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Frederic Gilles Sourgens

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# Value and Judgment in Investment Treaty Arbitration

Frédéric Gilles Sourgens\*

## I. INTRODUCTION

Are international treaties consenting to the resolution of disputes between foreign investors and the host states to their investment still a good idea? Recent and not so recent criticism of such treaty provisions calls into question whether investor-state tribunals can act as neutral arbiters of such disputes.<sup>1</sup> This criticism argues that tribunals are biased in favor of the business interests of investors—and therefore disfavor the state’s right to regulate.<sup>2</sup> Responses to this criticism frequently have alleged the opposite: The arbitral tribunals constituted under international treaties are, if anything, too friendly towards the interests of states.<sup>3</sup> They fail to protect the very economic interests of foreign investors that the treaties were designed to promote.<sup>4</sup>

The temptation in such instances is to call for moderation.<sup>5</sup> To recite an old adage—a decisionmaker is doing something right if both parties complain. This moderation would counsel that if one only strips away the partisan veneer of discourse about investment treaty arbitration, one will find the state of affairs far improved: arbitrators will be seen to act with independence, neutrality, and general predictability; these tribunals in other words will reflect the basic values of the rule

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\* Professor of Law & Director, Oil and Gas Law Center, Washburn University School of Law; Editor-in-Chief, *InvestmentClaims.com*; Co-Chair, American Society of International Law Private International Law Interest Group. I would like to thank Stacie Strong, Cindy Galway Buys, Milena Sterio, and Perry Bechky for the opportunity to participate in the ASIL-Missouri Works in Progress Conference. I would also like to thank Bart L. Smit Duijzentkunst and Relja Radović for the vigorous discussion on international dispute resolution. Finally, thank you to the editors of the *Journal of Dispute Resolution* for inviting me to respond to Relja’s excellent contribution at the symposium, *Inherently Unneutral Investment Treaty-Arbitration: The Formation of Decisive Arguments in Jurisdictional Determinations* published in this volume at 143.

1. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASHINGTON POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html?utm\\_term=.b5d319b75e15](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.b5d319b75e15); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts, Pub. Citizen (Oct. 25, 2017), [https://www.citizen.org/system/files/case\\_documents/isds-law-economics-professors-letter-oct-2017\\_2.pdf](https://www.citizen.org/system/files/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf).

2. See Warren, *supra* note 1; VAN HARTEN, *supra* note 1.

3. Todd Weiler, *Remarks*, in 10 *INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW* 342, 346 (Ian Laird, Borzu Sabahi, Frederic Sourgens & Todd Weiler eds. 2017) (“The proof lies in the arbitral pudding, manifested in hundreds of tribunal decisions and awards the vast majority of which have evinced the adoption of a considered and scrupulously deferential posture towards all manner of impugned measures”).

4. *Id.*

5. Ian Laird, *Remarks*, in *INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW* 347, 348-351 (Ian Laird, Borzu Sabahi, Frederic Sourgens & Todd Weiler eds. 2017) (“we should provide a position which is much, perhaps more difficult to resist, which the moderate, middle, mushy position”).

of law by depoliticizing otherwise volatile disputes with significant geopolitical implications.

As Relja Radović's apt deconstruction of the dialectic of decisionmaking in investor-state disputes shows, the institution of investor-state arbitration does not permit such calls for moderation. In his *Inherently Unneutral Investment Treaty: The Formation of Decisive Arguments in Jurisdictional Determinations*, Radović concludes that conflicting ideals of legalism and teleology—dare one say, statism and liberalism—invade the very foundation of the jurisdiction of investor-state arbitration tribunals.<sup>6</sup> This realization is central: The problem is not how investment treaty tribunals decide, it is that they are given the power to decide, at all.<sup>7</sup> To exercise jurisdiction is to participate in a broader juridico-political discourse – and to put its pragmatic needs of decision above all else.<sup>8</sup>

Relja Radović explains that as arbitral tribunals constituted under international treaties grapple with their own mandate, they are torn between limiting their own jurisdiction (thus favoring the sovereign interest of the respondent state party to the treaty) or asserting their jurisdiction vigorously (thus favoring the economic interests of the claimant investor).<sup>9</sup> He notes that they do so as a matter of necessity because neither view, restrictive or vigorous jurisdictional exercise of a mandate, can be preferred to the other in some form of infinite regress.<sup>10</sup> He further notes that because the very question of how jurisdiction should be viewed implies either perspective, there is no moderate middle ground that could be consistently defended.<sup>11</sup> But nor is ideological purity attainable – “[i]t is fairly odd to encounter examples of “total legalism” or “total teleology” among arbitral awards.”<sup>12</sup> Pragmatics, not ideology, drives decision.

