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Abstract

Justice, the customary law rules on treaty interpretation, and the universal recognition of human rights require construing international investment law (IIL) in conformity with the human rights obligations of states rather than only in terms of economic utility and autonomy (e.g. of investors, arbitrators and states). Prioritizing foreign investments risks undermining 'constitutional justice' and human rights law (HRL), as emphasized by the European Court of Justice (*section I*). In investor-state arbitration, complainants, respondents, third parties (e.g. *amici curiae*) and arbitrators increasingly invoke human rights as procedural 'due process rights', part of the applicable law, or as relevant context for 'systemic interpretation' (*II*). Yet, just as the adoption of the proposed UN Agreement on Business and Human Rights remains contested, so remains the impact of HRL on the settlement of investment disputes limited. This contribution explains why HRL and 'economic constitutionalism' can increase the source- and process-based 'normative legitimacy' and result-oriented, internal and external 'social legitimacy' of economic adjudication. Reforms of IIL are necessary for protecting 'constitutional and human rights integrity', 'deliberative' and 'constitutional democracy' and public reason in multilevel governance of public goods (like sustainable development). HRL justifies constitutional and cosmopolitan, legal and judicial methodologies limiting neo-liberal interest group politics, President Trump's mercantilist 'weaponisation' of trade and investments, and China's totalitarian state-capitalism (*III*).

Keywords

human rights; investment law; investor-state arbitration; judicial administration of justice; principles of justice

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I. Legitimation of Investment Adjudication through Human Rights?[*]

How to prevent – or remedy – abuses of human rights (e.g. of workers, consumers of essential services, indigenous people) by foreign investors and host states (e.g. if local governments engage or collude in violations of human rights), especially if domestic laws and courts in host and home states fail to offer effective remedies? Can transnational investment adjudication compensate for such 'jurisdiction and remedies gaps' in domestic legal systems and in non-binding recommendations on 'business and human rights' adopted by ever more international organizations and transnational corporations? How should investment adjudicators respond to the fact that most bilateral investment treaties (BITs) lack 'conflict clauses' on how to reconcile conflicts between IIL and non-economic legal obligations (like protection of the environment, respect for human and labor rights)? Does the increasing invocation of human rights in investor-state arbitration (ISA) confirm a change in the 'commercial law culture' of many arbitrators avoiding references to HRL? How should investment adjudicators define and protect procedural and substantive 'rule of law' in transnational ISA as a restraint on abuses of public and private power (e.g. in cases of bribery and corruption) and safeguard private and public interests? Is the civil society criticism of 'investor biases' and insufficient protection of public interests in IIL and ISA justified?

HRL and democracies recognize guarantees of 'access to justice' and governmental duties of justifying restrictions of human, constitutional and other individual rights. This need for justifying law and governance vis-à-vis citizens is also reflected in the customary law requirement of interpreting treaties 'in conformity with the principles of justice of international law', including also 'human rights and fundamental freedoms for all', as codified in the Vienna Convention on the Law of Treaties (e.g. in its Preamble and Article 31 VCLT). The Convention establishing the International Center for the Settlement of Investment Disputes (ICSID) confirms in its Article 42 that HRL may be part of the applicable law in investment disputes. According to Article 31.3(c) VCLT, HRL may also include 'relevant rules of international law' for interpreting IIL. Yet, most international trade and investment agreements prioritize trade and investor interests without adequate regard to governmental duties to protect human rights and justice comprehensively.

Commercial arbitrators in ISA prioritizing party autonomy, confidentiality and *inter partes* dispute settlement are increasingly challenged by social movements for their neglect of public interests (e.g. of local communities). Neoliberal economic justifications of 'separation of policy instruments' are, likewise, criticized for neglecting the social legitimacy of law and democratic duties to protect 'public goods' (PGs). Libertarian justifications of property rights - like John Locke's labor theory justifying private property rights as moral entitlements to the fruits of one's labor provided the valuable good was acquired or produced without violating the rights and basic needs of others, or Robert Nozick's theory of historical entitlements ('justice in holdings') if the acquisition, transfer and distribution of private property rights were lawful according to the rules in effect at the time – remain disputed by egalitarian claims that democracy requires reconciling individual and democratic autonomy in ways protecting the basic needs and human rights of *all* affected persons. Also the moral theories (e.g. on personal freedoms, capabilities, justice, basic needs, agency, human dignity) and political theories underlying HRL and democratic constitutionalism remain contested. Empirical evidence confirms that investment arbitrators remain reluctant to respond to their 'legitimacy crisis'[1], for instance by acknowledging HRL as applicable law or 'relevant interpretative context' in ISA and by promoting

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[1] Cf. M.Langford/D.Behn, Managing Backlash: The Evolving Investment Treaty Arbitrator, *EJIL* 29 (2018), 551-580.

transparency and *amicus curiae* submissions for taking into account public interests transcending the litigating parties. The commercial law background of many investment arbitrators, their 'commercial arbitration culture' (e.g. prioritizing party autonomy, confidentiality and *inter partes* dispute settlement), 'rational ignorance' (e.g. vis-à-vis the complexities of multilevel HRL), and prioritization of 'ordinary virtues' over the 'burdens of judgment' demanded by cosmopolitan HRL[2] offer additional reasons for path-dependent focus on state-centered IIL as narrowly defined in BITs and ISA procedures – rather than to propose integrated approaches to IEL and HRL in order to justify ISA more comprehensively vis-à-vis all citizens affected by ISA. The more utilitarian conceptions of 'law and economics' are contested (as illustrated by US President Trump's 'zero-sum' conception of trade and investments), the more necessary becomes embedding economic regulation into social and legal theories of justice that are socially and democratically supported. Insufficient 'institutionalisation' of human rights and of 'constitutional justice' in trade and investment agreements favors utilitarianism and intergovernmental power politics (e.g. 'member-driven WTO governance' disempowering the WTO Appellate Body). Insertion of 'human rights clauses' into trade and investment agreements may not suffice for changing path-dependent traditions that prioritize 'ordinary social virtues' (e.g. of arbitrators, investors and governments) over human rights protection. For instance, path-dependent judicial traditions – e.g. of WTO adjudicators invoking power-oriented, and investor-state arbitrators invoking commercial paradigms of 'judicial administration of justice' – may run counter to inclusive conceptions of 'constitutional justice' underlying transnational third party adjudication.

John Rawls' citizen-based *Theory of Justice* (1971) prioritizes equal freedoms and 'difference principles' for governing the basic structure of national societies without mentioning most of the civil, political, economic, social and cultural human rights prescribed in United Nations (UN) HRL; the latter aims at protecting legal 'status equality' of human beings and sufficient access to existential goods (like food) and services (like education and health protection) without aiming at 'material equality' and without guaranteeing the economic resources necessary for fulfilling human rights[3]. Securing adequate resources, goods and services satisfying popular demand depends on constitutional and economic law and institutions (like markets supplying consumers with goods and services). Trade law, investment and intellectual property law promote such production of goods and services, and acknowledge sovereign rights of states to protect PGs not supplied in private markets. Yet, with a few exceptions like the Lisbon Treaty on European Union (TEU) incorporating the EU Charter of Fundamental Rights (EUCFR), most international economic law (IEL) treaties neither incorporate HRL nor refer to it. The liberal understanding underlying the 1944 Bretton Woods Agreements (establishing the International Monetary Fund and the World Bank) and the 1947 General Agreement on Tariffs and Trade (GATT 1947) was only implicitly expressed in the stillborn 1948 Havana Charter for an International Trade Organization and in the 1948 Universal Declaration of Human Rights (UDHR); as the latter's recognition of all human beings as free, equal, rational, reasonable and entitled to inalienable human freedoms and private property remains contested (e.g. by authoritarian rulers and communist countries), UN HRL remains 'fragmented' and separated from IEL. Yet, all 193 UN member states have recognized – in national Constitutions, dozens of human rights treaties and hundreds of human rights declarations – 'inalienable' and 'indivisible' human rights deriving from mutual respect for 'human dignity' (cf. Article 1 UDHR). Arguably, HRL and 'systemic treaty interpretation' require interpreting and justifying IIL also in terms of human rights recognizing citizens as democratic authors and addressees of legitimate law and governance institutions.[4] How should international judges respond to the fact that:

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[2] Cf. M.Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World* (2017).

