coexistence among states. The second is when a *government* violates the rights of humanity through measures contrary to the interests of other states, be it through excessive injustice or through profound cruelty.

This tendency to claim a fundamental or human right as the grounds for intervention was simply regarded as non-sensical by Phillimore. If there is any use of the concept, he averred, it was as an accessory to a political claim.³⁸⁰ Such abstractions fitted well in masking the objections that were along the same lines as those raised by Calvo. Antoine Rougier,³⁸¹ for one, author of a short monograph on the theme, concluded that

³⁷⁹ Gustave Rolin-Jaequemyns, "Note Sur La Theorie Du Droit D'intervention, a Propos D'une Lettre De M. Le Professeur Arntz," *Rev. Droit Int'l & Legis. Comp.* 8 (1876).

³⁸⁰ Robert Phillimore, "Commentaries on International Law. Vol. 1," *Philadelphia: T and JW Johnson* (1854).

³⁸¹ Antoine Rougier, *La Théorie De L'intervention D'humanité. Extrait De La Revue Générale De Droit International Public*, ed. A. Pedone (Paris: Dalloz, 1910).

intervention would always have a political and juridical foundation. The problem is that the two dimensions are inseparable. Therefore, the political preference in choosing when and where to interfere are possible indications of the strategic uses for which the concept of human rights might be deployed.³⁸²

Oppenheim, in his treatise, states something similar: although there are no international human rights, for individuals cannot possibly be subjects of international law, “should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilization.”³⁸³

In Borchard’s own terms, this minimum standard, the recognition of which gives to states the free exercise of their jurisdiction over a given territory, was evidence of a state right to diplomatic protection. It was a right, he argued, not a duty, because there was no way of enforcing the duty. As he later remarks:

States are legal persons and the direct subjects of international law. They are admitted into the international community on condition that [...] they [...] manifest their power to exercise jurisdiction effectively and, as will be seen presently, to assure foreigners within it a minimum of rights.³⁸⁴

As to the contents of this standard, Borchard does not give a precise definition. He simply claims that it is “the result of the operation of custom and treaty, and is supported

³⁸² Ibid. at 62.

³⁸³ Lassa Oppenheim, *International Law: A Treatise. 2. War and Neutrality* (Longmans, Green, 1906). Section 291.

³⁸⁴ Borchard, *The Diplomatic Protection of Citizens Abroad, or, the Law of International Claims*. At 26-27.

by the right of protection of the alien's national state." As examples of this method he cites: "a certain minimum of rights necessary to the enjoyment of life, liberty and property." Such a standard, he adds, prevents "the territorial courts from declining to take jurisdiction of litigation between aliens, or the confiscation of the property of an alien who by war has become an alien enemy, or the forbidding of an alien's right of succession to property."³⁸⁵

The reading of these passages might give the impression that Borchard is confidently explaining the rule of a *de facto* international standard. But the notion of "an operation" and the reference to "the alien's national state" do not square with his claim. This point is even more evident if it is analyzed through the following reference subsequently given by him:

Any attempt to define this minimum is fraught with some danger, inasmuch as it varies from state to state. In modern practice, it may be said that the first obligation of the state is the recognition of the alien's legal personality and with it, the national allegiance which binds him to his own country.³⁸⁶

One should bear in mind, moreover, that Borchard had also explained the evolution of the international order through a narrative that argued that conflict of laws principles, such as domicile, were no longer applicable, since now only nationality was the unifying principle by which to solve private international law problems.³⁸⁷

³⁸⁵ Ibid. at 39.

³⁸⁶ Ibid. at 40.

³⁸⁷ Ibid. at 24.

Borchard then argues that the same rights were to be granted to legal corporations. Although the arguments are well known, since this exposition relies on a close inspection and analysis of its precise argumentation, it is worth quoting him accordingly:

A corporation, certainly a commercial corporation, is composed of human beings and has a real personality, which is a reality in every state. Its civil capacity, consisting of its right to sue and be sued, to enter into contracts and own property, is essential to its existence, and may be recognized quite apart from any permission to transact business or fulfill its functions. With these facts in mind, the liberal system founds its doctrine upon an assimilation between foreign corporations and natural persons. The corporation's civil capacity and status are governed by its personal law and only its functional capacity is under the control and regulation of the territorial state. This control is limited to those relations of the corporation which concern the citizens of the state, its public policy, or the interests of third parties. Thus, all questions of internal management are matters of personal law and are free from interference by the territorial state. The functional capacity of a corporation is limited by its charter and the law of the state where it transacts business.³⁸⁸

Borchard not only expressly rejected the continental view of the subject, he used the theory that had been developed in the United States in *Bank of Augusta v. Earle*.³⁸⁹ The solution he thus proposes is one very similar to that through which the development of the American doctrine of foreign corporations became possible.

Bank of Augusta was, indeed, a significant case for American corporate law. In it, the Court, led by Chief Justice Taney, applied the previous definition of the corporation³⁹⁰ and used the rule of comity to state that a corporation had a right to enter into contracts in another state if that state had not expressly denied such a right. The rule of comity, as defined by Story in his doctrinal work, applied fully, so that only if expressly denied or if in manifest disagreement with state policy would a unit of the nation be allowed to deny legal recognition of a corporation.

³⁸⁸ Ibid. 41-42.

³⁸⁹ *Bank of Augusta V. Earle*.

³⁹⁰ As it is known, in *Dartmouth College v. Woodward*, through Marshall the Supreme Court had affirmed that “a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law”. *In Re Ward*.

On this specific subject, Gerard Carl Henderson, just three years later, wrote a book called *The Position of Foreign Corporations in American Constitutional Law*.³⁹¹ Concurring with Borchard, Henderson claimed that “a great deal of the trouble can be traced directly to a faulty conception of the nature of a corporation, to the philosophy which looks upon a corporation as a fiction of the law.”³⁹²

To be sure, *Bank of Augusta* was a step forward in relation to the previous doctrine of “artificial being” adopted by the Supreme Court. Henderson aptly noted this point when simply ascertaining that the right of a corporation to sue in a foreign court did not depend on its nature: it was simply a right that was to be understood as an equal protection.³⁹³

In summary, the exercise of territorial jurisdiction was as a form of consent by the international community toward every state.³⁹⁴ Moreover, “it is the obligation of every state to regard the citizens of other states as the subjects of legal rights, and to furnish the machinery for enforcing the rights granted by municipal law.”³⁹⁵

It was up to the state and its formulation of nationality to determine whether or not the alien was entitled to legal protection. To so the concept of denial of justice “is the fundamental basis of an international claim.”³⁹⁶ This issue would not ordinarily come up,

³⁹¹ Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law: A Contribution to the History and Theory of Juristic Persons in Anglo-American Law*, vol. 2 (The Lawbook Exchange, Ltd., 1918).

³⁹² *Ibid.* At 165.

³⁹³ *Ibid.* at 187.

³⁹⁴ Although he did not use the word “comity,” it would have fitted well in here.

³⁹⁵ Borchard, *The Diplomatic Protection of Citizens Abroad, or, the Law of International Claims*. At 26.

³⁹⁶ *Ibid.* at 330.

since states are not liable for errors committed by its judiciary. Responsibility could emerge, he argued, “only if the court has misapplied international law, or if the municipal law in question is in derogation of the international duties of the state, or if the court has wilfully and in bad faith disregarded or misinterpreted its municipal law, does the state incur international liability.”³⁹⁷

Borchard collects a substantial account of state practices³⁹⁸ to provide an explanation for these instances of denial. Tampering with the court’s independence is the first of these cases. Lack of impartiality, political control, or steering of judges, or even the use of the judiciary to oppress foreigners were examples of denial of justice. He then analyzes the cases in which an undue interference occurs in the procedures of the courts. In these, according to him, there would then be a denial of justice before the proceedings of the court whenever there occurs, among other things, an “arbitrary annulment of concession contracts without recourse to judicial proceedings,”³⁹⁹ “confiscation of property without legal process,” “unlawful arrest,” “execution without trial,” or “an inexcusable delay in investigating offenses.” Denials might also happen during procedures where there is an undue delay or when international norms are violated. Finally, any time that decisions are not executed or guilty offenders are not punished or

³⁹⁷ Ibid. at 332.

³⁹⁸ Although there are significant references to practices of mixed commissions, many of the cases collected by Borchard were already assembled by Moore and Wharton. See, for instance, John Bassett Moore and Francis Wharton, *A Digest of International Law*, vol. 2 (US Government Printing Office, 1906). The Digest

³⁹⁹ Borchard, *The Diplomatic Protection of Citizens Abroad, or, the Law of International Claims*. at 336 et sq.

even when an appeal is not allowed would—again, according to Borchard’s account—amount to denial of justice.

Of course, one should be cautious in envisioning in the international doctrine of “denial of justice” the very same elements that are used, more generally, in legal theory.⁴⁰⁰ In legal theory, denial of justice is used to demonstrate the difference between legislation and jurisdiction. It serves to demonstrate that, differently from legislators, courts have to decide, even if there is no law on which to base its own decisions. The doctrine most aptly summarized by Borchard, on the other hand—although he used the definition to claim a possible future intervention, on the grounds that justice must be made—was simply a vehicle through which a state either could or could not practice diplomatic protection. Thus, Diplomatic Protection was a right of the state, not of the individual, who could not, either by himself or through the intervention of his home government, sue the injurer state.⁴⁰¹

From a practical standpoint, if denial of justice as a state right was the only difference between legal theory and international law, one might wonder if the two are indeed that different. This comes up because the differentiation of legislation and adjudication entails, at the organizational level, a separation of power. In legal theory, as

⁴⁰⁰ See, for instance, Luhmann, *Law as a Social System*.

⁴⁰¹ As Luhmann points out, however, one should not underestimate the significance of the concept of the prohibition on the denial of justice. This significance has time and again been signalled in international studies through the too state-centric concept of “credible commitments.” See, for instance, in human rights, Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54, no. 2 (2000). In international investment law, see: Zachary Elkins, Andrew T Guzman, and Beth A Simmons, “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000,” *International organization* 60, no. 4 (2006).

we have seen through the externalization toward procedural mechanisms, separation of powers entails the establishment of rules of organizational competence. Thus, in this respect, as it comes to the right of aliens, international law is just another case of competence organization.

What is lacking here, though, is that the legal basis for the principle of justice is not only the prohibition of the denial of justice, but also the right to legal protection. By claiming that the right pertained to the state, not the individual, diplomatic protection was not yet ready to become a viable substitute for the role of the court. In the practice of the United States, this amounted to viewing the acts of states, including the practice of diplomatic protection, as a “political question”,⁴⁰² which is not to say that international law is doing away with the prohibition of denial of justice, but that it is simply establishing procedures for formal decision-making.⁴⁰³

The minimum standard is, in the end, nothing more than a criterion for the application of the principle of denial of justice. Only from an internal perspective of the legal system can one claim that the standard is more relevant, because it is directly derived from a source of law, namely customary law, and, thus, represents best the “legislative” authority within international law. Law’s autonomy—one could say, simply, positivism—can only occur if the very decision on the existence of a law relies exclusively within the law’s own criteria. From an organizational perspective, for this

⁴⁰² Fritz W Scharpf, "Judicial Review and the Political Question: A Functional Analysis," *The Yale Law Journal* 75, no. 4 (1966).

⁴⁰³ Luhmann, *Law as a Social System*. At 286.

situation to occur, it is indispensable that the law deal with its own problems through the courts. Deciding whether or not a particular law is valid is what ultimately secures legal autonomy.

The views held by these authors are of fundamental importance to understanding how international law organized dispute resolution at the turn of the century. Stowell, for instance, described his own work as an exercise in political action, or as “rights in political action.” The conclusion to which he had arrived pointed to that same point: “the employment of force under international law, whether it be to defend rights or to protect interests, is always limited by the condition that there shall first have been made a reasonable effort to reach an amicable adjustment.”⁴⁰⁴ Of course, the main problem lay in the definition of “reasonable,” to which he ascribed the success of an appeal to the tribunal of reason. That tribunal was formed by “the consensus of opinion in a preponderating majority of states.”⁴⁰⁵ Up to this point, there is no novelty. Reasonableness as such is a customary rule. But the most relevant point lies elsewhere: in the “non-legal” or “extra-legal” relations, or the paradoxes that are externalized by the legal system to the political system.⁴⁰⁶ In this case, there is also a “supreme and guiding” rule of law to steer state action: “the legal obligation that states in their political

⁴⁰⁴ Stowell, *Intervention in International Law*. At 456.

⁴⁰⁵ *Ibid.* at 457.

⁴⁰⁶ Gunther Teubner, "Exogenous Self-Binding: How Social Systems Externalize Their Foundational Paradox," *Droit et société*, no. 1 (2017).

controversies shall observe – the rule which enjoins upon them to agree to a reasonable compromise of their differences.”⁴⁰⁷

These two rules would perhaps function as a prototype for constitutional creation. They make it possible for states that observe the rule of law to enjoy support in the arena of public opinion. As a legitimizing force, public opinion is not an abstract entity, only contemplated in theory. Citizens themselves would thus be able to invoke, as their own right, a law-conformity conducted by the state: “as long as public opinion has this directing influence, the citizen himself must assume part of the responsibility for the faithful observance of the law.” Thus, still using Stowell words, “to meet this responsibility fully he must be ready to commend his government for its just action, to condemn it for its violations of international law, and to lend his support for the adoption of a policy of enlightened self-interest which neither sacrifice essential interests to quixotic and ill-balanced impulses, nor yet is unmindful of the common interest of all the states to maintain peace and to preserve the health and rightful independence of each of the states separately.”⁴⁰⁸ Subsequently, Stowell would simply claim that the enforcement of international law resided in the right of intervention.

That these remarks were contended on the grounds that no individual rights existed or that no limit to the territorial authority could be imposed on states demonstrates that more than a mere rhetorical dispute was at stake. But to take the full significance of this point, it is important to recall the oppositions raised by Latin American lawyers

⁴⁰⁷ Stowell, *Intervention in International Law*.at 457.

⁴⁰⁸ *Ibid.* at 458.

against the doctrine of intervention. To be sure, this was the kind of question that Latin Americans constantly discussed, especially under the Calvo and Drago doctrines. As is well known, those doctrines had a marked an anti-interventionist stance, although in Calvo's statement, the principle was even broader. As both of these doctrines are relevant for the present discussion, they are worth citing. Calvo's conclusion, which appears in his *Le Droit International* reads as follows:

The principle of indemnity and diplomatic intervention on behalf of foreigners for injuries suffered in cases of civil war has not been admitted by any nation of Europe and America. The governments of powerful nations which exercise or impose this pretended right against states, relatively weak, commit an abuse of power and force which nothing can justify and which is as contrary to their own legislation as to international practice and political expediency.⁴⁰⁹

Listing all the interventions that European nations had promoted in Latin American during the first part of the nineteenth century, Calvo rejected any possibility of intervention on the grounds of the protection of private property, claiming that they were simply violations of international law.

Drago, for his part, had a more concise thesis. He simply argued that forced execution of public debt held by private investors against foreign country was illegal. As reasons on which he based this argument, he cited the fact that investors, when deciding to whom they would lend money, always have the necessary data to calculate the risks, knowing that, with regard to foreign nations, they cannot be compelled to pay. In other words, the risk of default was already taken into account in interest. Moreover, the act of

⁴⁰⁹ Calvo, *Le Droit International Théorique Et Pratique*. Apud Amos S Hershey, "The Calvo and Drago Doctrines," *American Journal of International Law* 1, no. 1 (1907).

forcing an execution was simply a contradiction in terms, since forcible execution deprived countries of the means through which they could provide repayment.