He concludes that this state of affairs reflects “realities that should be lived with, because they stem from the foundations of the international legal order, and are inherent to the system of international treaty arbitration.”<sup>13</sup> Rather than impeach investor-state arbitration, he chides “endless demands for perfection” and calls on academics that “more efforts should be directed towards finding a way to live with such realities.”<sup>14</sup>

What then are the realities in question? What is their value? And what is the kind of judgment that makes decisions in such a state of deconstructive flux? I will seek to venture down the path Relja Radović has laid before us. And I do so in the hope that a realistic view will ultimately prove both pragmatically and theoretically preferable to the metaphysical quest for perfection he rightly warns against.

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6. Relja Radović, *Inherently Unneutral Investment Treaty Arbitration: The Formation of Decisive Arguments in Jurisdictional Determinations*, 2018 J. DISP. RESOL. 143 (2018). For a definition of liberalism and Statism, see Weiler, *supra* note 4, at 342.

7. Radović, *supra* note 6, at 179.

8. *Id.* at 181 (“In such a chaotic environment the question of the expression of teleological and legalistic approaches does not appear as “either—or,” but as “more or less.” In other words, the issue at hand will dictate to what extent one or the other approach will be expressed. There might be an impediment for the expression of one of the two approaches to the extent that it becomes dominant one and serves as the basis of the decisive argument. In such occasions, no matter the willingness of the arbitrators to pursue one or the other ideal, the lack of the opportunity to do so will limit their effect.”)

9. *Id.* at 153.

10. *Id.* at 145.

11. *Id.* at 174.

12. *Id.* at 180.

13. *Id.* at 183.

14. *Id.*

In doing so, I ultimately agree with Relja Radović: A problem arises when we see arbitral jurisdiction as justified by a belief that “truth is out there.”<sup>15</sup> He submits that such a demand for truth would introduce requirements of consistency that, as he shows, can ultimately not be supported even within a single award.<sup>16</sup> As he notes, “while legalistic [statist] decisive arguments find their substance in the foundations of general international law and its basic concepts, teleological [liberal] decisive arguments find their merits in the protect purpose of international investment law. In both cases, they are formed outside the relevant treaty.”<sup>17</sup> My suggestion is that, in thinking about the dialectic of decision-making in investor-state arbitration, we think not of truth in terms of an “out there.” Rather, we should seek its meaning and value as if from within.

## II. THE ISDS PARADIGM

So first—what is “investment treaty arbitration?” Investment treaty arbitration is a form of binding international dispute resolution.<sup>18</sup> It permits certain foreign investors to file claims against host states.<sup>19</sup> It obligates both host states and investors to abide by decisions of arbitral tribunals awarding damages or other available relief.<sup>20</sup> The arbitration typically takes place before a three person panel composed of impartial and independent arbitrators chosen by the parties, or failing party agreement, an international institution such as the World Bank or the President of the International Court of Justice.<sup>21</sup>

There is no general right to Investor State Dispute Settlement (ISDS).<sup>22</sup> Instead, investor-state tribunals are authorized to act only to extent that both the investor and the host state to the investment have given their consent.<sup>23</sup> This consent can be given after the dispute has arisen.<sup>24</sup> But it more typically is included in an earlier document such as a concession contract between the host state and the investor.<sup>25</sup> International treaties are the most common source of ISDS state consent.<sup>26</sup> No matter how the consent is given, a host state’s ISDS consent is an international legal obligation.<sup>27</sup>

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15. Radović, *supra* note 6, at 171.

16. *Id.* at 181 (“Should an arbitrator refer to “the truth out there,” it is reasonable to assume the application of that “truth” throughout the entire arbitral reasoning. However, it is suggested, that is not the case. What matters more are the needs and opportunities.”)

17. *Id.* at 179.

18. CHRISTOPHER DUGAN ET AL., *INVESTOR STATE ARBITRATION* 220 (2008).

19. *See id.*

20. *See* Edward Baldwin, Michael Nolan, & Mark Kantor, *Limits to Enforcement of ICSID Awards*, 2 J. INT’L ARB. 1-24 (2006).

21. *See* DUGAN, *supra* note 15, at 128-29.

22. Frederic G. Sourgens, *By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations*, 37 N.C. J. INT’L L. & COM. REG. 875, 876 (2013).

23. *Id.*

24. *Co. Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, award (Feb. 17, 2000).

25. *World Duty Free Ltd. v. Kenya*, ICSID Case No ARB/00/7, award (Sept. 25, 2006).

