

Transnational Investment Arbitration: Proportionality's New Frontier.

A comment on Alec Stone Sweet

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Alec Stone Sweet brings his usual mix of theoretical insight and a sharp eye for the changing contours of transnational legal relations to bear on the question of the fast-developing structure of transnational investment arbitration, with particular reference to those arbitrations where one party to the arbitration is a state. The ultimate objective of his paper is to show how the transnational investment arbitration system may be ripe for the development of proportionality analysis, but to reach this conclusion he must proceed through a number of steps.

He begins by providing a brief overview of delegation theory, an approach to which he himself has made several noteworthy contributions in the context of the analysis of the role of national and transnational judges. He contrasts two ideal types of government or governance involving the investment of decision-making authority in courts or other third parties that are (more and less) explicable in terms of delegation theory. There is, first, a classic contractualist model where the Principal(s) remains in control of the terms of the delegation, closely circumscribing the decision-making authority of the Agent *ex ante* and/or subjecting it to strong forms of monitoring and accountability *ex post*. There is secondly, a model of trusteeship. This model, which, on Stone Sweet's own view, stretches the very ideas of delegation and of Principal and Agent to - and perhaps beyond - their breaking point, empowers the agent in much broader terms and, crucially, allows the agent authority over those who have delegated in the first place. The Principal, or 'truster', in this case, tends to be a broader constituency, the range and depth of whose collective action problems (and solutions) argues for a wide sphere of decision-making autonomy on the part of the trustee or agent. The most developed, and in many respects easiest case of trusteeship is that of 'the people' conceived of as a popular sovereign empowering various institutional agents through a written Constitution, conceived of as a kind of trust deed or instrument.

Stone Sweet then goes on to ask whether transnational arbitration is moving towards some version of the second trustee-based model. Interestingly, and quite plausibly, in this case, judicialization itself is posited as a strong indicator of the development of a trusteeship model. This is because as a basic governance choice, arbitration on the 'thin' contractualist model of delegation is in principle (and by definition) opposed to judicial intervention. The decision to refer to arbitration constitutes a choice to 'customize' ones third-party decision-maker in a manner that is ring-fenced from further judicial review. Accordingly, in the arbitral world even low levels of judicialization are suggestive of a 'thicker' post-contractual, trustee-based model.

Stone Sweet claims convincingly that, with particular reference to the system of arbitral tribunals set up under The International Centre for the Settlement of Investment Disputes (ICSID) Convention, there is indeed significant evidence of judicialization. There is, first, some evidence in the case-law of the development of a reliance on precedent, and the ideas of systemic consistency and integrity associated with precedent. There is, secondly, increasing evidence of a demand for appellate supervision, whether in the form of a self-standing court of arbitration appeal or as a special chamber of the ICJ, although as yet there is no such appellate structure in place. Thirdly, third party participation, and the wider conception of public or societal interests associated with this, is increasingly, if still tentatively recognized by the arbitration tribunals. Fourthly, and finally, there is increasing investment by the arbitrators in modes of reasoning associated with courts. In particular, under the 'fair and equitable treatment' standard that is treated as a master concept for dealing with investment disputes, we find much scope for the development of a wealth of judicial – even 'constitutional' – sub-principles, including good faith, due process, non-discrimination, and, at least embryonically, proportionality-based balancing itself. Invoking the necessity test in Art. 25 of the International Law Commission's 2001 Draft Articles on State Responsibility, a number of arbitration tribunals have begun to weigh the interest of the state in protecting their 'essential interest' in certain general public goods (including welfare goods) against the investor's right to have his investment safeguarded. The case of *LG&E v Argentine* of 2006, involving distribution concession in the sphere of natural gas transportation, is held up as a particularly significant development in the preparedness of tribunals to assert the interests of the state against the private investment right in a proportionality-conscious manner.

This is a richly suggestive paper. Let me briefly raise three questions in an effort to tease out the broader implications of Stone Sweet's insightful contribution.

