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## Resolving the Question of Inter-Scalar Legitimacy into Law? A Hard Look at Proportionality Balancing in Global Governance

Ming-Sung Kuo\*

### Abstract

In this paper, I examine the attempt to apply proportionality balancing (PB) to the coordination of the relations between governance regimes, which I call ‘inter-scalar PB’, from the perspective of competing institutional arrangements of global governance. Observing of inter-scalar PB becoming a legal technique of management, I argue that it be reconceived as a narrative framework within which the fundamental values and principles of individual governance regimes can be politically contested without antagonism. I first discuss the role PB has played in the interaction between the law of state immunity and international investment law and then take a closer look at the features of inter-scalar PB as intimated in those instances: simplism, normativism, institutionalism, and legalism. I suggest that the complex fundamental issues concerning the relationship between governance regimes are left out in the proportionality analysis-mediated resolution of regime-induced conflicts, disclosing the depoliticization tendency in inter-scalar PB. Juxtaposing it with the indicator project in international human rights advocacy, I conclude that both are jurispathic and reflect the rationalist propensity in the legal administration of global governance. PB, reconceived as a language in which values, conflicts, and interests of each governance regime can be argued and narrated as part of the politics of reconstructing global governance, will help to recast global governance in more jurisgenerative terms.

**Key Words:** proportionality balancing (PB), inter-scale, regime-induced conflict, global governance, jurisgenerative narratives

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<Table of Contents>

<b>1. INTRODUCTION: REGIME, CONFLICT, AND THE GLOBAL RULE OF LAW</b>	<b>2</b>
<b>2. BALANCING REGIME-INDUCED CONFLICTS: NEW FRONTIERS FOR PROPORTIONALITY</b> .....	<b>9</b>
2.1. TURNING TO ACCOMMODATION: THE ATTRACTION OF PROPORTIONALITY .	10
2.2. PROPORTIONING REGIME-INDUCED CONFLICTS IN GLOBAL GOVERNANCE? THE CASE OF THE INTERNATIONAL INVESTMENT LEGAL REGIME .....	13
<b>3. IN THE NAME OF LAW: MANAGING POLITICS OF INTER-SCALAR LEGITIMACY THROUGH PROPORTIONALITY</b> .....	<b>20</b>
<b>4. FROM TECHNIQUE OF INTER-SCALE TO NARRATIVE OF GLOBAL GOVERNANCE: PROPORTIONALITY RECONCEIVED</b> .....	<b>28</b>
<b>5. CONCLUSION</b> .....	<b>37</b>

## **1. Introduction: regime, conflict, and the global rule of law**

Global governance is a concept that eludes legal analysis.<sup>1</sup> Nevertheless, there seems to be a parallel between the complex multi-layered architecture of global governance and the state of international law: both are situated between fragmentation and unity. On the one hand, as with international law, global governance is in search of ‘constitutional’ legal rules and principles that apply across individual areas of governance with an eye towards a sense of unity.<sup>2</sup> On the other hand, the diversification and specialization of global governance mirrors

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<sup>1</sup> C. Offe, ‘Governance: An “Empty Signifier”?’ (2009) 16 *Constellations* 550; P. Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (2008), 259-63.

<sup>2</sup> See J.L. Dunoff and J.P. Trachtman, ‘A Functional Approach to International Constitutionalization’, in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 3.

the fragmentation of international law resulting from the proliferation of special legal regimes.<sup>3</sup>

Yet, the landscape of global governance is even more fragmented than that of international law. What threatens the unity of international law is the emergence of special legal regimes each of which has its own ethos and telos.<sup>4</sup> The focus of scholarship on the fragmentation of international law has been on how to steer the relations between different legal rules amidst the emergence of special legal regimes.<sup>5</sup> In contrast, the fragmentation of global governance results not only from the diversity of governance areas but also from the myriad actors and the corresponding ‘institutional’ arrangements taking part in the functioning of global governance.<sup>6</sup> Apart from conventional actors such as states and international organizations, individuals, corporations, nongovernmental organizations (NGOs), and more informal and amorphous committees, working groups, or simply networks of experts, civil servants, and other agents cluster around issues of common concern.<sup>7</sup> As a result, various clusters of concerned stakeholders become institutional components, or rather, governance regimes, in the process of multivalent global governance. As the clusters of concerned stakeholders continue to increase, each governance regime is also developing its own norms, standards, codes, or autonomous ‘scale’ as I call it in this paper, to help to make coherent

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<sup>3</sup> Compare B. Kingsbury, N. Krisch, and R.B. Stewart, ‘The Emergence of Global Administrative Law’, (2005) 68 *Law and Contemporary Problems* 15, with M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’, (2007) 70 *MLR* 1. Cf. B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, (2006) 17 *EJIL* 483. For the variations on the definition of regime in current literature, see M.A. Young, ‘Introduction: The Productive Friction between Regimes’, in M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2012), 1 at 4-11. I shall come back to the concept of regime later.

<sup>4</sup> See A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, (2004) 25 *Michigan Journal of International Law* 999.

<sup>5</sup> See J.L. Dunoff, ‘A New Approach to Regime Interaction’, in Young (ed.), *supra* note 3, at 136, 139-44.

<sup>6</sup> *Ibid.*, at 137-9, 158-73.

<sup>7</sup> A.-M. Salughter, *A New World Order* (2004), 131-65.

governance decisions in the face of conflicting considerations.<sup>8</sup> Moreover, the fragmentation of governance is not just a reflection of the practical needs of transnational policymaking. Nor is the tension between the myriad governance regimes confined to international relations.<sup>9</sup> Instead, as scholarship on global administrative law indicates, those myriad governance regimes are also the producers of various norms that work with formal legal rules underpinning the complex international legal order.<sup>10</sup> More than an application of the existing international legal doctrines to the phenomenon of global governance, to address the question of the fragmentation of global governance in legal terms can shed new light on current responses to the fragmentation of international law and beyond.<sup>11</sup>

Notably, conflict is one of the main themes in scholarship on the fragmentation of international law.<sup>12</sup> Mindful of the ramifications of the emergence of special legal regimes to the international legal order, scholars have attempted to deploy canonical judicial techniques of norm conflict avoidance or traditional conflict of laws tools to address various regime-induced conflicts, including those between general international law and special legal regimes and those concerning only the latter.<sup>13</sup> Depending on whether the rule conflict occurs within

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<sup>8</sup> As will be further defined, governance regimes are closely related to special legal regimes but they are not identical. Governance regimes are understood as the sites where standards, guidelines, and other norms that underpin the operation of international law, including special legal regimes, are created.

<sup>9</sup> See generally S. Krasner (ed.), *International Regimes* (1983).

<sup>10</sup> See Kingsbury, Krisch, and Stewart, *supra* note 3. See also Dunoff, *supra* note 5, at 159.

<sup>11</sup> See N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', (2006) 17 *EJIL* 1.

<sup>12</sup> Young, *supra* note 3; Fischer-Lescano and Teubner, *supra* note 4; G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012), 150-73. It is noteworthy that regime interactions are not necessarily conducted in the form of conflicts. See Dunoff, *supra* note 5, at 137-8.

<sup>13</sup> See R. Michaels and J. Pauwelyn, 'Conflict of Norms or Conflict of Law?: Different Techniques in the Fragmentation of Public International Law', (2012) 22 *Duke Journal of International and Comparative Law* 349; J. Crawford and P. Nevill, 'Relations between International Courts and Tribunals: The Regime Problem' in Young (ed.), *supra* note 3, at 235, 236-47.

a system or between distinct regimes, different traditional legal techniques of private international law have been drawn on in responding to the new conflict-of-laws question.<sup>14</sup> On the other hand, the proliferation of governance regimes further complicates the new conflict-of-laws question. Actor-centred governance regimes may well develop regime-specific scales,<sup>15</sup> even though they operate under a special legal regime.<sup>16</sup> It is true that regime interaction may take place in nonjudicial fora without conflicts.<sup>17</sup> Yet, the more regime-specific scales there are, the stronger the needs grow for inter-scalar coordination through ‘conflicts of laws arrangements’.<sup>18</sup> Pivoting on balancing and proportionality,<sup>19</sup> such conflicts of laws arrangements, which are not confined to the judicial forum, add another dimension to the legal resolution of potential conflicts amidst the fragmentation of international law and the complexity of global governance.<sup>20</sup>

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<sup>14</sup> Ralf Michaels and Joost Pauwelyn distinguish between conflicts of norms and conflicts of laws: the former refers to legal conflicts within a legal system (or a regime) whereas the latter to those between legal systems or regimes. Michaels and Pauwelyn, *supra* note 13, at 350-1.

<sup>15</sup> See, e.g., M. Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’, (2000) 11 *EJIL* 489; K.J. Vandeveld, ‘Sustainable Liberalism and the International Investment Regime’, (1998) 19 *Michigan Journal of International Law* 373.

<sup>16</sup> Cf. Dunoff, *supra* note 5, at 159.

<sup>17</sup> *Ibid.*, at 138.

<sup>18</sup> See also B. Kingsbury, ‘The Concept of “Law” in Global Administrative Law’, (2009) 20 *EJIL* 23, at 55-6.

