# Can Invocation of Human Rights Enhance Justice and Social Legitimacy in Investment Adjudication?

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**Abstract** *How should investment arbitrators and judges respond to the criticism that the legal privileging of foreign investors in international investment law (IIL) and arbitration risks undermining the human rights of citizens? Justice, the customary law rules on treaty interpretation, and the universal recognition of human rights require construing 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 relevant context for 'systemic interpretation' (II).Yet, just as the adoption of the proposed UN Agreement on Business and Human Rights remains contested, so remain judicial references to human rights – as applicable law or 'systemic interpretation' - in the settlement of investment disputes controversial. This contribution argues that judicial references to HRL can increase the source- and process-based 'normative legitimacy' and result-oriented, internal and external 'social legitimacy' of economic adjudication. Yet, judicial 'administration of justice' is no substitute for legislative*

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*reforms of IIL, which 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 requires legislative and judicial reforms aimed at limiting neo-liberal interest group politics and authoritarian state-capitalism in IIL and adjudication (III).*



## I. INTRODUCTION

Foreign investments (e.g. in exploitation of natural resources) affect the interests and rights not only of investors, but also of workers, consumers, competitors and many other people in host states. Yet, most of the more than 3000 bilateral investment treaties (BITs) concluded since 1959 focus one-sidedly on the legal and judicial protection of foreign investors without offering similar legal and judicial protection to other natural or legal persons, which may be adversely affected by foreign investments or by investor-state arbitration (ISA) awarding foreign investors financial compensation amounting to millions (and recently also billions) of dollars. In no other area of international law have natural and legal persons received such comprehensive, procedural and substantive legal privileges as in international investment law (IIL) and ISA. Even if domestic courts found the property rights claimed

by foreign investors to be unconstitutional and invalid[1], or adversely affected domestic citizens sought legal protection by regional human rights bodies[2], violations of domestic constitutional law or human rights law (HRL) may not prevent ISA awards protecting foreign investor rights as defined in BITs. In response to the long-standing civil society criticism that the prioritization of procedural and substantive investor rights in IIL and ISA may unduly disregard the rights of other persons (e.g. labor rights of local workers, citizens affected by environmental pollution), the complainants, respondents, arbitrators and third parties participating in ISA are increasingly invoking human rights in ISA –as procedural 'due process rights', part of the applicable law, or relevant context for 'systemic interpretation' – in order to prevent, or remedy, abuses of human rights (e.g. of indigenous people) by foreign investors and host states, for instance in cases of local governments engaging or colluding in violations of human rights, particularly if domestic laws and courts in host and home states failed to offer effective remedies. This contribution discuss the limited possibilities for investment arbitrators and judges to enhance 'judicial administration of justice' in investment disputes (section II) and the past efforts at rendering HRL more effective in ISA (section III). Section IV and V draw conclusions and discusses the need for *legislative IIL*

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[1] For example, in the *Awdi* v *Romania,* (ICSID Case No ARB/10/13, award of 2 Mar. 2015), the arbitration Tribunal noted that the property rights claimed by the investor had been found unconstitutional and invalid by Romania's Constitutional Court; this had breached the 'legitimate expectations' of the investor (as protected by Romania's 'fair and equitable treatment' obligations under the BIT) and required compensation of the damages and related expenses of the investor. For a discussion of case-law on such conflicts *see*: K.Y.Cordes/L. Johnson/S.Szoke-Burke/R.Maweni, *Legal Frameworks & Foreign Investment*, Columbia Center on Sustainable Investment (November 2019), 14 ff.