[3] Cf. S.Moyn, *Not Enough. Human Rights in an Unequal World* (2018).

[4] Cf. E.U.Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods Methodology Problems in International Law* (2017). The drafters of the UDHR reached consensus by respecting disagreements on the moral and political theories justifying HRL.

- most UN human rights conventions and BITs fail to clarify the relationship between human rights, property rights and foreign investor rights?
- national Constitutions often regulate these inter-relationships and judicial remedies in diverse ways and different from the comprehensive protection of human and economic rights in European law; and
- HRL requires legislative changes (as illustrated by new 'model BITs' emphasizing sovereign 'rights to regulate' and 'corporate social responsibilities') rather than only interpretative changes of IIL's one-sided prioritization of foreign investments in order to protect public interests and remedies comprehensively?

Clarifying 'judicial administration of justice' in IIL is important also in view of the emergence of communist China as the world's biggest trading nation and second-largest economy, the increasing number of trade and investment disputes (e.g. about 'forced technology transfers') involving China, and the denial of human and constitutional rights in China's 'communist party state', which risks further undermining interpretation of IEL in conformity with UN HRL and its universal values promoting inclusive, public policies taking into account all affected interests.[5]

Justice in investment adjudication?

Submission of disputes to impartial and independent third-party adjudication is a more ancient form of 'constitutional justice' than modern 'constitutional contracts' constituting democratic self-government of peoples. One of the most important, recent developments in international law is the multiplication of (quasi)adjudicatory institutions based on worldwide, regional or bilateral treaties, especially if international courts – as in HRL and IEL - interact with domestic courts in protecting transnational rule of law for the benefit of citizens and limit the 'legal fragmentation' resulting from the fact that international trade, investment, environmental law and HRL continue being developed in different worldwide institutions that often prioritize diverse values and regulatory interests.

Legitimacy challenges of courts differ depending on their judicial mandates, subject matters, specific goals, design choices, legal sources, processes, audiences, institutional contexts and jurisprudence.[6] Judicial disregard for human rights weakens *normative legitimacy*, which is concerned with the 'right to rule' (e.g. to issue judgments, decisions or opinions) according to agreed standards (like due process of law, independence and impartiality of judicial procedures). The more human rights are neglected in ISA, the more citizens and democratic institutions challenge the legitimacy of investment adjudication and the 'constitutional justice' of the basic structure of societies. *Sociological legitimacy* derives from empirical analyses of perceptions or beliefs that an institution has a right to rule. Both the *internal legitimacy* (e.g. the perceptions of regime insiders) and *external legitimacy* (e.g. beliefs of outside constituencies affected by trade and investment adjudication) are increasingly influenced by UN legal instruments (like the 2003 Framework Convention on Tobacco Control ratified by 181 countries), especially if they acknowledge human rights (e.g. to health protection), 'corporate social responsibilities' (e.g. to *respect* human rights), and the need for health and environmental regulations limiting commercial sales of toxic products (like tobacco) and other adverse human rights impacts of business activities (like environmental pollution).[7] ISA dominated by business-interests is criticized by

[5] Cf. E.U.Petersmann, International Economic Law without Human and Constitutional Rights? Legal Methodology Questions for my Chinese Critics, in: *JIEL* 21 (2018), 213-231.

[6] Cf. N.Grosman/H.Grant Cohen/A.Follesdal/G.Ulfstein (eds), *Legitimacy and International Courts* (2018).

[7] On recent trade and investment adjudication confirming national restrictions of tobacco consumption see: E.U.Petersmann, How to Reconcile Human Rights, Trade Law, Intellectual Property, Investment and Health Law? WTO Dispute Settlement Panel Upholds Australia's Plain Packaging Regulations of Tobacco Products, in: *The Global Community YILJ* 2018, 69-102.

civil society for undermining the *source-based*, *process-based* and *result-oriented legitimacy* of ISA through non-inclusive conceptions of the applicable law and procedures in investment disputes that entail procedural and 'distributive injustice' adversely affecting public interests.

Justice (e.g. in the sense of justifiable law-enforcement and treaty-interpretation), democracy (e.g. in the sense of transparent, participatory, deliberative and accountable governance), and effectiveness (e.g. in the sense of realizing the judicial goals) offer standards for assessing and improving the normative legitimacy of courts. If law is defined not only in terms of rules, principles and institutions, but also as relationships between citizens (e.g. as 'democratic principals' of governments with limited, delegated powers), then sociological legitimacy - for example, depending on how judgments respond to prevailing public interest conceptions in compliance constituencies – may influence the 'compliance pull' of judgments and of social beliefs in justice. Calls for 'constitutionalizing' ISA aim at 'inclusive justice' rendering courts justifiable for all affected persons (e.g. by transparent procedures reconciling 'public interests' with particular trading and investor interests). As judges must remain servants of law and justice, their legitimacy arises from effectively fulfilling this 'judicial function', especially if HRL is part of the applicable law.

Can human rights law legitimate investment adjudication?

Different courts have different normative goals (e.g. prospective justice in WTO adjudication vs restorative justice through investment law remedies), design choices (e.g. regime-embedded or regime-independent tribunals), audiences, institutional environments and modes of interacting with other courts (e.g. preliminary rulings or advisory opinions of regional courts at the request of national courts). Hence, 'justified authority' of courts and their contribution to *social capital* (e.g. based on trust increasing the market value of economic rights) depend on the particular contexts of courts. *Legitimacy of origin* of international courts may be distinguished from:

- the personal legitimacy of judges;
- operational legitimacy of judicial exercise;
- output legitimacy of judgments and jurisprudence;
- the perception of their sociological legitimacy by compliance constituencies; and
- social reactions by governments, diplomatic communities or civil society (e.g. against perceived 'judicial biases' of investment arbitrators or 'judicial overreach').

For instance, in Opinion 1/2017 rendered by the Court of Justice of the European Union (CJEU) on 30 April 2019, the ISA procedures in the EU's 2016 Comprehensive Economic and Trade Agreement (CETA) with Canada were found to be consistent with EU law in view of the legal limitations of the potential reach of ISA by CETA guarantees of, *inter alia*, the legal autonomy of EU law, the EU judicial system, the democratic 'regulatory freedom' to protect non-economic PGs, and of fundamental rights (e.g. of access to judicial remedies, equal treatment) as protected in the EUCFR.[8] The EU-Vietnam Investment Protection Agreement of 2019 limits the potential reach of ISA rulings, *inter alia*, by explicit references – in its Preamble – to 'the principles articulated in *The Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on 10 December 1948', so as to compensate for the inadequate HRL inside communist Vietnam. The EU objective of progressively replacing bilateral *ad hoc* investor-state arbitration by a permanent public law tribunal with full-time adjudicators and an appeal process is likely to strengthen judicial protection of human and constitutional rights. An increasing number of trade and investment agreements of less-developed countries, and some of their BITs (e.g. based on the 2012 Model BIT of the Southern

[8] Opinion 1/2017 CJEU of 30 April 2019, ECLI:EU:C:2019:341.