<sup>19</sup> For the purpose of elegance, I simply refer to the analytic framework of proportionality analysis and its component of balancing as proportionality balancing (PB). For the importance of balancing in proportionality analysis, see K. Möller, *The Global Model of Constitutional Rights* (2012), 13. See also A. Stone Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008) 47 *Columbia Journal of Transnational Law* 72, at 87-9. In an insightful comparative analysis of the German and the Canadian constitutional jurisprudence, Dieter Grimm observes of the relative weight given to balancing in the judicial exercise of proportionality balancing in both jurisdictions. D. Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’, (2007) 57 *University of Toronto Law Journal* 383. For a critical discussion of the relationship between proportionality and balancing in the law, see also M. Luterán, ‘The Lost Meaning of Proportionality’, in G. Huscroft, B.W. Miller, and G. Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014), 21 at 23-6.

<sup>20</sup> See, e.g., Fischer-Lescano and Teubner, *supra* note 4; Teubner, *supra* note 12; Kingsbury, *supra* note 18, at 55-6; C. Joerges, ‘The Idea of a Three-dimensional Conflicts Law as Constitutional Form’, in C. Joerges and E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (2011), 413. But cf. Michaels and Pauwelyn, *supra* note 13, at 356-7.

Against the intellectual backdrop as sketched above, this paper takes a hard look at the attempted deployment of proportionality balancing (PB) to issues resulting from the emergence of various regimes in global governance, including, but not limited to, the relationship of a special *legal* regime vis-à-vis general international law.<sup>21</sup> I shall argue that although PB is emblematic of the global mode of constitutionalism in which value conflicts find peaceful resolution,<sup>22</sup> its deployment to regime-induced conflicts also reveals the limits in the legal steering of global governance. In view of the politics of competing institutional actors and stakeholders involved in regime-induced conflicts, ‘inter-scalar PB’<sup>23</sup> reflects the constitutionalist tradition of managing political conflicts with objective rules underpinning the concept of the law.<sup>24</sup> Yet, in the guise of law’s rationality and objectivity, inter-scalar PB also conceals the political character of global governance, opening itself to the criticism of subscribing to inbuilt institutional bias at the expense of the global public interest. Inspired by the constructivist school in international relations (IR) scholarship,<sup>25</sup> I suggest that the inter-scale of PB be reconceived as a narrative framework. Viewed thus, PB is not so much the cross-regime inter-scale in resolving legal conflicts of global governance<sup>26</sup> as the framework within which the fundamental values and principles of individual regimes can be

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<sup>21</sup> This is what I call regime-induced conflicts. See note 35, *infra*. But cf. Crawford and Nevill, *supra* note 13, at 247, 259.

<sup>22</sup> See Section 2, *infra*.

<sup>23</sup> To avoid confusion, I interchangeably use the terms ‘inter-scalar PB and the ‘inter-scale of PB’ when referring to the exercise of PB in resolving regime-induced conflicts.

<sup>24</sup> See A. Somek, *Individualism* (2008), 140-3, 235-8. Cf. A. Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance* (translated by S. Brown) (2017), 42-4, 49-51.

<sup>25</sup> See text at notes 159-60, *infra*.

<sup>26</sup> E.g., A. van Aaken, ‘Defragmentation of Public International Law Through Interpretation: A Methodological Proposal’, (2009) 16 *Indiana Journal of Global Studies* 483, at 502-6; S.W. Schill, ‘Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights’, (2012) 27 *ICSID Review* 87; D. Pulkowski, *The Law and Politics of International Regime Conflict* (2014), 225.

politically contested without antagonism. Facing up to the political question of inter-scalar legitimacy and its inherent subjectivity is necessary to address regime-induced conflicts in fragmented global governance.

A terminological clarification on the concept of regime is due before proceeding. Regime is not a term of art in law.<sup>27</sup> Originating in IR studies, it is defined as a set of ‘implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations’.<sup>28</sup> Despite the lingering scepticism about its deployment in legal scholarship,<sup>29</sup> the International Law Commission (ILC) Study Group on the fragmentation of international law has suggested a tripartite typology of ‘special regimes’ in international law, all of which are centred on the particular sets of international legal rules oriented towards particular issues.<sup>30</sup> Acknowledging the constructivist and political character of the definition of legal regimes and comparing the ILC Study Group’s three understandings of special regimes, Margret Young proposes a ‘hybrid definition of regimes’.<sup>31</sup> Under her definition, ‘regimes are sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases’.<sup>32</sup> Given my focus on the legal

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<sup>27</sup> Young, *supra* note 3, at 4. Notably, James Crawford and Penelope Nevill trace the use of the term ‘regime’ in international law to the nineteenth century where it referred to a ‘legal framework which governed and controlled a particular area of conduct, usually concerning an area of *territory*’. Crawford and Nevill, *supra* note 13, at 258 (emphasis added).

<sup>28</sup> S.D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’, (1982) *International Organization* 185, at 186.

<sup>29</sup> Crawford and Nevill, *supra* note 13, at 258-9.

<sup>30</sup> ILC Study Group, ‘Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (A/CN.4/L.702) (18 July, 2006), para. 12.

<sup>31</sup> Young, *supra* note 3, at 11.

<sup>32</sup> *Ibid.*



management of politics in global governance, the actor is foregrounded in my understanding of regimes. Drawing on Young's definition as well as the IR classical definition given by Stephen Krasner, I thus define governance regimes as institutional actors, formal and informal, working on functional issue-areas in global governance and expressing their assumptions and biases through their own norms that interact with external norms and legal rules operating in the functional issue-areas concerned.<sup>33</sup> As regards the usage of special legal regimes in this paper, I adopt Young's foregoing definition, which focuses more attention on legal rules than on the norm-producing actors or organizations.<sup>34</sup> Through the lens suggested above, a conflict resulting from the emergence of special legal regimes may be reframed as one of governance regimes when focus shifts from the rules concerned to the actors that apply them.<sup>35</sup>

I structure my argument as follows. In the first place are examples of how proportionality is transposed from the balancing of public interest and rights or conflicting rights to the legal resolution of regime-induced conflicts. I shall discuss the international investment legal regime as a case in point. Scholars in this area have contended that PB can be utilized to steer the extra-regime relations of international investment law (IIL) vis-à-vis other legal regimes such as human rights law and environmental law and even the law of state immunity in general international law. To what extent they have made a case for the role of

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<sup>33</sup> Compare Fischer-Lescano and Teubner, *supra* note 4, at 1000-01, with Dunoff, *supra* note 5, at 139. For a much more restrictive, territory-based understanding of regimes, see Crawford and Nevill, *supra* note 13, at 259.

<sup>34</sup> Along the same line, Crawford and Nevill seem to use regime conflict and rule conflict interchangeably. See Crawford and Nevill, *supra* note 13, at 236.

<sup>35</sup> For this reason, a conflict between a special legal regime and general international law is still one induced by the emergence of the former, although the latter is not considered a regime in legal scholarship. See *ibid.*, at 259. I use regime-induced conflicts rather than regime conflicts to include conflicts between regimes and those between a special legal regime and general international law.

PB in resolving conflicts between IIL and the law of state immunity will be the focus of Section 2. I then take a closer look at these examples to show that regime-induced conflicts are rooted in conflicting values whose resolution lies in the political process beyond legal management in Section 3.<sup>36</sup> I shall argue that when formulated as a rights conflict or in terms of the balancing of rights and the public interest, regime-induced conflicts are simplified with complex fundamental issues concerning inter-scalar legitimacy concealed. As will become clear in Section 4, to counter the ‘jurispathic’ character of the legal management of regime conflicts,<sup>37</sup> the inter-scale of PB should be reconceived as a narrative framework within which the political question of inter-scalar legitimacy can be confronted. In Section 5, I conclude with a brief note on the implications of the proposed alternative understanding of PB to the global rule of law project.

## **2. Balancing regime-induced conflicts: new frontiers for proportionality**

In this section, I first explain why proportionality and PB become globally attractive to jurisdictions of different legal traditions. Through the lens of the accommodating character of proportionality, attempts to find a PB-mediated solution to regime-induced conflicts in global governance should come as no surprise. The second part of this section provides a close examination of the attempted application of PB to the international investment legal regime, suggesting that such application raises more questions than answers in global

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<sup>36</sup> For similar views but with different foci, see J. Klabbbers, *Treaty Conflicts and the European Union* (2009); V. Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (2017).

<sup>37</sup> M.-S. Kuo, ‘Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism’, (2011) 44 *New York University Journal of International Law and Politics* 55, at 98-9.

governance, despite PB's potential role in the conflicts between IIL and the law of state immunity.

## 2.1. Turning to accommodation: the attraction of proportionality

Originating as a judicial doctrine of the nineteenth-century Prussian administrative law,<sup>38</sup> proportionality has not only spread to national jurisdictions of diverse legal traditions in Africa, America, Asia, and other European countries but also penetrated the jurisprudence of international (quasi)judicial bodies such as the European Court of Human Rights (ECHR) and the Dispute Settlement Body of the World Trade Organization.<sup>39</sup> At the core of the proportionality doctrine is a 'structure' under which judges adjudicate the validity of an act of public authorities in the light of the rights safeguarded in the law.<sup>40</sup> Focusing on the question of whether the public interest pursued by the impugned act is proportionate to the harm inflicted on the rights concerned, the key component of this reasoning structure is balancing: if the former outweighs the latter, the impugned rights-limiting act is valid.<sup>41</sup> The proportionality principle is thus credited with providing a clear framework of analysis within which the reasonableness of a rights-limiting act of public authorities can be carefully

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<sup>38</sup> M. Cohen-Eliya and I. Porat, *Proportionality and Constitutional Culture* (2013), 10, 25-7.