26. Int’l Centre Settlement Inv. Disp., *The ICSID Caseload – Statistics (2015-2)* at 7, [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20\(English\).pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf) (“ICSID Statistics”).

27. FREDERIC GILLES SOURGENS, *A NASCENT COMMON LAW* 55-60 (2015).

The relevant bases for liability at issue in ISDS are set out in the consent documents.<sup>28</sup> In a contractual proceeding, ISDS will determine whether one of the parties to the contract owes damages to the other party for breach. In the context of treaty arbitrations, the question typically concerns whether the state has violated one of the basic protections extended to foreign investors in the treaty—such as the promise not to expropriate investments without due process of law and against payment of just compensation.<sup>29</sup>

ISDS has proved far from toothless: in one recent case, Russia was ordered to pay foreign investors in Yukos in excess of US\$50 billion.<sup>30</sup> It is thus hardly surprising that investor-state arbitration continues to be popular with foreign investors judging by the continuously growing number of new claims filed each year.<sup>31</sup>

The inclusion of ISDS consents in international investment agreements in practice has given foreign investors direct and immediate international legal rights against the host state of their investment.<sup>32</sup> It is hard for states to modify or terminate their ISDS consents without potentially running afoul of internationally-protected investor reliance interests or contractual rights.<sup>33</sup> ISDS consents, in short, are not a cheap tool in the host state's policy toolkit.

### III. CRITIQUING THE ISDS PARADIGM

Critics of ISDS submit that ISDS is not only expensive but also highly imprudent. ISDS squarely places in issue the international lawfulness of sensitive policy questions such as the existence of effective means of asserting claims and enforcing rights in host state judicial institutions,<sup>34</sup> or the propriety of plant phase-outs adopted as part of a broader nuclear policy.<sup>35</sup> The only ones who appear to profit from ISDS, according to the critics, are powerful multinational companies who know how to exploit it and the lawyers who represent them.<sup>36</sup>

The problem for both the critics and defenders of ISDS consents is that their focus is too narrow. Critics assume that international economic relations could be more legitimately regulated in the absence of ISDS either through a modified free trade treaty system or by reliance wholesale upon sovereign rights to regulate.<sup>37</sup> Defenders of ISDS submit that the criticism of ISDS is misplaced as legitimacy

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28. *See id.*

29. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 457 (2003).

30. Megan Davies, Jack Stubbs & Thomas Escrib, *Court Orders Russia to Pay \$50 Billion for Yukos Assets*, REUTERS (July 28, 2014), <http://www.reuters.com/article/2014/07/29/us-russia-yukos-idUSKBN0FW0TP20140729>. Nor are respondents fighting these awards taking investor-state awards "lying down." The same award has been set aside by a trial court in the Netherlands. Daniella Strik, Georgios Fasfalis, Marc Krestin, *Yukos Awards set Aside by The Hague District Court*, KLUWER ARB. BLOG (Apr. 27, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/04/27/yukos-awards-set-aside-by-the-hague-district-court/>.

31. *ICSID Statistics*, *supra* note 13, at 7.

32. SOURGENS, *supra* note 24, at 55-60.

33. *Id.*

34. *White Indus. Aus. Ltd. v. Republic of India*, Final Award in the Matter of an UNCITRAL Arbitration (Nov. 30, 2011), Westlaw UNCITRAL Investor-State Claim.

35. *Vattenfall vs. Germany: Nuclear Phase-Out Faces Billion Euro Lawsuit*, DER SPIEGEL (Nov. 2, 2011), <http://www.spiegel.de/international/germany/vattenfall-vs-germany-nuclear-phase-out-faces-billion-euro-lawsuit-a-795466.html>.

36. *See Warren*, *supra* note 1.

37. *Id.*

concerns raised by the critics address specific liability rules rather than ISDS as a means to enforce them; consequently, the focus should be upon improving these liability rules rather than railing against ISDS.<sup>38</sup> Both positions do not, on their face, fully engage the points made by the other—both critics and defenders of ISDS deflect rather than discuss the problem of ISDS as such.

As Relja Radović so cogently recognized, a meaningful discussion of investment treaty arbitration becomes possible only when we examine the legitimacy of ISDS consents themselves.<sup>39</sup> The inclusion of strong ISDS consents sets up a dialectic between different ideals of dispute resolution—statist and liberal, legalistic and teleological.<sup>40</sup> Rather than focus upon casuistic polemics, it is this dynamic that largely determines the value (or lack thereof) of ISDS as a decision-making process in international law.