African Development Community, Article 12.1(v) of India's 2015 Model BIT) and the 'Draft Pan-African Investment Code'[9], also include provisions referring to human rights and investor obligations.

HRL differs from BITs, *inter alia*, by recognizing the priority of human rights and related universal values over foreign investments and related rights. While HRL perceives governmental restrictions as exceptions that need to be justified (e.g. in terms of legality, public interests, proportionality) subject to limited standards of review (e.g. due to margins of appreciation), BITs protect foreign investments through international obligations (rather than exceptions from fundamental rights) and tend to prescribe 'full, prompt and effective compensation' as a condition of the legality of expropriation of investor rights. The universal recognition of human rights of access to justice and judicial remedies includes also 'rights to justification' requiring to ensure that governmental restrictions of individual rights remain consistent with human rights and procedural and substantive 'principles of justice'. 'Justice as justification'[10] prompts participants in ISA to increasingly challenge – as discussed in section II - investment regulations from the point of view of human and constitutional rights of adversely affected investors, workers, consumers and other citizens (e.g. suffering from adverse impacts of foreign investments), for instance by:

- construing BIT jurisdiction-, applicable law- and 'human rights-clauses' in conformity with the human rights obligations of states;
- defining protected 'investments' in conformity with local and international law;
- interpreting the customary rules of treaty interpretation, BIT references to 'public interests', investment law protection standards (like 'full protection and security', 'fair and equitable treatment' (FET), non-discrimination), rules on awarding damages and quantification of compensation in conformity with human rights;
- expanding judicial reason-giving, third-party participation and legal accountability of public and corporate actors involved; and
- supplementing 'commercial law'-approaches to ISA (e.g. emphasizing private autonomy of investors and arbitrators) and 'public international law'-approaches (e.g. emphasizing sovereignty and responsibility of home and host states) by 'constitutional law'-methodologies acknowledging constitutional duties of states and adjudicators to reconcile protection of foreign investments with broader state and judicial duties to protect public interests and human and constitutional rights.[11]

Section II discusses increasing references to HRL – e.g. by complainants, defendants, third parties and judges – in investment adjudication. It illustrates why such references to HRL - even if they remain of marginal importance for the substantive, judicial findings in most international investment disputes –

[9] Cf. *The Legal Nature of the Draft Pan-African Investment Code and its Relationship with International Investment Agreements*, South Center Investment Policy Brief 9 (July 2017).

[10] R. Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice* (2012). On interpreting IEL in the light of a 'human right to justification' of law, governance and adjudication vis-à-vis citizens requiring protection of agreed 'principles of justice' (like equal freedoms, social justice, due process of law) see Petersmann (note 4).

[11] Cf. E.U.Petersmann, Introduction and Summary: 'Administration of Justice' in International Investment Law and Adjudication, in: P.M.Dupuy/F.Francioni/E.U.Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), 3-39. As discussed in section II, it remains contested whether protection of foreign investments should be limited by 'proportionality balancing' (e.g. rather than by the more limited 'necessity exception' of international state responsibility law), how to 'weigh' foreign investments and adversely affected public interests, and how to define the 'indivisible core' of interdependent civil, political, economic, social and cultural human rights with due respect for 'constitutional pluralism' and sovereign rights to refuse ratifying UN human rights conventions. Arbitral discretion is especially wide regarding quantification of compensation (e.g. by taking into account an investor's 'contributory fault' and avoiding 'inequitable' outcomes).

may limit 'investor biases' in investment law and adjudication by justifying ISA procedures and investment regulations more inclusively vis-à-vis citizens. Complementing 'human rights jurisprudence' of specialized human rights courts by human rights references in 'other' international courts and economic regulation is a necessary, albeit controversial 'transition phase' aimed at institutionalizing 'public reason' and social support for reconciling IEL with HRL and constitutional law.[12] This may contribute to reforming 'state-centered investment paradigms' (e.g. in the context of China's 'Silk Road' investment projects) and 'neo-liberal investment paradigms' (e.g. underlying many US BITs and their ISA rules) and make them more compatible with 'ordo-liberal investment paradigms' underlying EU law and the UN Guiding Principles on Business and Human Rights.[13] The human rights imperative of reconciling IEL with civil, political, economic, social and cultural rights requires limiting 'investor biases' in investment law and arbitration in the broader context of HRL, constitutional law and IEL adjudication. Just as the case law of European courts has been instrumental for reconciling EU law with HRL, so can investment jurisprudence on the human rights dimensions of IIL promote social acceptance of mutually coherent 'principles of justice' in multilevel HRL, constitutional law, IIL and 'judicial administration of justice'. *Section III* concludes that invocation of human rights (e.g. of access to water, food, medicines, health protection and judicial remedies) may not change the judicial 'balancing' of economic rights (like market access rights, property and investor rights) with non-economic human rights if judges prioritize governmental *duties to protect PGs* (like public health) rather than corresponding *human rights*. Yet, judicial examination of HRL and related PGs may increase the *normative* and *sociological legitimacy* of investment adjudication, for instance by making judicial procedures and judgments more inclusive and offering judicial remedies to all affected persons (e.g. indigenous people affected by foreign investments). This is true especially for the *external legitimacy* and beliefs of outside constituencies affected by trade and investment adjudication, such as non-governmental organizations and indigenous people submitting *amicus curiae* briefs to ISA tribunals. EU law protects fundamental rights as constitutional restraints on the exercise of all public authority by EU institutions, including external policy powers of the EU[14]. Hence, ISA arbitration in intra-community relations challenging EU member states is inconsistent with EU constitutional law[15]; 'respect for human rights is a condition of the lawfulness of Community acts' also in the external relations of the EU.[16] The jurisprudence of European courts illustrates that HRL may both *legitimize* the protection of foreign investors and *justify limitations* on procedural and substantive investor rights as protected in IIL, for instance if – in foreign debt crises - compensation claims of foreign creditors and investors may have to be reconciled ('balanced') with state duties to protect existential needs of domestic citizens as recognized in HRL.

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[12] Cf. M.Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (2019).

[13] UN Guiding Principles on Business and Human Rights, adopted by UN Resolution A/HRC/RES/17/4 (2011). European ordo-liberalism differs from US-neoliberalism by its emphasis on 'constitutional and legal construction of markets' and systemic correction of 'market failures' and 'governance failures'; cf. E.U.Petersmann, How Should WTO Members React to their WTO Governance Crises? in: *World Trade Review* (18) 2019, 503-525.

[14] In Case C-263/14, *Parliament v Council*, ECLI:EU:C:2016, 435, the CJEU confirmed (para 47) that ensuring compliance of external EU agreements with human rights is required by Article 21:2 and 3 TEU. On the impact of HRL on the EU's investment agreements see: V.Kube, *EU Human Rights, International Investment Law and Participation. Operationalizing the EU Foreign Ploicy Objective to Global Human Rights Protection* (2019).