<sup>39</sup> See Stone Sweet and Mathews, *supra* note 19, at 111-59; A. Stone Sweet and J. Mathews, 'Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan – Whither Singapore?', (2017) 29 *Singapore Academy of Law Journal* 774.

<sup>40</sup> See Möller, *supra* note 19, at 179-205.

<sup>41</sup> See generally R. Alexy, *A Theory of Constitutional Rights* (translated by J. Rivers) (2002). See also Stone Sweet and Mathews, *supra* note 19, at 88-90; Somek, *supra* note 24, at 149; Cohen-Eliya and Porat, *supra* note 38, at 16-23; A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012), 340, 378. Cf. J. Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (2013), 18-19. But cf. Grimm, *supra* note 19, at 393-7. For the centrality of balancing to Robert Alexy's discussion of proportionality analysis, see N. Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (2017), 45-7. This formula of weighing also applies to the situation in which rights are in conflict. See Barak, *supra*, at 342.

examined without risking judicial arbitrariness.<sup>42</sup> Adopted as the principal doctrinal model in rights adjudication, proportionality analysis is presented as the prime example of global constitutionalism.<sup>43</sup>

Notably, the appeal of PB lies in its accommodating character in the face of conflicting interests. Under the framework of proportionality analysis, rights are no longer trump cards. Instead, they are reconceptualised as a default allocation of interests the modification of which requires special justification.<sup>44</sup> In this way, rights and the public policy in conflict are ‘translated’ into competing interests.<sup>45</sup> Each interest is given certain weight and then weighed against each other on a scale. That which ultimately outweighs other interests in the particular context is the one that deserves legal sanction. In this light, PB appears to be the rational ‘scale’, which is based on fact and free of prejudice and thus stands ready for deployment in different regimes and jurisdictions.<sup>46</sup> In the guise of scale, proportionality is evocative of objectivity to which the rule of law aspires.<sup>47</sup> Taking it further along the lines of the rational scale, some scholars suggest that PB be adopted to resolve regime-induced conflicts in global governance. For example, Benedict Kingsbury suggests the deployment of balancing in

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<sup>42</sup> Stone Sweet and Mathews, *supra* note 19, at 87-8; Möller, *supra* note 19, at 179; V. Perju, ‘Proportionality and Freedom—An Essay on Method in Constitutional Law’, (2012) 1 *Global Constitutionalism* 334, at 339-40, 350-6. Aharon Barak discriminately identifies the closeness of proportionality to ‘reasonableness in the strong sense’. Barak, *supra* note 41, at 377-8.

<sup>43</sup> Stone Sweet and Mathews, *supra* note 19. See also Möller, *supra* note 19.

<sup>44</sup> See M. Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, (2010) 4 *Law and Ethics of Human Rights* 141. See also Möller, *supra* note 19.

<sup>45</sup> I shall come back to the concept of translation in Section 3, *infra*.

<sup>46</sup> M. Antaki, ‘The Rationalism of Proportionality’s Culture of Justification’, in Huscroft, Miller, and Webber (eds.), *supra* note 19, at 284, 291-4. See also M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (2012), 8-12. But cf. Somek, *supra* note 24, at 143, 149.

<sup>47</sup> For the cultural evocations of mathematical objectivity surrounding the idea of proportionality, see Supiot, *supra* note 24, at 75-7.

steering the inter-governance regime relations in global governance. Mindful that each governance area tends to become a distinct regime with its own rules of administration, Kingsbury ascribes regime-induced conflicts to the differing interests among the stakeholders of individual regimes and thus contends that regime-induced conflicts be resolved through some ‘conflicts of laws arrangements’.<sup>48</sup> Notably, at the core of the ‘conflicts of laws arrangements’ he alludes to is the allocation of and the assessment of ‘weight’ among the conflicting regimes.<sup>49</sup> PB is thus projected beyond its traditional applications where rights are always at stake to conflicts of governance regimes.<sup>50</sup>

It is no surprise that the proposed unconventional deployment of proportionality analysis outside the balancing of rights and public interests or conflicting rights is contentious. For example, it is questionable whether regime-specific rules and their corresponding values are comparable. Failing this condition, the global scale on which PB is premised would not obtain.<sup>51</sup> Yet, such criticism essentially amounts to a restatement of what has long been said of PB in its conventional deployment within the same legal order.<sup>52</sup> In view of PB’s continuing popularity in various jurisdictions, it is not far-fetched to say that the

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<sup>48</sup> Kingsbury, *supra* note 18, at 55-6.

<sup>49</sup> *Ibid.*, at 55.

<sup>50</sup> See also C. Joerges, ‘Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form’, in R. Nicke and A. Greppi (eds.), *The Changing Role of Law in the Age of Supra- and Transnational Governance* (2014), 127-76; H. Muir Watt, ‘Conflicts of Laws Unbounded: The Case for a Legal-Pluralist Revival’, (2016) 7 *Transnational Legal Theory* 313; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), 12, 295-6.

<sup>51</sup> E.g., E. Guntrip, ‘International Human Rights Law, Investment Arbitration and Proportionality Analysis: Panacea or Pandora’s Box?’, *EJIL: Talk!*, 7 January 2014, available at [www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/](http://www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/); J. Finke, ‘Regime-collisions: Tensions Between Treaties (and How to Solve Them)’, in C.J. Tams et al. (eds.), *Research Handbook on the Law of Treaties* (2016), 415.

<sup>52</sup> See T. Endicott, ‘Proportionality and Incommensurability’, in Huscroft, Miller, and Webber (eds.), *supra* note 19, at 311.

incommensurability question falls far short of dampening the enthusiasm about the deployment of PB in regime-induced conflicts. As PB continues to travel across jurisdictions in spite of the foregoing scepticism, it has been considered to be ‘a tool that can harmonize the relationship between ...bodies of general or special international law’ in the fragmented landscape of global governance.<sup>53</sup> And, IIL is a good example.

## **2.2. Proportioning regime-induced conflicts in global governance? the case of the international investment legal regime**

Notably, PB has been adopted by arbitral tribunals as the doctrinal tool to reconcile the investor rights and the host state’s public policy, or rather, the right to regulate in investor-state disputes.<sup>54</sup> On closer inspection, however, the issues clustered under the rubric of the investor rights and the host state’s right to regulate are not just an expression of the conflicts between the host state’s domestic law and its obligations under international law, i.e., the investment treaties with the IIL regime. Instead, they can be seen as a refraction of regime-induced conflicts and thus how they are resolved has wider implications to global governance. Specifically, to the extent that the policy goals pursued by the host state through regulatory changes such as sustainable development and the protection of human rights reflect what

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<sup>53</sup> Schill, *supra* note 26, at 108.

<sup>54</sup> See, e.g., *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award (17 March, 2006), para. 306; *Joseph C Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January, 2010), para. 285; *Total SA v. The Argentine Republic*, ICSID Case No. ARB/04/01, Award (8 December, 2010), para. 123; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), paras. 241-3, 365-74. For further commentary on these cases, see Schill, *supra* note 26, at 107; A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (2017), 198-203. See also C. Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (2015). Cf. B. Kingsbury and S.W. Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality’, in S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), 75. Cf. L.W. Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016), 31-6.

international treaty regimes provide for, the dispute between the investor and the host state also concerns the relationship between IIL and international environment law or international human rights law (IHRL). Thus, in such instances, the PB exercised by arbitral tribunals is not only a calculation of the relative weight of the investor rights vis-à-vis the host state's right to regulate.<sup>55</sup> It effectively puts weights on the scales of the interests protected by IIL and those codified in the treaty regimes concerned.<sup>56</sup>

Yet, the double implications of the foregoing balancing exercise reveals its controversial character in the hands of arbitral tribunals. As the doctrinal framework within which the investor rights and the host state's right to regulate are to be weighed and decided, PB puts the host state's jurisdiction to prescribe, or, simply, sovereignty, and the foreign investor rights on the same scale. Deciding in favour of the host state, the arbitral tribunal would be susceptible to criticism for its failure to uphold the IIL special regime.<sup>57</sup> In contrast, as the rising concern over the arbitration clause in trade agreements or investment treaties suggests,<sup>58</sup> subscribing to the investor's claim means bending sovereignty to the private interests of foreign investors.<sup>59</sup> On the other hand, as the inter-scale between IIL and other special legal regimes, PB in investment arbitration is often suspected of rendering awards that reflect the assumed values

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<sup>55</sup> This is mostly obvious in the investor-state arbitration. Notably, Alec Stone Sweet and Florian Grisel suggest the application of PB in international commercial arbitration when arbitrators need to enforce mandatory law and public policy. See Stone Sweet and Grisel, *supra* note 54, at 172-86.

<sup>56</sup> *Ibid.*, at 197-8, 244-5.

<sup>57</sup> Cf. J.A. VanDuzer, 'Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?', in S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016), 142 at 173.

<sup>58</sup> See S.W. Schill, 'Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework', (2017) 20 *Journal of International Economic Law* 649, at 650-1.