This vision should cause us to pause and take stock of processes in international law more generally. International law is no stranger to similar opposing forces.<sup>41</sup> This opposition frequently is framed in terms of a dialectic.<sup>42</sup> Such a “dialectical character of all legal arrangements” leads to instability.<sup>43</sup> Thus, “the moment a legal arrangement is struck, it coalesces latent opposing coalitions, who demand its adjustment, amendment or replacement.”<sup>44</sup> The moment that this dialectic causes engagement—creation and creative destruction within a normative field—it becomes dynamic.<sup>45</sup> This dynamic harbors both vitality and significant dangers.

Understanding this dynamic requires a repackaging of the critics’ polemics against ISDS. As Relja Radović powerfully notes, the exercise of jurisdictional power by ISDS tribunals entails by its very invocation “risking the authority of their award.”<sup>46</sup> What does this mean for consents to jurisdiction? As W. Michael Reisman noted in a different context, consents may risk that “a State may not only lose its case, a risk which can be discounted beforehand, but presented with a decision going far beyond the downside risk which it had originally estimated. The prospect of such a risk may outweigh the prospective advantages of resolving the dispute.”<sup>47</sup> The (lack of) authority of the award thus threatens the authority of consent instruments: they are no longer means to yield predictable and anticipatable uses of power by international decision-makers.<sup>48</sup>

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38. See *An open letter about investor-state dispute settlement*, McGill (Apr. 2015), <https://www.mcgill.ca/fortier-chair/isds-open-letter> (“We respectfully submit that there are legitimate areas for meaningful debate about the substantive rights provided in investment treaties.”) (the author is a signatory to this letter).

39. Radović, *supra* note 6, at 171.

40. *Id.*

41. MARTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 62-3 (2007).

42. ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW 31 (2007).

43. W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 90 (2012).

44. *Id.*

45. *Id.*

46. Radović, *supra* note 6, at 149.

47. W. MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 207 (2012).

48. HAROLD D. LASSWELL & MYERS S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY, STUDIES IN LAW, SCIENCE AND POLICY 26 (1992). For a discussion, see Frederic G. Sourgens, *The End of Law*, 39 FORDHAM INT’L L. REV. 355, 366 (2015).

This in turn poses a risk for effectiveness of legal decisions as such—“in a political system which lacks a sheriff, one of the contributions of the consent requirement has been that it obviates enforcement virtually ensures compliance; each compliance with an international judgment helps to reinforce the law in dispute and, at the constitutive level, the effectiveness and legitimacy of international decision.”<sup>49</sup> If ISDS causes states to renege on the enforcement of arbitral awards despite their earlier consent to arbitrate, ISDS undercuts the value of international judicial and arbitral mechanisms as a whole.

The problem therefore may be more threatening for ISDS than at first anticipated. Certainly, it is true that “consensualism stubbornly persists.”<sup>50</sup> The problem is that consensualism might just undercut its own authority: once given, consent can lead to wildly unpredictable results.<sup>51</sup> This makes the granting of future consent less likely.<sup>52</sup> It in fact risks corroding consent itself. This would have far wider reaching implications for international law and international dispute resolution beyond the scope of ISDS.

One need only look at Argentina and disputes arising out of the 2001 financial crisis to understand this dynamic. Argentina gave advance consent to arbitrate investment disputes in a series of bilateral investment treaties in the late 1990s.<sup>53</sup> Argentina’s hope in entering into these consents was to attract further foreign investment to Argentina.<sup>54</sup> Argentina had offered significant other contractual incentives to attract investments—for instance, by promising payment of government obligations in U.S. dollar equivalent currency.<sup>55</sup> Argentina shortly thereafter suffered a debilitating financial crisis that made it impossible to pay government obligations in the promised U.S. dollar equivalent currency leading to a devaluation of the peso and payment of obligations in newly devalued pesos.<sup>56</sup> Arbitrations ensued.<sup>57</sup> Argentina invoked a defense of economic necessity—a defense essentially accepted by its dominant treaty partner, the United States—but rejected by a majority of

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49. REISMAN, *supra* note 40, at 213.

50. Radović, *supra* note 6, at 150.

51. See REISMAN, *supra* note 40.

52. For a discussion of the rollercoaster approach to investment arbitration clauses in treaty practice, see Edwina Kwan, *Australia’s Conflicting Approach to ISDS: Where to From Here?*, KLUWER ARB. BLOG (June 4, 2015), <http://kluwerarbitrationblog.com/2015/06/04/australias-conflicting-approach-to-isds-where-to-from-here/>.