[15] Case C-284/16, *The Slovak Republic* v. *Achmea BV*, ECLI:EU:C:2018:158, 6 March 2018.

[16] Opinion 2/94 CJEU, ECLI:EU:C:1759, para.34. On the '*Kadi*-jurisprudence' annulling 'smart sanctions' of the EU (like seizure of foreign property) on grounds of human rights violations even if these sanctions were ordered by the UN Security Council against alleged terrorists, see: M.Avbelj *et alii* (eds), *Kadi on Trial. A Multifaceted Analysis of the Kadi Trial* (2014).

II. Invocation of Human Rights in ISA

In the limited number of investment disputes before the ICJ initiated at the request of home states exercising diplomatic protection for foreign investments by their nationals, human rights were invoked only exceptionally.[17] In investment disputes initiated directly by investors in national and European courts like the European Court of Human Rights (ECtHR) and the CJEU, private property and investor rights tend to be protected with due respect for democratic regulation aimed at reconciling economic and non-economic rights and public interests.[18] The role of human rights in ISA - and the kind of human rights invoked - vary depending on the actor who (1) introduces them into the dispute and who (2) asserts human rights and their violation. These may be investors, home and host states, *amici curiae* and the arbitrators themselves. Investors have introduced human rights either as independent claims (e.g. violations of human rights of investors) or in support of the alleged violation of a BIT (e.g. to substantiate certain interpretations of treaty terms such as expropriation). Host states have occasionally invoked human rights as respondents to justify governmental limitations of investor rights in terms of protecting human rights of third persons. The success of such defenses hinges upon whether the regulatory objective (e.g. health protection) and 'proportionality balancing' play a role in determining the breach of investor rights, or whether only the severity and impact on the investor are the decisive criteria. The respondent state may also introduce 'counterclaims' alleging human rights abuses by the investor or related violations of 'corporate social responsibilities'. Finally, arbitrators have occasionally referred to human rights *ex officio* in their reasoning (e.g. for justifying admission of third party submissions including human rights arguments).

Human Rights as Investor Claims

Investors have claimed human rights violations in addition to breaches of IIL and as support for establishing breaches of IIL. In *Biloune v. Ghana*, a Syrian investor based his claim on violations of human rights (arbitrary detention and deportation) besides contractual breaches of an agreement between him and Ghana. The tribunal declared that it lacked jurisdiction to rule on human rights issues as an independent cause of action. This conclusion was based on the jurisdictional clause in the agreement, according to which arbitration only covers disputes arising 'in respect of the enterprise'. The actions alleged to be human rights violations were nevertheless taken into consideration when deciding on expropriation. The relation was deemed sufficient for factoring it in when determining the severity of the intrusion, which precisely for that reason was found to be tantamount to expropriation.[19] In *Chevron v. Ecuador I*, an independent assertion of denial of justice as a principle of customary law was accepted at the jurisdictional stage. The tribunal stressed that the only requirement for jurisdiction stipulated by the jurisdictional clause is sufficient relation to the investment; it found this requirement to be satisfied. Contrary to the *Biloune* assessment, this tribunal concluded that claims based on international customary law fall under the purview of the jurisdictional clause also as independent causes of action provided that the claims constitute an 'investment dispute'. Adopting the *Mondev* approach, the tribunal declared that lawsuits fall within the definition of investment if they are part of the 'overall investment project'.[20] In *Toto v. Lebanon*, the claimant referred to specific human rights in relation to the right to fair trial. Since the BIT stated that the jurisdiction as well as applicable law cover principles of international law, the tribunal accepted and engaged with the human rights

[17] *Cf.* A.Vermeer-Künzli, *Diallo: Between Diplomatic Protection and Human Rights*, 4 J. INT'L DISP. SETTLEMENT 487 (2013).

[18] Cf. V,Kosta /B. de Witte, Human Rights Norms in the Court of Justice of the European Union, in: Scheinin (note 12), 263ff.

[19] *Biloune and Marine Drive Complex Ltd* v. *Ghana Investments Centre and the Government of Ghana*, Award Jurisdiction and Liability, 27 October 1989, 95 ILR 184, at 30.

[20] *Chevron Corporation (U.S.) & Texaco Petroleum Corporation (U.S.) v. Republic of Ecuador*, PCA Case No. 34877, Interim Award, §§ 2, 3, 207 (Dec. 1, 2008), § 180.

argumentation.[21] The tribunal discussed which human rights were applicable to Lebanon (i.e., Article 14 ICCPR in conjunction with the interpretation by the ICCPR Commission).[22] It finally refused jurisdiction due to a lack of evidence presented by the claimant. In *Roussalis v. Romania*, the claimant based the claim on the right to property in Article 1 of the First Additional Protocol to the European Convention on Human Rights (ECHR) in addition to BIT breaches. The tribunal deemed a discussion of ECHR rights unnecessary since it was convinced that the BIT conferred more favourable rights. This line of reasoning was in line with the statement in Article 10 of the BIT that international obligations shall only be taken into consideration when more favourable.[23]

Supportive assertions of human rights used by investors as a supplementary means for strengthening their claims of investment treaty breaches are more frequent than independent assertions of human rights. In *Micula v. Romania*, the tribunal declared that it would be 'mindful' of Article 15 UDHR when determining the legality of deprivation of nationality.[24] Nevertheless, the tribunal's subsequent rejection of the ICJ reasoning in the *Nottebohm* case demonstrated a reserved approach towards international law. In *Grandriver Enterprise v. U.S.,* the major investors were indigenous people belonging to the First Nations. They argued that for the interpretation of the term investment, as well as the standard of protection under the FET provision, human rights – specifically those that are *jus cogens*, customary international law and indigenous peoples' rights – had to be taken into account. They asserted that indigenous peoples' rights include the obligation to promote commercial activities of First Nations Members. The tribunal found itself mandated to take public welfare issues into consideration since the preamble of North American Free Trade Agreement (NAFTA) refers to 'the need to preserve the NAFTA Parties' flexibility to safeguard the public welfare'. The tribunal discussed the scope of international indigenous rights and the states' duty to proactive consultation prior to enacting legislation that is affecting indigenous communities. It explicitly criticized the behavior of the US authorities for not being sensitive to the particular position of the claimants as indigenous people and thus not meeting international standards. However, the tribunal concluded that this failure did not constitute a breach of NAFTA as NAFTA does not confer a direct and privileged right of consultation to individual investors. Had such a duty to pro-actively consult existed, the Tribunal concluded, the claimants had failed to sufficiently substantiate that they were the legitimate representatives of such a collective right. The tribunal found that it had no jurisdiction over legal issues concerning the investors' individual statuses as members of the First Nations but only over protection standards accorded to investments as derived from NAFTA.[25]

In *UPS v. Canada*, the claimants invoked collective bargaining rights of Canadian postal workers.[26] According to UPS, Canada was violating core labor rights of the International Labor Organization, the International Bill of Human Rights as well as customary international law by denying Canada postal workers in rural areas the right to collective bargaining. This constituted a breach of Canada's NAFTA obligation to ensure minimum standards of treatment to foreign investors in accordance with international law because the prohibition of collective bargaining created unfairly low wages and distorted competition. The Canadian Union of Postal Workers and the Council of Canadians filed a petition for amicus submission in which they supported UPS' assessment of the core labor rights

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[21] *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, (Sept. 11, 2009) [hereinafter *Toto v. Lebanon*], §§ 144, 154.