<sup>59</sup> See Mouyal, *supra* note 54, at 17-19; G.V. Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', (2006) 17 *EJIL* 121, at 146; A. Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime', (2009) 50 *Harvard International Law Journal* 491, at 511-12.

of the former at the expense of, say, environmental protection.<sup>60</sup> Even so, PB is proposed to address IIL's 'external' relations with core classical areas of international law. Stephan Schill's proposal for steering the relationship between IIL and the law of state immunity is a case in point.<sup>61</sup>

With the host state's jurisdictional immunities waived, investors acquired the status of legal subject in the proceedings of investor-state arbitration. This has been welcomed as an innovative loosening of the state-centric Westphalian international legal order.<sup>62</sup> Yet, Schill notes that the law of state immunity remains a legal obstacle to the full protection of the investor rights as enforcement immunities continue to prevent the execution of arbitral awards, frustrating the realization of IIL's goal.<sup>63</sup> Apart from the explicit reservation in Article 55 of the ICSID Convention,<sup>64</sup> the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) seems to leave state immunity from enforcement relating to investor-state arbitration unaffected,<sup>65</sup> although the latter mainly concerns the awards of commercial arbitration between private parties.<sup>66</sup> It is true that the

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<sup>60</sup> A. Kulick, *Global Public Interest in International Investment Law* (2012), 258-9. But cf. Stone Sweet and Grisel, *supra* note 54, at 245-6.

<sup>61</sup> Schill, *supra* note 26.

<sup>62</sup> *Ibid.*, at 91-101.

<sup>63</sup> *Ibid.*, at 89-90, 104-5.

<sup>64</sup> 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.' Article 55 of the ICSID Convention. Although 'execution' is chosen for the purpose of Article 55, which is thus distinguished from both Articles 53 and 54 where 'enforce' and 'enforcement' are adopted, Andrea K. Bjorklund suggests that their meanings are identical when it comes to the attachment of the respondent host state's property. A.K. Bjorklund, 'State Immunity and the Enforcement of Investor-State Arbitral Awards', in C. Binder et al. (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), 302 at 306.

<sup>65</sup> Bjorklund notes that the provision for the enforcement of arbitral awards 'in accordance with the rules of the procedure of the territory where the award is relied on' in Article III and the public policy exception in Article V (2) (b) are susceptible to the interpretation that state immunity from enforcement is unaffected, despite variations on state practice. *Ibid.*, at 308-9.

<sup>66</sup> As the scope of the ICSID Convention is narrower, some investor-state arbitrations have to rely on the



foregoing treaty reservation of enforcement immunities does not generally prevent the execution of arbitral awards concerning foreign investors.<sup>67</sup> Nevertheless, it continues to be the focus of commentary on IIL while the execution of international commercial arbitral awards itself has been brought before several tribunals arbitrating investment disputes.<sup>68</sup>

Drawing on those arbitral awards,<sup>69</sup> Schill suggests that such treaty-underpinned arbitral tribunals can be the forum to address the issues of the international investment legal regime vis-à-vis enforcement immunities, at least, in part.<sup>70</sup> Moreover, inspired by the case law of investor-state arbitration that applies PB to cases concerning the impact of the exercise of the host state's right to regulate on the foreign investor rights (including the requirement of compensation for expropriation),<sup>71</sup> he contends that the host state's domestic law on enforcement immunities should be balanced against the investor rights.<sup>72</sup> Specifically, he argues that the host state's domestic law on enforcement immunities, which operationalizes the general international law of state immunity, be considered part of the host state's exercise of its right to regulate. Paralleling the steering of the relations between IIL and other special legal regimes as discussed above, Schill suggests that the arbitral tribunal's exercise of PB

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New York Convention for the enforcement of the award. See *ibid.*, at 308.

<sup>67</sup> See also *ibid.*, at 321. Cf. Stone Sweet and Grisel, *supra* note 54, at 2-3.

<sup>68</sup> See C. Priem, 'International Investment Treaty Arbitration as a Potential Check for Domestic Courts Refusing Enforcement of Foreign Arbitration Awards', (2014) 10 *New York University Journal of Law & Business* 189, at 196-217; C. Annacker, 'Investment Treaty Arbitration as a Tool to "Enforce" Arbitral Awards?', *Global Arbitration Review*, 16 November, 2014.

<sup>69</sup> The awards Schill discusses include *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17, Award, 5 February 2008), *Saipem SpA v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7, Award, 30 June 2009), and *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* (PCA Case No. 34877, UNCITRAL, Partial Award on the Merits, 30 March 2010). Schill, *supra* note 26, at 104-5.

<sup>70</sup> *Ibid.*, at 104-5.

<sup>71</sup> See cases cited at note 54, *supra*.

<sup>72</sup> Schill, *supra* note 26, at 106-8.

concerning the host state's right to regulate in the area of enforcement immunities amounts to an assessment of the relative weight of the general international law of state immunity and IIL.<sup>73</sup> Viewed thus, PB is conducted as if to resolve conflicts between two bodies of international law: the law of state immunity and IIL.

On closer inspection, however, Schill's foregoing account of the case law of investment arbitration on enforcement and the role of PB in the steering of the relations between the law of state immunity and IIL is not without question. First, the arbitral awards Schill draws on for support fall short of tackling enforcement immunities proper. They do concern issues resulting from the legal obstacle of enforcement immunities. Yet, not all issues concerning the enforcement of arbitral awards may be resolved by answering the question of enforcement immunities. To put it simply, none of the arbitral awards addresses issues arising under the law of state immunity.<sup>74</sup> The arbitral case law hardly lends support to Schill's assertion that the issues of the IIL regime vis-à-vis the law of state immunity can be resolved in the investor-state arbitration. Second, Schill's suggestion that the treaty-underpinned arbitral tribunals apply PB to the relationship between the law of state immunity, by way of the host state's right to regulate in the area of enforcement immunities, and the IIL special regime apparently would put the conventional wisdom on the relations between general international law and special legal regimes into question. *Pace* the foregoing suggestion, the treaty-underpinned arbitral tribunal is expected to decide 'international' legal disputes and abide by the rules concerning enforcement immunities in general international law.<sup>75</sup> As enforcement immunities concern

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<sup>73</sup> See *ibid.*, at 105-6.

<sup>74</sup> Schill acknowledges this discrepancy, too. *Ibid.*

<sup>75</sup> See G. Born, 'A New Generation of International Adjudication', (2012) 61 *Duke Law Journal* 775, at 831-

the primary rules, instead of the secondary rules such as state responsibility, in general international law, the principle of *lex specialis* does not apply in such instances.<sup>76</sup> A fortiori, the general international law of state immunity is to be upheld, not balanced, against the IIL special regime.<sup>77</sup>

Nevertheless, Schill's breakdown of the objectives of the domestic law governing enforcement immunities suggests a new way in which the law of state immunity can be reconceived in global governance. According to Schill, what lies beneath the law of state immunity is a cluster of public interests. Doctrines of jurisdictional and enforcement immunities should not be simply seen as a legacy of the Westphalian legal order atop which sits the concept of state sovereignty. Rather, they crystallize the idea that the state is instrumental in the realization of public good and thus it needs freedom from frivolous lawsuits and the possible enforcement proceedings for that purpose. Seen in this light, domestic legislation on jurisdictional and enforcement immunities reflects the concerns at the core of the general international law of state immunity, which can be weighed and assessed under the PB framework.<sup>78</sup>

For the reasons stated above, this breakdown approach to the general international law of state immunity does not seem to bear much on the investment disputes brought before the treaty-underpinned arbitral tribunals. Yet, it suggests a new perspective on the investor's

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<sup>76</sup> See B. Simma and T. Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology', in Binder et al., (eds.), *supra* note 64, at 678, 682-91. See also Mouyal, *supra* note 54, at 47-65.

<sup>77</sup> See Simma and Pulkowski, *supra* note 3, at 498-500. Cf. A. Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights', (2015) 56 *Harvard International Law Journal* 353, at 363.

<sup>78</sup> Schill, *supra* note 26, at 96-8, 102-8.

enforcement of arbitral awards vis-à-vis the property of the host state in third states. In the first place, it should be noted that the municipal court of the third state where the property of the respondent host state's property lies and is sought to be attached also functions as an institutional player in global investment governance regime when it is seized by the investor to enforce the arbitral awards.<sup>79</sup> Applying domestic law on enforcement immunities, however, the municipal court of the third state seized is not as restricted as the treaty-underpinned arbitral tribunal in deciding the weight of the general international law of state immunity. In the light of the ECHR jurisprudence, Schill thus makes a point of suggesting that the immunity the forum state's court extends to a foreign state should not be viewed as automatic or absolute.<sup>80</sup> Rather, it is an exercise of discretion in the pursuit of public interest such as the consideration of the diplomatic relations between the forum state and the respondent foreign state under the guidance of proportionality analysis.<sup>81</sup> Viewed thus, the forum state's court seized in the proceedings of arbitral award enforcement is expected to balance the public interest of preventing the execution of the designated property of the respondent as a foreign sovereign state against the claimant's investor rights under IIL.<sup>82</sup> In this way, the forum state's court virtually recalibrates the relationship between the general international law of state immunity, by way of its domestic law on enforcement immunities,

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<sup>79</sup> See C. Schreuer, 'Interaction of International Tribunals and Domestic Courts in Investment Law', in A.W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2010), 71, at 84-6. In this light, a parallel can be drawn between the municipal court of the forum state and 'distributed administration' in global administrative law, which means 'domestic regulatory agencies' that 'act as part of the global administrative space' and 'take decisions on issues of foreign or global concern'. See Kingsbury, Krisch, and Stewart, *supra* note 3, at 21-2.

<sup>80</sup> Schill, *supra* note 26, at 112-15.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, at 117-18. The result is likely to move in the direction of what has been called the 'restrictive theory of immunity'. See Bjorklund, *supra* note 64, at 304.

and the IIL special regime under the PB framework.

