Reviving the Emperor's Old Clothes: The Good Governance Agenda, Development and International Investment Law[1]

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1. Introduction

Originally conceived and promulgated widely by development agencies, notably the World Bank, in response to concerns over the effectiveness of development assistance, the good governance agenda quickly gained concurrent currency within the broader framework of international economic law. In the realm of investment law, the language of good governance, its associated rule of law narrative and their relationship to development outcomes have been used to justify the normative and institutional evolution of law and policy in this area. Specifically, notions of stability, predictability and efficacy that feature prominently on the good governance and rule of law agenda have been widely conscripted to legitimise the rapid proliferation of international investment agreements (IIAs) and the attendant ascendency of the investment arbitration regime over the past two decades.

More recently, as global criticism of and dissatisfaction with the current regime of investment law have intensified, the narratives of good governance and development have re-emerged as instruments of both critique and crisis containment of the legal framework for international investment. Reflecting the contested interpretative terrain that underpins these discourses, the concepts of good governance and the rule of law have alternately provided the language for challenging contemporary international investment law while supplying the scripts for a counter-discourse that seeks to rehabilitate the normative and institutional credibility of the existing investment regime. Crucially, the discourse of good governance, framed in the context of development outcomes for host states, has once again been harnessed to justify the regulatory reforms of and limits placed on governmental action by international investment law.

This paper examines the problematic revival of the good governance agenda and its relationship to international investment law and development. First, the paper reviews the origins of the good governance concept as a tool of development policy and practice, locating its inception and evolution within a particular policy and operational context. Second, the paper interrogates the agenda's pivotal role in supplying the conceptual framework on which contemporary international investment law and policy is premised. In particular, the paper examines how the language of good governance has been instrumental in providing a justificatory link between international investment law and economic and social development in host states. The paper then proceeds to evaluate how the contemporary investment protection regime measures up to the same indicators of good governance subscribed to and promulgated by international development agencies.

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In doing so, the paper considers how the same discourse has alternately served as a potentially transformative narrative for confronting the negative dislocations of the investment framework at the same time as it is being utilised to diffuse systemic criticism and rehabilitate the credibility of the regime. Here, the paper cautions against the ahistorical import of the good governance agenda into the international investment law and policy unless accompanied by a broader systemic review and reform of the regime. It argues that while the discourse of good governance and development offers a useful prism for reflecting upon and/or challenging the substantive and procedural limitations of international investment law, the utility of these concepts must be placed within the broader context in which they were conceived and applied in law, policy and practice.

2. <u>Good Governance as a Development Construct</u>

a) <u>Crisis Containment</u>

The genesis of the good governance agenda can be traced back to the conceptual shifts in development policymaking in the late 1980s and throughout the 1990s, driven by rapidly changing global economic and geo-political circumstances. Led by the World Bank, its key intellectual actor and financier, the emergence of the good governance project can be situated within a broader movement by the international development sector to recast the conceptual and operational premise of official development assistance in light of growing criticism that the development interventions of the postwar period were failing to deliver the outcomes envisioned by its architects, with developing countries remaining mired in a chronic poverty and debt trap.

Specifically, international development practitioners were confronted with two distinct but interrelated challenges at the close of the 1980s. Firstly, the Washington Consensus model of economic organisation that informed the design of structural adjustment programmes over the past decade was failing to engender the expected economic growth and generating social and economic dislocations, including the exacerbation of income disparities and structural inequalities within and between states.[2] Instead, the withdrawal or reduction of state support in key economic and social sectors, coupled with the removal of government controls over trade and financial flows, had 'weakened the state as an institution',[3] removing not only its productive role in the economy but also much of its regulatory and administrative functions. Secondly and relatedly, concerns with weak governance of state agencies and fractured mechanisms for public accountability and democratic decision-making in aid recipient states had led to increasing public awareness in both donor and recipient states over the efficacy of development assistance. This, along with frustration with fragmented aid structures and processes, resulted in corresponding demands for greater transparency of and accountability for aid.[4]

Influenced by the institutional turn in economics, rooted in the work of Robert Coase and popularised by Douglass North and, latterly, Joseph Stiglitz, chief economist at the World Bank at the time of this conceptual shift,[5] good governance provided an expedient conceptual

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[2] Rita Abrahamsen, *Disciplining Democracy: Development Discourse and Good Governance in Africa* (London and New York, Zed Books 2000) 37-38; SAPRIN, *Structural Adjustment: The Policy Roots of Economic Crisis, Poverty and Inequality* (London and New York, Zed Books 2004) 1-4.

[3] SAPRIN (n 2) 76.

[4] Martin Doombos, ''Good Governance': The Rise and Decline of a Policy Metaphor?' (2001) 37(6) The Journal of Development Studies 93, 97-102; Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge, Cambridge University Press 2010) 133-135; Carlos Santiso, 'Development Finance, Governance and Conditionality: Politics Matter' (2004) 7(1) International Public Management Journal 73, 75-76.

[5] Toby Carroll, *Delusions of Development: The World Bank and the Post-Washington Consensus in Southeast Asia* (Basingstoke and New York, Palgrave Macmillan 2010) 70-82; Tor Krever, 'The Legal Turn in Late Development Theory; The

framework for addressing these latent concerns of the development practitioners while maintaining the credibility of past and future aid programmes. Emerging from and refined by a series of reports from the World Bank,[6] the good governance agenda reconceptualises the relationship between the state and the market, viewing the state as central to the promotion of economic development, not as a primary provider of goods and services but rather as 'a partner, catalyst and facilitator' of market.[7]

The central message of the good governance agenda was and continues to be that structural and macroeconomic reforms are insufficient to generate economic growth and social development outcomes without an enabling institutional environment to underpin them. According to this approach, success of economic reform programmes and efficacy of development interventions are dependent on the effectiveness of institutions – including the civil service, judicial systems, financial regulators and supervisory authorities, legislatures, and civil society groups[8] – to support them. Good governance, it was argued, entailed not only 'effective participation in public policy-making' but also 'the prevalence of the rule of law and an independent judiciary' and 'institutional checks and balances through horizontal and vertical separation of powers, and effective oversight agencies'.[9]

For its proponents, the good governance agenda served as a credible foil to critics of mainstream development policy and practice at the time, supplying both a conceptual framework to explain the substantive failures of development assistance while providing a technocratic arsenal for tackling the more instrumentalist concerns of aid delivery and effectiveness. The failures of earlier development interventions were therefore less to do with the content of the economic prescriptions themselves than with how these reforms are implemented by recipient governments and whether these governments possess the necessary institutional framework to successfully embed such in pursuit of social and economic objectives. At its core, the good governance agenda seeks at once to both problematise and reinvigorate the role of the state in economic development and social welfare. It recognises the importance of public institutions in the economy but at the same time places the burden of institutional development and effectiveness on the state while legitimising the interventions of the international development community where such institutional failures are perceived of as inadequate.[10]

Rule of Law and the World Bank's Development Model' (2011) 52(1) Harvard International Law Journal 287, 302-304.

[6] The concept of good governance was first mooted in a World Bank report on sub-Saharan Africa that characterised the crisis in Africa as 'a crisis of governance' and elaborated and expanded in subsequent documents, most notably in its landmark report on *Governance and Development* in 1992 (Washington DC, World Bank 1992), the Bank's governance and anti-corruption strategy, *Reforming Public Institutions and Strengthening Governance* (World Bank, Washington DC, World Bank 2000) and successive editions of its annual flagship *World Development Reports (WDR)*, including that of 1997 on *The State in a Changing World* (New York, Washington DC, World Bank and Oxford University Press 1997), *Building Institutions for Markets* in 2002 (Washington DC, New York, World Bank and Oxford University Press 2002) and *A Better Investment Climate for Everyone* in 2005 (Washington DC, World Bank 2005). For a historical review of the Bank's conceptual thinking, see Krever (n 5); Carlos Santiso, 'Good Governance and Aid Effectiveness: The World Bank and Conditionality' (2001) 7(1) The Georgetown Public Policy Review 1; Santiso, 'Development Finance, Governance and Conditionality' (n 4).