But Drago also cited other authorities to back his claims. He invoked the principle of equality to state that nations should treat each other with mutual consideration and respect. He also cited—and here lies the most interesting aspect of his proposition—the Eleventh Amendment to the U.S. Constitution and Alexander Hamilton’s wording: “contracts between nation and private individuals are obligatory according to the conscience of the sovereign, and may not be the object of compelling force.”

To be sure, this argument is just one of the reasons offered by Drago. But it is telling. The Eleventh Amendment states that “the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

As is well known, the amendment was especially designed to overrule the decision handed down by the Supreme Court in *Chisholm v. Georgia*,⁴¹⁰ in which the majority of a recently inaugurated Supreme Court decided that a private individual could sue in that same court a state of the Union over debt incurred in his private capacity. The reaction was immediate. In less than two years, the Eleventh Amendment was approved and remains up until today one of the building blocks of American constitutionalism.⁴¹¹

⁴¹⁰ *Chisholm V. Georgia*, 2 US 419 (1793).

⁴¹¹ A block, though, that has been insistently and vigorously criticized. For a discussion on this topic, see Vicki C Jackson, "Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment

The case is of particular interest because it shows almost a contradiction within the “spirit” of the American Constitution. For both Federalists and anti-Federalist, the text of Article III could never be construed so as to allow for state governments to be sued in federal courts.⁴¹² James Madison, for instance, had argued that “a Union of States containing such an ingredient seemed to provide for its own destruction.”⁴¹³ During the ratifying convention in North Carolina, Iredell claimed that, according to the text, the only natural and effective way of enforcing laws was against individuals, not the states.⁴¹⁴ Such a strong position insured that the result of the case would quickly find consensus for the amendment process.

For the purposes of this work, this case also shows why the solution proposed by Story for the conflict of laws does not establish a hierarchy of organizations. As the text of the Eleventh Amendment clearly states, the Supreme Court was never intended to be a super organization. As Vicki Jackson critically summarizes, the orders given by the Court are never intended to bind the legislators.

The custom, then, seems far from settled. The British and Americans disputed the exact content of the possibility of intervention. The English had famously held the position expounded by Lord Palmerston, which viewed diplomatic negotiation as a matter of “discretion” and not of international rights.⁴¹⁵ This unwarranted position seemed to be

and State Sovereign Immunity," *Notre Dame L. Rev.* 75 (1999). For a historical overview of the amendment process, see Clark, "The Eleventh Amendment and the Nature of the Union."

⁴¹² "The Eleventh Amendment and the Nature of the Union." At 1886.

⁴¹³ *Ibid.* at 1886.

⁴¹⁴ *Ibid.* at 1886.

⁴¹⁵ Hershey, "The Calvo and Drago Doctrines."

deliberate, as the result of not granting foreign investor guarantees would, it was believed,⁴¹⁶ foster domestic investment.

Frederick Dunn, in the paper of the proceedings of the *American Journal*,⁴¹⁷ had already demonstrated the difficulties of having to attach nationality to the protection of aliens. He had claimed that the crucial aspect of protecting aliens abroad was precisely the protection of the level of commerce and trade between nations, something that Phillip Jessup⁴¹⁸ noted when trying to explain the paradoxical situations of individuals who had double nationality. In such cases, he contended, the individual would find multiple opportunities to redress eventual injuries, whereas those with only one nationality would not. The question thus raised would be to try to find an equilibrium with regard to how much an individual is entitled to protection. But then what would be the underlying distinction between private and public international law? Doctrinal study simply seems to vary in the options chosen. Take, for instance, the work of T. D. Woosley. He claims that the difference resides solely in the territorial principle. Whereas public law relies exclusively on the territorial principle, private law “may allow that the law of another territory to be the rule of judgement in preference to the law of that where the case is tried.”⁴¹⁹ Whereas public law rests on sovereignty, private international law rests on “the humanity and comity of nations, or, in other words, the recognition of the brotherhood of

⁴¹⁶ Ibid. at 38.

⁴¹⁷ Frederick S Dunn and Alwyn V Freeman, "The International Rights of Individuals" (paper presented at the Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969), 1941).

⁴¹⁸ Philip C Jessup, "Responsibility of States for Injuries to Individuals," *Columbia Law Review* 46, no. 6 (1946).

⁴¹⁹ Woolsey, *Introduction to the Study of International Law: Designed as an Aid in Teaching and in Historical Studies*.

men, and the mutual duties thence arising.”⁴²⁰ Both are international because Christian nations adopt the same principles in judicial decisions.

In this sense, at least in terms of how Woosley conceived it, private international law was entirely unknown to other societies or epochs. It is, to be sure, a different branch of international law, but it is one that sheds light on the “tendency towards a common acceptance of the same principles of justice,” or, in other words, “a brotherhood of nations under the same rules of right.”⁴²¹

With the wisdom of hindsight, it is not that difficult to understand why the New International Economic Orders movement was destined to fail. The experience of American independence was, to be sure, exactly as the newly born countries had described it. Judging by that standard, freedom from colonial rule did mean a right to choose appropriate economic and social systems and full and permanent sovereignty of every State over its natural resources, amongst other principles. But in world society, where legal norms were gaining the international stage, sovereignty was simply not enough to effect the changes the movement envisioned.

Be that as it may, flowing underneath the surface in this debate was the idea of corporate citizenship, which has been only hinted at in this chapter. To be sure, as with any other form of citizenship, it was to be dealt with through conflict-of-laws rules. As seen in the first chapter, however, granting rights to corporations amounted to recognizing a legal validity for their acts and, should an economic damage emerge from

⁴²⁰ Ibid. at 73.

⁴²¹ Ibid. at 74.

them, no legal damage could be sought. In other words, the economic actions of a corporation are only to be evaluated by the economic system.

This formulation is the only way to come to the realization that if, at the organizational level, a concept of denial of justice could be used to justify legal unity, functional differentiation could only happen imperfectly without granting access to courts. That, in turn, would amount to an inclusive process, where corporations are included not in the political system, but in the legal system. To what extent this was—and still is—possible is the question to which we now turn.

CHAPTER 3

Conflict of Laws, Constitutionalism and the American Origins of the Investment Regime

The aim of this thesis has been to uncover the layers of American legal experiences that were assembled in the use of a simple standard in investment treaties. In the previous chapters, we have proposed an understanding of the constitutional concept and contextualized it in a specific constitutional experience. Instead of seeing its origins only through the political system, we have approached the subject from the perspective of the legal system through a dynamics that we have called constitutional and defined it as the meaningful articulation of the prohibition of denial of justice. In the organization of modern states, this last question is targeted toward the differentiation between adjudication and legislation: articulating the prohibition of denial of justice means that the judicial authority will have to decide whether it has been given authority to hand down a decision.

In legal theory, this is also the question in which positivism dwells. Having to differentiate between deciding and being commanded to decide also implies asking if the previous command has been validly given. Luhmann gives a definition of validity that is entirely dependent on time: validity is given by the synchronicity of all operations with

other social systems.⁴²² The legal system “solves” this problem by externalizing the paradox toward a constitution, which, in turn, functions as mechanism for distinguishing between hetero- and self-references.⁴²³ This is done because the constitution is a structural coupling between law and politics, which means that the irritations in both systems occurs more frequently, thus augmenting synchronicity.

But the problem still remains: what gives the constitution its own validity? Luhmann, here, relies on Douglas Hofstadter,⁴²⁴ claiming that there is an inviolate level within the constitution.⁴²⁵ That level is assigned to values, whose function is not to impose a particular meaning, but simply to guarantee that in communicative settings they are not put into discussion.⁴²⁶ With this argument, Luhmann keeps the concept of validity devoid of any normative claim.

Another way of arriving at the problem of values—or principles, which, from the viewpoint of systems theories, are both indeterminate—is through the relinquishing of the concept of sources of law. This concept, however, loses explanatory value when it has to deal with the differentiation between formal and procedural law. This is a question that the legal system deals with through concepts such as subjective rights and legal standing. Procedural concepts, however, cannot, per se, solve the problems that the sources of law attempted to solve, namely the unity of the legal system.

⁴²² Luhmann, *Law as a Social System*. At 131.

⁴²³ "La Costituzione Come Acquisizione Evolutiva."

⁴²⁴ Douglas R Hofstadter, *Godel, Escher, Bach* (New York: Vintage Books, 1980).

⁴²⁵ Neves, *Transconstitutionalism*. At 183.

⁴²⁶ Luhmann, *La Sociedad De La Sociedad*. At 266. The typical example is “health”: when someone says that something is good for your health, then the utility of the something is already assimilated.

In the first chapter, we saw that a combination of functional differentiation and self-reflexive practices within the legal system have relied on the Constitution to help the system achieve its autonomy. This was also done with the help of the economic system. The autonomy of law, therefore, was partly constituted vis-à-vis other functional systems.

As pressures for the expansion of the economy augmented by the turn of the twentieth century, the constitutional experience propelled Americans to transplant⁴²⁷ their organizational model internationally. The remembrance of this constitutional experience was used in the project of an international court, as described in the last chapter. The constitutional project itself, however, was conspicuously absent. In other words, the expansion of the economic system was only followed by that of the legal system, not the political one. This conclusion can also be gleaned from looking at where the same arguments presented for the world court ultimately ended: the articulation of the principle of prohibition of denial of justice and the customary rule of an international minimum standard.

This chapter aims to describe the emergence of a regime for international investment in the ruins of these expansionary efforts. To that history we now turn.

⁴²⁷ While legal transplants refer to the movement of one rule or system from one country to another, the use I am giving it here adds a time dimension to it. As Americans prepared the presentation of their proposal, they looked back to their particular constitutional experience, thus building on their own narrative. Narratives do not occur in a vacuum: they are targeted toward the future. Thus, the concept of transplant is that coined by George Galindo, in which a time dimension must be taken into account. George Rodrigo Bandeira Galindo, "Legal Transplants between Time and Space," in *Entanglements in Legal History: Conceptual Approaches*, ed. Thomas Duve (Frankfurt am Main: Max Planck Institute for European Legal History, 2014). At 140 ff.

3.1 Diversity Jurisdiction and Legal Subjects: The Constitutional Origins of Investment Treaties

Traditional accounts of the origins of modern Bilateral Investment Treaties (BITs)⁴²⁸ usually start with the failure to establish a multilateral platform for investment protection under the Havana Charter. According to this narrative, the United States was reluctant to participate in the discussions. As an alternative, according to this oft-cited history, the U.S. Congress opted for the second-best option:⁴²⁹ negotiating protections bilaterally, in an attempt to circumvent the opposition for a major overhaul of treaty protection.

To be sure, this is a story of the emergence of bilateral investment treaties, not of the dawn of what one could call the regime of international investment. It should not cause any surprise, therefore, that the periods scholars usually ascribe to the development of international investment law are coincident with the many phases of bilateral investment treaties and, more often than not, include the adaptations and the institutional learning reflected in those practices.⁴³⁰ But recounting the history of international law

⁴²⁸ For the history and policy of investment protection before the Second World War, see Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*.

⁴²⁹ Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010). At 184. A similar point is made by Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009). At 370-371. Schill argues that BITs were negotiated because of a deadlock between capital-importing and capital-exporting countries.

⁴³⁰ As Sornarajah has aptly described, these periods can be studied through the writings of Kenneth Vandeveld, who himself has taken part in the construction of investment treaties. Kenneth J Vandeveld, "Us Bilateral Investment Treaties: The Second Wave," *Mich. J. Int'l L.* 14 (1992); "The Bilateral Investment Treaty Program of the United States," *Cornell Int'l LJ* 21 (1988); *Bilateral Investment Treaties: History, Policy, and Interpretation*.

only through treaties or customs does not take into account that modern law-making is becoming extremely complex.⁴³¹

Moreover, such an account fails to acknowledge that, at least in the U.S., the Havana Charter faced opposition precisely for its section on investment protection, which was seen as a weak form of protection and also as an opportunity for governments to support “harassment and interference with American enterprises operating in foreign countries,” as the lobbying group of the National Foreign Trade Council put it.⁴³² Chief among those concerns was Chapter V on restrictive business practices.⁴³³ Mirroring American corporate law development, some government officials wanted to transfer antitrust measures to a global context. The move was obviously seen as threatening and sparked opposition from industrial associations, as shown by the statement from the National Foreign Trade Council.

But there is still one important development that occurred before the final rejection of the Charter: the program for the development of new BITs was already

For a conservative reaction to the 2004 model, see Stephen M Schwebel, “The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law,” *Transnational Dispute Management (TDM)* 3, no. 2 (2006).

⁴³¹ Koh, “Transnational Legal Process.”

⁴³² Mira Wilkins, *The Maturing of Multinational Enterprise: American Business Abroad from 1914 to 1970* (Cambridge, Mass.: Harvard University Press, 1974). At 288. Charles Lipson argues, in turn, that in response to the criticism espoused by the Council, the U.S. pushed for the inclusion of another article in the Geneva sessions of ITO. The subsequent failure of the negotiations was sparked firstly by the opposition from developing countries, which backed away from free-trade, and later by the lobbying from traditional, old-fashioned protectionists. For Lipson, this would be the cause behind the demise of the Havana Charter. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*. At 87.

⁴³³ See Tony A Freyer, *Antitrust and Global Capitalism, 1930–2004* (Cambridge: Cambridge University Press, 2006). At 396: “The United States failed to pass the ITO, largely because Truman Administration officials failed to resolve how international antitrust enforcement might disrupt national support for cooperative commodity polices.”

underway by the time the Charter was still being negotiated, with the support of the U.S., which hints at what might account for the first developments in modern international protection, at least in this country.

In a testimony before the Committee on Foreign Relation of the U.S. Senate in 1946, the Assistant to the Secretary of State told Senators that the provisions on the rights of companies that were included in the new model for treaties of commerce and friendship were “perhaps the most striking advance” in U.S. trade policy.⁴³⁴ That statement seemed to get at the preoccupation that was vented in a convention in New York about the future of the world economic order and the place corporations should have in it.⁴³⁵

The typical wording of these innovative provisions to the policy regarding investment protection provided the following:

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities.⁴³⁶

A more detailed clause, covering the standard of national treatment, is worded thusly in the treaty with Japan:

National treatment accorded under the provisions of the present Treaty to companies of . . . shall, in any State, Territory or possession of the United States of America, be the treatment

⁴³⁴ Testimony of Deputy Assistant Secretary of State Linder, Hearing before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, Eighty-second Congress second session, on treaties of friendship, commerce and navigation with Colombia, Israel, Ethiopia, Italy, Denmark, and Greece, May 9, 1952, par. 4, apud: Walker, "Provisions on Companies in United States Commercial Treaties."

⁴³⁵ Wilkins, *The Maturing of Multinational Enterprise: American Business Abroad from 1914 to 1970*. At 288.

⁴³⁶ U.S. Treaty of Friendship, Commerce and Navigation with China, 1946 (63 Stat. Pt. 2, 1299).

accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.⁴³⁷

This novelty has perhaps been overlooked. Although dating from a period that Vandavelde has dubbed the “modern treaties of friendship, commerce and navigation,” this provision on the rights of companies has a *de facto* function granting a company’s right of establishment. In that regard, one can’t help but notice that the wording of these clauses closely resembles the right of establishment provisions contained under the European Treaty of Rome.⁴³⁸

Although they were latecomers to bilateral treaties,⁴³⁹ U.S. bureaucrats who were drafting the new treaties of friendship, commerce and navigation were keen on emphasizing that the new treaties would also cover the most significant part of the national interests to be protected abroad: the corporate interests.