53. Facundo Pérez-Aznar, *Argentina Is Back in the BIT Negotiation Arena*, INVESTMENTCLAIMS.COM (Nov. 14, 2016), <http://oxia.ouplaw.com/page/argentina-bit>.

54. See *id.* (discussing BITs part of conscious program of economic liberalization).

55. Jose E Alvarez & Kathryn Kamsi, *The Argentine Crisis and Foreign Investors, A Glimpse into the Heart of the investment Regime*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008/2009 379, 387-89 (Karl Sauvant ed., 2009).

56. *Id.* at 389-90.

57. *Id.* at 390-91.

ISDS tribunals.<sup>58</sup> In light of this inconsistency, Argentina has long refused to comply with awards relating to disputes arising out of its financial crisis.<sup>59</sup> This precedent of non-payment can corrode the authority of ISDS and international legal decision in general when used as a policy tool.<sup>60</sup>

But this is not the end of the story. Rather, we are witnessing a paradigmatic shift, a trans-nationalization of international law; the sovereign is being removed from its august position of sole rule on the international plane.<sup>61</sup> It now must share this rule with many non-state actors central to the function of the world community as we know it today. Not only that, conflicts between “states” and “human beings” are now being resolved against the state.<sup>62</sup> Strong consents to dispute settlement between states and any of these non-state actors before an international body has tremendous importance to making this shift from a sovereign-centered to a sovereign-organized order legally cognizable.<sup>63</sup> Without such consents, there would be no manner of resolving any conflicts against the state—and thus no manner to continue the trans-nationalization of legal decision-making processes.

Relja Radović discusses this second competing aspect of the dialectic by reference to global public goods.<sup>64</sup> These global public goods bestow a benefit to the international community as a whole.<sup>65</sup> International governance, he submits, is responsible for advancing public goods globally, for instance, through human rights treaties.<sup>66</sup> Investment protection—and consents to arbitrate investment treaty disputes—similarly can be seen to constitute one such global public good.<sup>67</sup> From this perspective:

It has been suggested that international investment law satisfies the two basic characteristics of a public good, namely (i) non-rivalry, since its use by one party (an investor or a State) does not disturb its usage by others, and (ii) non-excludability, as it ultimately provides the benefit of facilitating capital flow and advancing economic growth (although its main architecture might associate to ‘club good,’ being available only to States signatories to investment treaties).<sup>68</sup>

I prefer a different, competing theory of the second prong of the dialectic—though it ultimately may lead to practically similar results. Many of the global

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58. Diane A. Desierto, *The Modern International Law of Necessity with and Beyond Economics, A Response to Alan Sykes on Investment Treaty Making and Interpretation*, 38 HOUSTON J. INT’L L. 715, 745 (2016).

59. Tsai-yu Lin, *Systemic Reflections on Argentina’s Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement?*, 5 CONTEMP. ASIA ARB. J. 1-2 (2012).

60. See Public Statement on the International Investment Regime, OSGOOD HALL (Aug. 31, 2010), <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> (calling on states to “refus[e] to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose.”).

61. Frederic G. Sourgens, *Functions of Freedom – Privacy, Autonomy, Dignity, and the Transnational Legal Process*, 48 VAND. J. TRANSNAT’L L. 471 (2015).

62. REISMAN, *supra* note 40, at 267.

63. SOURGENS, *supra* note 24, at 57.

64. Radović, *supra* note 6, at 150.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*



mechanisms so inherent in contemporary world order broaden the scope of participants in prescription and in decisionmaking processes. Individuals can press claims before human rights courts against states. Investors can press claim before investor state tribunals. The decisions rendered by human rights courts and investor-state tribunals themselves become the basis for future international prescription in a host of different areas. In other words, the opening up of decision-making processes gives voice to an ever greater scope of those affected within society by sovereign, economic, financial, and industrial action.<sup>69</sup> It provides means for a world civil society to assert its place more directly within transnational legal processes. It also provides an accelerant and a catalyst for these processes to gain critical mass or cross a tipping point ultimately transforming means of participation in decision-making for global civic actors.

Both perspectives can explain why states cannot, and should not be able to, estimate potential costs and benefits of their consents.<sup>70</sup> The process is no longer just about sovereign interests. We expect international law to reach and protect beyond the sovereign, and to provide a “good” immediately to global civic actors. In fact, the highest “good” such a process can bestow upon world society is increased participation. If a public good is not seen through a contemporary regulatory lens, but through an ethical lens, the question is not what utility we generate for society.<sup>71</sup> Rather, the question is what capability of human agency is improved.<sup>72</sup> A core capability remains that of being engaged, immediately, in the decisions affecting one’s social and economic life.<sup>73</sup> In the classic civic republicanism of Rome and the Renaissance, this good had a specific name—liberty.<sup>74</sup>

Importantly, if one takes such a broader view, each legal instrument that increases participation is good for world society as a whole, even if it does not immediately increase economic development everywhere. The point of the trans-nationalization of law is not just, or perhaps even principally, economic development. Rather, it is the transformation of law to better reflect the interests and needs of an ever greater number of civic participants.