[22] *Toto v. Lebanon*, §§ 157-60.

[23] *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award , §§ 111-12., 310 (Dec. 7, 2011).

[24] *I. Micula et al. v. Romania,* ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008), § 88.

[25] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America,* UNCITRAL, Award, §§ 66f, 182, 220 (Jan. 12, 2011).

[26] *United Parcel Services of America Inc. v. Government of Canada*, UNCITRAL, Investor's Memorial (Merits Phase), §§ 645-71 (Mar. 23, 2005).

violations committed by Canada; at the same time, they criticized that UPS was not the right holder of the workers' right at stake and was not truly interested in their enforcement, as demonstrated by UPS' rejection of the affected workers and their representatives as third party interveners.[27] It would not render Canada's conduct compatible with human rights if the affected individuals remained excluded from the proceedings and if only pecuniary damages were awarded to a third party instead of improving the situation for the victims. The tribunal failed to respond to the human rights arguments and rejected the alleged linkage of national treatment with the workers' rights violations.[28]

The investment arbitrations following Russia's criminal proceedings against its successful oil company Yukos and its management for tax evasion[29], and the parallel human rights complaints before the ECtHR, reveal diverging conceptions of property and diverging judicial methodologies in HRL and IIL. The tribunals in *Quasar de Valors SICAV S.A. v. Russia* and *Veteran Petroleum v. Russia* denied any binding force of the ECtHR's jurisprudence on the tribunals, yet declared to take them into consideration when needed. In *Quasar de Valors SICAV S.A. v. Russia*, the tribunal stressed the differences of the required assessment; unlawfulness or *bona fide* regulations did not play a role for determining the existence of an expropriation under IIL, which was primarily aimed at inducing foreign investment. Even though the assessments of the ECtHR did not have any legal force for the given proceedings, the tribunal discussed the arguments brought forward before the ECtHR. In *Veteran Petroleum v. Russia*, Russia invoked *res judicata* as a ground for lack of jurisdiction by pointing to the ECtHR proceeding. The tribunal responded that it was not a human rights court; it would assess the alleged human rights violations of the individuals linked to Yukos as 'part of the factual matrix of the claimants' complaints that the Russian Federation violated its obligations under the Energy Charter Treaty (ECT).[30] Even though no legal force was ascribed to ECtHR judgments for the arbitration proceedings, the human rights violations played a role in the assessment of violations of the ECT. While human rights courts protect *human rights* against undue governmental restraints, ISA tends to interpret BITs as *international obligations* protecting *foreign investments* regardless of whether investors invoke HRL, and may prioritize procedural autonomy of participants in ISA (e.g. to insist on confidential, bilateral arbitration without publication of awards).

In *H.T.M. Al-Warraq v. Indonesia*, the claimant argued that the term 'basic rights' used in the investment agreement must include human rights; the claimant engaged in an in-depth analysis of the presumption of innocence as recognized in several human rights instruments and the corresponding jurisprudence.[31] The tribunal followed the respondent state by interpreting the term in the specific context of the treaty provision, which is concerned with ownership rights. It discussed the ICCPR and its relevance to the claimant's FET claim as a basic minimum standard; it also examined the scope of Indonesia's obligations, in particular, the right to be present at trial, to defend oneself and the presumption of innocence. Although the alleged human rights violation could not have constituted a treaty breach in itself, the assessment of the FET principle amounted to an examination of Indonesia's human rights obligations. In *Rompetrol. v. Romania*, the investors invoked due process rights under international law as an independent claim and in support of breaches of the Dutch-Romanian BIT and the ECT. The claimants alleged that they had been subject to arbitrary criminal investigations and governmental control measures which amounted to state harassment and pressure on the claimant's

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[27] *United Parcel Services of America Inc. v. Government of Canada*, UNCITRAL, Application for Amicus Curiae Status by the Canadian Union of Postal Workers and the Council of Canadians, §§ 36, 58 (Oct. 20, 2005).

[28] *United Parcel Services of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits, §§ 185-87 (May 24, 2007).

[29] *Hulley Enterprises Ltd. (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award (July 18, 2014); *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, § 765 (July 18, 2014); *Quasar de Valors SICAV S.A. et al. v. Russian Federation*, SCC Case No. 24/2007, Award, § 25 (July 20, 2012); *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, § 765 (July 18, 2014).

[30] *Veteran v. Russia* (note 29) §§ 76, 765.

[31] *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, §§ 178-84 (Dec. 15, 2014).

company in violation of Article 6 of the ECHR. The parties to the dispute – Romania and Rompetrol – agreed that Article 6 ECHR played a role for the investment dispute; but they disagreed as to whether the ECHR standards constituted 'the floor or the ceiling' for protection standards. Romania argued that denial of justice claims should be adjudicated according to the same standards that would apply in any international forum, i.e., higher standards of proof and only after exhaustion of local remedy; the ECtHR jurisprudence should be considered as the ultimate yardstick for lawful behavior of the investigation authorities. The arbitral tribunal stressed that it was established to decide upon legal disputes arising directly out of an investment; the alleged violations of the investors' private lives were not sufficiently related to the investment dispute. Thus, it was not competent to decide on the correct application of the ECHR.[32] However, it did not close the door to resorting to human rights argumentation by stating that it would nevertheless take into account common standards of other international regimes if appropriate. The tribunal referred back to the ECHR and international norms when assessing the authorities' conduct. Ultimately, the human rights question related to the legality of the criminal proceedings against individuals linked to Rompetrol; it played a role in establishing a breach of the BIT, namely the state's failure to undertake all possible steps within a criminal proceeding to avoid unnecessary, adverse effects on the investors' interests.

Human Rights as a Defense of the Host State

Host states may rely on human rights argumentation as a respondent of an investor claim or in the context of counterclaims in relation to investor's misconduct, as in *Urbaser v Argentina*, where a tribunal interpreted Article 46 ICSID and the BIT as allowing for host state counterclaims and engaged in a discussion of such a claim based on human rights (like the right to water) and corresponding corporate obligations accepted by the investor.[33] Most often, human rights only play a minor role as justification for state measures undertaken to comply with HRL. For instance, the duty of the state to ensure just and favorable conditions of work may compel states to enact legislation that is to the detriment of the investors' profit. Host states often invoke their regulatory discretion without specifying their concrete human rights obligations in investment disputes. Tribunals have recurrently stressed that the objective behind a state measure does not play a role for their assessment of potential BIT breaches.[34] Even in cases in which a regulation's objective was discussed, the examination tends to focus on general terms – such as 'public/social welfare' or 'public policy' – without engaging with concrete human rights obligations of the host state. One exception concerns the right to water cases, which illustrate the diverse possibilities of approaching human rights justifications. The right to water is part of the International Covenant on Economic, Social and Cultural Rights (ICESCR);[35] it is also recognized in other human rights treaties, and was confirmed in a 2010 U.N. General Assembly resolution as well as in a 2012 U.N. Human Rights Council resolution as being part of HRL.[36]

The water-related investment disputes mostly arose following the privatization of water supply and sewage systems and subsequent termination of concessions (or tariff freezing) by the states' authorities in order to secure adequate access to water at affordable prices, notably in response to

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[32] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, §§ 47, 83, 89, 172 (May 6, 2013).