[7] World Bank *WDR 1997*, (n 6); also Carroll (n 5) 2-3; David Craig and Doug Porter, *Development Beyond Neoliberalism? Governance, Poverty Reduction and Political Economy*, (Abingdon, Routledge 2006) 10-15; David Trubek, 'The Political Economy of the Rule of Law: The Challenge of a New Developmental State' (2009) 1(1) Hague Journal on the Rule of Law 28, 31.

[8] World Bank, *WDR 2002* (n 6) 2, table 1; World Bank, *WDR 1997* (n 6) 7 - 11.

[9] Santiso, 'Good Governance and Aid Effectiveness' (n 6) 5.

[10] Abrahamsen (n 2) 41 – 45; Carroll (n 5) 76 – 78; Santiso, 'Good Governance and Aid Effectiveness' (n 6) 5.

b) Disciplining the New Developmental State[11]

A central plank in the good governance agenda is the concept of the rule of law, an instrument through which state power can be curtailed, diffused, and channelled towards creating the environment for economic growth and social development. The rule of law provides a mechanism through which the aforementioned invigorated role of the state in the economy can be managed and delimited. With its emphasis on developing functional judicial, legislative, administrative and regulatory regimes within developing countries, the rule of law supplies 'the normative and institutional structure'[12] to support the construction of a market economy. It does so through the promotion of legal systems which are entrusted 'with the task of protecting individual rights', notably property and contractual rights, by constraining the inclination of political power to expand, to act arbitrarily and to abuse its prerogatives'.[13] An effective rule of law is therefore seen as a requirement of this new regulatory developmental state, a bulwark against the exercise of arbitrary state power and excessive state intervention in the economy and a guarantor and an enforcer of private contracts and property transactions.[14]

This emphasis on institutions and the rule of law makes good governance an attractive conceptual paradigm for embedding the law and policy of a nascent international investment regime predicated on liberalisation and investor protection. Indeed, an important component of the governance approach to development policy has been the creation of a so-called enabling climate for foreign investment in developing countries and transition economies as a means of incentivising foreign direct investment (FDI) in efforts to deliver developmental outcomes. Efforts to foster this investor-friendly environment in developing countries have ranged from embedding legal and regulatory reform of economic sectors in broader developmental policy loans from the international financial institutions to discrete judicial reform and legal training projects funded through multilateral loans and bilateral donor grants.[15] The World Bank Group, in particular, has been at the forefront of advocating this 'investment climate approach' to development, arguing that countries' transition towards market economies cannot be achieved with legal and institutional reform and 'firmly establishing the rule of law to create the necessary climate of *stability* and *predictability*'.[16]

The emergence of an international legal framework of investment protection in the past two decades builds on the reforms promoted through international development interventions. Consisting of a proliferating network of bilateral investment treaties (BITs) and investment chapters of free trade agreements and an increasingly sophisticated international arbitral system, this regime constitutes a major 'paradigm shift' in international investment law.[17] Unlike the previous, *ad-hoc* landscape of investment protection predicated on customary legal principles and

[11] This term is adopted from Trubek's conception of the new functions of the state in contemporary international political economy that is qualitatively different from the classical notion of a developmental state (Trubek (n 7) 31). In the former, the state assumes a productive role in the economy while the latter conception views the state as a driver for and regulator of private sector activity (ibid).
[12] Pietro Costra and Danilo Zolo, *The Rule of Law: History, Theory and Criticism* (The Netherlands, Springer 2007) 19.
[13] ibid.
[14] Humphreys (n 4) 138-140; Krever (n 5); World Bank, *Initiatives in Legal and Judicial Reform* (2004 Edn, Washington DC, World Bank 2004) 2.
[15] International Finance Corporation, *International Finance Institutions and Development through the Private Sector: A Joint Report of 31 Multilateral and Bilateral Development Finance Institutions* (Washington DC, International Finance Corporation (IFC) 2011) 33 – 34; World Bank, *Initiatives in Legal and Judicial Reform* (n 14) 3 – 4.
[16] World Bank, *Initiatives in Legal and Judicial Reform* (n 14) 2.
[17] Stephan W Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Virginia Journal of International Law 57, 74 – 75.

espousal of claims through home states, contemporary international investment law is much more codified, juridified and, some would argue, depoliticised.[18]

Proponents of this new universe of IIAs and arbitral tribunals argue that it provides a stable and predictable regime of investment governance that is crucial because of the evolving nature of 'political risk', especially in emerging markets and developing economies. The rapid liberalisation of cross-border capital flows and the mass privatisations of key economic sectors, such as extractive industries and utilities, in developing countries since the mid-1980s shifted the landscape of foreign direct investment significantly. Specifically, the aforementioned changing role of the state from a producer of goods and services to a regulator of a multiplicity of private actors charged with the ownership and operation of economic sectors had led to new concerns over the exercise of state power *vis-à-vis* foreign investors. In a complex domestic landscape which posits the state as an interlocutor between a myriad of local and foreign private actors within an intricate web of transnational and national commercial arrangements, new political risks are argued to arise not from the actions of the government itself but how it balances the relationships between different domestic and foreign constituents.

In other words, risk to investors today is perceived not as stemming primarily from overt interference of states with the proprietary rights of the investor, such as through forced nationalisations of entities or industries, or from the impact of civil insecurity and failure to maintain law and order. Instead, political risk is said to arise from broader use of state regulatory power and the institutional framework – or lack thereof – under which governmental authority is exercised.[19] This is compounded by the increasing devolution of regulation, including to quasi-governmental and private agencies, and political decentralisation to sub-national entities that further destabilises the domestic framework in which foreign investment takes place. At the same time, the transactional complexities of contemporary investments – that can include multilevel and multinational firm contracting – demands greater institutional and legal stability for enforcement of agreements between private entities to reduce the so-called transactional costs of doing business.[20]

The good governance agenda therefore provides a legitimising discourse for the new structure of international investment law, providing a frame of reference through which the discipline of governmental action vis-a-vis the private sector can be justified. The logic of this confluence between development policy and investment rules maintains that good governance is key to

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[18] See Jose E Alvarez, *The Public International Law Regime Governing International Investment* (The Hague, The Hague Academy of International Law 2011) 59; Ibrahim F I Shihata, 'Toward a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' in Kevin W Lu, Gero Verheyen and Srilal M Perera (eds), *Investing with Confidence: Understanding Political Risk Management in the 21st Century* (Washington DC, Multilateral Investment Guarantee Agency 2009). The depoliticisation aspect refers to the right of foreign investors under investment treaties to bring claims directly against host states in an ostensibly neutral international forum, thereby extricating host states from involvement in such disputes as was the case under the system of state espousal of claims (Jose E Alvarez, above, 99; Susan D Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19 Global Business & Development Law Journal 337, 343 - 344; Ibrahim F I Shihata, above, 4 – 6).

[19] See Patrick Garver, 'The Changing Face of Political Risk', in Kevin W. Lu, Gero Verheyen and Srilal M. Perera (eds), *Investing with Confidence: Understanding Political Risk Management in the 21st Century* (Washington DC, World Bank Group 2009); Thomas Waelde, 'The Effectiveness of International Law Disciplines, Rules and Treaties in Reducing the Political and Regulatory Risk for Private Infrastructure Investment in Developing Countries' (A Conceptual Study in Preparation for the World Bank Conference on Political and Regulatory Risks in Private Infrastructure Investment, 9 – 10 September, Rome, Italy 1999) <www.dundee.ac.uk/cepmlp/jorunal/html /vol5/article 5-5.html> accessed 10 January 2014.

[20] Garver (n 19) 82 – 83; Thomas Waelde, 'Changing Directions for International Investment Law in the Global Economy' (1998) CEPMLP On-line Journal on Natural Resources, Energy and International Business Transactions <http://www.dundee.ac.uk/cepmlp /main/html/journal/vol1-5.htm> accessed 10 January 2014, 31.

attracting foreign investment which in turn translates into economic growth and resources for social development.[21] Here, the problematisation of host state legal and governance regimes as weak and inadequate for the purposes of global economic integration legitimises the interventions of the international community by way of the aforementioned good governance and rule of law projects and latterly by way of legal reform induced by IIAs.