First, and most specifically, in his closing remarks Stone Sweet seeks to defend the possibility of proportionality analysis in this domain against the robust arguments of Alvarez and Khamsi to the effect that the very purpose of bilateral investment treaties (the basic building blocks of the present transnational system) is to prevent investor rights from being sacrificed 'in the balance' to state-based public interests. In so doing, Stone Sweet argues, cogently in my view, that at least the first two stages of a proportionality analysis – the suitability and the 'least restrictive' or necessity stages – may be appropriate to the investment arbitration cases, and that together they ensure, despite the concerns of Alvarez and Khamsi, a still high threshold of protection of investor interests. What is not entirely clear, however, is whether the author believes that third stage of proportionality analysis – balancing *stricto sensu* – can have any independent role here. The author only really refers to this obliquely, when stating on p19 that 'when the stakes are sufficiently high, the suitability and LRM test might kick in'. Superficially, this sounds like an absolute threshold ("the stakes are sufficiently high"), a standard that can be specified prior to any assessment of proportionality, but it may instead simply be a condensed way of articulating a process of balancing (i.e. "when what is at stake as an important state interest sufficiently outweighs what is at stake and what may be lost in terms of investment rights"). This ambiguity, and the possibility of an extended version of balancing it allows, is important, since if the third stage balancing is indeed desirable and/or unavoidable in the context of arbitration disputes, then

this raises the sharpest questions about the legitimacy of transnational balancing. As I have argued in my own contribution to the conference, the very nature of the tension that the transnational judge seeks to resolve between different 'national' and 'transnational regime' interests creates a paradox. In short, if he is not simply to be seen as a one-eyed partisan of either the 'national' or the 'transnational regime' interest, the transnational and trans-polity judge is required to be robustly independent, and so to be most intrepid in defence of an open-ended system of balancing in just these situations where he is most lacking in the democratic or 'common cultural' supports that the infra-national and infra-polity judge can count on to ground the exercise of such an open-ended brief.

Secondly, Stone Sweet links his approach interestingly to a pluralistic or systemic, and in any case non-hierarchical view of 'constitutionalism' (pp8-9). That is to say, in his analysis of the basis of judicialization/constitutionalization he is interested not in political-institutional hierarchy (e.g. a top-down global order) or some thin idea of the necessarily constitutive features and level of any legal system, but rather in the way in which principles and ideas are rolled out, borrowed and applied trans-contextually (see e.g. his reference to the use of ECHR case-law by ICSID arbitrators on p15) in ways which spread "virally" (a word he uses elsewhere, in Stone Sweet and Matthews(2008), to talk about the spread of proportionality analysis) rather than 'trickle down' or are 'directed downwards'. How far does he want to push this analysis? Is his alternative non-hierarchical view of system-integrity understood to be true more generally of the global system of 'heterarchical constitutionalism, or is it largely understood as a point internal to the fragmented and (so also) heterarchical system of investment arbitration? In addition, how important does he consider proportionality analysis as a 'driver' of this non-hierarchical constitutionalism? Is it just one of a number of 'migrating' constitutional principles, alongside rights, due process, subsidiarity etc, or is it *primus inter pares*?

Thirdly, and related, how special a case for Stone Sweet's broader thesis about the spread of judicialization/constitutionalization (and of proportionality analysis as an aspect of this) is the case of arbitration? Stone Sweet is of course right to say that the arbitral world, just because of its 'anti-judicial' 'animating design, is a hard case for judicialization and those aspects of constitutionalization associated with judicialization. Yet arbitration regimes remain what we might call, distinctly 'decision-centred' compared to many other interesting developments in the transnational 'constitutional' order, and this is precisely why 'judicialization', for all the initial animus against it, offers itself as an alternative decision-centred solution when the existing 'decision-centre' (i.e. the arbitration framework) no longer appears adequate in itself. Think, in contrast, of many of the other prominent transnational developments caught under the umbrella of so-called global administrative law, whether it be hybrid private-public regimes such as ICANN (the Internet regulator) or purely private bodies such as the International Standards Organisation, or informal transgovernmental bodies such as the Basel Committee (of heads of central banks). All of these bodies, too, just as much as the arbitration tribunals, are grappling with the effort to take responsibility for the negotiation *inter se* of public interests and private goods in contexts which cannot be resolved within a framework of national sovereignty. But such bodies tend to be 'policy-centred' rather than 'decision-centred' in ways which do not so readily lend themselves to

judicialization, or where judicial involvement is more attenuated.¹ Does the absence or remoteness of the judicial medium in such cases make them less effective carriers of transnational constitutionalism in general, and of those aspects of transnational constitutionalism associated with proportionality analysis in particular?

¹ Of course, *the* most developed transnational regimes such as EU and WTO are *both* strongly decision-centred and strongly policy-centred, and so, like the transnational arbitration regime, also effective judicial carriers and transmitters.