[33] *Urbaser v Argentina, Award* (2016) ICSID Case No. ARB/07/26 §§ 1144, 1188-1192, 1200. As most BITs do not mention counterclaims, ISA has tended to reject such claims on grounds of lack of jurisdiction, inadmissibility (e.g. due to lack of a close 'connection' with the main claim), or lack of legal obligations of the investor concerned.

[34] *See, e.g.*, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, § 72 (Feb. 17, 2000).

[35] According to General Comment 15 the right to water is part of the right to an adequate standard of living (Art. 11), to adequate housing and adequate food (Art. 11) and of the highest attainable standard of health (Art. 12); Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 15, The right to water*, § 3, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

[36] Cf. P.Thielbörger, The Right(s) to Water. The Multilevel Governance of a Unique Human Right (2014).

Argentina's emergency measures mitigating the social impact of its economic and financial crisis starting in 1999. In *Azurix*, the tribunal failed 'to understand the incompatibility' with human rights as the facts had not been sufficiently established.[37] In seeking guidance in the case-law of the ECtHR for interpreting the scope of property rights and the role that 'public purpose' ought to play for determining expropriation, the Tribunal concluded that the public purpose of a measure plays a less significant role when the affected individual is a non-national. In *Siemens*, the human rights relevance was rejected because Argentina failed to develop the argument that state measures to protect the human rights of domestic citizens may justify expropriation of foreign investors without full compensation.[38] In *Suez/Vivendi*, Argentina – as well as five non-governmental organizations (NGOs) as *amici* - stressed the importance of the right to water that Argentina aimed to protect by freezing the water tariffs. The tribunal acknowledged that safeguarding sufficient water supply 'was vital for the health and well-being of 10 million people'.[39] Nevertheless, it concluded that adopting measures in breach of investors' rights were not the only means available. The tribunal stated that human rights obligations as well as BIT obligations must be respected equally, which it found to be possible in the given case. In *SAUR International v. Argentina*, Argentina explicitly argued that its 'most basic human rights obligation' – with constitutional hierarchy in the Argentinian legal system – made it indispensable for Argentina to intervene in the investors' business; such human rights protection could not constitute an expropriation. The tribunal responded by emphasizing 'that human rights in general, and the right to water in particular, are one of the various sources that the tribunal should take into account to resolve the dispute'; however, Argentina had the possibility to comply with its human rights obligations while compensating the investor.[40] In other Argentina crisis cases, the defense claims were based on the 'necessity'-clause in the US-Argentina BIT (which was interpreted in the light of customary international law[41] or of Article XX of the General Agreement on Tariffs and Trade (GATT))[42] or on the 'exceptional circumstances', which should have influenced the 'legitimate expectations' of the investors.[43] The precise criteria for preclusion of liability differed depending on the legal interpretation of the necessity exception, for example as being based on the customary law rules on state responsibility (e.g. excluding recognition of 'necessity' of emergency measures if the state could have prevented the emergency situation) or on more flexible treaty exceptions providing for 'proportionality balancing' between the competing rights and legal values concerned. As explained in the *Continental Casualty* award, interpreting BIT exceptions similar to the WTO jurisprudence regarding GATT Article XX enables arbitrators to 'balance' the competing rights and obligations more flexibly.

The jurisprudence by national Constitutional Courts in over-indebted EU member states limiting the national rights of governments to curtail human rights protection in exchange for international debt arrangements illustrates how the relationships between investor rights, human rights and 'conditionality' of international financial assistance remain similarly controversial among creditor and debtor countries as among host states and foreign investors protected by BITs. *Philip Morris v Uruguay* was one of the increasing number of disputes over restrictions on the packaging of cigarettes; the claimants argued that Uruguay's restrictions amounted to an expropriation of their intellectual

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[37] *Azurix v. Argentina Republic*, ICSID Case No. ARB/01/12, Award, § 261 (July 14, 2006).

[38] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, §§ 79, 121 (Feb. 6, 2007).

[39] *Suez et al. v. The Argentine Re*, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010), §§ 252, 256, 260.

[40] *SAUR International S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, §§ 328, 330-31 (June 6, 2012).

[41] For example: *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, §§ 315-17 (May 12, 2005).

[42] *Continental Casualty v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, §§ 192-95 (Sept. 5, 2008)

[43] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 308-14 (Dec. 27, 2010).

property rights.[44] The tribunal recalled that public health protection is widely accepted as an expression of the state's police power in accordance with international customary law. By applying the ECtHR's doctrine of 'margin of appreciation', the tribunal held that any state measure that is reasonable, not arbitrary, non-discriminatory, adopted in good faith and not wholly disproportionate, does not constitute a breach of expropriation.[45] Specific weight was given to the fact that public health is protected by Uruguay's Constitution and in numerous international treaties (like investment treaties, the Framework Convention on Tobacco Control (FCTC)). Uruguay's tobacco packaging restrictions were found to be non-discriminatory and proportionate limitations of intellectual property rights that did not amount to illegal expropriation.

Human Rights Introduced by Third Party Interveners

As host states tend to justify their regulatory action by reference to public policy concerns, the participation of third parties is an important avenue for bringing in concrete human rights interests that otherwise risk being ignored. Third party interventions by civil society groups as *amici curiae* are increasing. Such interveners often act as advocates for affected populations or communities in response to the reluctance of governments to introduce their own human rights duties into the investment dispute. The human rights argumentation may play a role for the acceptance of an *amicus* submission when ISA tribunals acknowledge that public interests are at stake. *Amici* submissions may promote the examination of human rights issues as part of the investment dispute.

Amicus curiae participation started with *Methanex v. U.S.* in 2001.[46] The applicable NAFTA and United Nations Commission on International Trade Law (UNCITRAL) procedural rules did not include provisions on third party intervention. The tribunal nevertheless declared that it had the power to accept third party submissions in view of the public interests involved.[47] *Suez/Vivendi* was the first ISA where an arbitration tribunal working under ICSID procedures decided to accept participation of civil society organizations as *amicus curiae* even though the complaining companies had objected to it. It stated that the given case 'involved matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable non-parties'; 'the investment dispute centers around the water distribution and sewage systems of a large metropolitan area.'[48] In the decision on the merits, the tribunal explicitly responded to the human rights argumentation by Argentina and the *amici*; it made clear that it saw no incompatibility between the right to water and the BIT obligations and examined Argentina's plea of the defense of necessity in terms of Article 25 of the Draft Articles on State Responsibility (codifying the customary rules on state responsibility) without giving any relevance to the human rights at stake.[49]

In *UPS v. Canada* (2007), the tribunal made no reference to human rights in the acceptance of the *amicus* submission; it followed the argumentation of the *amici* by rejecting the parts of the claim that were based on labour rights, yet without explicit reference to the *amici* nor to their arguments.[50] In

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[44] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Republic of Uruguay,* Award (2016) ICSID Case No. ARB/10/7.

[45] *Philip Morris v. Uruguay,* Award (note 44) § 305. The application of the ECtHR's 'margin of appreciation doctrine' was sharply criticized in the *Concurring and Dissenting Opinion of Co-Arbitrator Gary Born* (2016) ICSID Case No. ARB/10/7, §§ 87, 138.

[46] *Methanex Corp. v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to intervene as 'amici curiae' (Jan. 15, 2001).