3. Investment Law as Good Governance

a) Externalisation of Investment Governance

The structure of contemporary international investment law externalises the internal governance of foreign investment by subjecting the exercise of state power in respect to investment policy and practice to a higher source of law. It requires the exercise of government authority in this area to be made within an externally supervised framework of correspondingly externally derived rules and principles.[22] The existence of this external body of law governing states' relationships with foreign investors coupled with a system of dispute resolution that automatically elevates settlement of state-investor disputes to an international forum therefore constrains state power more effectively than patchy and *ad-hoc* institutional changes implemented through reforms promoted by international development agencies.

IIAs 'lock in' institutional and regulatory changes by making it difficult for states to renege on their commitments to liberalise investment regimes and to establish principles for the treatment of foreign investors that is not dependent on domestic laws or administrative decision-making. Host state regulatory prerogatives are constrained by these agreements through substantive treaty guarantees – including assurances against expropriation without compensation, the fair and equitable treatment (FET) of investors by the host state and guarantees of full protection and security – supported by the right to enforce them outside the host state's legal system through international arbitral tribunals.[23] This right of investors to pursue claims directly against host states in an international forum is a landmark in international law, constituting the broadest expansion of legal personality of private actors in the postwar period. The distinctiveness of this contemporary universe of IIAs is that 'they are designed to function without the political involvement of either host-or home governments', enabling, in the majority of cases, foreign investors to file claims against host states before international arbitral tribunals without 'exhausting local remedies at host states' courts, and without authorisation from or endorsement by their own home states'.[24]

The reference to an external source of law and enforcement of obligations by an international dispute settlement body conforms ostensibly with the standards of good governance and the rule of law, notably with regard to state action. It situates the exercise of governmental authority

[21] See Rudolph Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 New York University Journal of International Law and Politics 953, 953 – 954; Franck, 'Foreign Direct Investment' (n 18) 341; Schill, 'Enhancing International Investment Law's Legitimacy' (n 17) 62.

[22] Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford, Hart Publishing 2012) 1 – 2; 146 – 147; W Michael Reisman and Robert D Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) 75(1) British Yearbook of International Law 115, 116 – 117.

[23] Franck, 'Foreign Direct Investment' (n 18) 342; Montt (n 22) 127.

[24] Montt (n 22) 1 – 2. This can be contrasted with the so-called 'denial of justice' system under the previous era of investment disputes premised on the customary international legal principle of state responsibility for the mistreatment of aliens (Montt (n 22) 17 – 19). Here, the diplomatic protection of home states could only be sought by a foreign investor in a claim against the host state 'once domestic courts [in host states] had acted on the case under dispute' and were found wanting in this regard (ibid).

within a framework of clearly recognisable rules and principles and enables the scrutiny of a state's administrative and legislative acts by an independent tribunal based on its interpretation of these rules and principles.[25] IIAs purportedly resolve what Yackee terms 'the central *problematique* of host state-foreign investor relations': that of the 'obsolescing bargain' where 'the host state will opportunistically interfere with the investment's profitability once the investment has been sunk'.[26] These agreements also overcome the so-called 'dynamic inconsistency problem' for host states, enabling states to commit to an investment project without fear that a future government will interfere with the rights guaranteed to the investor.[27]

The current international investment architecture therefore said to promote investment certainty protecting foreign investors against the risk of reliance on a) potentially mutable domestic laws of host states governing their investments; and b) potentially partial, politically motivated or incompetent local courts to adjudicate on disputes arising from such investments.[28] Additionally, the privity of an arbitration process designed for commercial disputes also generally restricts the involvement of third parties and excludes considerations of broader social and economic policy issues outside the subject matter of the dispute (a subject to which we return in section 5). In the eyes of foreign investors, this guards against political opportunism and regulatory interference with investor rights induced by claims from interest groups in host states.[29]

Accordingly, accession to IIAs is often viewed as a corollary development to 'good governance' and 'investment climate' reforms, with entry into such agreements regarded as an indicator of a host state's commitment to enabling a hospitable legal environment for foreign investment. IIA advocates argue that such a commitment by a host state encourages inward investment by signalling 'receptivity to foreign investments' or enhancing the state's credibility as a reputable international actor'.[30] Thus, it has been argued IIAs often serve as substitutes for 'domestic institutional quality',[31] providing a mechanism for the protection of investor rights where such domestic guarantees are weak.[32]

b) <u>Incentivising Domestic Institutions</u>

The importance of IIAs as an indicator of investment governance has led to arguments that the contemporary investment regime incentivises domestic governance reforms. States with weak institutional capacity are compelled to develop 'an effective normative framework' for governance that includes, *inter alia*, 'impartial courts, an efficient and legally restrained

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[25] Montt (n 22) 147; UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries' (UNCTAD Series on International Investment Policies for Development, New York and Geneva, United Nations Conference on Trade and Development (UNCTAD) 2009) 14 – 15.

[26] Jason Webb Yackee, 'Bilateral Investment Treaties, Credible Commitment and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42(4) Law and Society Review 805, 807.

[27] Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 International Review of Law and Economics 107, 113.

[28] Ronald Daniels, 'Defecting on Development: Bilateral Investment Treaties and the Subversion of the Law of Law in the J Developing World' (Toronto, University of Toronto, Draft dated 23 March 2004 <www.unisi.it/lawandeconomics/stile2004/daniels.pdf> accessed 10 January 2014 22 – 23.

[29] UNCTAD, 'The Role of International Investment Agreements' (n 29) 14 – 15; Thomas Waelde, 'The Effectiveness of International Law Disciplines, Rules and Treaties' (n 19) 28 – 29.

[30] Franck, 'Foreign Direct Investment' (n 18) 341, drawing on Jennifer Tobin and Susan Rose-Ackerman, 'When BITs Have Some Bite: The political-economic environment for bilateral investment treaties' (2011) 6(1) Review of International Organizations 1; Andrew Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38(4) Virginia Journal of International Law 639 and Kenneth J Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41(2) Harvard International Law Journal 469.

[31] Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33(10) World Development 1567, 1578.

[32] ibid; Ginsburg (n 27) 14.

bureaucracy, and the measure of transparency in decision[making] that has increasingly been recognized as a control mechanism over governments'.[33] Recent studies have indicated that IIAs can attract FDI to developing countries but only as a complement rather than a substitute to a hospitable institutional environment.[34] In other words, while international investment agreements can lend credibility to countries with a qualitatively adequate institutional framework, 'they cannot bootstrap a high risk country' to the same level as countries with more robust institutions for investor protection.[35]

This impetus to improve domestic institutional quality is driven primarily by the financial threat of non-compliance with IIAs. Host state signatories to IIAs risk incurring significant costs if they do not reform domestic institutions to give effect to treaty standards of protection, including direct costs of litigation for treaty breaches and any ensuing compensatory damages to the foreign investor as well as indirect costs, such as the aforementioned effects of reputational loss.[36] Given the broad and open-ended nature of most IIA provisions, this commitment to governance reform is significant, involving not only the liberalisation of economic sectors under the non-discrimination obligations but also changes in domestic law, administrative and regulatory policy and practice to conform with state's obligations under the FET and transparency principles and compliance with standards of expropriation and compensation.