This was not a minor achievement, since it implied that countries that were not familiar with the corporate form would have to grant it legal status, even if the treaties did not have an obligation to legalize it. It would also mean that even those who did, but not on the terms of exporting capital countries, would have to grant legal status to

⁴³⁷ Treaty with Japan, Art. XXII, par. 4.

⁴³⁸ Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. “Companies or firms” means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those that are non-profit-making. Under the European Union, the freedom of establishment is regarded as one of the four essential freedoms, the others being the movement of goods, the movement of labor, and the movement of capital. These freedoms are the pillars of the European market economy, and, as the EU is keen on observing, they are essential to its liberal order.

⁴³⁹ According to Walker Jr. the first modern generation BIT was signed by Germany.

different kinds of corporations.⁴⁴⁰ But how could that come about, since the definition of nationality and the protection of the corporate form would have implied a special protection of a private and domestic institution through a public international agreement? Why would such a development come precisely from the United States?

As the drafters themselves have explained, the United States had witnessed the slow process of corporate citizenship recognition in its case law. In his contribution to the Cambridge American Economic History, Tony Freyer has claimed that the advancements in business law proved to be the underpinnings of the unprecedented growth the U.S. had experienced in the nineteenth century.⁴⁴¹ The process that he describes is not a straightforward achievement, but rather an incremental interpretation of major economic shifts by U.S. institutions. It is a story of the formation of the American capitalist system, a narrative in which corporations are contrasted with public authority. Four precedents could be cited to describe this process.

In the second half of the nineteenth century, the U.S. saw its population shift from a rural majority to an urban one. As a result of this phenomenon, the government made itself increasingly present, albeit in a decentralized fashion, mainly through states. In

⁴⁴⁰ To be sure, other treaties also contained provisions on companies' rights, as Walker Jr. himself acknowledges. For instance, in the series of treaties from 1923-38, there were dispositions on the rights of foreigners to establish corporations. Nonetheless, the new treaties changed this approach by extending these rights to a company establishing subsidiaries abroad. To a newly created company, it should be granted national treatment.

⁴⁴¹ In a similar vein, recent works that emerged after the financial crisis of 2008 have explored this link in the most innovative ways. Curtis J Milhaupt and Katharina Pistor, *Law & Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development around the World* (Chicago: University of Chicago Press, 2008).

Munn v. Illinois, the Supreme Court ruled that a state could maintain regulatory practices over business in the name of the public interest.⁴⁴²

To be sure, this was not the first instance where the Court ascertained the powers of a state legislature (1877), but the fact that it did so when an economic revolution was taking place allows one to understand why corporations continued to be chartered under state legislation, as Tony Freyer has explained:

These and other institutional conflicts stimulated the gradual expansion of federal administrative authority, including funding of the transcontinental railroads, the Interstate Commerce Act of 1887, the Sherman Antitrust Act of 1890, and the Bankruptcy Act of 1898. Congress also extended the right of those engaged in interstate business to remove cases from state to federal courts, fostering tension between state contract and tort rules and the federal common law built up around the Swift doctrine.⁴⁴³

The Swift doctrine, as seen in the first chapter, was established much earlier, and it is known for having established the federal diversity jurisdiction.

One could perhaps wonder if this understanding would apply to corporations. In fact, it was precisely through this analogy that corporate personality came into being. In this respect, another landmark decision was delivered in *Santa Clara County v. Southern Pacific Railroad* (1886), in which the Court held that corporations were like natural persons and were to be protected under the Equal Protection Clause of the Fourteenth Amendment.

⁴⁴² It is worth noting, however, that the defense of state autonomy worked in tandem with an enlarged national authority, especially, as Tony A. Freyer points out, for such new technologies as the telegraph. See *Pensacola Telegraph Co. V. Western Union Telegraph Co.*, 96 US 1 (1878).

⁴⁴³ Tony A. Freyer, "Business Law and American Economic History," in *The Cambridge Economic History of the United States* ed. Stanley L. Engerman and Robert E. Gallman (Cambridge: Cambridge University Press, 2008). At 465.

It is worth noting that, as also seen in the first chapter, the granting of rights to corporations did not wait until *Santa Clara County* to take place. In *Dartmouth College v. Woodward* (1819), some rights under the U.S. Constitution were granted to corporations. The rather curious development in *Santa Clara* was perhaps that the clause of equal protection, one of the cornerstones of national Reconstruction legislation after the Civil War, which had mainly been designed for the formal inclusion of the slave population, was used as a *de facto* form of regulating corporate activity through judicial reasoning.

Be that as it may, the most striking decision for our purposes was made in *Bank of Augusta v. Earle* (1839), in which the Court held that states are to respect the rules created by another confederate member with respect to the rights of corporations. In its ruling, the Taney Court stated that the obligation of respect emerged out of the rule of comity:

The term 'comity' is taken from the civil law. Vattel has no distinct chapter upon that head. But the doctrine is laid down by other authorities with sufficient distinctness, and in effect by him. It is, in general terms, that there are, between nations at peace with one another, rights, both natural and individual, resulting from the comity or courtesy due from one friendly nation to another. Among these, is the right to sue in their Courts respectively; the right to travel in each other's dominions; the right to pursue one's vocation in trade; the right to do all things, generally, which belong to the citizens proper of each country, and which they are not precluded from doing by some positive law of the state. Among these rights, one of the clearest is the right of a citizen of one nation to take away his property from the territory of any other friendly nation, without molestation or objection. This is what we call the comity of nations.

The reference to international law could perhaps strike one as being misleading: what, out of every law discipline, has international law to do with corporate law? That question, however, would miss the point. In truth, the ruling shows that the very foundation of the American economic model rests on a forgotten principle of international law. Claiming that it pertains to international law just confounds the subject even further. As Alex Mills has demonstrated, both public and private international law

are intermingled in their origins.^{444,445} What the principle of comity actually amounted to was that corporate citizenship in the U.S. was to be given by state legislatures while they would freely pursue their practice nationwide. In other words, the combination of all these precedents explains why corporate law in the U.S. remains a matter of state jurisdiction while at the same time being litigated in federal courts.

Such a conclusion is not too far off from to one that Hermann Walker Jr. reached.

When defining the corporation that now received protection under the treaty, Herman Walker Jr. recalled Chief Justice Taney, in his oft-cited statement in *Bank of Augusta v. Earle*, saying that “a corporation is as creatures of sovereignty which can exist only within the jurisdiction of the state creating it and cannot move or migrate outside that jurisdiction.”⁴⁴⁶ Such a position, as the author claimed, held sway in American legal culture up until the turn of the Century:

As a practical matter, it was not until about the last quarter of the nineteenth century that men’s minds had become habituated to corporate activities which crosses state lines; and it was not until well into that quarter-century that authority for the creation of mercantile corporation, the particular type most readily associated with the traditional avowed purposes of a commercial treaty, came to be granted by many of the states.

The development of the rule of the corporate entity with international implications benefitted from the experience of the United States in not only granting legal personality

⁴⁴⁴ See Alex Mills, "The Private History of International Law," *International & Comparative Law Quarterly* 55, no. 1 (2006).

⁴⁴⁵ A similar account could perhaps be told by the preference in the United States for the term “conflict of laws” instead of “private international law.” Although the two terms are usually used interchangeably, the American Society of International Law later opted to use “private international law” when the problem was not only deciding which domestic law was applicable, but also in which forum should it be claimed.

⁴⁴⁶ Walker, "Provisions on Companies in United States Commercial Treaties." At 375.

to corporations, but also of creating permissible rules for strategic behavior,⁴⁴⁷ something that would later be seen as forum shopping. As been affirmed previously, the case law emerged from a series of disputes among states, which initially held the power to legislate over their subject, in conflicts of jurisdiction over corporations that held activities outside the state of incorporation.⁴⁴⁸ One should also keep in mind that the rule of comity, which was also of significant importance in solving these conflicts, was similarly developed incrementally through a long series of cases.

Herman Walker Jr. summarizes the development of the international rule as thus:

The simple "classical" test, which has been found acceptable by all countries with which the United States has signed commercial treaties since the last war, nevertheless follows a number of earlier treaties, especially examples dating from the last century, and is consonant also with other precedents. Further, it represents the practice followed by United States courts in determining the "citizenship" of corporations for jurisdictional purposes.⁴⁴⁹

It is striking how such remarks were closely followed by Leo M. Drachsler, a former Prosecutor at war trials in Nuremberg and a colleague of Herman Walker Jr. in the Executive:⁴⁵⁰

The starting point in United States legal thought with respect to corporations is the existence of multiple state laws governing corporate activity premised on the concept that except for certain constitutional clauses, each state of the Union is a foreign to the other as any foreign nation is to the United States of America. So pronounced is the attitude that the great weight of writing in the field of law governing foreign corporations refers almost exclusively to relations among the states of the United States.

⁴⁴⁷ Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation."

⁴⁴⁸ The history is also well documented in the US. See Walker, "Provisions on Companies in United States Commercial Treaties." At 375.

⁴⁴⁹ Ibid. at 376.

⁴⁵⁰ Leo M Drachsler, "The Status of Alien Corporations in the Law of the United States," *Fordham L. Rev.* 23 (1954).

In clarifying that position, the new treaties also contained a provision on such rights in the following terms:

National treatment accorded under the provision of the present Treaty to companies of . . . shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.⁴⁵¹

The most immediate consequence of granting corporations personality is to extend them the right to access to courts. But the modern treaties⁴⁵² of investment did this in four steps.⁴⁵³ First, they state that the parties shall grant companies the standard of national treatment, i.e., to grant them rights in terms no less favorable than those applicable to domestic companies. Secondly the treaties contain a provision extending “the non-discrimination rules to requirements regarding security for costs.”⁴⁵⁴ Thirdly, the right also includes adjudicating bodies that are not necessarily linked to the Judiciary, such as administrative tribunals and agencies. Finally, the right can be recognized even if the subject company has not been admitted to do business in gross violation of contract law or intellectual property rights.

Through the standard of national treatment, it is also possible to derive a set of functional rights of companies, since these new treaties “assure to companies of either party equality of treatment with companies of the other party, with respect to engaging in

⁴⁵¹ E.g. Treaty of Japan Art. XXII, par. 4. Apud Walker, "Provisions on Companies in United States Commercial Treaties." at 390.

⁴⁵² The term “modern treaty” was used in reference to the treaties concluded “following World War II.” See Vandeveld, "The Bilateral Investment Treaty Program of the United States." At 206.

⁴⁵³ Walker, "Provisions on Companies in United States Commercial Treaties." At 384.

⁴⁵⁴ Ibid. at 384.

all ordinary business activities, commercial, industrial and financial.”⁴⁵⁵ If national treatment is not the standard agreed upon rule, then companies enjoy, as a minimum, the protection of the most favored nation principle.

These rules do not apply to property protection. The standard, in such cases, is still close to traditional international law, providing for prohibition of arbitrary seizures and the provision of “prompt, just and effective compensations” in the event of expropriation measures.

In other words, it is not the mere signing of bilateral treaties of bygone eras that marks the rising of IIL, but the admission of companies as rights holders under international law.

Such a development also marks, under Walker’s view a significant accomplishment, albeit a quantitatively modest one:

They mark a definite advance in an area in which progress through multilateral agreement has so far been lacking. There are sufficient realized examples, considering the variety and the geographical spread of the countries party to them, to form a clear and forward-looking pattern. The growth of this pattern, if and as it occurs with the accretion in time of additional examples, should be conducive to the development of international standard of practice, not to say the crystallization of principles of international law, with respect to the treatment of companies. This consummation would seem especially appropriate in an age when international trade and business are so predominantly conducted through the corporate medium.⁴⁵⁶

Again, it is worth noting that these remarks were made by someone who actively participated in conducting American foreign policy following the Second World War.

⁴⁵⁵ Ibid. at 385.

⁴⁵⁶ Ibid. at 393.

Walker co-authored a book with Robert Renbert Wilson, another key figure of the time, on the protection of foreign investment.⁴⁵⁷

Ten years after the modern treaties began to appear, Robert R. Wilson, writing in the Editorial Comment section of the *American Journal of International Law*, signalled out what, under his view, were the major features of IIL. Along with the provisions concerning real property, “there is provision for companies organized in one party state to engage in listed types of activities [...] and for national and companies of one party state to organize, control, and manage companies under the laws of the other party state.”⁴⁵⁸

3.2 The Formal Implementation of the Prohibition of Denial of Justice

One would be rather surprised to see how little reference, if any at all, was made to the clause of “equitable treatment” or “fair and equitable treatment.” To be sure, these were clauses that were present in almost all the treaties that were signed at that time, and they were also present in the Havana Charter.⁴⁵⁹ A possible explanation is due to the fact that the major concern, in terms of policy for investment protection, was with expropriation, a topic that did deserve attention from the early drafters as well as from policy-makers. This is because as early as 1952, debates on sovereign rights over nationalization seemed too politically driven, and investment treaties were used to avoid the troubles the United States had in places such as Russia and Mexico.⁴⁶⁰

⁴⁵⁷ Robert Renbert Wilson, "A Decade of New Commercial Treaties," *ibid.*, no. 4 (1960). At 929.

⁴⁵⁸ *Ibid.* at 929.

⁴⁵⁹ Marcela Klein Bronfman, "Fair and Equitable Treatment: An Evolving Standard," *Estudios Internacionales* (2005). At 615.

⁴⁶⁰ Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*. At 87.

Be that as it may, if through legal terms it is possible to see the implications a right of standing gave to corporations, the social effects such a change begin to enact should also be stressed. The novelty that these treaties enacted coincided with three key developments in world society. First, there was an expansion of the limits of social systems beyond state borders. In other words, the emergence of a “world society”⁴⁶¹ removed functional systems out from under the umbrella of an exclusive organization, namely the state.⁴⁶² Secondly, the emergence of the multinational corporation as “an actor” in society engendered a shift in international relations scholarship, which had to forge new conceptual frameworks to deal with a “plurality” of agents. Finally, the irritations that these dynamics brought to the legal system was a major thrust behind the fragmentation of international law.

Corporations are key organizations in the economic system, and they almost function as a proxy for the market.⁴⁶³ In that position, having them organized as a collective unity is surely a form of inclusion, which prompted calls for a shift in the concept of subject toward that of organizations.⁴⁶⁴ Be that as it may, legally organized corporations are not mere “subjects” of rights, but they are endowed with a special

⁴⁶¹ Niklas Luhmann, "Globalization or World Society: How to Conceive of Modern Society?," *International Review of Sociology* 7, no. 1 (1997).

⁴⁶² Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*.

⁴⁶³ “Industrial firms may be said to ‘own’ their markets in much the same way that academics from various universities can be said to own their particular subdisciplines or invisible colleges, or in the way that divorce lawyers in a community are thought to jointly own the local divorce business.” Harrison C White, *Markets from Networks: Socioeconomic Models of Production* (Princeton: Princeton University Press, 2005). At 325. In an earlier study White had registered: “markets are self-reproducing social structures among specific cliques of firms and other actors who evolve roles from observations of each other’s behaviour.” “Where Do Markets Come From?,” *American journal of sociology* 87, no. 3 (1981). At 518.

⁴⁶⁴ Luhmann, *Law as a Social System*. At 454.

privilege, which is the possibility of inflicting competition damage without taking responsibility for it.⁴⁶⁵ As seen in the first chapter, to effect such a mechanism, law had to shift the definition of organizations, which had been public entities, since chartering meant special privileges, to make them private.⁴⁶⁶ In the language of the legal system, competition was a public good.⁴⁶⁷

Another relevant effect of the changes enacted was that the international protection of contracts and properties abroad meant, in reality, that the structural coupling between the legal and economic systems has now become the medium for the medium of politics, only, however, on a global scale. This is a relevant insight. It dispels the primacy of the state in describing the state of affairs in international settings. One should keep in mind Luhmann's remarks reckoning that the structural coupling between the legal and the economic system are not related to the political system; in fact, the discussion on intervention and the limits of intervention, or even regulation and the limits thereof, is not really relevant for the political system when it comes to the actual implementation of these acts. As Luhmann explains, "All that matters for the autopoiesis of the political system is collectively binding communication about intentions to intervene, and not the actual effects of intervention—which occur much later, or not at all."⁴⁶⁸

⁴⁶⁵ Ibid. at 400.