As the above example illustrates, domestic courts may play a role in the decentralized international investment regime.<sup>83</sup> It shows how the traditional international legal issues such as the relationship between general international law and special legal regimes and that between the international and municipal legal orders can be studied afresh from the perspective of global governance. Moreover, it suggests that as PB has been tapped into for resolving the conflict between public interest and rights, there appears to be no reason to exclude regime-induced conflicts in global governance from the application of PB, including those concerning the law of state immunity and IIL. Whether this is true is the theme to which I turn next.

### **3. In the name of law: managing politics of inter-scalar legitimacy through proportionality**

Balancing occupies centre stage in the exercise of proportionality analysis.<sup>84</sup> For this reason, to decide whether PB analysis can provide an effective tool in resolving regime-induced conflicts requires further assessment of how balancing works. As Ralf Michaels and Joost Pauwelyn perceptively observe, balancing functions as a conflict-resolving rule within the same legal order insomuch as each legal order presumes ‘an objective standard for the respective weight of each principle’ in conflict.<sup>85</sup> Yet, no such objective standard can be presumed across legal orders. Thus, the very absence of a common standard casts doubt on the application of PB to conflicts that extend beyond a single legal order.<sup>86</sup> Even so, Section

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<sup>83</sup> Born, *supra* note 75, at 831.

<sup>84</sup> See note 41 and accompanying text, *supra*.

<sup>85</sup> Michaels and Pauwelyn, *supra* note 13, at 356.

<sup>86</sup> *Ibid.*, at 368.

2 shows that amidst the rising concerns over potential regime-induced conflicts, PB is still being tipped as a promising response in the pursuit of cross-regime inter-scale in the legal administration of global governance. Departing from the prior question of applicability,<sup>87</sup> I now turn focus to what lies beneath the enthusiasm about PB and the issues its application may entail.

As suggested above, ‘translation’ plays a key part in the exercise of PB with respect to regime-induced conflicts.<sup>88</sup> This is not a phenomenon tied to cross-regime relations. Rather, translation is a common phenomenon that has long been observed in the practice of legal interpretation. Not only does the use of comparative law require translation in the literal sense,<sup>89</sup> applying the statutory text to a concrete case or controversy requires translation, too.<sup>90</sup> The necessity of translation raises the question of ‘fidelity’ in legal interpretation.<sup>91</sup> Failing the requirement of fidelity, translation is nothing less than manipulation and interpretation blends into invention.<sup>92</sup> It is necessary to examine the features of the exercise of PB in the steering of regime-induced conflicts to judge whether fidelity has been lost in the translation.

The first feature of inter-scalar PB is what I call simplism. As the analytical framework of proportionality analysis indicates, competing values, whether they concern two conflicting rights or implicate public interest on the one hand and rights on the other, are the protagonists in the exercise of balancing. To fit into this framework, governance regimes in conflict need

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<sup>87</sup> I shall further address the issues surrounding the question of applicability in Section 4, *infra*.

<sup>88</sup> See text at note 45, *supra*.

<sup>89</sup> See generally S. Glanert (ed.), *Comparative Law - Engaging Translation* (2014).

<sup>90</sup> W.N. Eskridge, Jr, *Dynamic Statutory Interpretation* (1994), 128-32.

<sup>91</sup> L. Lessig, ‘Fidelity in Translation’, (1993) 71 *Texas Law Review* 1165.

<sup>92</sup> *Ibid.*, at 1168-9.

to be translated into competing values. On this view, each regime represents a predominant value. A regime-induced conflict boils down to the clash of fundamental values. That process appears to be another instance of legal practice. After all, one of the law's principal functions is to reduce the complexity of social interaction so that it can be managed through the normative frame of legal authority.<sup>93</sup> Yet, in inter-scalar PB, simplification takes place with respect to two sets of norms underpinning governance regimes in conflict. This suggests that simplification here is more a question of interpretation, or rather, translation, than a reduction of social complexity to legal norms. Thus, what matters is whether the translation of a governance regime into a value faithfully reflects the reality.

It is noteworthy that a governance regime not only concerns substantive values but also includes a set of secondary rules on its compliance in many instances.<sup>94</sup> The chosen compliance mechanism attached to individual regimes reflects a balance of different values and policy goals. For example, the periodic review widely adopted in IHRL is a function of balancing the importance of human rights and the doctrine of domestic jurisdiction.<sup>95</sup> Moreover, substantive provisions of a special legal regime implicate multiple and conflicting values. The tension between the designation of exclusive economic zones (articles 55-75) and the principle of freedom of fishing on the high seas (article 87 (1) (e)) in the United Nations Convention on the Law of the Sea is just one example.<sup>96</sup> Seen in this light, each governance

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<sup>93</sup> See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by W. Rehg) (1996), 326-8; N. Luhmann, *Law as a Social System* (translated by K.A. Ziegert) (2004), 94.

<sup>94</sup> Cf. Simma and Pulkowski, *supra* note 3, at 492-3.

<sup>95</sup> D. Shelton, 'International Human Rights Law: Principled, Double, or Absent Standards', (2007) 25 *Law and Inequality* 467, at 491-505.

<sup>96</sup> J.L. Bailey, 'States, Stocks, and Sovereignty: High Seas Fishing and the Expansion of State Sovereignty', in N.P. Gleditsch (ed.), *Conflict and the Environment* (1997), 215 at 220.

regime is a complex of differing values and a result of compromise and balancing at once. Thus, to translate a multivalent governance regime into a predominant value to fit into the framework of proportionality analysis means a simplification of the intra-regime diverse values concerned. Compared to the reduction of social complexity to legal norms, which is characteristic of the law's relationship with the external environment, the operation of translation in the context of global governance as observed above would involve a double reduction: the initial reduction of social complexity into a multivalent governance regime followed by a further reduction of the latter into a predominant value.<sup>97</sup> Yet, thanks to simplism, PB appears to provide a handy general working framework for resolving various regime-induced conflicts.

Related to the feature of simplism is the inbuilt normative attitude towards regime-induced conflicts when they are translated into a particular kind of questions under the framework of proportionality analysis. As indicated above, proportionality is aimed at delimiting the scope of a right in context when its exercise appears to be in clash with the public interest or another right. The translation of regime-induced conflicts into the question susceptible of proportionality analysis is a simplified conversion of a governance regime into a value, and a normative one at that, i.e., the subject of a right. Take IIL again. Foreign investment has long been considered crucial to the economic development in the less developed countries and mutually beneficial to capital-exporting countries.<sup>98</sup> Guided by the

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<sup>97</sup> With such a double move of reduction, the issues concerning the opaqueness of global governance are likely to be further aggravated.

<sup>98</sup> See E. Borensztein, J. De Gregorio, and J.-W. Lee, 'How Does Foreign Direct Investment Affect Economic Growth?', (1998) 45 *Journal of International Economics* 115; X. Li and X. Liu, 'Foreign Direct Investment and Economic Growth: An Increasingly Endogenous Relationship', (2005) 33 *World Development*



policy goals of facilitating foreign investment in the pursuit of further development, IIL requires arbitration before the home state can espouse the investor's claim through diplomatic protection.<sup>99</sup> In this way, IIL the protection of foreign investors' interests seems to be taken out of international politics and placed under the legal framework. Gradually it evolves into a special regime underpinned by the investor-state arbitration.<sup>100</sup> Yet, when regime-induced conflicts concerning IIL arise, inter-scalar PB prefers to focus on normative questions concerning the scope and content of rights rather than engage in the debate about policy choices in individual governance regimes.<sup>101</sup> This is what I call 'normativism', which constitutes another feature of the inter-scale of PB.

The third feature, which I term 'institutionalism', has less to do with PB itself than the identity of its object of measurement in regime-induced conflicts. I have noted in Section 1 that the fragmented landscape of global governance results not only from the development of individual treaty regimes in the international legal order but also from the profusion of formal and informal institutional arrangements in global administration.<sup>102</sup> Seen in this light, the unit that is involved in the regime-induced conflict is not limited to a self-contained treaty regime.<sup>103</sup> Rather, as indicated in Section 1, regime-induced conflicts also take place between the myriad formal and informal institutional arrangements of global governance. Thus, units

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<sup>99</sup> ICSID Convention Article 27 (1).

<sup>100</sup> J.W. Salacuse, 'The Emerging Global Regime for Investment', (2010) 51 *Harvard International Law Journal* 427, at 446-8.

<sup>101</sup> Even when issues concerning the law of state immunity are brought up before the investor-state arbitral tribunal, they are likely to be subsumed under the concept of the host state's right to regulate, although it is more of sovereignty than right. Cf. Mouyal, *supra* note 54, at 79-80.

<sup>102</sup> For the idea of global administration and its role in the analysis of global governance, see Kingsbury Krisch, and Stewart, *supra* note 3, at 18-27.

<sup>103</sup> See also Simma and Pulkowski, *supra* note 3, at 490-4.

in regime-induced conflicts include those institutional arrangements in the administration of global governance, regardless of whether they belong to the same treaty regime. This focus on institution bears greatly on the deployment of PB to regime-induced conflicts. As discussed above, the exercise of PB rests on the identification of a distinct value with each unit involved in a conflict. As the units in a regime-induced conflict turn out to be the institutional arrangements, the focus will be more on the identification of the predominant value emitted from each institutional entity than on the discovery of a distinctive value in each self-contained treaty regime. Notably, Kingsbury suggests that with no global ‘public’ in sight, the idea of the public in global governance should be understood in a diffuse way as each institutional ‘entity’ together with the stakeholders centring around it constitutes a ‘public’,<sup>104</sup> reflecting the feature of institutionalism. The ‘conflict of laws arrangement’, which he proposes to govern the relations between governance regimes, amounts to an ‘inter-public law’, or rather, an inter-regime law.<sup>105</sup> Thus, institutionalism is characteristic of inter-scalar PB in that its object of measurement extends to the institutional entities of global governance.