When we thus say with Relja Radović that we seek to “induce the relevant actors to shift from the traditional consensualism based thinking on the international legal order towards seeking to satisfy the ultimate objective that needs to be achieved,” we expect decision-making about these rights and protections to be extended beyond the naturally self-interested realm of sovereigns, as well.<sup>75</sup> Strong consents to dispute settlement, as Relja Radović cogently explains, fundamentally support this goal.<sup>76</sup> Without such consents, international law would fall short of our expectations that law ought to protect people, not legal fictions. Without them, this means, international law would be somehow less authoritative because it would fail

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69. GRALF-PETER CALLIES & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE* 208-09 (Hart Publishing, 2010).

70. REISMAN, *supra* note 40, at 207 (discussing the state-based cost-benefit analysis of consents to jurisdiction).

71. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 17, 58-63 (1999) (discussing freedom as process and freedom as opportunity and discussing the limitations of utility).

72. AMARTYA SEN, *THE IDEA OF JUSTICE* 228-35 (The Belknap Press, 2009).

73. *See id.*

74. PHILIP PETTIT, *REPUBLICANISM, A THEORY OF FREEDOM AND GOVERNMENT* 36 (Oxford University Press, 1999) (discussing the link between law, freedom and non-domination).

75. Radović, *supra* note 6, at 154.

76. *Id.*

to meet the normative expectations of world society.<sup>77</sup> With less authority, international law would need to spend more resources to control beyond sovereign-to-sovereign relationships or risk becoming an afterthought in the policy toolkit of international relations and international commerce.<sup>78</sup> Mere efficacy arguments thus do not suffice to justify narrowing ISDS consents.

This dynamic or stress field cannot be “won” outright. The critics’ point is that a slower pace would lead to a more sustainable international legal order; this slower pace would sacrifice ISDS on the altar of systemic change. The defender of ISDS would point out that such a sacrifice gives up something reasonably central to the current international legal enterprise. Both simply focus on different parts of the same process—protecting efficacy and protecting teleological integrity. As Relja Radović would put it, the problem is ultimately that “legalistic and teleological decisive arguments discussed here do lead to different outcomes, and they do so because they are caused outside the interpretive toolkit.”<sup>79</sup> The toolkits are incommensurate—and the dynamic of dialectic cannot be stayed or resolved.

It is thus far from trivial for Relja Radović to encourage us to “[find] a way to live with such realities” that this dynamic will remain perennially unresolved.<sup>80</sup> It should cause us to re-examine the goals we initially intended for ISDS and appraise whether ISDS actually meets these goals.<sup>81</sup> In the context of such tension, ISDS practitioners should ask themselves: are ISDS consents worth defending? Simply put, defending ISDS consents may well weaken the authority of the broader international legal enterprise; it would require more than a pure profit motive by those practicing in the field to defend. This question thus asks less provocatively—what is the constitutive value behind strong ISDS consents? It seeks to identify the broader good served by including ISDS consents for the integrity of international legal processes more generally that makes them worth the costs they doubtlessly entail.

#### IV. UNBUNDLING UNNEUTRALITY

Both the unneutrality, to use Relja Radović’ apt turn of phrase, and the perception that investment treaty arbitrators trade in an endless regress of excuses imply that ultimately, investment treaty arbitration is ill-judged by some external yardstick. Neutrality presumes that an object of study is susceptible to understanding according to a unitary measure. It presumes what the Greeks thought classified as *technē*—“to make a systemic unity of disparate elements.”<sup>82</sup> To be “un-neutral,” as opposed to being biased, thus simply denotes the absence of systemic unity. In this case, it further implies its logical impossibility.

An “endless excuse” invoked by Relja Radović comes to the same point. As the Oxford English Dictionary notes, “excuse” is “the action of releasing a person from an obligation; a dispensation, release.”<sup>83</sup> As the Oxford English Dictionary

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77. REISMAN, *supra* note 40, at 213.

78. *Id.*

79. Radović, *supra* note 6, at 172.

80. *Id.* at 183.

81. See REISMAN, *supra* note 40, at 90-91, 171, 176.

82. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS, LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 95 (Cambridge University Press, 2001).