⁴⁶⁶ The word "investment," which has come to be used to define a whole branch of international law, derives from the Spanish "*invertido*," a term that designated the person who put on the official vestments that were required to perform public functions. In contrast to the many histories devoted to international investment law, the etymology of the concept still holds the meaning that investment regimes perform today: to grant special privileges to capitalist production.

⁴⁶⁷ *Bank of Augusta V. Earle*.

⁴⁶⁸ Luhmann, *Law as a Social System*. At 402.

It seems as though intervention should not be taken too seriously, but it should not be taken lightly either. In international relations, a whole body of work has dealt with the emergence of these new “actors.” The very terms *interstate*, *transgovernmental*, and *transnational* have been coined to allow analysis to happen.⁴⁶⁹ In a group of studies at Harvard University, Raymon Vernon, an American economist who had participated in the Marshall Plan,⁴⁷⁰ began working on the Multinational Enterprise Project. The term multination had been used in the first half of the twentieth century to describe integration problems in what today we would call multi-ethnic societies. Until that period, nations were just a part of the political vocabulary of Victorian society.⁴⁷¹

To recall one of the most influential books of that time,⁴⁷² and as many key scholars of that period claimed,⁴⁷³ the rise of the multinational corporation put sovereignty at bay. The work of these scholars aimed to respond to what in systems theory one cannot answer, namely how, and to what extent, should a country relinquish its sovereignty while retaining power to pursue legitimate economic interests.⁴⁷⁴ Later on, this line of research gave birth to a much more sophisticated concept. Heavily influenced by Polany, Ruggie developed the notion of “embedded liberalism” to refer to the fact that, during Bretton Woods, what was taking place was a new version of liberalism. The

⁴⁶⁹ Robert O Keohane and Joseph S Nye, *Power and Interdependence* (Boston: Harpers Collins, 1989). At 25.

⁴⁷⁰ Michael J Hogan, *The Marshall Plan: America, Britain and the Reconstruction of Western Europe, 1947-1952* (Cambridge: Cambridge University Press, 1987). At 120.

⁴⁷¹ Eric Hobsbawm, *Age of Empire: 1875-1914* (New York: Vintage Books, 1987). At 142.

⁴⁷² Raymond Vernon, "Sovereignty at Bay: The Multinational Spread of Us Enterprises," *Thunderbird International Business Review* 13, no. 4 (1971).

⁴⁷³ Robert O Keohane, "The Old Ipe and the New," *Review of International Political Economy* 16, no. 1 (2009). At 35.

⁴⁷⁴ *Ibid.* at 35.

term was devised to explain complex interdependence: how states held autonomy, while still needing to cooperate.

The standard definition of a regime under international relations theory defines it as “social institutions around which actor expectations converge in a given area of international relations.”⁴⁷⁵ Regimes, therefore, are limits on the discretion an actor possesses in conducting his businesses and are, thus, “akin to language,” since they have an intersubjective quality.⁴⁷⁶ Building on this notion, Ruggie later argued that international relations could be best explained through the fusing of the legitimate social purpose and power, to which he ascribed the term “embedded liberalism.” It consisted, therefore, of striking a balance between multilateralism and domestic stability; in economic terms, this means that governments would be more likely to favor a form of

⁴⁷⁵ Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables." at 2.

⁴⁷⁶ John Gerard Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order," *ibid.* at 380. Ruggie claimed that “these regimes, then, are neither determinative nor irrelevant, but provide part of the context that shapes the character of transnationalization.” Ruggie’s analysis was quickly welcomed under international relations scholarship. Only later did the relevance of his concepts began to gain ground in international law. This started with international trade. Dunoff, and later Howse, used Ruggie’s concepts to describe the functioning of the WTO. Today his contributions have become a central tenet of international relations and international law efforts at joint methodology. In a more recent article, Andrew Lang commented on the main features of Ruggie’s contribution. According to the LSE professor, “its most distinctive contribution is to our understanding of the nature of regime – in particular, their intersubjective quality.”⁴⁷⁶ By this he means an emphasis on the nature of regimes as being akin to language: they provide a framework for collective intentionality. Regimes provide “cognitive scripts” giving meaning to behavior, a central feature for making social action possible. Moreover, a regime consists of what Howse dubbed “constitutive rules”: they do not regulate trade, as in the case studied by Ruggie, but they create the very possibility of playing the game. This focus on “communicative dynamics,” as Lang registers it, seems to place Ruggie’s contribution under the helm of constructivism. This is important because it allows one to apply the same concepts used under regime theory to legal systems: “like the trade regime, we may expect trade law to have not just a regulative but a constitutive function.” See Jeffrey L Dunoff, "Rethinking International Trade," *U. Pa. J. Int'l Econ. L.* 19 (1998). Robert Howse, "From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime," *American Journal of International Law* 96, no. 1 (2002). Andrew TF Lang, "Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime," *Journal of International Economic Law* 9, no. 1 (2006).

international division of labor that, while gaining in some form of comparative advantage, also minimizes the risks of disruptive innovation domestically. In other words, it is not a proper *laissez-faire*, but as Polany would have argued, an invented *laissez-faire*.⁴⁷⁷

It is curious to note that what Ruggie attempted to describe with these concepts was a definition of “regime change.” He claimed that through the notion of “embedded liberalism,” it was possible to observe how states could change instruments (rules and procedures) while maintaining the normative framework (principles and norms) intact.⁴⁷⁸ Of course, the methodological approach developed by international relations differs from that of systems theory. In a sense, it could be claimed that what lawyers are attempting to do now under the Luhmannian framework is very much akin to what political scientists were doing in the 1970s. The terms “international constitution” or “transnational constitution” are sometimes linked to the description of governance space left to local political bodies in the age of globalization. Systems theory, however, provides a framework through which the changes in legal programs could be interpreted not as an exclusive product of power politics—the claim behind the theory of sources—but

⁴⁷⁷ What kind of division of labor among the industrialized countries do these patterns portray? It is, in Cooper’s words, one characterized by a “narrowing of the economic basis” on which international transactions rest. By this, he means that international economic transactions increasingly reflect the effects of marginal cost and price differentials of similar activities and products, rather than the mutual benefits of divergent investment, production, and export structures. Moreover, within this division of labor, there is a critical shift in functional differentiation from the level of country and sector to the level of product and firm. And the economic gains from trade are correspondingly smaller. Ruggie, “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order.” At 400-401.

⁴⁷⁸ Ruggie is, in reality, using a concept of interaction between regimes and ascribing to it behavioral outcomes. In contrast, one could compare such an approach to that of Krasner’s notion of intervening variables. See Stephen D Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables,” *ibid.* at 12.

through the mutual learning between functional systems.⁴⁷⁹ In other words, it provides an explanation, albeit a functional one, for why “the fragmentation of global law is more radical than any single reductionist perspective—legal, political, economic or cultural—can comprehend.”⁴⁸⁰

If it is indeed possible to claim that the concept of a corporation, through an ingenious combination of property and contract, represents, at the organizational level, the structural coupling between law and economics, then the decisions within the organization, mainly justified by ownership that is “the disjunction of the requirements for consensus,”⁴⁸¹ can be seen in their full significance. Decisions can be forcefully implemented because changes in the validity of law make the political system react.⁴⁸² This is more significant than the developments of a *lex mercatoria*,⁴⁸³ but it should not be taken to mean the creation of legal orders from each individual enterprise.⁴⁸⁴ By granting a right to access to court, investment treaties allowed for a prohibition of the denial of justice to be articulated against an entire country. If more research is needed to understand what structural conditions were changed by the articulation of such principles in legal orders, in international law, then, one can only speculate: might the prospect of

⁴⁷⁹ Niklas Luhmann, "The World Society as a Social System," *International Journal of General Systems* 8, no. 3 (1982).

⁴⁸⁰ Fischer-Lescano and Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." At 1004.

⁴⁸¹ Luhmann, *Law as a Social System*. At 392.

⁴⁸² *Ibid.* at 401.

⁴⁸³ Peter Muchlinski, "Global Bukowina'examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community," in *Global Law without a State*, ed. Gunther Teubner (Aldershot: Dartmouth Gower, 1997). At 79.

⁴⁸⁴ Jean-Philippe Robé, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order," in *Global Law without a State*, ed. Gunther Teubner (Aldershot: Dartmouth Gower, 1997). At 56.

having to present litigation have forced countries to adopt an overly liberal economic program out of fear of having it challenged if they did otherwise?⁴⁸⁵ Or is it not enough of a guarantee for firms who must gather additional elements to prove a prohibition of prohibition of denial of justice?

These are the features that have prompted legal scholars to explain why states adhere to such treaties in the first place. This is a troubling question if one considers that the regime evolved despite the opposition—the fierce opposition, one could claim⁴⁸⁶--from developing countries.⁴⁸⁷ Against such a unidirectional approach, Elkins, et al. have

⁴⁸⁵ In a letter to the American Congress signed by more than 200 academics, similar concerns were voiced by people like Joseph Stiglitz and Laurence Tribe on the following terms: “Through ISDS, the federal government gives foreign investors and foreign investors alone the ability to bypass that robust, nuanced, and democratically responsive legal framework. Foreign investors are able to frame questions of domestic constitutional and administrative law as treaty claims, and take those claims to a panel of private international arbitrators, circumventing local, state or federal domestic administrative bodies and courts. Freed from fundamental rules of domestic procedural and substantive law that would have otherwise governed their lawsuits against the government, foreign corporations can succeed in lawsuits before ISDS tribunals even when domestic law would have clearly led to the rejection of those companies’ claims. Corporations are even able to relitigate cases they have already lost in domestic courts. It is ISDS arbitrators, not domestic courts, who are ultimately able to determine the bounds of proper administrative, legislative, and judicial conduct. This system undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law. In addition to these fundamental flaws that arise from a parallel and privileged set of legal rights and recourse for foreign economic actors, there are various flaws in the way ISDS proceedings are meant to be conducted in the TPP. In short, ISDS lacks many of the basic protections and procedures of the justice system normally available in a court of law. There are no mechanisms for domestic citizens or entities affected by ISDS cases to intervene in or meaningfully participate in the disputes; there is no appeals process and therefore no way of addressing errors of law or fact made in arbitral decisions; and there is no oversight or accountability of the private lawyers who serve as arbitrators, many of whom rotate between being arbitrators and bringing cases for corporations against governments. Codes of judicial conduct that bind the domestic judiciary do not apply to arbitrators in ISDS cases.” In: Robert Howse, “International Investment Law and Arbitration: A Conceptual Framework,” in *International Law and Litigation*, ed. Helene Ruiz-Fabri (Berlin: Nomos Press, 2017).

⁴⁸⁶ Many have indeed occurred long before the NIEO Resolution. Months after the approval of the Havana Text, Latin American countries made explicit their reservations in almost every conceivable aspect of investment protection at the Ninth International Conference of American States. Charles G. Fenwick. The Ninth International Conference of American States. 42 *American Journal of International Law* 561.

⁴⁸⁷ The quest for the sovereignty claim over permanent resources was approved by the General Assembly in 1952, under the initiative of Uruguay and Bolivia. General Assembly Resolution 626 (VII). For a longer

argued that investment treaties consist of a program of credible commitments by host countries to abide by the rules that protect foreign property; developing countries have an incentive to adhere to such treaties to showcase a liberal stance.⁴⁸⁸ This argument is understandable since “BITs give host governments a competitive edge in attracting capital if there are otherwise doubts about their willingness to enforce contracts fairly.”⁴⁸⁹ Thus, the commitment is expressed through clarification, government involvement, and enhanced enforcement⁴⁹⁰.

Their explanation could perhaps best be called the competition model, as it documents that host countries compete for finite capital resources. The result of this competition is that it “minimally improves access to capital at a high cost to national sovereignty.”⁴⁹¹ This is so because competition for capital has “distributive consequences,” a trait that resembles Marx’s depiction of competition among workers being worse than that among capital owners.

Of course, the competition model has the virtue of underlying the main drivers of international investment decisions, which are correlated with the spread of BITs. In this respect, the theory claims that treaties should be distributed among host countries and that they are more likely in countries where competition for capital is most intense. The

discussion on the opposition from developing countries, see also Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*. At 85-89.

⁴⁸⁸ Elkins, Guzman, and Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000." at 819.

⁴⁸⁹ Ibid. Note that this is independent of the actual evidence on whether or not BIT signing increases capital flows.

⁴⁹⁰ Ibid. at 823.

⁴⁹¹ Ibid. at 843.

spread, in turn, should occur more frequently at times where the investment pool rises. Finally, host countries that lack credibility are usually the first to take part in it.

Thus, the model provides a great accounting of the spread of bilateral treaties, and it also is a predictive instrument. But it has underlying assumptions: whereas the model remains doubtful of ideological reasons, it nevertheless assumes that developed countries have the treaties ready, so it is up to host countries to adhere to investment treaties. In sum, under the competition model, in the free market for development ideas, developed countries have pret-a-porter solutions for developing ones.

Although the model is a capable narrative for the spread of treaties, it fails to account for the underpinnings of the regime, which are, in reality, the normative assumptions of investment law. This is a highly debated issue because it touches on the assessments of the accomplishments of the New International Economic Order and the assumption, or claims, as to whether or not it toppled the customary international law. In other words, from a legal perspective, addressing the question of why states adhere to investment treaties depends on two questions: the first is if there is an interest of the state in submitting its decisions to an international adjudicatory body; the second, of whether or not the rules were created by these new bilateral investment treaties. To these two questions we now turn. Firstly, we will attempt to describe the sources that are usually pointed to as evidence of international legal norms. Secondly, we will examine whether these elements are coherent enough to allow for court adjudication or whether they are a cause of the troubles of the regime. The precise definition of the problem will allow us to

understand whether the constitutional concept, as recalled in the last two chapters, could provide a solution.

3.3 The Normative Framework of International Investment and the Dormant Equitable Standard

International lawyers have a hard time these days. The status of the judicial branch as a contra-majoritarian institution is well debated within domestic orders, with the key tenets of the discussion relying on the democratic accountability of a non-elected decision-maker.⁴⁹² In international law, however, accountability must rely not only on democracy, but also on the sovereignty rights each nation has.

However problematic the concept of legal source is, it still provides an authoritative framework in which international law can take place. That authority is said to have come from sovereignty itself,⁴⁹³ but maybe it is simply best that we regard it as rules of change.⁴⁹⁴ As no treaty on the right of companies was available before the second half of the twentieth century, one would have to look to state practices as evidence of either a customary source or of general principles of law. But how to start looking?

As the boom of investment treaties took hold at the beginning of this century, awards came to be granted not on the basis of the right to property—the key substantive concern of the treaties devised in the United States—but on the rather “dormant” clause of fair and equitable treatment: “even though those who established the US BIT

⁴⁹² Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986). At 67.

⁴⁹³ Lauterpacht, *The Function of Law in the International Community*. At 3-4.