[47] *Id*. § 49.

[48] *Suez et al. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (May 19, 2005), §§ 19, 20.

[49] See note 41, § 262.

[50] *UPS v. Canada*, *supra* note 28.

Suez v. Argentina, the tribunal accepted the *amicus* submission on the ground that the operation of water and sanitary systems affects human rights. This connection also led the *Biwater Gauff v. Tanzania* tribunal to accept *amicus* participation; however, in its final award, there is no reference to the human rights raised in the submission. This case law suggests that the rationale behind accepting third party intervention is not primarily to ensure legal remedies for affected individuals or communities; third party intervention is rather meant to assist the tribunal in evaluating public interests and enhancing the transparency and legitimacy of the investment arbitration concerned. For example, in accepting an *amicus* submission, the *Philip Morris v. Uruguay* tribunal referred to the fact that 'granting the request would support the transparency of the proceeding and its acceptability by users at large.'[51] As stated by the tribunal in *Suez*, the 'purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, and expertise and perspectives that the parties may not have provided. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case'. [52]

Human Rights Introduced by Adjudicators Ex Officio

Arbitrators have also referred to human rights *ex officio*, i.e., without having a dispute party referring to the specific argument. This was mainly the case in the context of determining procedural rights (e.g. promoting transparency of ISA in disputes involving public interests transcending the two parties), admitting *amicus curiae* submissions, and clarifying the scope of property rights, the existence of an expropriation and the amount of compensation. For instance, in *Azurix*, the tribunal sought guidance in the ECHR and corresponding case law.[53] The tribunal in *Tecmed v. Mexico* referred to the case law of the ECtHR and the Inter-American Convention on Human Rights for determining the existence of an expropriation and for stressing the legitimacy of distinguishing between nationals and non-nationals in this context.[54] In *Saipem v. Bangladesh*,[55] ECtHR case-law was cited to confirm the assertion that also immaterial rights can be property rights protected by IIL, and also judicial acts may amount to illegal interference with property rights. ISA tribunals have also resorted to HRL and jurisprudence to support the use of 'proportionality balancing' of investor rights with public interests as defined by human rights.[56] In *Mondev v. US*, when assessing the claim that the granting of a special governmental immunity for domestic tort law was in breach of NAFTA law, the tribunal turned to ECtHR case law by stating that it could provide guidance by analogy.[57] In *Phoenix*, the tribunal acknowledged that 'nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments in pursuance of torture or genocide or in support of slavery or trafficking of human organs.'[58] Also in cases in which human rights arguments were dismissed as not excluding liability, ISA tribunals referred back to human rights considerations when assessing compensation for damages. Yet, the

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[51] *Philip Morris v. Uruguay*, note 44, § 30.

[52] *Suez/Vivendi v. Argentina* Order, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, § 24 (Mar. 17, 2006).

[53] See note 37.

[54] *Tecmed S.A. v. The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award, §§ 116, 122 (May 29, 2003).

[55] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, §§ 130, 132 (Mar. 21, 2007)

[56] *See supra* note 54, §122, with reference to ECtHR case law. Necessity and proportionality balancing are recognized as general principles in Article 5:4 TEU (no action shall 'exceed what is necessary to achieve the objectives of the Treaties').

[57] *Mondev International Ltd. v. United States of America*, ICSID Case No ARB(AF)/99/2 (NAFTA), Award, § 144 (Oct. 11, 2002).

[58] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, § 78 (Apr. 15, 2009).

occasional references by arbitrators to human rights for interpretative guidance – in particular to human rights jurisprudence on property rights – do not follow a transparent, legal methodology transcending the commercial law culture of many arbitrators.

III. Does the Marginal Impact of Human Rights on the Outcome of Most Investor-State Arbitrations Reflect Neglect of Public Interests?

Section I explained why human rights - as procedural 'due process rights', part of the applicable law in ISA or relevant context for 'systemic interpretation' of IIL - may enhance the normative and sociological legitimacy of investment adjudication. For instance, in its Opinion 1/2017 confirming the legal consistency of the EU-Canada CETA provisions on ISA with EU law, the CJEU underlined the CETA provisions limiting the judicial powers of ISA; they

> deprive those tribunals of any power to call into question the choices that have been democratically made within a Party to that agreement in relation to, inter alia, the level of protection of public order or public safety, the protection of public morals, the protection of health and life of humans and animals or the preservation of food safety, protection of plants and the environment, welfare at work, product safety, consumer protection or, equally, fundamental rights. Consequently, that agreement does not adversely affect the autonomy of the EU legal order.[59]

Do such unilateral 'constitutional interpretations' effectively constrain ISA in CETA member states notwithstanding the few references to human and constitutional rights in CETA law? HRL has not only empowered and mobilized civil society and indigenous people to participate in ISA as third parties promoting more inclusive ISA procedures and protection of public interests. As discussed in section II, also respondent states and arbitrators have invoked HRL. 'Systemic interpretation' of IIL in conformity with human rights obligations of the home and host states involved reduces the risks of 'legal fragmentation' and of nationalists discrimination of foreigners by promoting a more comprehensive framework for evaluating 'social justice' reconciling all affected, private and public interests. HRL reinforces the constitutional limits of economic rights (e.g. of investors) and the transformative task of public law to respect, protect and fulfill human and constitutional rights also in the context of IEL (e.g. procedural rights to information, consultation, due process and consent in case of government interferences). Yet, administration of justice in ISA must take into account also realities like scarce resources, legal disagreements (e.g. on 'corporate responsibilities' to *protect* human rights, lack of protection of property rights in Canada's federal Constitution), and only partial rule-compliance in many host states. As illustrated by non-participation of many industrialized countries in the UN negotiations on the 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises'[60]: as long as the precise obligations of home and host states to *protect* against human rights abuses by enterprises remain contested, judges may have good reasons for justifying their investment adjudication by procedural, constitutional, distributive, commutative and corrective 'principles of justice' governing the applicable law, the 'social functions' of property rights, and the 'constitutional functions' of judicial administration of justice – rather than by pronouncing on contested human rights claims.[61]

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[59] Supra note 8.

[60] This draft agreement was elaborated and published, on 16 July 2019, by the UN's 'Open-Ended Intergovernmental Working Group on Business & Human Rights'.

[61] Cf. E.U.Petersmann, Human Rights, Constitutional Justice and International Economic Adjudication: Legal Methodology Problems, in: Scheinin (note 12). While citizen-based approaches risk neglecting protection of *foreign* investor rights, universal human rights approaches risk neglecting the contextual nature of state-centered principles of justice underlying the diverse 'basic structures' of societies shaped by different histories of social and constitutional struggles. J.Rawls' refusal to extend his citizen-based *Theory of Justice* (1971) to his transnational *Law of Peoples* (1999) – based on his empirical claim that poverty is essentially the responsibility of the states concerned – remains contested (e.g. as a basis for treating national and foreign investors differently by protecting foreign investor rights like 'absolute rights'). BITs

Their judicial weighing of *domestic* human rights concerns with *foreign investment protection* requires focusing not only on democratic regulation by the host state and respect for BITs and foreign property rights, but also on other rights and values protected by HRL.