‘Legalism’ is the fourth feature of the inter-scale of PB. As the feature of institutionalism suggests, what is characteristic of the approach of PB to regime-induced conflicts is its association of conflicts with the diffuse publics organized around individual institution-pivoted governance regimes. Each governance regime brings a cluster of stakeholders to itself and becomes a public and a unit of conflict in global governance. Seen in this light, regime-induced conflicts result from the disagreement between individual clusters

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<sup>104</sup> Kingsbury, *supra* note 18, at 56.

<sup>105</sup> *Ibid.*, at 55-6; B. Kingsbury, ‘International Law as Inter-Public Law’, in H.S. Richardson and M.S. Williams (eds.), *Moral Universalism and Pluralism: NOMOS XLIX* (2008), 167 at 190-1.

of stakeholders with respect to the governance matters that implicate multiple regimes. To put it bluntly, regime-induced conflicts are reflective of the politics playing out among the stakeholders in global governance.<sup>106</sup> Against this backdrop, PB appears to be a legal means to tame politics as it provides a legal framework within which politics can be recast.<sup>107</sup> Reining in politics through law is surely a noble dream worth pursuing. Yet, as Alexander Somek perceptively observes, in the exercise of PB, ‘one is left with a constitutional conception that reaches out, at bottom, *beyond law*’.<sup>108</sup> Even so, efforts have been made to reduce PB’s value-laden character so much so that it is even expressed through an economics-inspired ‘indifference curve’<sup>109</sup> or presented as a ‘formula’,<sup>110</sup> suggesting the legal objectivity to which it aspires.<sup>111</sup> Thus, the enchantment of PB is not so much about the legal solution it ostensibly provides as about the legal image it emits. Through this lens of legalism, the political issues at the core of the relations between governance regimes such as diverse values, differing policy goals, and distinct interests are recast as legal questions in inter-scalar PB.<sup>112</sup>

The four features—simplism, normativism, institutionalism, and legalism—raise fundamental issues about fidelity and beyond in the emerging adoption of PB as the inter-scale for regime-induced conflicts. As noted above, framing the question of regime-induced

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<sup>106</sup> M.-S. Kuo, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’, (2009) 20 *EJIL* 997, at 1002-3.

<sup>107</sup> Perju, *supra* note 42.

<sup>108</sup> Somek, *supra* note 24, at 149 (emphasis in original).

<sup>109</sup> Alexy, *supra* note 41, at 102-7.

<sup>110</sup> *Ibid.*, at 408-10.

<sup>111</sup> For the quest for objectivity in law, see L. Alexander, ‘Legal Objectivity and the Illusion of Legal Principles’, in M. Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (2012), 115.

<sup>112</sup> M.-S. Kuo, ‘Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law’, (2012) 10 *ICON* 1050, at 1064-7. Cf. Jeutner, *supra* note 36, at 105-6.

conflicts as one susceptible of PB requires translation, and fidelity is the lynchpin of translation. Yet, the double reduction of the social complexity to a governance regime and the latter further to a predominant value (simplism), the inbuilt normative inclination in the rights-oriented framing of conflicts (normativism), and the juridification of policy issues (legal objectivism) indicate that what is reflected in the analysis of PB is a refracted image of what is really going on between conflicting governance regimes.<sup>113</sup> As a result, inter-scalar PB fails to reflect fully the complexity of competing interests in regime-induced conflicts. Fidelity is thus lost in the translation of regime-induced conflicts into what is suitable for PB, entailing an even more opaque landscape of global governance and calling the legitimacy of inter-scalar PB into doubt.

Through the lens of institutionalism, the special character of legitimacy conceived in the invocation of PB in regime-induced conflicts becomes clearer. It is true that through the equation of the institutional entity-attached stakeholders as a public, or rather, a conflict unit, in the relationship between governance regimes, institutionalism has the virtue of clarity in determining what constitutes a public, which further serves as the marker of what interests must be reckoned with in deformalized global governance.<sup>114</sup> Nevertheless, it cannot conceal the fact that access to global governance and its myriad regimes is not equal. Resources, including budget, education, communication, and even personal connection, determine who gains better access to governance regimes and is thus included as stakeholder.<sup>115</sup> Achieving

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<sup>113</sup> For a discussion of the concept of juridification and its relationship with legalism, see G. Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics* (2009), 1-10.

<sup>114</sup> Kuo, *supra* note 107, at 1000-01.

<sup>115</sup> See E.A. Bloodgood, 'The Interest Group Analogy: International Non-Governmental Advocacy Organisations in International Politics', (2011) 37 *Review of International Studies* 93. See also M.-S. Kuo,

the status of stakeholder is the stepping-stone to the decision-making process through which the predominant value or interest of a governance regime is given expression. Together with normativism and legal objectivism, institutionalism works to simplify the complexity of political issues such as the definition of global publics and the delimitation of governance regimes.<sup>116</sup> As a result, the inter-scale of PB ostensibly depoliticizes the operation of global governance, only risking obscuring global governance even more.<sup>117</sup>

#### **4. From technique of inter-scale to narrative of global governance: proportionality reconceived**

The seemingly apolitical and objective inter-scale of PB is more than a trait of the steering of regime-induced conflicts. It is also a symptom of the legal administration of global governance. I hasten to add that the quest for objectivity has long been characteristic of the rule of law. Yet, legal objectivity is only plausible within a common political space.<sup>118</sup> In the face of the transboundary character of contemporary governance issues and the fragmented political landscape of global administration, attempts to engender legal objectivity look to global ‘scales’, generic ‘benchmarks’, or numerical ‘indicators’ for the solution.<sup>119</sup> These are considered the way out of the political thicket of global governance, and towards legal objectivity without a common political space, as they transcend locality, exemplify

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“(Dis)Embodiments of Constitutional Authorship: Global Tax Competition and the Crisis of Constitutional Democracy”, (2009) 41 *George Washington International Law Review* 181, at 229-31, 239-40.

<sup>116</sup> See also Fischer-Lescano and Teubner, *supra* note 4, at 1002-3.

<sup>117</sup> Kuo, *supra* note 115, at 1067-72. Cf. Rosanvallon, *supra* note 1, at 260-3.

<sup>118</sup> See A. Somek, *The Cosmopolitan Constitution* (2014), 264-6, 272-3.

<sup>119</sup> See generally K.E. Davis et al, *Governance by Indicators: Global Power through Quantification and Rankings* (2012); D. Cingranelli, ‘The Cingranelli and Richards (CIRI) Human Rights Data Project’, (2010) 32 *Human Rights Quarterly* 401. See also D. McGrogan, ‘Human Rights Indicators and the Sovereignty of Technique’, (2016) 27 *EJIL* 385.

universality, and are value-free in the eyes of the public.<sup>120</sup>

The propensity towards legal objectivity as expressed in PB is reflective of a broad phenomenon in global governance and IHRL is a case in point. Let us take a closer look at the international human rights regime. One of the principal issues in the implementation of IHRL is the generality and abstractness of rights.<sup>121</sup> Despite the commentary the treaty bodies have issued on the provisions of human rights treaties, its legal effect is not without question.<sup>122</sup> It is also doubtful that a one-size-fits-all interpretation from a distant treaty body can apply to all societies the world over. Moreover, domestic implementing authorities with economic, technological, cultural, and social differences rarely arrive at the same rendering in the interpretation of a human right.<sup>123</sup> As a result, efforts to put teeth into the international human rights regime by means of treaty codification only yield limited results.<sup>124</sup>

Seen in this light, it is not hard to understand why the international human rights movement stalls when it comes to implementation and enforcement. As the history of national struggles for rights indicates, the realization of human rights is always entwined with

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<sup>120</sup> McGrogan, *supra* note 1209, at 393-7.

<sup>121</sup> J. Donnelly, 'The Virtues of Legalization', in S. Meckled-Garcia and B. Çalı (eds.), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (2006), 61 at 63-5.

<sup>122</sup> K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', (2009) 42 *Vanderbilt Journal of Transnational Law* 905, at 919-22; J. Harrington, 'The Human Rights Committee, Treaty Interpretation, and the Last Word', *EJIL: Talk!*, 5 August 2015, available at [www.ejiltalk.org/the-human-rights-committee-treaty-interpretation-and-the-last-word/](http://www.ejiltalk.org/the-human-rights-committee-treaty-interpretation-and-the-last-word/).

<sup>123</sup> With the duplication of human rights provisions in domestic legislation and treaties, national renderings of a human right play an increasingly important role in the implementation of international human rights law. See J. Waldron, *"Partly Laws Common to All Mankind": Foreign Law in American Courts* (2012), 24-47. This brings to the fore the long overlooked third primary source of international law, the 'general principles of law recognized by civilized nations', which sits alongside treaty and customs in the Statute of the International Court of Justice Article 38(1). See H. Thirlway, *The Sources of International Law* (2014), 94-115.