⁴⁹⁴ Hart and Green, *The Concept of Law*. At 81. And Waldron, “Who Needs Rules of Recognition?.”

programme stressed the need for treaty protections against expropriation, the treaty based protection ensuring ‘fair and equitable treatment’ (‘FET’) is the most important and frequently adjudicated question.”⁴⁹⁵ As another writer puts it, FET is the most successfully argued investors right in the experience of international adjudication⁴⁹⁶—and also the most ubiquitous.⁴⁹⁷ These clauses, however, as we will see later, are extremely vague, so it is no wonder why lawyers have devoted many books to the scope of the clause. One of these approaches has, more recently, been a turn towards the use of history, to examine instances of where dispositions of such a right could be gleaned.⁴⁹⁸

Scholars have drawn on the articulation of the protection of aliens abroad to claim that FET reveals the internationally recognized principle of minimum standard,⁴⁹⁹ as well as a customary international law.⁵⁰⁰ From what we saw in the second chapter, however, the minimum standard simply provided a standard of review for when a claim of denial justice was articulated, and one must provide grounds for what the outcome of its

⁴⁹⁵ Alvarez, *The Public International Law Regime Governing International Investment*. At 177.

⁴⁹⁶ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008). At 119.

⁴⁹⁷ Alvarez, *The Public International Law Regime Governing International Investment*. At 177.

⁴⁹⁸ For a critical perspective on the uses of history in international law, see George Rodrigo Bandeira Galindo, "Matti Koskenniemi and the Historiographical Turn in International Law," *European Journal of International Law* 16, no. 3 (2005).

⁴⁹⁹ For instance, the Annex of the new BIT negotiated by the United States contains the following provision: “The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.” In: United States Treasury Department, "Us Model Bilateral Treaty," <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

⁵⁰⁰ Pappas, *The International Minimum Standard and Fair and Equitable Treatment*. At 54 ff.

prohibition would be. These grounds tended to vary, and they were context dependent, so it is important to examine the actual cases in which that argument was raised.

Elletronica Sicula S.p.A was the only instance where the ICJ was called upon to interpret the rule.⁵⁰¹ There were, to be sure, other instances in which the arguments were presented before the Court, but in those cases, the Court dealt with them specifically.⁵⁰² The Permanent Court, however, dealt with considerably more cases, albeit in none of them was there evidence of a full definition of the principle. In Oscar Chinn,⁵⁰³ for instance, although the United Kingdom had raised questions pertaining to the minimum standard, the Court dismissed the claims of (i) infringement of the rights of equality, stating that the right amounted to no discriminatory treatment on the basis of nationality,⁵⁰⁴ and (ii) infringement of vested rights.⁵⁰⁵ In the Phosphates case, the Court

⁵⁰¹ Elletronica Sicula S.p.A.(USA v. Italy) [1989] ICJ Rep 15, par. 111. The primary standard laid down by Article V is "the full protection and security required by international law," in short the "protection and security" must conform to the minimum international standard. As noted above, this is supplemented by the criteria of national treatment and most-favored-nation treatment. The Chamber is here called upon to apply the provisions of a treaty which sets standards—in addition to the reference to general international law—that may go further in protecting nationals of the High Contracting Parties than general international law requires; but the United States has not—save in one respect—suggested that these requirements do, in this respect, set higher standards than the international standard. It must be doubted whether, in all the circumstances, the delay in the Prefect's ruling in this case can be regarded as falling below that standard. Certainly, the Applicant's use of so serious a charge as to call it a "denial of procedural justice" might be thought to be exaggerated.

⁵⁰² In the *Ambatielos* case, United Kingdom v. Greece, ICJ Case, Merits Obligation to Arbitrate, Judgement of May 5th 1953, the Court took note of UK arguments that "denial of justice" required proof of violation to a "general principle of international law." In the case of *Barcelona Traction*, the Court did examine arguments raised about questions of denial of justice having said, in *obiter dicta*, that the protection against denial of justice is a human right. *Barcelona Traction Case (Belgium v. Spain)*, ICJ, Judgement of 5 February 1970, par. 75.

⁵⁰³ Oscar Chinn (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12).

⁵⁰⁴ "The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups." Par. 93.

⁵⁰⁵ "No enterprise—least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates—can escape from the chances and hazards resulting from general

could not examine the question of denial of justice, but it did establish the principle that a denial of justice can only occur with no remedy or when an undue delay follows an illegal act.⁵⁰⁶ In the *de Mavrommatis Concessions Case*, the PCIJ first approached the question of diplomatic protection, recognizing it as a principle of international law.⁵⁰⁷

It is worth noticing that none of these cases deals directly with what later become known as the minimum standard, after Hull's speech at the *American Society of International Law*. The closest that the Courts get to that concept has been when they examined arguments on violations of "vested rights."⁵⁰⁸ Even when using this term, the

economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State." Par. 100.

⁵⁰⁶ "In these circumstances the alleged denial of justice, resulting either from a lacuna in the judicial organization or from the refusal of administrative or extraordinary methods of redress designed to supplement its deficiencies, merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it." *Phosphates in Morocco (Italy v. Fr.)*, 1938 P.C.I.J. (ser. A/B) No. 74 (June 14), par. 48.

⁵⁰⁷ "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, of whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. The fact that Great Britain and Greece are the opposing Parties to the dispute arising out of the *Mavrommatis concessions* is sufficient to make it a dispute between two States within the meaning of Article 26 of the *Palestine Mandate*." *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30), par. 21-22.

⁵⁰⁸ *German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7 (May 25), par. 132.

context was closer to what today one would argue as a right of property, a defense against expropriation.⁵⁰⁹

Arbitral decisions on diverse mixed claims commissions present a clearer picture of the standard invoked nowadays. In *LFH Neer and Pauline Neer*⁵¹⁰, for instance, Fred. K. Nielsen, in a separate opinion, affirmed that even if illegal conduct cannot be found in domestic law, that would not preclude international organizations from deciding upon it. He later argued that “the propriety of governmental acts should be determined according to ordinary standard of civilization, even though standards differ considerably among members of the family of nations, equal under the law.” He later stated that although it is difficult to establish, such acts could be exemplified by “obvious error in the administration of justice, or fraud, or a clear outrage.”

There are other instances in which the same line of reasoning can be gleaned. To be sure, the *Neer* award is itself based on previous claims commissions, such as the one with *Costa Rica and Venezuela*. Also, the same reasoning was later repeated in *Chattin*, notwithstanding the fact that Nielsen was dissenting.⁵¹¹

To be sure, there were other instances where similar arguments were raised, but the content did not vary from that of the *Neer* claim. As a testament to its significance,

⁵⁰⁹ It is worth recalling that the concept of “vested rights” is referenced in American jurisprudence in the works of Joseph Beale. In his *Treatise on the Conflict of Law*, he noticed that Story’s description of the rule of comity was not as the Dutch model prescribed: “instead of the Dutch theory of comity, the common law has worked out indigenously a theory of vested rights which serves the same purpose, that is, the desire to reach a just result, and is not subject to the objections which can be urged against the doctrine of comity.” Joseph Henry Beale, *A Treatise on the Conflict of Laws* (Cambridge: Harvard University Press, 1916). p. 105.

⁵¹⁰ *LFH Neer and Pauline Neer* (US v Mexico) (15 October 1926)

⁵¹¹ *B. E. Chattin* (US v Mexico) (23 July 1927).

Edwin Borchard, in a commentary for the *American Journal of International Law*, later remarked that the opinion was to be commended. Later in the text, he summarized the opinion: “the Commission seems firmly convinced that the test of ‘denial of justice’ in these matters is not merely the municipal law, or the equality of treatment of aliens and nationals, but whether the act or omission in question, on which governmental responsibility is predicated, meets the so-called international standard of civilized justice.”⁵¹² Though one might get the impression that this was a substantive right, Borchard then explains exactly what the decisions implied: “the Commission, thus, seeks to establish a kind of international ‘due process of law,’ by which the legitimacy and propriety of national action may in last resort be tested.”⁵¹³

The point raised by Borchard is a fundamental one. It is extremely difficult to draw substantive principles from a formal standard. Thus, the question is translated to a problem of jurisdictional competence. This view has apparently been followed by later developments. The International Law Commission has recognized, for instance, that denial of justice is an act that falls under Article 4 of the Draft Articles on State Responsibility.⁵¹⁴ It also important to bear in mind that, in the same document, that Commission created a clause requiring the exhaustion of local remedies, expressly citing

⁵¹² M. Borchard Edwin, "Important Decisions of the Mixed Claims Commission United States and Mexico," *The American Journal of International Law* 21, no. 3 (1927). At 521.

⁵¹³ *Ibid.* at 521.

⁵¹⁴ ILC, Articles on State Responsibility, Yearbook of the International Law Commission, 2001, vol. II, UN DOC A/CN.4/SER.A/2001/Add.1 Part Two.

Calvo. But what actually amounts to a denial of justice seems to be, again, only a procedural right: the right to a fair trial.⁵¹⁵

The gravest problem with “the minimum standard” is not so much whether or not it derives from customary international law, or from a specific treaty provision, but rather the question of in relation to which parameter the right could be invoked. In other words, in relation to which country should one measure if the trial can be deemed fair? This is precisely where the history of the concept can only provide a negative answer: the minimum standard was conceived in reference to “civilized nations,” a principle that, after the turn of the century, seemed too far off to be used.⁵¹⁶

This last point, it seems, is what is at the center of the problems with the current regime, even if the right to a fair trial could be invoked in reference to international human rights mechanisms.⁵¹⁷ The problems that are currently being targeted in the regime stem, at a deeper level, not only from the lack of precision in a clause that, up until the last decade of the twentieth century went unnoticed, but also from this foundational principle to which the constitution has held up as an answer. This is the question to which we now turn.

3.4 The acoustic separation between states and arbitrators

In a recent book chapter, Fabio Morosini and Michelle Badin call attention to the new forms of investment protection that are currently being developed in the Global

⁵¹⁵ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*.

⁵¹⁶ Gerrit W Gong, *The Standard of "Civilization" in International Society* (Clarendon Press, 1984).

⁵¹⁷ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*. At 224 ff.

South. To be sure, theirs is a striking contribution to a still underexplored theme. In this work, they have presented a synthesis of the criticism currently directed toward the investment regime:

The current investment regime faces structural challenges, which are rooted in different and interrelated explanations. One factor associated with such crisis is the increasing discomfort about the actual effects of international investment agreements (IIAs) in promoting FDI. A second factor relates to the controversial nature of investment agreements that unduly protect private property at the expense of the right of host countries to regulate in the public interest. Third, there is a growing demand for a more balanced approach between investors and states, imposing more obligations on the former. Finally, the legitimacy crisis of the investment regime is linked to the contested benefits of investor-state dispute settlement (ISDS), which is grounded on the potential disparity of treatment between foreign investors and domestic investors, arbitrator's bias, lack of arbitrator accountability, lack of transparency, absence of *amicus curiae* and third-party participation, inconsistency of awards, absence of an appeals mechanism and constraint on policy space. While these structural challenges affect both developed and developing countries, their responses vary according to the size of their markets and developmental needs, and their leverage in the international investment regime.

Their criticism is not new, but they provide a good framework for understanding the law's function in the international order. To be sure, assessing whether or not treaties are true to their promise to attract foreign investment is a debate that requires economic analysis.⁵¹⁸ For a similar reason, legitimacy is a problem that the legal system cannot solve.⁵¹⁹ From the standpoint of the theory adopted in this thesis, the only claim that can be addressed in here is the one of balancing and consistency, which is at the core of the fair and equitable treatment clause.

Fair and equitable treatment is a standard of review, that is, a standard that is directed to judges, in contrast with the standard of conduct, which is addressed to the

⁵¹⁸ Eric Neumayer and Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?," *World development* 33, no. 10 (2005).

⁵¹⁹ Luhmann, *Law as a Social System*. At 470.

States.⁵²⁰ This might be counterintuitive, especially given the wording of these provisions:

“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”⁵²¹

“Each Contracting State shall in its territory in every case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under this Treaty.”⁵²²

“Investment and activities associated with investments by investors of the other contracting party shall be accorded in all times fair and equitable treatment and shall enjoy constant protection and security in the territory of the other contracting party.”⁵²³

As is possible to tell from the text of these provisions, the option to adopt the clause of “fair and equitable treatment” would necessarily oblige international lawyers to uncover the “ordinary meaning” of the terms. But recourse to a dictionary would only lead to yet another circular definition.⁵²⁴

The interpreter is forced, then, to search for an answer in the “object and purpose” of the treaty. Recourse to the preamble of the treaties is usually a good starting point, and

⁵²⁰ Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law," *Harvard Law Review* (1984). Dan-Cohen separated two types of norms, one that is directed towards the judge and another that directed toward everyone else.

⁵²¹ Department, "Us Model Bilateral Treaty". To be sure, the model treaty has moved on to detailed discussions of the scope of the treatment. For instance, paragraph two has the following provision: “2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.”

⁵²² Federal Ministry for Economics and Technology, "Germany Treaty Model," <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865>.

⁵²³ China and Argentina BIT, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/79>.

⁵²⁴ Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties," *The International Lawyer* (2005).

in many of the arbitral decisions given against Argentina, fair and equitable treatment was interpreted in light of the teleology thus envisioned by the tribunal.

In *LGE Energy Corp.*, for instance, the ICSID argued that:

“Several tribunals in recent years have interpreted the fair and equitable treatment standard in various investment treaties in light of the same or similar language as the Preamble of the Argentina-US BIT. These tribunals have repeatedly concluded based on the specific language concerning fair and equitable treatment, and in the context of the stated objectives of the various treaties, that the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law.”⁵²⁵

The Argentinean cases are exemplary in setting the standard for future interpretations of the FET clause,⁵²⁶ to the point where some arbitrations have referred to a “principle” of “stability and predictability.”⁵²⁷

Doctrinally, this has been summarized as a standard that has “a strict focus on the state of the law at the time of the investment, laying the basis and limiting expectations protected by the standard.”⁵²⁸ It should not come as a surprise, then, that the difference between the expectations of a given investment and its aims in terms of regulatory adjudication can eventually collide—and this precise space of harmonization has then been viewed as a “regulatory space”⁵²⁹ to be thought through as a prototypical instance of global administrative law.⁵³⁰

⁵²⁵ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 125

⁵²⁶ José E Alvarez, “The Once and Future Foreign Investment Regime,” in *Looking to the Future* (Brill, 2010).

⁵²⁷ *BG Group Plc. v. Argentine Republic*, UNCITRAL, Award, 24 December 2007, para. 307.

⁵²⁸ Dolzer, “Fair and Equitable Treatment: A Key Standard in Investment Treaties.” At 106.

⁵²⁹ Wagner, “Regulatory Space in International Trade Law and International Investment Law.” One does not need to dig too deep into the concept to grasp how dangerous it is from a legal perspective. To perceive any type of judicial adjudication, be it national or international, as limiting the purpose orienting conditions can only be justified if those limitations were expressly agreed to in the norms being applied by these

Since identifying the legal criteria for applying the notions of “purpose” and “legitimacy expectations” when it comes to investment decisions is not a trivial task, some tribunals have opted to follow pertinent state practices. This was the case, for instance, in *Metalclad*,⁵³¹ in which the Tribunal analyzed the content of specific governmental regulations so as to assess the basis for the expectations that businesses could legitimately hold.

In an even more detailed award, the Tribunal in *Técnicas Medioambientales Tecmed* expounded further:

“The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor’s ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle.”⁵³²

judicial or quasi-judicial bodies. Another possibility would be to see these bodies as capable of delivering purpose conditional programs through their decision-making processes. That last possibility, however, is simply not legally feasible. Law can only establish conditional programs. See Luhmann, *Law as a Social System*. At 196.

⁵³⁰ Gus Van Harten and Martin Loughlin, "Investment Treaty Arbitration as a Species of Global Administrative Law," *European Journal of International Law* 17, no. 1 (2006).