Governance reforms induced by IIAs have been posited, in some circles, as welcome incentives to shift government behaviours for the betterment of their domestic constituents, conferring upon international investment law a broader function of enabling social and political development. These changes occur on several registers. First, it has been argued that the liberalisation of a host state's investment regime can result in greater competition in economic sectors, breaking up existing monopolies and oligopolies and entrenched political interests in previously closed door economies. These structural reforms, viewed in corollary to the aforementioned 'investment climate approach' promulgated by development agencies and donors, are mapped as part of a broader virtuous circle of free markets and the rule of law. Here, an international commitment to liberalisation can be perceived as 'a domestic defense mechanism to insulate the state from local rent-seeking efforts' and spurring competition among domestic as well as foreign investors.[37]

Second, liberalisation reforms of IIAs are buttressed by substantive and procedural investor protection provisions and their increasingly expansive interpretation by arbitral tribunals. Expressions of good governance and the rule of law have featured prominently in tribunal interpretations of substantive treaty standards, notably in considerations of the FET and transparency principles. Specifically, interpretations of the former standard, regarded as the 'alpha and the omega' of the so-called 'BIT generation',[38] have clustered around a core of 'normative principles' identified by Kingsbury and Schill forming the contours of what

[33] Reisman and Sloane (n 22) 117.
[34] For example, Tobin and Rose-Ackerman's latest study on BITs and inward investment found that 'the marginal benefit of entering into a BIT is higher for a developing country with a better institutional quality ranking', less of on an impact 'in the riskiest environments' and 'a larger positive effect for countries with moderate levels of political risk' (Tobin and Rose-Ackerman (n 30) 6); See also Yackee (n 26).
[35] Tobin and Rose-Ackerman (n 30) 6.
[36] See Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65(3) International Organisation 401; Tobin and Rose-Ackerman (n 30); Yackee (n 30).
[37] Ginsburg, (n 27) 119; Alvarez (n 18) 378.
[38] Montt (n 22) 294.

constitutes 'good administrative governance' in host states.[39] These include requirements of 'stability predictability and consistency' of the host state's legal framework;[40] 'protection of legitimate expectations';[41] 'administrative due process and prohibition of denial of justice'[42] and the 'requirement of transparency'.[43]

The use of the language of good governance to justify this expansive reach of international investment law into the domestic sovereign realm has been justified and indeed promoted by its proponents who argue that such 'normative seepage'[44] can influence the positive development of legal, regulatory and administrative institutions in host states. For example, it has been argued that requirements for transparency in and accountability for regulatory change and administrative decision-making may in turn combat political corruption and temper arbitrary or discretionary exercises of state power.[45] Meanwhile, it is argued that regulatory competition between domestic courts and international arbitral mechanisms can incentivise local courts to 'compete for the business of resolving commercial disputes and therefore improve their quality'.[46]

In other words, it has been contended that institutional reforms induced by IIAs to protect foreign investors can 'trickle down' to host state constituents generally, including domestic investors as well as other stakeholders. Competition with or mimicry of external legal or regulatory regimes can, in some instances, strengthen weak internal governance and force governments to confront weak administrative and legal institutions. It can, in some circumstances, embed a culture of transparency and accountability that may lead not only to economic growth but also broader social development and political franchise. In these contexts, the language of good governance is used here to leverage transformations in the legal, regulatory and political institutions of host state developing countries similar to the way in which the concept is expressed in development policy and practice discussed in section 2 to justify the governance reforms promulgated by development agencies and donors.

4. Taking Governance to Task

a) Enclaves and Exclusions

The progressive expansion of the scope of protection offered under BITs and other IIAs by arbitral tribunals has meant that there are few aspects of host state regulatory authority that are not covered by their treaty obligations and potentially subject to review by international arbitrators, raising significant concerns about the negative correlation between investment law and domestic governance mechanisms. The positive correlation between international investment law *and* institutional development and the rule of law in host states is tenuous despite the arguments forwarded by proponents of IIAs discussed in section 3. Instead, there is

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[39] Benedict Kingsbury and Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (IILJ Working Paper 2009/6, New York University School of Law 2009) 8 – 10.
[40] *CMS Gas Transmission v Argentine Republic* ICSID Case No. ARB/01/8 (May 12, 2005); *Metalclad v Mexico,* ICSID Case No. ARB(AF)/97/1 (August 30, 2000).
[41] *Technicas Medioambientales TecMed, S.A. v Mexico,* ICSID Case No. ARB(AF)/00/2 (May 29, 2003); *International Thunderbird Gaming Corporation v Mexico,* UNCITRAL (NAFTA) Arbitration Proceedings (January 26, 2006).
[42] *Metalclad v Mexico* (n 44).
[43] ibid; *Technicas Medioambientales TecMed, S.A. v Mexico* (n 41). See Kingsbury and Schill (n 43) 8 – 15.
[44] ibid 16.
[45] Kingsbury and Schill (n 39) 16- 17; Juanita Olaya, *Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption* (Second Biennial Global Conference July 8-10 2010, The University of Barcelona, Society of International Economic Law 2010) 3 – 5.
[46] Ginsburg (n 27), 119.

mounting evidence to suggest that the constraints levelled on states by IIAs and the elevation of investor-state disputes to an international arbitral system premised on adjudicating upon primarily commercial matters is having a negative effect on good governance and the rule of law in host states.

First, there is criticism that an international regime for investment protection that relies primarily on an external authority for the source of rules and principles and on an extra-territorial means of dispute settlement does not provide sufficient motivation for endogenous local development. According to Ginsburg, this 'decision to bypass domestic courts may reduce courts' incentives to improve performance by depriving key actors from a need to invest in institutional improvement'.[47] Unlike the governance and rule of law interventions of the international development community (see section 2), states are expected to independently manage the process of regulatory and institutional compliance with IIA provisions. Without financial support or technical expertise, coupled with limited institutional and professional capacity in many developing countries, host states will struggle with improving judicial quality to the standards expected by foreign investors who, given an option, would prefer international arbitration over domestic remedies.

The removal of local courts and laws from the jurisdiction of foreign investment claims results in the creation of 'legal enclaves'[48] which enable foreign investors to exit domestic jurisdictions and rely on an external legal regime for protection of their rights and adjudication of their disputes with host states.[49] This 'siphoning off' of foreign investor-host state conflict to another jurisdiction for contest can undermine the function of the local judiciary and legal system.[50] Inasmuch as commitment to IIAs and international arbitration can signal host state credibility in the treatment of foreign investors within its domestic legal and administrative environment, these same commitments can also signal the host state's own loss of confidence in the same institutions to do the same.

The practice of 'allowing foreign investors to leap-frog over domestic courts' has major ramifications on standards of good governance within host states.[51] The provision of a right to international arbitration as the first recourse under most IIAs supplant the public rationales which still underpin the time-honoured local remedies rule – still applied by most international and regional dispute settlement bodies, such as the European Court of Human Rights and the International Court of Justice (ICJ) – and promulgate a near universal distrust of local legal regimes, irrespective of their reliability.[52] The limitation or removal of the local remedies rule in IIAs presume that local courts are incapable of delivering justice and deny domestic institutions the opportunity to review and, if necessary, redress the substance of the claims against the host government.[53]

The limited role of local courts in investment disputes, effectively rendering them little more than enforcers of external arbitral decisions, has an impact on public confidence in the domestic

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[47] ibid.

[48] Daniels (n 28).

[49] ibid; Ginsburg (n 27).

[50] ibid.

[51] Luke Eric Peterson, 'Evaluating Canada's 2004 Model Foreign Investment Protection Agreement in Light of Civil Society Concerns' (CCIC June 2006) < http://www.ccic.ca/ _files/en /what_we_do/trade_2006-06_foreign_ investment_memo_e.pdf> accessed 9 January 2014, 1 – 2.

[52] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) European Journal of International Law 121, 130.

[53] ibid; see also Alvarez (n 18) 68 – 69.

legal system. This is particularly striking when courts have little option but to give effect to an award which may have negative ramifications on public interests with little opportunity to review the merits of the award. Enabling foreign investors to bypass local legal systems can also prevent the endogenous evolution of law through judicial precedent and statutory interpretation. This is particularly relevant in common law systems where such judicial activism is central to the development of law and which rely on test and novel cases to further the development of specific arenas of law and policy.