<sup>124</sup> See E. Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', (2005) 49 *Journal of Conflict Resolution* 925.

politics.<sup>125</sup> Negotiated compromise is central to politics and cannot be dictated from the top or from afar. It is a product of local politics and social dialogue. The politics of human rights is no exception.<sup>126</sup> To reach a uniform rendering through the complex and dynamic discursive politics in a pluralist world is a tall order. For this reason, IHRL suffers from the lack of clear standards and concrete prescriptions, weakening both its legal effect and practical impact.<sup>127</sup> Thus, along with the barriers arising from the doctrine of domestic jurisdiction, the lack of clarity poses another challenge to the global implementation and promotion of human rights. Against this backdrop began the move towards ‘techniques’ in the 1990s.<sup>128</sup> It was argued that, by turning to indicators, benchmarks, and statistical measurements, advocates for human rights could focus on the seemingly neutral, demonstrable statistics, and league tables and thus ‘bypass’ the complicated local politics in the quest for legal objectivity despite the lack of political consensus.<sup>129</sup> In this way, the international human rights legal regime could seek to influence the behaviours of local actors without direct intervention, i.e. ‘govern at a distance’.<sup>130</sup> With the focus shifting from treaty interpretation to measurable monitoring, IHRL was thus cloaked with objectivity, uniformity, and certainty. The ‘indicator project’ at the core of international human rights advocacy enhances the legal status and practical impact of the international human right regime,<sup>131</sup> suggesting the resurgence of

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<sup>125</sup> S. Moyn, *The Last Utopia: Human Rights in History* (2010), 20-41, 100-06.

<sup>126</sup> *Ibid.*, at 213-27.

<sup>127</sup> Donnelly, *supra* note 122. Compare O.A. Hathaway, ‘Do Human Rights Treaties Make a Difference?’, (2002) 111 *Yale Law Journal* 1935, at 2006-7, with R. Goodman and D. Jinks, ‘Measuring the Effects of Human Rights Treaties’, (2003) 14 *EJIL* 171.

<sup>128</sup> McGrogan, *supra* note 120, at 388.

<sup>129</sup> *Ibid.*, at 399.

<sup>130</sup> See *ibid.*, at 399-401 (quoting K.E. Davis, B. Kingsbury, and S.E. Merry, ‘Indicators as a Technology of Global Governance’, (2012) 46 *Law and Society Review* 71, at 81).

<sup>131</sup> See K.E. Davis, B. Kingsbury, and S.E. Merry, ‘Introduction: Global Governance by Indicators’, in Davis et al. (eds.), *supra* note 120, at 3.

the undying idea of nonhuman law.<sup>132</sup>

To be clear, the inter-scale of PB is not just a statistical exercise and the element of judgment cannot be completely taken out of equation.<sup>133</sup> Instead, its juxtaposition with the indicator project reveals that the emphasis on the resolution or management of regime-induced conflicts by virtue of legal objectivity reflects the general unease about the political uncertainty and complexity in the administration of global governance. In the legal response to the politics of the interaction between governance regimes, PB stands out for the aura of reason, objectivity, and neutrality, with which the image of proportionality as a scale is associated and to which the law aspires.<sup>134</sup> The adoption of PB as the legal inter-scale of regime-induced conflicts shares the rationalist propensity in the pursuit of techniques of indicators, benchmarks, and statistical measurements in international human rights advocacy.<sup>135</sup>

If so, is this a welcome development in the global rule of law project? Before answering that question, let us take IHRL again. One fundamental criticism about the rationalist propensity in the international human rights regime's continuing pursuit for more accurate benchmarks and more sophisticated indicators is its shadowing effect on the reality and complexity of global governance. Disguised in value-free numerals, these new techniques of

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<sup>132</sup> Alain Supiot notes the age-old 'fascination with numbers and their systematising powers' as a counter to the manmade law that is susceptible to arbitrary will. Nonhuman law can take different forms in different periods of history. In ancient times, the law of nature that embodies the harmony of cosmos is one example. See Supiot, *supra* note 24, at 67-73.

<sup>133</sup> M. Kumm and A.D. Welen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing', in Huscroft, Miller, and Webber (eds), *supra* note 19, at 67, 69-70. See also Luterán, *supra* note 19, at 29-41.

<sup>134</sup> G.F. Gaus, 'Public Reason and the Rule of Law', in I. Shapiro (ed.), *The Rule of Law: NOMOS XXXVI* (1994), 328. For the embeddedness of proportionality in law, see Luterán, *supra* note 19, at 23-9.

<sup>135</sup> McGrogan, *supra* note 120, at 397. For the rationalist propensity in proportionality balancing, see Antaki, *supra* note 46.



governance seem to be able to dodge politics.<sup>136</sup> Out of this comes the apolitical character of the indicator project. Seen in this light, the indicator project appears to be free of value judgment and policy choice, embodying the ‘sovereignty of technique’.<sup>137</sup> Yet, it is also for its politics-averse techniques that the indicator project is accused of ‘diminishing moral discourse in human rights’ and keeping the contestation about the implementation of IHRL from the ‘conversation of human societies’.<sup>138</sup>

The depoliticization criticism of the rationalist propensity of the indicatory project sheds illuminating light on the deployment of PB in resolving regime-induced conflicts. As the four features in the inter-scale of PB shows, the politics of regime-induced conflicts is reframed in terms of issues to be addressed through legal reasoning. This does not mean that the legal expression of the politics of regime-induced conflicts in global governance is meant to dodge politics in the way the indicator project does. Yet, the legal language of inter-scalar PB does give the resolution of regime-induced conflicts a veneer of objectivity, certainty, and reason. And, these seemingly ‘scientific’ properties are PB’s charm to those concerned about regime-induced conflicts.<sup>139</sup> On this view, the inter-scale of PB and the indicator project converge on their politics-averse character. As it turns out, the enthusiasm about the inter-scale of PB

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<sup>136</sup> See also F. Schauer, ‘Proportionality and the Question of Weight’, in Huscroft, Miller, and Webber (eds.), *supra* note 19, at 173, 173-4. For the intellectual roots of this development, see Supiot, *supra* note 24, at 78-120.

<sup>137</sup> McGrogan, *supra* note 120, at 392 (quoting M. Oakeshott, *Rationalism in Politics and Other Essays* (1962), 1, 6).

<sup>138</sup> McGrogan, *supra* note 120, at 408.

<sup>139</sup> For the perceived scientific character of proportionality and balancing, see T.A. Aleinikoff, ‘Constitutional Law in the Age of Balancing’, (1987) 96 *Yale Law Journal* 943, at 992-93; V.C. Jackson, ‘Being Proportional About Proportionality’, (2004) 21 *Constitutional Commentary* 803, at 832. As suggested in Section 3, Robert Alexy’s ‘Law of Balancing’ and associating it with ‘legal scales’ and what he calls ‘Weight Formula’ testify to this point. Alexy, *supra* note 41, at 401-14; see also Klatt and Meister, *supra* note 46, at 10-12.

suggests the attempt to substitute science for politics as the legitimate foundation for the management of regime-induced conflicts.<sup>140</sup> In sum, although PB is neither rid of politics nor meant to be so, politics in the guise of PB is obscured.

I have noted in Section 3 that PB within the same legal order pivots on the assumed objective value, which guarantees its efficacy and legitimacy. The assumption of an objective value further rests on the premise that members of a common place that bring forth the legal order can subscribe to a common value on account of shared culture, history, and mores as well as interest.<sup>141</sup> This community-embedded premise is foundational to the legitimacy of balancing.<sup>142</sup> When balancing extends beyond a single legal order, that premise falters and the legitimacy of balancing is plunged into contestation.<sup>143</sup> Balancing presupposes a legitimacy-bestowing politics, not the other way around. Specifically, even though judicial balancing is reminiscent of judicial lawmaking,<sup>144</sup> PB secures its legitimacy on the grounds that it is conducted by the institution entrusted with that power.<sup>145</sup> Yet, as observed above, at the core of regime-induced conflicts are competing stakeholder interests in the administration of global governance without an authoritative voice. Against this distinctive political backdrop, the very legitimacy of inter-scalar PB becomes an issue when it is deployed to manage the politics of global governance, despite its rationalist propensity and scientific property.

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<sup>140</sup> Cf. Supiot, *supra* note 24, at 48-9, 75-6, 93-7.

<sup>141</sup> Cf. Michaels and Pauwelyn, *supra* note 13, at 356-7.

<sup>142</sup> Somek, *supra* note 119, at 131, 272-3. See also Kuo, *supra* note 113, at 1072.

<sup>143</sup> Michaels and Pauwelyn, *supra* note 13, at 368.

<sup>144</sup> See Stone Sweet and Mathews, *supra* note 19, at 82-9. Cf. Kuo, *supra* note 115, at 1068-70.

<sup>145</sup> Kuo, *supra* note 113, at 1071-2.

Once the political underpinnings of inter-scalar PB are uncovered, its legitimacy as the inter-scale of regime-induced conflicts cannot be presumed but rather becomes contested. Parrying contestation, inter-scalar PB only asserts legitimacy in the steering of regime-induced conflicts in the name of law's reason, certainty, and objectivity. The role of judgment, bias, tactical alliance, and other less normative factors underpinning the formation of regime-specific rules and the coordination of legal regimes in global governance are thus obscured,<sup>146</sup> worsening the legitimacy problem of global governance. The inter-scale of regime-induced conflicts amounts to resolving the politics about legitimacy into the law of PB. Although the inter-scale of PB may help to decide the applicable law in each instance of regime-induced conflict, it is not 'jurisgenerative'.<sup>147</sup> On the contrary, the legal 'resolution' of regime-induced conflicts in global governance is 'jurispathic' as the applicable law resulting from the exercise of PB results from a managerial lawmaking process.<sup>148</sup> To be sure, the lawmaking process embedded in the management of regime-induced conflicts is political. Yet, the politics in the lawmaking of governance regimes is hardly an inclusive discursive politics but rather confined to its direct stakeholders, despite its impact on people other than those centring on individual regimes.<sup>149</sup> If so, what can we expect of PB in the steering of regime-induced

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<sup>146</sup> See also Aleinikoff, *supra* note 140, at 992-4; Jackson, *supra* note 140, at 832-3.