⁵³¹ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (*Metalclad*), para. 79.

⁵³² *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case no. ARB(AF)/00/2, para. 154.

More recently, in *Eiser*, the Tribunal held that the obligation to accord “fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments.”⁵³³ The Court conceded that regulations could be altered, provided that they were not radically altered: “fair and equitable treatment cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment’s value.”⁵³⁴

To be sure, it is difficult to summarize the readings of the decisions handed down by numerous tribunals on the topic of Fair and Equitable Treatment.⁵³⁵ At times, it seems that investment tribunals are just too uncertain of the actual content of the clauses. The explanation given for adjudication often seems too casuistic. It should not come as a surprise, then, that a backlash has ensued in response to the precise cases in which this right was summoned,⁵³⁶ backlashes that have questioned the very legitimacy of the regime.⁵³⁷

The topic becomes even blurrier if one is to acknowledge the difference between the treaties. In Nafta, for instance, fair and equitable treatment falls within the scope of

⁵³³ *Eiser Infrastructure Limited and Energia Solar Luxembourg S. A. L. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, Para. 382.

⁵³⁴ *Eiser Infrastructure Limited and Enregía Solar Luxembourg S. À R.L. V. Kingdom of Spain*. para 382.

⁵³⁵ SW Schill and B Kingsbury, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law," *Transnational Dispute Management (TDM)* 8, no. 2 (2011).

⁵³⁶ Kaushal, "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime."

⁵³⁷ Susan D Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions," *Fordham L. Rev.* 73 (2004).

Article 1105, entitled “Minimum Standard Treatment.”⁵³⁸ The article has been interpreted by the Free Trade Commission, which understood that the Article was an exact description of the customary norm, an interpretation that has subsequently been confirmed in the *Mondev*⁵³⁹ and *ADF*⁵⁴⁰ cases. In *ADF*, in particular, the Tribunal underscored that this conclusion should not be interpreted as a fix for a definite resolution because international customary law is in constant evolution.

These cases were specifically mentioned by the Tribunal in *Waste Management Two*. Relying on these specific cases, it held that FET protection “is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”⁵⁴¹

This decision has recently been used by *Paparinskis*⁵⁴² and has echoes of a long-standing state practice and customary international practice in the standard. For instance,

⁵³⁸ The article provides: “each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

⁵³⁹ *Mondev International Limited v. United States of America*, Award of 11 October 2002, 6 ICSID Reports 192.

⁵⁴⁰ *ADF Group Inc. v. United States of America*, Award of 9 January 2003, 6 ICSID Reports 470.

⁵⁴¹ *Waste Management, Inc. v. United Mexican States (“Number 2”)*, Award of 30 April 2004, ICSID Case No. ARB(AF)/00/3, para. 98.

⁵⁴² *Paparinskis, The International Minimum Standard and Fair and Equitable Treatment*.

with respect to the concept of “arbitrariness,” he sees a deferential stance toward state policy, something that was also seen, as he argues, in the law against expropriation.

There is an ongoing discussion on the nature of the obligation contained in international law, possibly due to the search for the real “purpose” behind the treaties. The debate centers on the question of whether or not FET is a treaty or a customary standard. As Schill has demonstrated, there is more at issue here than mere dilettantism.⁵⁴³ If FET derives directly from the rules on the minimum standard, then it might be seen as proof that it is also part of customary international law.⁵⁴⁴ Moreover, even if states do not expressly acknowledge the content of the minimum standard, cross-referencing between arbitral precedents without critical examination of the nature of the standard seems to suggest that the concepts are also converging for tribunals.⁵⁴⁵

Schill then argues that fair and equitable treatment is part of public law, “an embodiment of the concept of the rule of law,” and that arbitral practice fits precisely in this framework.

As evidence of the use of the concept of rule of law in investment cases, Schill organizes precedent into seven fields: (i) stability, predictability and consistency; (ii) legality; (iii) protection of legitimate expectations; (iv) procedural due process and denial

⁵⁴³ Stephan Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law," *International Investment Law and Comparative Public Law* (2010). At 153.

⁵⁴⁴ In *Pope & Talbot v. Canada*, for instance, the Tribunal held that: “Canada’s views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.” *Pope & Talbot v. Canada UNCITRAL/NAFTA, Award in Respect of Damages*, 31 May 2002, para. 62.

⁵⁴⁵ Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law." At 154.

of justice; (v) substantive due process and protection against discrimination and arbitrariness; (vi) transparency; and (vii) principle of reason and proportionality.⁵⁴⁶ Along the same lines, Kenneth Vandavelde has argued that “the existing awards describe fair and equitable treatment in accordance with broad understanding of the rule of law.”⁵⁴⁷

In any case, these references, bold though they are, contrast with the criticism verbalized by Sornarajah.⁵⁴⁸ He claims that these approaches run the risk of simply substituting the requisites of customary international law and substituting them for more general principles. But these principles are still the ones found in European or Western states. Sornarajah is particularly concerned, it seems, with the reference made to Hayek’s *The Road to Serfdom*. Under this perspective, his criticism might find echoes in Oliver Wendell Holmes Jr.’s celebrated dissent in *Lochner v. New York*.⁵⁴⁹

⁵⁴⁶ As to the concept of rule of law, Schill relies mainly on Pietro Costa and Zolo’s (Danilo Zolo and Pietro Costa, “The Rule of Law: History, Theory and Criticism,” (Dordrecht: Springer, 2007).) and Waldron’s (Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?,” *Law and Philosophy* 21, no. 2 (2002).) His synthesis provided the following: “the rule of law primarily refers to the formal quality of law as providing guidance for human affairs and comprises the institutional aspiration that government use law as a means of exercising power. First, the rule of law translates into procedural requirements for the deployment of legal processes and mandates that ‘individuals whose interests are affected by the decisions of ... officials have certain rights,’ such as ‘the right to a hearing before a decision is made, the right to have the decision made in an unbiased and impartial fashion, the right to know the basis of the decision so that it can be contested, the right to reasons for the official’s decision, and the right to a decision that is reasonably justified by all relevant legal and factual considerations.’ Hence, the rule of law requires that the affected individual is recognized as a subject with certain rights, which have to be taken into account in the decision-making process of public authorities [...]” Schill, “Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law.” At 158.

⁵⁴⁷ Kenneth J Vandavelde, “A Unified Theory of Fair and Equitable Treatment,” *NYUJ Int’l L. & Pol.* 43 (2010). At 106.

⁵⁴⁸ Sornarajah, *Resistance and Change in the International Law on Foreign Investment*. At 295.

⁵⁴⁹ “This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many

The solution envisioned by Sornarajah is, nonetheless, a non-solution. It is impossible for international law to take into account the dynamics of private power and to establish counter-measures to restrict them without perverting the legal system. One would perhaps have a better viewpoint if this critical assessment were considered under Luhmann's ironic ending to his *Law as a Social System*: since functional systems are all historically dependent, it might also stand to reason that the functional systems of a functioning legal coding are nothing but an European anomaly.

The most challenging critique has come from Susan Frank. She has pointed out divergences in Tribunals over almost the same facts and with the same case law. With regard to the fair and equitable treatment clause, these problems have been pointed out in the *Lauder* arbitrations and NAFTA cases.

The standard of the London Tribunal in *Lauder* was:

Article II(2)(a) of the Treaty sets forth that "investments shall at all times be accorded fair and equitable treatments, (...)". As with any treaty, the Treaty shall be interpreted by reference to its object and purpose, as well as by the circumstances of its conclusion (Vienna Convention on the Law of Treaties, Articles 31 and 32). The preamble of the Treaty states that the Parties agree "that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources". The Arbitral Tribunal notes that there is no further definition of the notion of fair and equitable treatment in the Treaty. The United Nations Conference On Trade And Development has examined the meaning of this doctrine. Fair and equitable treatment is related to the traditional standard of due diligence and provides a "minimum international standard which forms part of customary international law" (U.N. Conference On Trade & Development: Bilateral Investment Treaties In The Mid-1990s at 53, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998). In the context of bilateral investment treaties, the "fair and equitable" standard is subjective and depends heavily on a factual context. It "will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances" (U.N. Conference On Trade & Development: Fair And Equitable Treatment, Vol. III at 10,15, U.N. Doc. UNCTAD/ITE/IIT/II, U.N. Sales No. E.99.11.D.15 (1999)).⁵⁵⁰

ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract." *Lochner V. New York*, 198 US 45 (1905).

⁵⁵⁰ Ronald S. Lauder v. The Czech Republic, Award of 3 September 2001, UNCITRAL.

On the other hand, the Stockholm partial award, issued almost on the same date, used the following parameter:⁵⁵¹

The Treaty further provides that investments are to be ensured “fair and equitable treatment.” Treaty at art. 3 (I). The Treaty’s Preamble underscores the importance of this obligation, acknowledging that “fair and equitable treatment” of investments plays a major role in realizing the Treaty’s goal of encouraging foreign investment. The broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment. The Treaty makes this plain by separating the requirement of “fair and equitable treatment” in article 3 (1) from the obligation to adhere to “obligations under international law” in article 3(5). The obligation of fair and equitable treatment is a specific provision commonly at the heart of investment treaties that may prohibit actions—including State administrative actions—that would otherwise be legal under both domestic and international law. Whether conduct is fair and equitable depends on the factual context of the State’s actions, including factors such as the undertakings made to the investor and the actions the investor took in reliance on those undertakings. This requirement can thus prohibit conduct that might be permissible in some circumstances but appears unfair and inequitable in the context of a particular dispute.

Although the criteria were closely alike, the divergences dealt with the assessments of the facts, rather than with the legal standard.⁵⁵² Be that as it may, one cannot escape Franck’s conclusion that both decisions cannot be right, which is, to be sure, a manifest injustice.⁵⁵³

The Tribunals in the NAFTA decision, however, had different views of the very same legal clause. In *S.D. Myers*, the Tribunal stated that fair and equitable treatment

⁵⁵¹ *CME Czech Republic B.V. v. The Czech Republic*, Partial Award of 13 September 2001, UNCITRAL.

⁵⁵² “The two tribunals also differed on whether the Czech Republic violated its obligation to provide fair and equitable treatment, even though the two investment treaties had similar obligations. Noting that the Media Council had a duty to ensure observance of the Media Law, the London tribunal explained that it was not inconsistent to enforce the law absent a specific undertaking, and, thus, it would not refrain from doing so. Since there was no such undertaking and the Media Council commenced proceedings because of its concerns about illegal broadcasting, the London tribunal held that there was no breach of the fair and equitable treatment obligation. The Stockholm tribunal again came to an opposite result. Explaining that the Media Council intentionally undermined the investment, the Stockholm tribunal held that the Czech Republic violated its obligation to provide fair and equitable treatment to investors “by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.” Franck, “The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions.” At 1566.

⁵⁵³ *Ibid.* at 1568.

should be read in conjunction with the customary standard. A breach of the standard occurs, whenever “it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”⁵⁵⁴ The Tribunal held, moreover, that the standard was based on customary international law. In *Metaclad*, however, the Tribunal apparently rejected the customary interpretation and extended the clause to topics such as investment and predictability. In addition, in *Pope & Talbot*,⁵⁵⁵ in turn, the Tribunal held that “fair and equitable treatment” was an additional standard to the customary one.

Whereas criticism of the *Lauder* cases is, indeed, compelling, the cases in which the standard was examined under NAFTA rules do not present nearly so strong a position. This is because even if the words were changed there is no guarantee that the results would be different. The problem is, thus, not so much one of inconsistency but one of clarity. Thus, the best approach for solving this dilemma is through consensus building.

In an attempt to summarize these trends, Nitish Monebhurrin argued that the fair and equitable treatment clause should be read as the principle of legitimate expectations.⁵⁵⁶ Drawing mainly on the reasoning of the Tribunal in *Tecmed*, he argues

⁵⁵⁴ *S.D. Myers, Inc. v. Government of Canada*, Partial Award 13 November 2000, UNCITRAL, par. 262.

⁵⁵⁵ *Pope & Talbot Inc. v. The Government of Canada*, Award 10 April 2001, UNCITRAL, par. 109.

⁵⁵⁶ Nitish Monebhurrin, "Revisiting the Fair and Equitable Treatment in International Investment Law," *Cosmopolitan Law Journal/Revista de Direito Cosmopolita* 1, no. 1 (2013). At 164.

that “it is more convenient to examine how the legitimate expectation principles can be enlightened to gain in effectiveness.”⁵⁵⁷

But what exactly is the principle to which Monebhurrin refers? In the Report on the work of the sixty-ninth session of the International Law Commission, the legal body of the United Nations gave its first account of the developments of the long-term project to advance general principles of international law.⁵⁵⁸ The rapporteur, Marcelo Vazquez-Bermudez, presented a summary of the current status of the mandate that the Commission received to develop the conceptual framework for this source of international law.

Right at the beginning of the Report, the Commission touches upon many issues that have been referred in this thesis. For instance, the first recorded reference to the “principles of international law” concerns the Hague Convention for the Pacific Settlement of International Disputes of 1899, in which, under Article 48, it established that “the Tribunal is authorized to declare its competence in interpreting the compromise as well as the other Treaties which may be invoked in the case, and in applying *principles of international law*.” The Martens clause, in the preamble of Hague II, also makes references to principles: “until a more complete code of the laws of was is issued, the High Contracting Parties think it right to declare that in cases not included in the regulations adopted by them, populations and belligerents, remain under the protection and empire of the principles of international law.” Similar clauses were also inserted in

⁵⁵⁷ Ibid. at 164.

⁵⁵⁸ Vazquez-Bermudez, "Report of the International Law Commission."

the 1907 Conventions, in the Convention for the Establishment of the Central American Court of Justice and in the Convention relative to the Establishment of a Prize Court.⁵⁵⁹

It is not an easy task to grasp the meaning of the words used in these clauses. By referencing the work of multilateral treaties, one might get the impression that, under the proceedings of these conferences, a better concept of the idea of principle might emerge, but in fact little can be grasped through them. The best reference, to be sure, is in the 1899 Conference, which justifies the article on the jurisdiction of the court thusly (although the quotation is long, since it takes as its point of departure a not very well known source, it is worth citing):

“The right of the tribunal to determine the scope of its powers by the interpretation of the *compromise* and of the other treaties which may be invoked in the proceeding, and by the application of principles of international law must be recognized. Not to accept this view would be to place the tribunal in the condition of a court incapable of acting, and obliged to divest itself of jurisdiction of the controversy every time that it might please one of the parties to maintain, even against evidence, that the tribunal could not take cognizance of such a question. The more arbitration assumes the character of an institution of international common law, the more the power of the arbitrators to decide upon this matter appear to be of the very essence of the arbitral function and one of the inherent requirements for the exercise of this function. The parties may, of course, limit as they may agree the extent of the powers of the arbitrators; they may submit the exercise of this power to such reservations as they deem necessary or opportune. They may, if they choose, formulate the principles which the arbitrators shall follow to guide them in their decision. But it does not seem possible to refuse the arbitrators the power of deciding in case of doubt whether the points are within or without their jurisdiction.”⁵⁶⁰

The only engagement with the idea in the 1907 Conference was in a reference in which the representative of Mexico objected to a suggestion by the United States that contracts could be enforced through force. Francisco de la Barra claimed that even if this

⁵⁵⁹ Ibid. at 225. Although the International Law Commission has made references to the proceedings of the Statute of the International Court of Justice as a possible complementary source for the meaning of general principles, one should proceed with care. The text of the Statute simply draws on the experience of the other established international courts.