Crucially, the relocation of foreign investment disputes away from local courts and the subjection of these disputes to external law remove incentives for foreign investors to participate as civic actors within home states, enabling the withdrawal of their voice from domestic debates on legal and judicial reform and regulatory change. This system can create a two-tiered regime of investment governance in which foreign and domestic investors are subjected to different systems of rules and adjudication and allow a government 'to segment its reputation among domestic and foreign actors'.[54] This can lead to asymmetries in the treatment of foreign and local investors with foreign investors benefitting from a highly specialised, institutionalised and often more efficient mechanism for adjudication while consigning domestic investors to often overburdened local courts.[55]

b) <u>Regulatory Chill and the Social Contract</u>

The governance concerns stemming from reliance on external institutions for adjudication is compounded by the significant shortcomings of the arbitral system to which a rapidly rising number of investment disputes are referred.[56] These concerns, which are well-documented, fall broadly into two categories: a) criticism of the expansionist scale of tribunal decisions and their impact on host states and their local constituents; and b) critique of the procedural deficiencies of the process of international arbitration. Underlying these concerns is what Schill terms the 'public law challenge'[57] of a system that is public in character but private in form, charged with the review of inherently public and civic issues but operationally and conceptually premised on a framework that was designed for commercial disputes between private actors. The open-ended nature of substantive content of investment agreements coupled with the overarching *raison d'etat* of investment treaties to minimise political and regulatory risk has meant that the arbitral system has been called upon to adjudicate matters of public concern in host states without the corresponding institutional framework or professional expertise to support it.

Acting under the auspices of BITS and other IIAs, arbitral tribunals have been called upon to evaluate claims relating to a wide range of governmental action ranging from termination of

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[54] Ginsburg (n 27) 119.

[55] In *Glamis Gold v USA,* UNCITRAL (NAFTA) Arbitration Proceedings, Award (June 8, 2009), for example, the foreign mining company sought to challenge Californian mining regulations under the North American Free Trade Agreement (NAFTA)'s Chapter 11 provision for arbitration rather than in a Californian Court (see Brynn Olsen, 'International Local Government Law: The Effect of NAFTA Chapter 11 on Local Land Use Planning' (2007) 4 International Law and Management Review 53).

[56] The number of known investor-state dispute settlement (ISDS) cases has risen exponentially since the mid-1990s. In 2012, there were at least 58 new cases filed, constituting the 'highest number of known treaty-based disputes ever filed in one year', the majority of which were filed against developing countries and economies in transition (UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS), Updated for the Multilateral Dialogue on Investment, 28-29 May 2013' (IIA Issue Note 1, United Nations Conference on Trade and Development (UNCTAD) 2013) 1. At the end of 2011, there were a total of 514 known treaty-based investment cases (ibid 3).

[57] Schill, 'Enhancing International Investment Law's Legitimacy' (n 17) 67.

water concession contracts[58] to government failure to renew a licence for the operation of a landfill[59] and refusal of a permit to operate a hazardous waste disposal facility[60] to the institution of environmental and cultural impact assessments[61] and government bans on gasoline additives.[62] In a series of cases resulting from the Argentinean financial crisis in 2000 – 01, arbitral tribunals have had to examine the legitimacy of government acts to redenominate the local currency in the midst of economic exigencies.[63]

In many of these cases, tribunals have been called upon to assess the quality of governance in host states by evaluating not only the appropriate scope of governmental action but also the efficacy of state institutions when carrying out the functions of government.[64] Frequently called upon to 'resolve wider conflicts of rights and interests between international investors, on the one hand, and individuals who benefit from domestic regulation of business on the other',[65] arbitral tribunals are regularly entertaining 'claims that would otherwise lie with the exclusive province of constitutional and supreme courts in host states'.[66] Under municipal law, this review of governmental action is normally conducted by the public judicial system, usually honouring the constitutional separation of powers that enables citizenry rights to be guaranteed by judicial review of executive or legislative action. Removing the forum for review to an external system has significant ramifications not only for the conduct of government in host state but also the relationship between state and its constituents.

A key concern arising from the deficiencies of the investment arbitral system is that the stability and predictability afforded by the legal protections under international investment law for foreign investors has translated into a corresponding instability and lack of predictability for host states and their domestic constituents. Governments may now be reluctant to institute regulatory or administrative changes even where such reforms are necessary for the protection of public interest. In seeking to manage 'political risk' and 'regulatory opportunism' by host states (see section 2), international investment law conversely exerts a 'regulatory chill' on host governments through substantive treaty provisions and stabilisation clauses in investment contracts that seek to freeze regulations in host states, including changes necessitated by shifting economic and environmental circumstances.[67]

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58 See *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania,* ICSID Case No. ARB/05/22 (July 24, 2008).

59 See *Technicas Medioambientales TecMed, S.A. v Mexico* (n 41).

60 See *Metalclad Corporation v Mexico* (n 40).

61 See *Glamis Gold v USA* (n 55).

62 See *Methanex Corporation v United States of America* UNCITRAL (NAFTA) Arbitration Proceedings (August 3, 2005).

63 See *CMS Gas Transmission Company v Argentine Republic* (n 40); *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v Argentine Republic,* ICSID Case No. ARB/01/3 (May 22, 2007); *Sempra Energy International v Argentine Republic,* ICSID Case No. Arb/02/16 (September 28, 2007).

64 As Dolzer observes, '[t]he appropriate time for filing an appeal, the process of determining a relevant fact, and the judicial administration of justice in general have all been subject to review by this growing jurisprudence' (Dolzer (n 21) 970).

65 Gus Van Harten, 'Private Authority and Transnational Governance: The Contours of the International System of Investor Protection' (2005) 12(4) Review of International Political Economy 600, 615.

66 Montt (n 22) 126.

67 *Metalclad Corporation v* Mexico (n 40); *CMS Gas Transmission Company v Argentine Republic* (n 40); *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v Argentine Republic,* ICSID Case No. ARB/01/3, Award (May 22, 2007); *Sempra Energy International v Argentine Republic* (n 63); *LG& E Energy Capital Corp. and LG& E International Inc. v Argentine Republic,* ICSID Case No. ARB/02/1) (July 25, 2007).

This creates what Schneiderman describes as a 'political economy of certainty' which insulates 'key aspects of economic life from the pressures of majoritarian politics'.[68] In many host states, the decision of the executive to enter into IIAs has been taken without adequate consultation with local communities and other domestic constituents, including local businesses that may be affected by the substantive terms of such treaties. Despite the wide-ranging scope of IIAs and their significant impact on the capacity of host states to act in the public interest, host states have routinely entered into these agreements without satisfactory consultation and debate.[69] In some countries where entry into an international agreement remains the prerogative of the executive, the waiver of government authority in this manner has raised significant questions over the exercise state power.

Additionally, the shift from domestic lawmaking and adjudication mechanisms to a process that enshrines in private adjudicators 'the authority to review the legitimacy of state action and omissions according to undefined standards of review'[70] exerts a constitutional toll on the social compact between the host state and its citizens. Aside from the privileging of foreign investors discussed in section 3, the extensive constraints placed on state's regulatory prerogatives by IIAs and arbitral jurisprudence can undermine the institution of the state itself, calling into question the very function of government and government institutions. This is particularly acute in host states with fragile political coalitions, those emerging from economic crisis, natural disasters or armed conflict or indeed states transiting from authoritarian rule where consolidated state authority remains pivotal in consolidating a fragmented national polity.

c) <u>Arbitral Assaults on Governance</u>

The transplantation of a private framework of adjudication to issues of public policy has resulted in critical procedural anomalies which, paradoxically, sits in opposition to the standards of governance the very same arbitral tribunals seek to enforce in host states. First, the appointment and conduct of investment arbitrators challenges the core 'principles of public accountability and judicial independence that underlie public law'.[71] In particular, the *ad-hoc* nature of appointments – by disputing parties or designated external authorities[72] on a case-by-case basis – mean that the '[i]nstitutional safeguards of judicial independence' that are normally present in the resolution of public law disputes, such as security of tenure, bars on external remuneration, and objective and independent assignment of cases to judges, are absent in investment arbitration.[73] This, it has been argued, predisposes arbitrators to bias by increasing their financial and professional dependence on both foreign investors as the sole prospective claimants under the asymmetrical structure of investment arbitration and on officials in the designating arbitral centres.[74]

These perceptions of bias are attenuated by criticisms that the 'club' of individuals from which arbitrators are selected form a closed circle of advocates 'who serve as counsel in some cases and

[68] David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge, Cambridge University Press 2008) 205 – 207.

[69] Gus Van Harten, 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Stephan Schill (*ed), International Investment Law and Comparative Public Law* (Oxford, Oxford University Press 2010) 630.

[70] Montt (n 22) 126.