83. Excuse, Oxford English Dictionary (3d ed. 1884).

further explains in its etymology of the word, the obligation is a legal one: *ex-causa*, *causa* being an accusation or suit at law in Latin.<sup>84</sup> Having migrated through old French to current English usage, an “excuse” thus is the attempt of seeking dispensation from an external (legal) duty.<sup>85</sup> In sum, Relja Radović’ appraisal leads us logically to conclude that no systemic unity of legal obligation can be theorized that could end arbitral regress.

This result is not trivial given the normative conclusion that we are to “[find] a way to live with” the realities of investment treaty arbitration. Relja Radović suggests that these realities are bereft of truth—or more precisely that any quest for external truth or validation is doomed to fail. At first blush, the article appears to proclaim the doom of legal practice and the futility of legal science.

But there is another way. The power of Relja Radović’ article is to demonstrate that midway upon the journey of our practice, we have found ourselves stumbling in the dark and at a loss for external reference to act as our guide.<sup>86</sup> We therefore must change perspective. Investment arbitration in this sense is a jurisgenerative process.<sup>87</sup> It creates from within.<sup>88</sup> Its guide is its own peculiar poetics.<sup>89</sup> And it is this poetics, rather than a *technē*, that could make finding a way to live with the realities of the practice worthwhile.

What then is the point of this “poetics”? Let’s begin answering this question with a hypothetical—what if we resolved disputes in the absence of ISDS consents? In this hypothetical scenario, investors in transitional economies would be asked to present their disputes with the government in the host state’s nascent court systems with frequently little experience with either complex projects or judicial independence. These courts are unlikely to give fast and effective relief.

Given the stakes in many of these disputes, investors are unlikely to give in to their fate. Rather, the investor is systemically encouraged to turn to its home state for aid. This aid could both “expedite” host state judicial processes or “incentivize” extra-judicial settlement.

But the home state is unlikely to act altruistically. It is far more likely to use the investor-state dispute as part of its broader foreign policy interests and use the investor-state dispute as additional leverage in geopolitical bargains. The effective decisions of this process would make a myth of any international regime for the protection of investments, property of aliens, or corporate responsibility of multinationals. Such decisions are opaque, at home in the realm of “secret” diplomacy, and highly unlikely to comport with the authoritative expectations of most members

84. Excuse, Oxford English Dictionary (“[ME. Escusen, excusen, ad OF escuser, excuser, ad L. excusare, f. ex- (see Ex- pref.) + causa CAUSE, accusation]”).

85. *Id.*

86. See DANTE, *INFERNO: THE LONGFELLOW TRANSLATION 1* (Modern Library, 2003) (“Midway upon the journey of our life/ I found myself Within a forest dark/ For the straightforward pathway had been lost.”).

87. See Frederic G. Sourgens, *Reconstructing International Law as Common Law*, 47 Geo. Wash. Int’l L. Rev. 1 (2015).

88. *Id.* at 46.

89. See DANTE, *supra* note 83, at 2-3 (Dante’s guide through inferno is Virgil, the poet). Poetics here is also intended as referencing the scholarship surrounding *autopoiesis*. For this scholarship, see particularly GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS* (2012). I view poetics not as operating within autopoietic systems. Rather, I view poetics as process independently of systemic constraints. See Sourgens, *supra* note 84, at 45-47; see also NUSSBAUM, *supra* note 79, at 79-82 (discussing poetic discourse as yielding in the context of Antigone).

of the world community. In short, they are more likely to support an operational code that is “profoundly dysfunctional,” corrupting and corrupt.<sup>90</sup>

The corrupting influence of such profoundly dysfunctional codes is particularly present in the context of investments. Investment arbitration deals with very real assets having a sizable influence on the economic capabilities of the host state. The confluence of cash and capabilities creates conduits for sizable corruption—if not one of the most significant pressure points through which to achieve it. Leaving investment protection to this dysfunctional operational code thus harbors serious risks.

As the move to trans-nationalized international law continues, a key goal—and a key goal supported by ISDS—is to limit the role of such non-transparent and dysfunctional operational codes on the sovereign-to-sovereign level. Say what one might about ISDS awards, they are public.<sup>91</sup> They are reasoned.<sup>92</sup> They are open to academic and public scrutiny.<sup>93</sup> They present less risks of supporting profoundly dysfunctional operational codes than the alternative.

What is more, the ISDS process precisely permits not only the parties to the dispute but also NGOs and other civil society participants to voice their views as part of the decision-making process through *amicus curiae* submissions.<sup>94</sup> These voices would not have had a prayer at relief in our alternative world—even or precisely in the context of momentous decisions for the host state, the region, and its citizens.