⁵⁶⁰ James Brown Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (New York: Oxford University Press, 1920). At 147.

were the case, not only would it have to give primacy to diplomatic settlement, but it would also need to be in accordance with the principles of international law. By this last point, he meant the exhaustion of domestic remedies and denial of justice.⁵⁶¹

Reference to the works of publicists might shed some additional light, but that requires a careful interpretation. The idea of principles of international law is usually invoked to define what authors of the twentieth century would have called the dogma of completeness. Thus, for Westlake, principles were meant to guide state action when rules were wanting: “when a state has to act although a rule is wanting, it ought as far as possible so to act that a rule might be framed on the precedent.”⁵⁶² Adopting a rather careful language, Oppenheim claimed that principles ought to be gleaned from how courts decided. Principles were the guiding rules.⁵⁶³ For Fiore,⁵⁶⁴ the empire of international law meant completeness, which was to be grasped from the rules of international law. If no rule could not be found, then *comitas* would be imposed.

Interpreting the position of these publicists as an expression of the dogma of completeness points to the understanding that was registered in the Hague Conference. The idea of a “principle” would work in international law in a way similar to how it was invoked in national jurisdictions. Domestic jurisdictions apply principles to solve lacunae problems. But that still does not tell the whole story.

⁵⁶¹ *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts*, 2. At 240.

⁵⁶² John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894). At 79.

⁵⁶³ L. Oppenheim, "The Science of International Law: Its Task and Method," *American Journal of International Law* 2, no. 2 (1908). At 341.

⁵⁶⁴ Pasquale Fiore, *Le Droit International Codifié Et Sa Sanction Juridique* (Paris: Chevalier-Marescq et cie, 1890). At 83.

Examples of principles shed more light on how they function. In citing evidence of them in the field of investment law, the International Law Commission has pointed to good faith, *res judicata*, competence-competence, *burden of proof*, and unjust enrichment. With particular reference to the clause of fair and equitable treatment, the Commission cited good faith,⁵⁶⁵ due process,⁵⁶⁶ and proportionality.⁵⁶⁷ The Commission, however, has only cited the cases as evidence for future work. In essence, it has not addressed the question to which Oppenheimer alluded, namely how to discover principles.⁵⁶⁸

To be sure, Oppenheimer himself was not concerned with answering the question. Trained in the practical philosophy of British lawyers, he claimed that researchers should restrict themselves to what the law is. That intuition points to a profound problem in legal theory, particularly in international legal theory. Defining a principle in international law seems, as with every other source, to rely on the doctrine of sources. Principles are even described in the listing offered by Article 38 of the International Court of Justice.

But principles are not a real source.⁵⁶⁹ And this is precisely what the proceeding of the Hague Conference of 1899 seems to indicate. The text of the treaty states that the Tribunal is *authorized* to use principles and that it is granted that authorization because it was of the *essence* of the power delegated by the parties. And this, in turn, is exactly what judicial power entails.

⁵⁶⁵ *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007, para. 298.

⁵⁶⁶ *Waste Management v. Mexico (II)*, ICSID ARB(AF)/00/3, Jurisdiction, 26 June 2002, para. 98.

⁵⁶⁷ *MTD Equity Sdn. Bhd and MTD Chile S.A v. Chile*, ICSID ARB/01/7, Award, 25 May 2004, par. 109.

⁵⁶⁸ Oppenheimer, "The Science of International Law: Its Task and Method."

⁵⁶⁹ Martti Koskenniemi, "General Principles: Reflexions on Constructivist Thinking in International Law," in *Sources of International Law*, ed. Martti Koskenniemi (New York: Routledge, 2016). At 366.

Here, not surprisingly, is the point of departure for the constitutionalization of international law: “The idea of constitutionalism implies that state sovereignty is gradually being complemented (not substituted) by other guiding principles, notably the respect for human rights, human dignity, human security, a principle of civil inviolability, and/or global common interest or rule of law.”⁵⁷⁰ Principles, inasmuch as they are used by multiple tribunals, are also responsible for eroding the consensus base of international law,⁵⁷¹ but also, at the same time, for creating the basis for community interests.⁵⁷² In short, constitutionalization emerges from a shared recognition of principles.⁵⁷³

To the extent that principles compose the form of the constitutional state, there would not be a problem in recognizing that the international investment regime does, in fact, possess constitutional traits. But the argument is made the other way: the constitution is precisely what would ensure more clarity.⁵⁷⁴ This point emerges because “the use of principles as norms in the solution of normative problems means having recourse to general evaluative statements justified by a background theory which the decision-maker has internalized as a member of a profession and a participant in a

⁵⁷⁰ Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." At 586.

⁵⁷¹ *Ibid.* at 589.

⁵⁷² Von Bogdandy, "Constitutionalism in International Law: Comment on a Proposal from Germany."

⁵⁷³ Andreas L. Paulus, "The International Legal System as a Constitution," in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009). At 69 ff.

⁵⁷⁴ “Constitutional analysis (at a domestic, comparative and international level) can serve as the normative basis for a comprehensive, balanced, predictable, and broadly consented regime governing international investment relations and guide the reform process leading to this goal.” Schill, "Editorial: Towards a Normative Framework for Investment Law Reform."

discursive practice.”⁵⁷⁵ The discourse of change around such practices is, thus, “a programme for moral and political regeneration,” what Koskenniemi has aptly described as a “mindset.”⁵⁷⁶

But that would still leave unanswered the question of the content of the definition of general principle, as if it were not a rule of international law. To be sure, the literature on the meaning of principles is voluminous, and a definitive answer would require a discussion that is beyond the scope of this thesis. It might, however, suffice to recall the differentiation, used by Meir Dan-Cohen, between “decisions rules” and “conduct rules.”⁵⁷⁷ The distinction between the two, which the author claims is seldom debated, is that whereas decision rules are guidelines for adjudicators, conduct rules are commands directed to the general public. Between the two, there lies an acoustic separation, meaning that law deals only selectively with more requirements for the transparency of law’s application. That indeterminate space is part of the legal system, whether or not it is bound by a constitutional mindset. In the end, the problem with fair and equitable treatment might just be the same old question of the very autonomy of the legal system that is contested time and again.

⁵⁷⁵ Koskenniemi, "General Principles: Reflexions on Constructivist Thinking in International Law." At 157.

⁵⁷⁶ "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization," in *Theoretical Inquiries in Law* (2006). At 18.

⁵⁷⁷ Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law."

CONCLUSIONS

Throughout this thesis, I have attempted to develop a historical account of the heart⁵⁷⁸ of the investment regime. Taking as my point of departure the critical commentaries that were launched against the regime, mainly on charges of inconsistency and lack of clarity, I have engaged with the current interpretation of the clause, which not only states its centennial history, but also assumes that lack of clarity is of the essence in the regime.⁵⁷⁹

To organize this historical investigation, I have examined the three possible manifestations of the clause on fair and equitable treatment in the sources of international law, namely treaties, customs, and principles.⁵⁸⁰

In examining the history of the investment regime, I have sought to depart from traditional accounts of the regime that only portray it as part of a kind of model to be exported toward developing countries. This approach was particularly relevant because the clause of fair and equitable treatment has never been a major concern from the point of view of investment policies in the State Department of the United States. As has been shown, the first generation of bilateral treaties was designed to insure the investor against expropriation. But in the process of analyzing this particular source, it became clear that the novelty these authors were most proud of was that, through a new generation of

⁵⁷⁸ Alvarez, *The Public International Law Regime Governing International Investment*. At 177.

⁵⁷⁹ *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007, para. 296.

⁵⁸⁰ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*.

treaties, corporations became subjects under international law. The reading of the reasons given by these writers could be simply read as a legal transplant.

However, as George Galindo has shown, legal transplants are not a simple transfer of a legal institution in space, but also in time. Thus, legal historians should be aware that “a rule or institution that is transplanted from one space to another carries at its core many expectations waiting to be fulfilled in the receiving legal system.”⁵⁸¹ In fact, the American experience from which they drew was a complex and pluralist social experiment. The concept of corporation was mainly devised so as to form the prototypical economic organization. The mechanisms through which it evolved were drawn from key constitutional decisions of a federal organization. Through this process, the Judiciary effectively forged a specific forum for commercial litigation through diversity jurisdiction. More than a simple analogy, the legal structure of the American economic system was transplanted to the global stage.

The very idea of a transplant, saturated with experiences and expectations, had already been used before, when international lawyers launched in the United States the discipline of public international law. Their project was deeply embedded in their constitutional experience, to the point that, at the Hague Conference of 1907, few of their fellow delegates seemed prepared to agree on a project of a world court that mirrored the American Supreme Court.⁵⁸² To the extent that a shared constitutional experience is the

⁵⁸¹ Galindo, "Legal Transplants between Time and Space." at 137.

⁵⁸² James Brown Scott, "The Evolution of a Permanent International Judiciary," *American Journal of International Law* 6, no. 2 (1912).

basis for international constitutionalism, that generation of lawyers would deserve credit for being one of the first proponents of this thesis.

The American constitutional experience was also at the center of the articulation of the famous minimum standard treatment. The standard had been debated many times at the then recently formed *American Society of International Law*, and it was mediated by the project that would ultimately be presented as a permanent court. The development of the standard was mainly drawn from previous experience with the arbitration commission that mushroomed in the second half of the nineteenth century. However, it was also a significant extension of what had been decided previously.

For all of these reasons, understanding the clause on fair and equitable treatment either through treaty interpretation or as a historical development of customary norms seems a doomed enterprise. Not surprisingly, investment tribunals and the legal community around them have begun to use principles as sources of interpretation. That trend seems in line not only with the development of the minimum standard—since it was not meant to be a conduct rule—but also with the very proposition of an international court.

Although meant to be an academic exercise in the history of international law, many implications relevant to legal theory could also be drawn: “A theory cannot be sustained without history, and a historical narrative, to be understood, needs a theory.”⁵⁸³ From this perspective, one could ask how “critical” this account of the emergence of such

⁵⁸³ Bandeira Galindo, "Force Field: On History and Theory of International Law." At 89.

a clause is, in the sense that it questions the authority of the past.⁵⁸⁴ To the extent that finding past, and infrequently cited, authors changes the power of the past, this perspective was, to be sure, a critical one.

But, most importantly, this perspective did not lose sight of the present landscape of an encompassing legal theory. The problems that were pointed to in the investment regime are not to be dismissed because of historical research, but the so-called novelty of these problems and the quest for creative and innovative solutions should be taken with a grain of salt. We have posited that the main problem with international investment law is a problem of consistency, which means that the concepts judges and arbitrators use to solve cases are too often vague.

The solution that law gives for problems of consistency is justice, which, under a legal theory oriented around systems theory, is not to be confused with a value, but is, simply, a requirement on the part of decision-makers to decide like cases alike. Another way of putting this point is that justice requires redundancy, not in the sense that it ought to be repetitious, but that cases are to be processed in light of previous cases—as it is reasonable to assume that a decision will be just if it decided according to previous cases, as a “memory” of the legal system. Thus, justice is characterized by both predictability and integrity.

Another way of putting this idea is to say that consistency can be translated as certainty, “the certainty that, if requested, matters will be dealt with exclusively on the

⁵⁸⁴ Ibid. at 91.

basis of the code of law and not, say, on the basis of the code of power or any other interests which are not recognized by law.”⁵⁸⁵ In other words, certainty means that a decision will be given by using only the criterion of legal/illegal.

The consistency problem can also be assessed according to a right of equality. Equality means to be treated equally. As a right, it obliges the legal system to have a criterion for its decision—in other words, “the scheme equal/unequal creates a demand for criteria.”⁵⁸⁶ The lack of consistency can, thus, be seen as a lack of criteria for solving like cases.

We have also posited that the lack of consistency in investment law is intensified due to a clash of rationalities, a term used for explaining that rationalities may emerge from different functional systems, namely economics and politics, which means that the structural limits of the legal system—formed, on the part of the economic system, by property and contract and, on the part of politics, by the constitution—are used as a buffer for the expansion of both politics and economics.

Positivist legal theory commands that the problem of lack of criteria must be assessed using sources of law. In investment treaties, this is possible because almost all treaties have established a clause on obligatory jurisdiction, which, in practice, means that arbitrators who are commanded to decide cannot resort to a *non liquet*.⁵⁸⁷ The obligation to decide imposes on arbitrators the duty of giving reasons for the decision and

⁵⁸⁵ Luhmann, *Law as a Social System*. At 195.

⁵⁸⁶ *Ibid.* At 133.

⁵⁸⁷ Weil, "The Court Cannot Conclude Definitively... Non Lique Revisited."

thus, one could claim, of forging a unity of the legal system. In other words, legal sources offer the legitimacy to decide.

As Luhmann writes, “The metaphor of sources of law has, as far as validity is concerned, the function of a formula of contingency—just like the concept of substantive justice from the perspective of a rule of reason.”⁵⁸⁸ In constitutional systems, the problem of validity is referred to the constitution and, thus, to the political system, not in the sense that politics is the foundation of law, as the old references to God or to a sovereign functioned, but in the sense that law creates programs for assessing collective decisions as a form of binding for future laws. Of course, one could then question the very validity of such orders, but Luhmann resolves this problem by referencing them to an inviolate level formed by values. They do not function normatively; they simply provide a loose framework from which law can forge new assumptions of validity.⁵⁸⁹ This occurs because a constitution is an auto-logical text, requiring, in its interpretation, that the interpreter differentiate the text that is being analyzed from the constitutional text, which, in turn, forces the decision-maker to answer the question of the unity of the legal system with reference to the constitution.

But what happens in the international space where no constitutional text has been provided? The unity of the legal system is still possible, at least as claimed under positivism, through a reference to the concept of sovereignty. Sovereignty means that states give the laws that are to be applied against them, and they decide which court will

⁵⁸⁸ Luhmann, *Law as a Social System*. At 445.

⁵⁸⁹ *La Sociedad De La Sociedad*. At 266.

adjudicate which case according to the law it has previously chosen. A theory of source of law is then available for differentiating between the forms of consent a state can give, as, for instance, in Article 38 of the statute of the International Court of Justice.

However, the theory of sources of law, either in the national or international setting, is limited: it does not serve to differentiate between substantive and procedural law, particularly when all law is positive law.⁵⁹⁰ This is precisely what happens when the prohibition of denial of justice ensues, because one must define which cases will be heard—in other words, define its own competence. Again, in legal theory, albeit from a different point of view, this is a problem that is dealt with through concepts such as legal claim, subjective rights, and legal subject.

In investment treaties, this problem has been dealt with by granting legal recognition to corporations. This was possible because economic interests could be successfully organized into the contract of a legal person. In addition, law recognized that it had some subjective rights, such as the right to be treated fairly.

From the point of view of legal theory, this represents a paradox since investment claims, although they seemingly contrast two different organizations in a legal dispute, are, in reality, organizing disputes from two different social systems. The problem is that no hierarchy can be established in this context: the interest of the investor has the same value as that of the state in regulating a given sector. As there is no superior authority, all

⁵⁹⁰ *Law as a Social System*. At 452.

that law can do, as Luhmann once again remarks, is shift the center of gravity from operations to due process.⁵⁹¹

In investment law, however, due process is not a right to be gleaned from sources of law. To be sure, treaties can establish the ground rules, custom might provide a framework, and one can even speak of a general principle of law. But as soon as the question of content emerges, one needs to resort to what due process really amounts to: a standard of review or, in other words, the very possibility of deciding.

The problem, then, goes back to the question of sources. And here a whole body of literature has emerged to try to understand why states adhere to such mechanisms in the first place. Economic theory attempts to investigate, for instance, if these treaties do in fact help a country attract foreign investment. Legal scholars have claimed a symbolic function for the treaties because of the signalling effect that law gives to market: it is a test of good behavior. Implied in each of these explanations is the idea that if a state abides by international jurisdiction, it relinquishes part of its sovereignty, and for that, it must get something back, even if it is only a symbolic effect.