[71] Van Harten, 'Private Authority and Transnational Governance' (n 65) 615.

[72] IIAs often prescribe a designating authority for appointing arbitrators, such as the ICSID or the International Chamber of Commerce (ICC) International Court of Arbitration (ICA) (see Van Harten, 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' (n 69) 4, fn 1).

[73] Gus Van Harten, 'Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration' (2011) 1(4) Oñati Socio-Legal Series 1, 3 – 4.

[74] ibid; Van Harten, 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' (n 69) 643-651; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford, Oxford University Press 2008) 167-168.

as arbitrators in others, often obtaining repeated appointments, thereby raising concerns about potential conflicts of interest'.[75] Additionally, there are concerns that although they are adjudicating on cases involving public interest, many arbitrators lack the professional expertise in public policy and are not accountable to stakeholders other than the parties to the dispute.[76] This contrasts with the practice domestic legal regimes and in other public international arenas, such as the ICJ and the World Trade Organisation (WTO)'s dispute settlement body, where adjudicators tasked with review of government conduct are drawn from a wider pool of expertise and where the terms of appointments are reflective of the public character of the cases they hear.

Concerns with the lack of transparency in the selection of arbitrators are matched by concerns over the lack of transparency in arbitral proceedings more generally. Here, the transposition of a system established for commercial disputes – with confidentiality as one of its 'distinctive features'[77] – sits uncomfortably with its new reality of hearing cases of public interest. A hallmark of this system has been its presumption of privacy that has greatly limited public access to arbitral proceedings, both in terms of documentary disclosure and third party participation in tribunal hearings. This adjudicative model premised on party autonomy, party consent and commercial confidentiality transplants uneasily to disputes involving matters of public concern which go beyond the interests of parties to the case.[78] In recent years, there has been progress towards facilitating greater openness in arbitral proceedings but these new rules remain highly qualified and still fall short of the disclosure rules of many domestic legal regimes in cases that deal with public interest matters (see section 5).

The informational and representation deficits of the arbitral system is further compounded by the lack of institutional hierarchy within the arbitral regime that has resulted in conflicting decisions on cases filed in multiple fora by foreign investors and by the absence of an effective and independent appellate mechanism that can redress these inconsistencies and other procedural deficits.[79] Paradoxically, the problem of inconsistency in awards by different tribunals – illustrated by the *Lauder* and *SGS* arbitrations[80] – and the absence of the doctrine of precedent in arbitral practice impact not only on the regulatory authority of host states but also on their ability to meet their obligations to foreign investors. If the purpose of IIAs is to serve as credible commitment devices to ensure regulatory certainty and manage regulatory risk, then the indeterminacy of the arbitral process risks undermining the capacity of states to formulate and implement coherent regulatory policy.

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[75] UNCTAD, 'World Investment Report 2012: Towards a New Generation of Investment Policies' (Geneva, United Nations Conference on Trade and Development (UNCTAD) 2012) 88; see also Van Harten, 'Private Authority and Transnational Governance' (n 69) 615 – 616; Andrea Bjorklund, 'The Emerging Civilization of Investment Arbitration' (2009) 113(4) Penn State Law Review 1269, 1297 – 1298.

[76] ibid.

[77] Bjorklund (n 75) 1287.

[78] ibid; Franck, 'Foreign Direct Investment' (n 23); Susan D Franck, 'The Legitimacy Crisis in Investment Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1541 – 1542; UNCTAD, 'World Investment Report 2012' (n 75); Van Harten, 'Private Authority and Transnational Governance' (n 69).

[79] See Franck, 'The Legitimacy Crisis in Investment Arbitration' (n 78) 1586.

[80] *Ronald S. Lauder v Czech Republic (Final Award)*, UNCITRAL (3 September 2001); *CME Czech Republic BV v Czech Republic*, UNCITRAL (3 September 2001); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13(6 August 2003) and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6 (29 January 2004). The former two tribunals (*Lauder* and *CME*) reached conflicting decisions regarding 'the same facts, related parties and similar investment rights' while the latter two (*SGS* arbitrations) resulted in differing opinions regarding the similar investment rights and commercial situations for different sets of parties(Franck, 'The Legitimacy Crisis in Investment Arbitration' (n 78) 1558 – 1574.

The question of damages also reflects the hybrid nature of the investment regime which transposes a private adjudicatory regime to matters of international public interest. Inconsistent awards aside, the use of damages 'as a public law remedy' contrary to the practice of most international legal regimes[81] highlights the fundamentally pecuniary nature of the investment arbitral system and contradicts arguments that such cases can work towards incentivising the improvement of domestic governance (see section 3). Without clear and prospective means of enforcing state obligations – such as trade sanctions available at the WTO – the investment regime relies on retrospective financial sanctions as a deterrent to supervise state compliance with their obligations at the same time as it seeks to use the same damages to compensate private actors for losses suffered as a consequence of host state treaty violations. However, the system lacks the public interest qualifications that apply to the award of damages in other international legal regimes, such as the European Court of Justice, that provide for damages to individual claimants, including thresholds of culpability and limits to the quantum of damages recoverable, despite the significant financial implications of such awards on host states, particularly developing country states.[82]

5. Governance as Recalibration

a) Rewriting Wrongs

As the language of good governance becomes increasingly expressed in the law, policy and practice of the investment regime, there are increasing expectations that these narratives may be utilised to transform the deficiencies of the regime itself. In recent years, as global criticism of and dissatisfaction with the current investment law framework have intensified, the narratives of good governance and development have re-emerged as potential scripts for countering the legitimacy and credibility crisis in international investment law. As discussed in section 2, the discourse of good governance has been appropriated by proponents of the contemporary framework of international investment law to justify its prevailing norms and structures, particularly the constraints the system imposes on the political and economic institutions in host states.

The concepts of good governance and the rule of law are now forming an important plank in efforts to recalibrate international investment law. On the one hand, notions of good governance and the rule of law provide the language through which claims of different stakeholders of the regime – host states, civil society groups and communities at the frontline of adverse foreign investment outcomes – can be articulated and through which the normative agenda of international investment may be challenged. At the same time, the discourse of good governance can also be viewed as supplying the scripts for countering the current legitimacy and credibility crisis in the investment regime through attempts to embed a broader social and public agenda into the system. In practice, both registers operate in tandem, reflecting the iterative process of sustained critique and incremental change.

First, the good governance agenda has provided a conceptual and operational framework for forwarding critique of the procedural deficiencies of the investment arbitration regime. In particular, the discourse of the rule of law has supplied a valuable tool for highlighting the paradox of a system that purports to uphold standards of good governmental conduct (at least *vis-a-vis* investors) yet fails to engender such values within its institutional structure. Civil society

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[81] Van Harten and Loughlin (n 52) 131.

[82] ibid 131 - 133; Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge, Cambridge University Press 2012) 82 – 83.

groups, sometimes but not always, in conjunction with host states, have successfully lobbied for greater access to the arbitral process using the language of transparency, due process and good governance.[83] Here, the rule of law has served as a valuable resource to leverage greater openness in the arbitral process, leading to incremental changes in public disclosure of and third party representation in arbitral proceedings.