Section II's overview of investor claims based on human rights revealed a lack of consistent methodology regarding the legal responses by arbitrators to human rights claims. In some cases, the human rights issues (like imprisonment of the investor) were so severe and closely linked to the investment that the arbitrators could not ignore their legal relevance. The judicial responses to alleged human rights infringements varied from taking them into account in determining a breach of investment law obligations (e.g. under 'FET' standards), stating to be 'mindful' or aware of the human rights at stake (e.g. for clarifying 'corporate social responsibilities'), to denying the tribunals' competence for examining 'independent' human rights claims (e.g. of 'indigenous peoples'). The judicial assessment of the impact of human rights (e.g. on the scope of 'corporate social responsibilities') often remained vague and difficult to assess. The reasoning of the *Rompetrol* tribunal on the need to balance the right to privacy against the public right to information shows how increased reliance of investors on human rights may compel tribunals to scrutinize in more detail public policy concerns and competing interests. Yet, the invocation of human *rights* seems to have had a marginal impact on the judicial reasoning compared with the alternative of focusing on the *governmental duties* to protect the PGs (like public health, access to water) underlying the human rights concerned. For instance, even though some arbitral awards criticized governmental neglect of protecting indigenous peoples in conflicts over land use, no arbitral award has so far found a violation of indigenous peoples' human rights. In ISA case-law engaging in judicial 'proportionality balancing', the 'constitutional weight' to be given to human rights protection - and the 'weight' of adversely affected investments and corresponding 'corporate social responsibilities' of foreign investors - may not depend on whether a host state justifies its regulatory measures by invoking *public interests* (like health protection) or by corresponding *human rights* (e.g. to protection of health). As IIL protects investor rights more specifically, HRL protection of property rights plays only a marginal role in ISA.[62] Acceptance and impact of human rights arguments made by third parties remain subject to the discretion of the arbitrators, which have so far failed to develop a consistent, transparent methodology for responding to human rights claims.

The impact of HRL on IIL is likely to remain limited

Investment arbitrators prefer to leave it to the parties to decide on whether human rights arguments are raised either as independent claims or as 'interpretative guidance' for construing investment rules and principles (like FET). Participants in ISA increasingly reflect 'beyond rational choice' by considering not only their economic utility maximization (e.g. in claiming 'regulatory takings' and compensation due), but also whether the 'framing' of arguments should take into account insights from cognitive psychology; accepting 'corporate social responsibilities' may enhance reputation and 'social capital', and reduce 'biases' and 'collective action problems' (like corruption) inside host states and in ISA. Arbitral tribunals are more open toward human rights arguments for clarifying principles of procedural fairness (e.g. access to justice, due process of law), legal methodology (e.g. 'proportionality balancing'

(Contd.)

and related ISA are embedded into diverse, transnational 'basic structures' that may justify adjusting IIL protection and compensation standards to particular 'contexts of justice' recognizing transnational 'difference principles' and 'social functions' of private property. HRL can assist investment arbitrators in developing case-oriented 'equity principles' (e.g. for over-indebted host states and other conflicts between *national constitutional* and *transnational cosmopolitan* 'difference principles'); their political acceptability to home and host states of investors may be promoted if the proposed UN Agreement to regulate human rights violations by transnational business enterprises should be ratified by many states.

[62] This seems to be confirmed by the empirical study of S.Steiniger, What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration, in: *Leiden Journal of International Law* 31 (2018), 33-58.

of investor rights and other competing rights), and the relevant factual context (e.g.. in *Veteran Petroleum Limited v. Russia*). Where HRL and IIL reflect common principles (such as non-discrimination, due diligence, procedural fairness, proportionality, protection of property), arbitral tribunals are more willing to accept the relevance of HRL. A discussion of other substantive human rights (like indigenous peoples' rights, the right to water) risks being rejected on grounds of lack of jurisdiction or the respective party's failure to substantiate its claims. Other interests protected by HRL are often not identified, even if investment arbitrators acknowledge that HRL and IIL 'are not inconsistent, contradictory, or mutually exclusive'.[63] In the *Urbaser* arbitration, the foreign investor had committed himself to comply with the human rights principles in the UN Global Compact and in the OECD Guidelines for Multinational Enterprises; yet, the human rights obligations of foreign investors, their relationships to the human rights obligations of host states and home states, and the relationships between HRL and multilevel investment, intellectual property, labor, health, environmental, social and emergency regulations remain controversial.[64] As constitutional law and IIL tend to regulate investor rights more comprehensively compared with UN HRL, the number of ISA awards referring to HRL in their interpretations of IIL remains small. This marginal role of HRL as a system of substantive rights in investment arbitration (including now more than 980 known ISA cases) is likely to continue.

HRL calls for 'economic constitutionalism' protecting justice and rule of law

The historical bias of IIL in favor of protecting foreign investments continues to be progressively transformed by emphasis on governmental 'rights to regulate' and duties to protect public interests and related human rights. The historical influence of commercial arbitration on ISA is increasingly limited by acknowledgment of ISA's public law dimensions, as illustrated by increasing transparency and inclusiveness of ISA procedures, comprehensive judicial balancing of investor rights with public interests, recognition of 'social corporate responsibilities', publication of ISA arbitration awards, and the EU, ICSID and UNCITRAL initiatives for strengthening the public law dimensions of ISA. The EU's 'micro-economic common market constitution' (e.g. based on EU competition law, common market freedoms, social law, constitutional rights and multilevel judicial remedies of EU citizens) and the EUCFR confirm the 'constitutional significance' of HRL for designing individual access to justice and judicial protection of economic and non-economic rights in transnational economic cooperation.[65] The 'constitutional dimension' of ISA was illustrated by the *Achmea* judgment of the CJEU[66], which - according to the EU Commission - implies 'that all investor-State arbitration clauses in intra-EU BITs are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement'.[67] The ongoing negotiations on reforming ICSID-, UNCITRAL- and other ISA procedures - and on strengthening 'corporate social responsibilities' - reflect increasing recognition that justice and HRL – even if they may neither change the 'rational choices' and 'ordinary virtues' of utility-maximizing economic actors nor prescribe specific economic policies – entail duties for governments, courts of justice and also corporate actors that require 'constitutionalizing' the path-dependent investor privileges in BITs and ISA so that citizens are legally and judicially protected more comprehensively in non-discriminatory

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[63] *Suez* (note 39), § 262.

[64] In the *Urbaser* arbitration, the tribunal derived the investor's obligation of not destroying human rights of access to water from domestic – not international – law (cf. note 33, § 1210).

[65] On 'economic constitutionalism' in Europe see: E.U.Petersmann, Lessons from European Constitutionalism for Reforming Multilevel Governance of Transnational Public Goods in Asia? in: J.Chaisse (ed), *EU Leadership and Global Power Shifts: What Lessons for Asia?* (Hart 2020), 217-237.

[66] Supra note 15.

[67] Cf. *Protection of Intra-EU Investment, Communication from the Commission to the European Parliament and the Council*, COM (2018) 547 (19/7/2018), at p. 26.

ways. Protecting constitutional and human rights, including also the right of 'everyone … to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 UDHR), is particularly urgent at times when cosmopolitan conceptions of IEL are increasingly challenged by Anglo-Saxon, neo-liberal interest group politics (e.g. underlying the 'Brexit'), President Trump's hegemonic mercantilism (e.g. invoking national security exceptions for justifying trade and investment restrictions adversely affecting many countries), China's totalitarian state-capitalism, and global climate change threatening mutually beneficial trade, transnational rule of law and human rights.