This leaves the question—why arbitration? Professor Reisman correctly laments that “paradoxically, rational responses to [our] increasingly ‘global’ condition always seems to require and involve the creation of more alliances and more transnational governmental structures, which in turn further minimize the opportunities for individual agency in the policy decisions affecting one’s life.”<sup>95</sup> Arbitration by and large is the least structurally complex mode of decision-making capable of supporting necessary agency (courts by and large are more complex animals than ad hoc arbitral tribunals and less flexible in addressing new realities and global administrative agencies are less flexible still than courts). Applying Ockham’s razor, as the simplest, most flexible way to achieve the larger constitutive goals we have in mind for ISDS, we should stick with it. We should identify and attempt to fix problems within this means for dispute settlement before we attempt a wholesale exercise in novel institutional design. This is no easy feat—but given the flexibility of arbitration, it nevertheless appears to be an eminently achievable task.

Pace the mounting criticism against investor-state dispute settlement, there are strong structural reasons to support ISDS precisely because of its unneutrality. Counter-intuitively, the constitutive value of ISDS, including its unneutrality, is the opening-up of previously hidden operational codes of frequently quasi-colonial *Realpolitik* and their replacement with decisions subject to public scrutiny, rational

90. See REISMAN, *supra* note 40, at 101.

91. See generally OXFORD UNIVERSITY PRESS, <http://oxia.oup.com/home/ic> (Sept. 12, 2017).

92. See GUILLERMO AGUILAR ALVAREZ & W. MICHAEL REISMAN EDS., *THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES* (Brill Academic Publishers, 2008).

93. See Frederic G. Sourgens, *Law’s Laboratory: Developing International Law on Investment Protection as Common Law*, 34 NW. J. INT’L L. & BUS. 181 (2014).

94. Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1290-94 (2009).

95. REISMAN, *supra* note 40, at 76.

engagement, and authoritative account.<sup>96</sup> This rational engagement is driven by conflict—conflicting narratives and values. Poetics suggest that this conflict can be brought to a resolution because of our ability to yield, simultaneously, to both value sets, to both narratives. Investor-state arbitration demonstrates such a cross-weaving of the teleological and legalistic concerns in almost every single decision. In the end, decisions are justified in terms of the prevailing discourse—yet the discourse itself is somewhat changed by the engagement.

Poetics in this sense operate much in the way of translation. As a leading theorist of translation notes:

Each differentiation entails its own dynamic of internal regrouping, even as each frontier zone between nations has its own special character of exaggerated national assertion and, at the same time, of amalgam with elements over the border (hence the questions regarding the internal topology of the multilingual). The difference of English from French for the French-speaker, of French from English for the English-speaker—the terms can cross over on either side of the equation, being the reverse and observe of the diacritical contact—is at every linguistic point so dense and plural as to deny formal description.<sup>97</sup>

The engagement between different theories of consent operates in much the same way as proponents of the opposing teleological and legalistic views engage each other. To decide, they ultimately translate their respective points into their own idiom. In doing so, they deny formal description, neutral measure, or common axiom as the two are precisely incommensurate as Relja Radović has shown. But their engagement leaves each changed precisely because the act of translation amalgamates and reincorporates within the home idiom.

Understanding why we should live within our realities despite the open incommensurabilities they contain, in other words, is to understand that to advocate otherwise is to fall for a dangerous myth. It would be to fall for the lure of the monolingual that the world would just be simpler if we all spoke the same language. The statist would thus intone that without arbitral oversight, investors, host states, and home states would not dare to play politics with very sizable and geopolitically sensitive investment, but submit to transparent and efficacious domestic judicial processes.<sup>98</sup> Historical evidence strongly suggests that belief in this myth has less footing in reality than a belief in Santa Claus. And it is a myth that is on the whole more geopolitically pernicious: Each state would insist upon the validity of its own interest, its own idiom over the other. By denying space for transnational normative translation through international dispute resolution mechanisms such as ISDS, in other words, we set up the play for global colonialist conquests. Though always justified by reference to some “truth” out there to be vindicated, *that* reality is on the whole bleaker than the one with which we currently live.

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96. W. Michael Reisman, *Myth Systems and Operational Code*, 3 YALE STUD. WORLD PUB. ORD. 229, 231 (1977) (defining operational codes as “the way things are actually done by key official or effective actors to force the observer to apply another name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors.”).

97. GEORGE STEINER, *AFTER BABEL* 382 (Oxford University Press, 3d ed. 1998).

98. *Id.*