UNCTAD in its revised paper on 'transparency' observes the significant changes to the way in which transparency issues have been expressed in IIAs and arbitral practice since its last iteration of the note in 2004, noting in particular 'the emergence of investor responsibilities' and 'the introduction of a transparency dimension into investor-state dispute settlement'.[84] With respect to the latter, the organisation notes that the linking of sustainable development objectives with the language of good governance has led to changes in arbitral procedure that has enabled greater public participation in disputes that have implications for development strategies in host states, including increased public disclosure of documents, public access to hearings and third party representation via the submission of *amicus* briefs.[85]

In this context, the parties to the North American Free Trade Agreement (NAFTA) had paved the way for greater public disclosure and access to arbitral proceedings, providing expressly that, subject to certain elementary redactions, nothing in the NAFTA precludes parties to the agreement 'from providing public access to documents submitted to, or issued by a Chapter Eleven tribunal'.[86] This reflects in part an extension of what Bjorklund identifies as the 'strong cultures of open access to government information' in North America, notably the US and Canada,[87] but also demonstrates the strength and increasing professionalization of domestic advocacy, mainly by civil society groups, on these broader investment-related issues. The NAFTA practice has been extended in the new generation of model BITS issued by Canada and the US in 2003 and 2004 respectively, leading to a series of IIAs now containing extensive provisions on disclosure of documents and awards of arbitral tribunals, access to hearings and allowance of third party submissions in arbitration.[88]

Meanwhile, amendments to the ICSID Convention Arbitration Rules (ICSID Rules)[89] and ICSID Additional Facility Rules (ICSID Additional Rules)[90] in 2006 have enabled 'access to the legal reasoning behind awards in cases administered by ICSID' with express consent of the parties but 'stop short of requiring the disclosure of the pleadings or the memorials submitted by the parties'.[91] The recently adopted UNCITRAL Rules on Transparency (UNCITRAL

[83] NGOs, such as the Canadian-based International Institute for Sustainable Development (IISD) and the Washington DC-based Centre for International Environmental Law (CIEL), have been active in monitoring IIAs and evaluating their public interest impacts as well as forwarding claims from stakeholders and civil society groups in developing countries affected by foreign investment projects.
[84] UNCTAD, 'Transparency' (UNCTAD Series on Issues in International Investment Agreements II, New York and Geneva, United Nations Conference on Trade and Development (UNCTAD) 2012) xi.
[85] ibid 36 – 37.
[86] NAFTA Free Trade Commission (2001), 'NAFTA: Notes of Interpretation of Certain Chapter 11 Provisions', 31 July 2001 <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> accessed 10 January 2014, section A(1).
[87] Mexico only recently amended its Constitution to allow for a guarantee a right to government information (see Bjorklund (n 75) 1288).
[88] See UNCTAD, 'Transparency' (n 84) 37 – 43; Kyla Tienhaara, 'Third Party Participation in Investment-Environment Disputes: Recent Developments' (2007) 16(2) Reciel 230, 232 – 233.
[89] ICSID Convention Rules for Arbitration Proceedings (Arbitration Rules). See ICSID Convention Rules for Arbitration Proceedings (Arbitration Rules), Washington D.C., ICSID/15, ICSID April 2006.
[90] ICSID Additional Facility Rules in ibid.
[91] Bjorklund (n 75) 1290; Rule 37 ICSID Rules.

Transparency Rules)[92] goes further than the ICSID amendments and provides for transparency throughout the entire lifecycle of a treaty-based investor-state arbitration conducted under UNCITRAL Arbitration Rules, including the disclosure of a wide range of documents, such as party submissions and expert reports, subject to certain exceptions.[93] Crucially, in a departure from other arbitral practice, the new rules require hearings to be open subject to limitations.[94]

The UNCITRAL Transparency Rules also allow for third party involvement in investor-state disputes, continuing a trend towards broadening access to such hearings in other arbitral regimes. NAFTA parties set the precedent for *amicus curiae* submissions with the landmark receipt of such briefs by the tribunal in *Methanex Corporation v US*[95] and later, in the case of *UPS v Canada*,[96] a practice effectively codified in a latter statement by the Free Trade Commission in 2003.[97] Since then, a series of arbitral tribunals have accepted *amicus* submissions and allowed third party participation in investor-state disputes to varying degrees,[98] highlighting in particular the public interest rationale in their reasoning for accepting these briefs.[99] In addition to the expertise and alternative perspectives that *amici* may contribute to the substantive claims, tribunals have grounded their decision to allow *amicus* briefs in the wider legitimacy import of allowing such submissions. Specifically, tribunals have stressed the significance that acceptance of third party submissions would contribute towards enhancing the public image of the arbitral process.[100]

Aside from challenging the procedural deficits of the arbitral system, critics of the investment regime have similarly harnessed the language of good governance to forward substantive arguments, usually in support of host states in defence of communities affected by investment projects and arbitral claims. Harrison, for example, notes the increasing frequency in which human rights arguments, framed in the context of substantive and procedural fairness and social justice, are raised by groups intervening in investment disputes.[101] While the two concepts should

[92] UNCITRAL Rules on Transparency in Treaty-bound Investor-State Arbitration 2013 (Pre-release publication, 2 October 2013) <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/pre-release-UNCITRAL-Rules-on-Transparency.pdf> accessed 9 January 2014.

[93] Exceptions include confidential or protected business or security information or if disclosure would jeopardise the integrity of the arbitral process (UNCITRAL Rules on Transparency 2013 (n 92) Article 7). See Lise Johnson and Nathalie Bernasconi-Osterwalder, 'New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps' (2013) 4(4) Investment Treaty News 3, 3; UNCITRAL Rules on Transparency (n 92).

[94] UNCITRAL Transparency Rules (n 92) Article 6. These limitations are similar to the exceptions to documentary disclose (above), including on grounds of confidentiality.

[95] *Methanex Corporation v USA* UNCITRAL (NAFTA) Arbitration Proceedings (3 August 2005).

[96] *United Parcel Service of America Inc v Government of Canada* UNCITRAL (NAFTA) Arbitration Proceedings (11 June 2007).

[97] NAFTA Free Trade Commission, 'Statement of the Free Trade Commission on Non-Disputing Party Participation' (2003) <www.state.gov/documents/organization/38791.pdf>accessed 10 January 2014; see also Tienhaara (n 88)232.

[98] See *Methanex Corporation v United States of America* (n 95); *United Parcel Service of America Inc v Government of Canada* (n 95), *Glamis Gold v United States of America* (n 55), *Aguas del Tunari SA v Republic of Bolivia,* ICSID Case No. ARB/02/3, (October 21, 2005), *Suez, Sociedad General de Arguas de Barcelona S.A, and Vivendi Universal S.A. v The Argentine Republic,* ICSID Case No. ARB/03/19 (August 3, 2006), *Suez, Sociedad General de Arguas de Barcelona S.A, and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic*, ICSID Case No. ARB/03/17 (July 30, 2010) and *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania,* ICSID Case No. ARB/05/22 (July 24, 2008).

[99] James Harrison, 'Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?' in Pierre-Marie Dupuy and others (eds), *Human Rights in International Investment Law and Arbitration* (Oxford, Oxford University Press 2009) 404; Eugenia Levine, '*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29(1) Berkeley Journal of International Law 200, 205 – 206.

[100] See *Methanex Corporation v United States of America* (n 95); *Suez, Sociedad General de Arguas de Barcelona S.A, and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic* (n 98); See also discussion below.

[101] Harrison(n 99).

not be conflated, it is instructive to note Harrison's assessment of why such discourses are attractive to those who seek to challenge the premise of international investment law. According to Harrison, a rights-framework posits an alternative claim on host states regulatory authority, creating primary legal obligations on states to intervene on behalf of its citizens where their rights – enshrined either via domestic constitutions or regional or international human rights law – are violated by third parties.[102]

Similarly, the language of good governance supplies those stakeholders whose interests stand in opposition to the foreign investors' proprietary rights protected by investment contracts and IIAs with a frame of reference under which their rights can be articulated and taken into account, both within and outside and the legal regime. Within the legal architecture of investment protection, the terminology afforded by the discourse of good governance, human rights and the rule of law 'gives legal expression' to certain values, such as social welfare and environmental protection, that would otherwise find little currency in the world of arbitration and international lawmaking.[103] Operationalised through *amicus* submissions, these discourses 'translate ... public concerns' into specialised terms of art that can be filtered and understood by arbitrators whose narrow field of expertise and limited parameters of engagement precludes them from otherwise hearing.[104]

Outside the legal framework, the good governance agenda marshals public support for challenging the overarching universe of IIAs and investment policy by providing a language through which broader citizenry action against the constraints of the investment regime may be mobilised. In this manner, the good governance agenda may have mobilised greater recognition among policymakers of the need to shift the previously narrow focus of the investment regime. UNCTAD's flagship report, the *World Investment Report*, in 2012 notes innovations in recently concluded IIAs have included features 'to ensure that the treaty does not interfere with, but instead contributes to, countries' sustainable development strategies', including those that 'provide treatment and protection guarantees to investors without hindering the government's power to regulate in the public interest' or those that undermine domestic laws, including environmental and labour laws.[105] Towards this end, UNCTAD itself has developed its 'Investment Policy Framework for Sustainable Development' which it is offering as a policy tool for governments developing national and international investment policies, including the reorientation of investment regimes towards more inclusive growth and sustainable development.[106]