<sup>147</sup> The concept of jurisgenesis and the critique of the jurispathic vis-à-vis jurisgenerative character of state law are central to the work of the late legal scholar, Robert Cover. In Cover's view, a fundamental distinction needs to be drawn between the lawmaking processes and the resulting legal precepts. The jurisgenerative envisages a *nomos* imbued with meaning whereas the jurispathic is a legal system underpinned by administration and force, if necessary. See R.M. Cover, 'The Supreme Court, 1982 Term -- Foreword: *Nomos* and Narrative', (1983) 97 *Harvard Law Review* 4. Notably, Neil Walker transmutes the normative meaning of jurisgenesis at the heart of Cover's critique. By 'jurisgenerative', he simply describes the processes and activities that contribute to the emergence of transnational law. See N. Walker, *Intimations of Global Law* (2015), 52.

<sup>148</sup> See Kuo, *supra* note 37, at 99. But cf. Dunoff, *supra* note 5, at 149-56.

<sup>149</sup> See Kuo, *supra* note 113, at 1074.

conflicts?

To answer this question, let us first rewind a bit and recall PB in its conventional form. It is noteworthy that although proportionality and balancing have become a popular legal language, their overtones of analogy suggest that they have long been common factors in the making of everyday decisions in the human society.<sup>150</sup> Adopted as a judicial language,<sup>151</sup> PB is widely embraced for empowering the court to take hard look at constitutional issues resulting from conflicting claims on solid grounds of legitimacy. Appealing to the rationalist PB, the lawmaking court speaks the language of authority and is shielded from accusations of judicial interventionism when setting aside the political branch's policy.<sup>152</sup> Yet, PB is effective only thanks to the authority conferred on the court. It is the final say the court has over the legality or constitutionality of policies that brings forth the sense of certitude about the exercise of PB.<sup>153</sup> In this light, the emphasis on the legal character of inter-scalar PB among its advocates is misplaced. In the absence of an effectual central international judicial body, the hope that PB will play the role of a new conflict-resolving rule in the legal administration of global governance seems to be dimmed.<sup>154</sup> To reconceive the role of PB in regime-induced conflicts, it needs to be freed from the conflict of laws thinking and disentangled from the quest for the objective inter-scale.

As its supporters have observed, PB does not necessarily end up being politics-averse as

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<sup>150</sup> Compare Antaki, *supra* note 46, at 305-8, with T.L. Saaty, *Mathematical Principles of Decision Making (Principia Mathematica Decernendi)* (2009), 43-4.

<sup>151</sup> See Schauer, *supra* note 137, at 184.

<sup>152</sup> Compare Antaki, *supra* note 46, at 287-94, 300-03, with Stone Sweet and Mathews, *supra* note 19, at 86-9. See also J. Rivers, 'Proportionality and Variable Intensity of Review', (2006) 65 *CLJ* 174, at 176.

<sup>153</sup> Kuo, *supra* note 113, at 1069-70.

<sup>154</sup> *Ibid.*, at 1070-2.

discussed above. Rather, it serves as the framework within which politically contested issues can be argued about and resolved through practical reasoning.<sup>155</sup> In this way, law tames politics without colonizing it. This political and practical reading of PB merits close attention. Yet, it does not go far enough, especially when it is deployed in the decentralized global order with no authoritative judicial body sitting on the top.<sup>156</sup> Failing to disclose the distinctive political setting in full, appealing to practical reasoning conceals rather than tames the politics of inter-scalar PB.

As noted above, inter-scalar PB, as it is, points to a jurispathic lawmaking, which does the global rule of law project a disservice. As Robert Cover powerfully argued, narratives, instead of precepts, are what make the common political space jurisgenerative and turns the corresponding legal order into a *nomos*, a normative world enriched with meanings we inhabit.<sup>157</sup> To engender a jurisgenerative global rule of law, narratives have a role to play in the management of regime-induced conflicts in global governance. Extending beyond their roots in literature, narratives have been a major tool of IR scholars in the reconstruction of international politics.<sup>158</sup> For example, ‘strategic narratives’ are considered important to reshape the international order.<sup>159</sup> In this light, to fully uncover the political character of regime-induced conflicts, PB can be reconceived as a constructive narrative framework within

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<sup>155</sup> M. Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, (2010) 4 *Law & Ethics of Human Rights* 141. Cf. Perju, *supra* note 42, at 334.

<sup>156</sup> See Kuo, *supra* note 113, at 1072-74. Cf. Jeutner, *supra* note 36, at 105-10.

<sup>157</sup> See Cover, *supra* note 148, at 4-5, 11-19.

<sup>158</sup> See generally B. Bliesemann de Guevara (ed.), *Myth and Narrative in International Politics: Interpretive Approaches to the Study of IR* (2016).

<sup>159</sup> See A. Miskimmon, B. O’Loughlin, and L. Roselle (eds.), *Forging the World: Strategic Narratives and International Relations* (2017). See also T. Flockhart, ‘Towards a Strong NATO Narrative: From a “Practice of Talking” to a “Practice of Doing”’, (2012) 49 *International Politics* 78; V.D. Salla, ‘Political Myth, Mythology and the European Union’, (2010) 48 *Journal of Common Market Studies* 1.

which the political question of inter-scalar legitimacy can be confronted. Viewed thus, the inter-scale of PB should not be expected to yield legally authoritative results. Rather, any conclusion from it should be treated as provisional, subject to further modification. In this way, inter-scalar PB is not so much a scale as a platform. Its function is to bring all competing factors in regime-induced conflicts together for contestation instead of deciding which governance regime has more ‘weight’. On this view, who is to be included in the platform should remain open and be constantly contested. The conflicting interests of stakeholders, other interested parties, and the regime-specific institutions can thus come to the fore in the ongoing debate about the relationship between governance regimes in global governance. Moreover, the compatibility question that haunts PB can be unveiled and tackled head-on. Under this new understanding, the inter-scale of PB provides a language in which values, conflicts, and interests of each regime can be argued, narrated, and provisionally resolved as part of the politics of reforming and constructing global governance. In this way, PB is instrumental in the ‘jurisgenesis’ of regime-induced conflicts and global governance.

## **5. Conclusion**

The question of regime-induced conflicts looms large in the fragmented landscape of global governance. PB, the darling of legal academics and practitioners for the past thirty years or so, finds its new calling in the legal resolution of regime-induced conflicts. In this paper, I have tried to shed light on the attempt to apply PB to the coordination of the relations between governance regimes from the perspective of competing institutional arrangements of global governance. I first discussed the deployment of PB in the ostensible conflicts between the law of state immunity and IIL and then took a closer look at the features of inter-scalar PB as intimated in those examples. Simplism, normativism, institutionalism, and

legalism are central to the inter-scale of PB. These four features help to reformulate the question of regime-induced conflicts as one of rights conflicts or the balancing of rights and public interest under inter-scalar PB. As a result, the complex fundamental issues concerning the relations between governance regimes are either excluded or obscured in the resolution of regime-induced conflicts with the political character of the legal administration of global governance concealed. After disclosing the depoliticization tendency in the inter-scale of PB, I juxtaposed it with the indicator project in international human rights advocacy, suggesting that both are jurispathic and reflect the rationalist propensity in the legal administration of global governance. Drawing inspiration from the constructivist application of narratives in IR scholarship, I suggested a departure from the conflict of laws thinking prevalent in legal scholarship on global governance. As a platform rather than an (inter-)scale, PB provides a narrative vis-à-vis legal framework within which the fundamental values and principles of individual regimes are to be politically contested.

Regime-induced conflicts and the response as discussed in the paper illustrate the character of the rule of law project. Under this project, law is seen as the antidote to political anarchy. The history of domestic legal development is one of struggling to tame politics with the law.<sup>160</sup> Domesticating the anarchic international politics has also driven the development of modern international law.<sup>161</sup> The legal administration of global governance is another chapter to the long story of fighting political anarchy with the law.<sup>162</sup> Calls for resolving

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<sup>160</sup> P.W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (1999), 15-16, 48-50, 73-4, 99-100.

<sup>161</sup> *Ibid.*, at 108-11; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002), 11-97.

<sup>162</sup> D. Kennedy, 'The Mystery of Global Governance', in Dunoff and Trachtman (eds.), *supra* note 2, at 37,

regime-induced conflicts through PB echo this rationalist tradition.

Yet, as I have pointed out, the rationalist propensity gives short shrift to the complexity of global governance and other rule of law projects. The derogatory terms such as legalistic, managerial, jurispactic, to name but a few, give expression to the dissatisfaction with the state of the global rule of law project. To make the global rule of law into a process of jurisgenesis, we need to face up to the fundamental question of its legitimacy and the underlying political conflicts.<sup>163</sup> PB, reconceived as a language in which values, conflicts, and interests of each governance regime can be argued and narrated as part of the politics of reconstructing global governance, is a jurisgenerative step towards rethinking the meaning of the global rule of law.

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43-54.

<sup>163</sup> See also Klabbers, *supra* note 36, at 227.