This point is, to be sure, a matter of the politics of the regime and, therefore, of its legitimacy. Law, however, cannot grant political legitimacy, nor can it help to solve the problem. In law, this question is an unanswerable one: empowerment is a political

⁵⁹¹ Ibid. at 454.

decision and one that can have no meaning, except in the sense that it is meaning given.⁵⁹²

Doing away with the concept of sources becomes more complex if one takes into account how diffuse the sources of law are in this regime. International investment is a complex web of many similar bilateral treaties. There have already been claims that the regime, even though it's based on bilateral relations, has acquired a multilateral dimension,⁵⁹³ to the point of claiming that this is a form of rendering visible the legitimacy problem in the regime itself.⁵⁹⁴ To the extent that this argument is used to claim consistency within awards, it is just what the old problem of sources of law could not solve: namely, how to achieve unity when only principles are available.

In common law countries, this is precisely what hard cases are about,⁵⁹⁵ and one could add that, whenever the question of fair and equitable treatment emerges, investment tribunals are faced with hard cases. To be sure, there is no solution to this problem, and much less so if one attempts a resort to a moral theory: "whatever legal theory may make of such a moral pretence, one cannot subject courts to the pressure of compulsory

⁵⁹² In this sense, Luhmann recalls the meaning of "donation du sens" after Deleuze. *La Sociedad De La Sociedad*. At 31.

⁵⁹³ Schill, *The Multilateralization of International Investment Law*. At 364 ff.

⁵⁹⁴ Stephen W. Schill, "Multilateralization: An Ordering Paradigm of International Investment Law," in *International Investment Law: A Handbook*, ed. Marc Bungenberg, et al. (Baden-Baden: Nomos, 2015).

⁵⁹⁵ Hard cases in the sense that no settled rule guides a decision. See Ronald Dworkin, "Hard Cases," *Harv. L. Rev.* 88 (1974). At 1060

decision-making and, at the same time, subject the logic of the argumentation of courts to an infinite regression or logical circles.”⁵⁹⁶

The same limits on judicial interpretation repeat yet again,⁵⁹⁷ when decisions are contrasted with legislation—or, for that matter, with treaties. No matter what the reading of Article 38 of Statute of the International Court of Justice says, whenever a court must decide, its decisions are hierarchically on par with the same “source” it is applying. This is the reason that Luhmann replaces the hierarchical relationship with that of center and periphery. The key distinction here is between compulsory and non-compulsory operation: court-decisions are obligatory and forge a hierarchy among courts only at the center of the legal system. At the periphery, where contracts and legislation reside, there is no obligation to decide: politics can, for instance, chose not to do so. In other words, at the center of the system is the organization of courts.⁵⁹⁸

The demand for delegation and court organization comes from the expansion of social systems. Whenever a change is to be effected in the legal system, it is done so by the use of programs.⁵⁹⁹ Programs create the possibility of having only one code in use at a time, so that “demands for social integration are relaxed or delegated to decision-making process.”⁶⁰⁰ Moreover, when other social systems begin using their own programs and

⁵⁹⁶ Luhmann, *Law as a Social System*. At 288. And Luhmann adds: “one has to understand that in practice they will follow principles.”

⁵⁹⁷ Or, as Luhmann remarks, it is once again the unfolding of the legal paradox of the unity of the system. It is “as a ‘*unitas multiplex*’ and as re-entry of form into the form, as the sameness of difference, as the determinacy of indeterminacy, as self-legitimation.” Ibid. at 292.

⁵⁹⁸ Ibid. at 293.

⁵⁹⁹ Ibid. at 193. Programs are, thus, Hart’s rules of change. See Hart and Green, *The Concept of Law*. At 95.

⁶⁰⁰ Luhmann, *Law as a Social System*. At 194

use legislation—or any other “source of law,” for that matter—to create changes, it pushes the system to the extreme, where “conditioning is reduced to a norm of competence.”⁶⁰¹ Effecting changes, thus, tends to impose delegation or empowerment.

These features of the proceduralization of the prohibition of denial of justice and the impossibility of using the theory of sources of law now present a challenge to international law. If, at the state level, the organization of courts is a matter of the constitution, i.e., a norm that empowers organizations to decide, what is the equivalent at the international stage? In other words, how can a court system be established with so many different organizations? How can the unity of the system be guaranteed?⁶⁰²

A trend in trying to answer to this question has been to rely on private international law. Joost Pauwelyn and Ralf Michaels have attempted to answer this question in a more pragmatic manner. They claim that when a problem of conflict of norms or of conflict of laws emerges, lawyers should simply attempt to solve it using the techniques provided by legal systems or, in the case of the latter, by private international law.

This problem occurs because, with the prohibition of denial of justice, only some legally relevant cases can be processed by the system. Pauwelyn and Michaels reckon, though, that jurisdictional conflicts in international public law can be tackled by using private international law. Although they claim that this particular effect is not relevant,

⁶⁰¹ Ibid. at 202.

⁶⁰² To be sure, this is not a mere dialectical exercise because there are jurisdictional problems, as pointed out at the introduction of this thesis. Again, the problem is more severe in investment law, since it is, if one does not follow Schill’s normative description, simply a network of bilateral treaties and, thus, a plurality of different tribunals.

the implication for the unity of the system is straightforward: “international law may, therefore, be a system at some level (in the sense, for example, that all of its rules and branches interact and are governed by certain general rules without there being so-called self-contained regimes), but a universe of different system, sub-systems or branches at another level [...]”⁶⁰³

From a different perspective, Gunther Teubner argues that private international law can, with some modification, help to solve the conflicts within rationalities, thus extending the problem beyond the organization level. He claims that conflict-of-laws rules should follow a pattern that gives deference to “primary coverage”⁶⁰⁴ regimes, except when they are divergent from *ordre public transnational*: “in place of the venerable *comitas* of private international law, it is the principle of ‘constitutional tolerance’ that applies to inter-constitutional collisions.”⁶⁰⁵ The unity of the legal system, however vaguely this term can be used, is to be found in a normative network where the “nodes” are formed by “nation states in Europe” or “function regimes in a global context.”⁶⁰⁶

To be sure, as we have seen in the introduction, Teubner’s ideas are rooted in a much thinner concept of constitution, which he sees emerging whenever co-evolutionary dynamics appear in self-reflexive observations between social systems. However

⁶⁰³ Ralf Michaels and Joost Paulwelyn, "Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law," *Duke J. Comp. & Int'l L.* 22, no. 3 (2011).

⁶⁰⁴ The concept is borrowed from Trachtman, and it is intended to go beyond the *lex specialis* standard, meaning that the “responsibilities allocated to the functional organization.” Joel P Trachtman, "Institutional Linkage: Transcending “Trade and...”,” *American Journal of International Law* 96, no. 1 (2002). At 90.

⁶⁰⁵ Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*. At 158.

⁶⁰⁶ *Ibid.* at 159.

applicable his ideas are in other contexts, it is simply impossible to use this framework in investment treaties, since it depends, as a court procedure, on the existence of three different and individualized systems, namely politics, economics and law. If we were to describe this formulation under systems theory, the point of departure would have to be Luhmann's definition of regulation: "the structural coupling between the legal system and the economic system became the medium for the medium of political power."⁶⁰⁷

To make matters worse, arbitrators cannot decide a case through recourse to "primary coverage," because these are usually norms that are of a domestic competence. True, one could argue that, if this is case, then states could simply fix treaty obligations so as to make them more precise. But this only hides the problem, since even if treaties get more precise, they will still need to be interpreted.

The radical novelty of investment treaties is, precisely, that they claim an international right to property and contract—the structural couplings between law and economics.⁶⁰⁸ As an international right, the concept then becomes decontextualized from legal domestic orders. This is precisely the point raised by the New International Economic Order when it claims, in Article 4.d of the Declaration, a "right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result." This

⁶⁰⁷ Luhmann, *Law as a Social System*. At 402.

⁶⁰⁸ Sornarajah, *The International Law on Foreign Investment*. At 193. The example of intangible property is striking. Recognizing a protected interest with regard to intangible property is dependent upon domestic legislation. Through international investment treaties, this protection can be extended internationally without needing to register in each specific country. More importantly, the protection would be guaranteed even if the country did not recognize in its domestic law that specific intangible property.

point is made not simply to argue that states have overruled the NIEO by entering into investment treaties, nor that the regime is a contradiction in terms, but rather that there are not co-evolutionary dynamics in play here between law and economics. This formulation is simply an expansion toward the political system.⁶⁰⁹ From this point of view, it is hard to imagine that simple recourse to participation in the procedures or organized protests could suffice.⁶¹⁰

But if the question of unity is put in more abstract terms, as Michaels and Paulwelyn suggest, it will simply depend on the norms of legal conflict. This might sound like a novelty, but this thesis has also aimed to show that is precisely not the case.

Instead, this thesis has shown that it is possible to forge a legal unity within pluralist orders, not in a hierarchical way, but in a heterarchical one. Contrary to Teubner's claim, a federalist network could indeed be used to describe the structural delegations of power that were enacted by the American Supreme Court in the nineteenth century. This network ensued from a delegation of authority, an empowering norm, which hierarchized courts *and* made them aware of what other courts were doing.

This type of process occurs whenever jurisdictional nodes are aligned in relation to one another. The possibility of choosing one forum over the other, for instance, forces both an awareness of the other's policies—either for the sake of rejecting them and to affirm its own identity or simply because professional lawyers can compare different

⁶⁰⁹ This point is close to the critique developed by Schneiderman, in which he claims that investment law is not global law without a state. See David Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (London: Palgrave Macmillan, 2013). At 57.

⁶¹⁰ For a different view, see Ricardo Campos, "Resisting Economic Globalization. Critical Theory and International Investment Law," *International Journal of Constitutional Law* 12, no. 3 (2014).

instances and choose the one that best fits their interests.⁶¹¹ Another way of describing it is that on a procedural line, decision-makers will ponder what other decision-makers are doing along the same lines, as the very consequence of their decisions. Be that as it may, this “awareness” can only happen if there is a link between these nodes, either through constitutional norms or through judicial law-making, as in the case of diversity jurisdiction. To put it in classical legal terms, the decision-maker must have been granted authority.⁶¹²

There is nothing new, moreover, in the problem of applying norms through an international tribunal. At the limit, it is just a recognition that law decides through principles and what is left, as a task for legal doctrine, is an attempt to best describe the content of a given principle. Nothing is more revealing of this idea than the actual uses of the concept of principles of law in the Permanent Court of International Justice. In almost all the cases where principles of law were invoked, they were invoked as a procedural matter: *ejus est interpretare legem cujus condere*,⁶¹³ *nemo iudex in re sua*,⁶¹⁴ *estoppel*,⁶¹⁵ and *competence-competence*.⁶¹⁶

In the end, one could simply posit that this whole thesis could have simply answered the question of prohibition of denial of justice in light of general principles of

⁶¹¹ Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation." 675 ff.

⁶¹² One can also describe it along the lines of the German tradition of the concept of sovereignty as *competence-competence*. See Neil MacCormick, "The Maastricht-Urteil: Sovereignty Now," *European Law Journal* 1, no. 3 (1995). At 259 ff.

⁶¹³ Question of Jaworzyna, Advisory Opinion, PCIJ Series B, No. 8, 37.

⁶¹⁴ Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, PCIJ Series B, No. 12, 32.

⁶¹⁵ Legal Status of Eastern Greenland case, PCIJ Series A/B, No. 53, 69.

⁶¹⁶ Interpretation of Greco-Turkish Agreement, Advisory Opinion, PCIJ Series B, No. 16, 20.

international law. For a clearer answer, one should simply consult Lauterpacht's *The Function of Law in the International Community*.⁶¹⁷ But for that, the parlance of the constitutionalization of investment regimes would need to get out of the way.

What then remains of the constitutional space beyond borders? Constitutions, as Marcelo Neves has shown, are both "the structural coupling and, at the same time, a mechanism of functional differentiation between politics and law."⁶¹⁸ Nothing in the international realm can be said to resemble a structural coupling, as Teubner claims, between law and politics. All there seems to be are failed attempts, as has been shown with the American experience of a world court and with occasional episodes of the prohibition of denial of justice. As countries still maintain the stance of simply wanting to avoid international *fora*, a tendency that has recently seen an upsurge, politics will still remain organized at the periphery of international law.

On the other hand, that functional differentiation has extended beyond borders is an undisputable fact.⁶¹⁹ This is especially true for the legal and the economic systems. An imbalance between the systems is felt not only through the protest against investment treaties and investment arbitration, as the literature on the backlash against the regime has

⁶¹⁷ George Rodrigo Bandeira Galindo, "A Paz (Ainda) Pela Jurisdição Compulsória?," *Revista Brasileira de Política Internacional* 57, no. 2 (2014). As George Galindo has demonstrated, such a solution might be just as old as Kant's proposal for an international court, at 87: "Lauterpacht, by his turn, not only defended the expansion of obligatory jurisdiction and that of the Permanent Court of International Justice, but also saw in the judicial function a structural and evolutionary role for international law."

⁶¹⁸ Neves, *Transconstitutionalism*. At 41.

⁶¹⁹ Luhmann, "Globalization or World Society: How to Conceive of Modern Society?."

described,⁶²⁰ but also through the resistance demonstrated by Third World Countries.⁶²¹ A repercussion of this problem in the field of international law has been a call for a careful use of the theory of sources and, in particular, of the concept of custom.⁶²²

From a policy perspective, the imbalances between functional systems can be checked by raising the awareness of decision-makers as to the vulnerabilities of specific countries. Transconstitutionalism can provide a normative framework for justifying the expansions or retractions of network nodes, thereby increasing the possibility of mutual learning, provided it maintains a Kantian mindset.⁶²³ Be that as it may, assessing the limits and the organizational capacity of international tribunals will have to move beyond legal theory to adopt a sociological stance. International tribunals, in this sense, can be part of the problem.⁶²⁴

This is not to conclude in an optimistic tone. In his quest on *How to Conceive of Modern Society*, Luhmann imagines a pessimistic scenario:

The worst imaginable scenario might be that the society of the next century will have to accept the metacode of inclusion/exclusion. And this would mean that some human beings will be persons and others only individuals; that some are included into function systems for (successful or unsuccessful) careers and others are excluded from these systems, remaining bodies that try to survive the next day; that some are emancipated as persons and others are emancipated as bodies; that concern and neglect become differentiated along this boundary; that tight coupling of

⁶²⁰ Kaushal, "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime."

⁶²¹ Sornarajah, *Resistance and Change in the International Law on Foreign Investment*.

⁶²² George Rodrigo Bandeira Galindo and César Yip, "Customary International Law and the Third World: Do Not Step on the Grass," *Chinese Journal of International Law* 16, no. 2 (2017).

⁶²³ Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization."

⁶²⁴ George Rodrigo Bandeira Galindo, "Dialogando Na Multiplicação: Uma Aproximação," *Revista de Direito Internacional* 9, no. 2 (2012). At 8. This is particularly true if one understands that in the problem of unity, law has to make even larger presuppositions. As no principle of civilization seems ready to be applied, no value can be universally accorded. The revolutionary dynamic of a constitution seems only possible to be translated as a managerial mindset.

exclusions and loose couplings of inclusions differentiate fate and fortune: and that two forms of integration will compete: the negative integration of exclusions and the positive integration of inclusions⁶²⁵.

That the only way that legal unity can be conceived of today is through loose-couplings is not a good omen.

⁶²⁵ Luhmann, "Globalization or World Society: How to Conceive of Modern Society?." At 76.

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