Importantly, the language of good governance has also been utilised to recalibrate the asymmetry between investment protection and investment regulation by placing emphasis on investor responsibilities in addition to investor rights. As noted previously, investor behaviour is increasingly being featured in newer generations of IIAs and state investment policy. Two prominent regional agreements in Africa – the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area 2007 and the Protocol on Finance and Investment of the Southern African Development Community (SADC) 2006 – both contain provisions on 'investor obligation' and 'corporate responsibility' respectively, effecting placing obligations on foreign investors to comply with domestic laws, policies and administrative measures.[107] The SADC's model BIT further include measures to combat

[102] ibid 413.
[103] ibid.
[104] ibid.
[105] UNCTAD, 'World Investment Report 2012' (n 75) 89.
[106] ibid.
[107] See UNCTAD, 'Transparency' (n 84) 31 – 32, Box 20 & 21.

corruption and sets standards for human rights, environment, labour and corporate governance while upholding the right of host states to regulate in the interest of development.[108]

b) Recalibration or Relegitimation

The recalibration of investment law via the transformative language of good governance must be located within the limitations of the current framework of international law and crucially the geopolitical and economic realities of interstate relations and relations between host states and foreign investors. While concepts of good governance and the rule of law can serve 'as a resource available to social movements to countervail the power of dominant social and economic forces', it can also be used as a means of 'inhibiting the possibilities for political action'.[109] The utility of the good governance agenda as an instrument of public change must therefore be placed within the caveat. As previously discussed, changes in the framework of investment law and arbitration has been relatively incremental despite the extensive criticism directed at the regime and it is questionable whether the largely procedural reforms would have an impact on the substantive scope of international investment law.

While there have been reforms towards greater transparency in and access to arbitral proceedings, discussed in the previous section, these innovations are not universal and remain subject to restrictions and exceptions. For example, under the amended ICSID Rules, disclosure of awards still requires parties' consent and there is no requirement to make public other documents, such as submissions and pleadings.[110] Similarly, the more comprehensive new UNCITRAL Transparency Rules (see above) only comes into effect after 1 April 2014 and applies only to IIAs concluded after that date, allowing state parties to opt out or modify application of the rules.[111] Disputes arising from treaties concluded before the Rules' entry into force will be heard using the existing UNCITRAL Arbitration Rules. Moreover, since IIAs frequently provide for a menu of dispute settlement options, parties to an investment dispute could choose to have their disputes heard in other arbitral fora, such as the ICSID, or organisations such as the ICC's International Court of Arbitration or the Stockholm Chamber of Commerce that have maintained the *status quo* on confidentiality.

Correspondingly, provisions for third party participation in hearings remain limited largely to written submissions from the *amici* although tribunals can allow access to (but not participation in) the proceedings.[112] Further, the right to participate is subject to tribunal approval and tribunals can and have rejected *amicus curiae* applications. While there has been a gradual acceptance of *amicus curiae* submissions by tribunals from interested third parties since the *Methanex* case, the extent to which the tribunals feel they are able and willing to give weight to the considerations raised by these submissions is questionable.[113]

Additionally, formal access to tribunal proceedings does not necessarily translate into useful disclosure of information nor ensures effective participation by relevant stakeholders. The crux of the problem remains the diversion of disputes involving wider questions of public interest to an external regime that is inaccessible to local constituents and further disenfranchises participation in public processes of decision-making and adjudication. Access to information on

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[108] UNCTAD, 'World Investment Report 2012' (n 75) 89.
[109] Schneiderman (n 68)) 207.
[110] Bjorklund (n 75); Rule 37 ICSID Rules.
[111] UNCITRAL Transparency Rules, Articles 1 – 3.
[112] NAFTA Free Trade Commission (n 101); ICSID Rules, Rule 32(2) & 37(2); UNCITRAL Transparency Rules, Article 4(1) & 6.
[113] Harrison (n 99).

arbitral proceedings can be limited by virtue of the language, commonly English, used in the pleadings and decisions and unfamiliarity with the law applied in these cases.

Moreover, while this recognition constitutes a step in the right direction, there are questions as to whether submissions brought by *amici* groups are sufficiently representative of the public interest in the disputes brought to tribunals. Given that access to such hearings requires a heavy investment of financial resources and expertise, *amici curiae* submissions may continue to constitute the preserve of well-organised, often metropolitan and externally funded organisations at the expense of local, grassroots organisations that may be at the sharp end of the ultimate outcome of arbitral decisions.

At the same time, there are also significant concerns that the process of 'recapturing the public sphere' of arbitral proceedings[114] may be utilised as a mechanism of relegitimising the authority of the arbitral process rather than a genuine attempt to reform the system. As Harrison and Tienhaara's respective surveys of *amicus* submissions demonstrate, tribunals have typically justified their inclusion of such briefs as a means of strengthening the legitimacy of the arbitral process.[115]

The tribunal in *Suez/Interaguas v Argentina* for example noted:

> The acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor–state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function ... Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.[116]

In other words, the good governance narrative is increasingly acting as a 'prose of counter insurgency'[117] to quell the incipient crisis of faith in the investment regime, similar to the manner in which it was utilised to respond to crisis in development policymaking discussed in section 2.

6. Conclusion

This paper has sought to consider the relationship between investment law, development and good governance. Good governance is a construct that is rooted in temporal and policy space and its utilisation as a conceptual scaffold on which to evaluate the legitimacy and deficiencies within the international investment regime must be located within this broader construction of its emergence as this tool of international development policy. In the realm of investment law, the language of good governance and associated rule of law narrative have been the traditional *leitmotif* justifying the normative and institutional evolution of law and policy in this area. For the proponents of the contemporary legal universe of international investment, the framework of

[114] Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) 41 Vanderbilt Journal of Transnational Law 775.

[115] Harrison (n 103); Tienhaara,(n 88).

[116] *Suez, Sociedad General de Arguas de Barcelona S.A, and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic,* ICSID Case No. ARB/03/17 3(0 July 2010).

[117] James Thuo Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107.

IIAs and investment arbitration tribunals create a regime that provides an enabling climate for foreign investment, particularly in developing countries and transition economies.

The narratives of good governance and the rule of law 'legitimise a certain view of the legal system and its relation with the economy, and to naturalise a particular kind of economic structure', the equation of law with progress and a market economy that prioritises investor rights as a *sine qua non* of economic development and a pre-requisite of social progress.[118] In this sense, 'BITs consciously seek to approximate in the developing, capital-importing state the minimal legal, administrative, and regulatory framework that fosters and sustains investment in industrialized capital-exporting states'.[119] The refashioned 'rule of international economic law' offers a multilateral protection that the good governance agenda sought to deliver locally by providing a framework through which contemporary regulatory state can be disciplined.

The aforementioned discussion has demonstrated that, both substantively and procedurally, at national and international levels, the current framework of investment law fails to meet the standards of good governance even as measured in their own terms. The good governance agenda must therefore be located within the conceptual premise of international investment law and mainstream development policy that problematises the role of state and upholds the primacy of market actors in delivering an enabling climate for social and economic development.

This underlying conceptual legacy can and does limit the efficacy of the good governance discourse as a tool for recalibrating the imbalances of international investment law in favour of development and public interest outcomes. At its best, incorporating these concepts loads greater complexity onto a system that is currently ill-equipped with the expertise and institutional structure to support it while doing little to engender economic development and further the interests of social and ecological justice. At its most insidious, the discourse of good governance and its associated the aforementioned language of 'counter insurgency'[120] that seeks to mitigate critique of the regime while masking and further legitimising its systemic deficiencies.

[118] Humphreys (n 4) 142.
[119] Reisman and Sloane (n 22) 115 – 118.
[120] See Gathii (n 117); Sundhya Pahuja, 'Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide' (2000) 13(4) Leiden Journal of International Law 749.