[2] For example, in the Endorois case, the African Commission on Human and Peoples' Rights confirmed that the eviction – without consultation or compensation - of hundreds of families belonging to the indigenous Endorois people from their ancestral lands to create game reserves for tourism, and to grant concessions for forestry and mining, violated the Community's rights to protection of religion, culture, property and freedom to dispose of its natural resources and wealth; *Centre for Minority Rights Development (Kenya) on behalf of Endorois Welfare Council* v *Kenya*, Merits and Provisional Measures, Decision African Commission HPR No. 276/03 (25 Nov. 2009). In the Kilwa case, the same African Commission found that the government and military of the Democratic Republic of Congo, with support from an Australian-Canadian mining company operating a copper and silver company near Kilwa, had engaged in extrajudicial executions, torture, arbitrary arrests and forced displacement violating numerous rights under the African Charter on Human and Peoples' Rights; *Institute for Human Rights and Development in Africa and Others* v *Democratic Republic of Congo,* Communication 393/10 (2017). In *Sawhayamaxa Indigenous Community* v *Paraguay*, the Inter-American Court of Human Rights rejected the argument that the governmental taking of the community's ancestral lands and related violations of the Inter-American Convention on Human Rights could be justified by the governmental sale of the land to a foreign investor and by the protection of this foreign property through a BIT; cf judgment on merits, reparations and costs of 29 Mar. 2006, Inter-Am. Ct.HR (ser. C), No. 146.

*and BIT reforms* in order to reconcile protection of foreign investor interests with domestic citizen interests more effectively.

## II. LEGITIMATION OF INVESTMENT ADJUDICATION THROUGH HUMAN RIGHTS?

Most international human and labour rights treaties are binding only on states and do not create directly binding legal obligations for investors to protect or fulfil human rights. As national human rights systems legitimately differ among countries according to the democratic preferences of their people, most BITs do not explicitly refer to HRL. Yet, as illustrated in section III below, human rights to, *inter alia*, water, health protection, access to courts, due process of law, and the rights of indigenous peoples are increasingly invoked before ISA tribunals. In light of this, the following questions arise. Can transnational investment adjudication protect human rights and compensate for '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 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 ISA confirm a change in international HRL[3] and 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

[3] Note the *obiter dicta* by the tribunal in *Urbaser* v *Argentina*: "[…] international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.' *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa* v *Argentine Republic* , ICSID Case No ARB/07/26, Award, 8 Dec. 2016, paras 1194-1195. ('*Urbaser* v. *Argentina* '). *See* also UN Human Rights Council, Eighth Session 7 April 2008, 'Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' UN Doc A/HRC/8/5, para 54: 'whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect (human rights) is defined by social expectations – as part of what is sometimes called a company's social licence to operate.' Such 'soft law obligations' may evolve into 'hard international law' (as defined in Article 38 of the Statute of the International Court of Justice) by incorporation into the formal sources of national or international law.

transnational ISA as a restraint on abuses of public and private power (e.g. in cases of bribery and corruption) and reconcile private and public interests?

## A. 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 in many other areas of international economic law (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. This raises the question of what are the relationships between judicial mandates for 'administering justice' in the settlement of specific investment disputes, the universal recognition of 'inalienable' and 'indivisible' human rights, and the increasing civil society challenges of the 'input-' and 'output-legitimacy' of ISA?

HRL and democracies recognize guarantees of 'access to justice' and governmental duties of justifying limitations 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 'systemic interpretation' of IIL (e.g. in conformity with regional and UN human rights conventions accepted by host and home states of investors). 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. This path-dependent, utilitarian 'economic law approach' is influenced by the fact that, *inter alia*, most UN human rights conventions – like many national Constitutions (e.g. of Canada) - do not provide for protection of private property rights.

UN HRL differs from BITs, *inter alia*, by recognizing the priority of 'inalienable' human rights and related universal values over foreign investments and related private property and economic 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 that governmental restrictions of individual rights remain consistent with human rights and procedural and substantive 'principles of justice'. 'Justice as justification'[4] prompts participants in ISA to increasingly challenge – as illustrated in section III - investment regulations from the point of view of human and constitutional rights of the 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-discination), 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

[4] 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* E.U. Petersmann, *Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems in International Law* (2017).

reconcile protection of foreign investments with broader state and judicial duties to protect public interests, human and constitutional rights.[5]

## B. Respect for constitutional pluralism and its limits

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'[6], for instance by acknowledging HRL as applicable law or 'relevant interpretative context' in ISA (e.g. for promoting 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

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[5] 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 S II, it remains contested whether protection of foreign investments should be limited by 'proportionality balancing' 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 (eg by taking into account an investor's 'contributory fault' so as to avoid 'inequitable' outcomes).

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

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[7] 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' protecting all adversely affected interests.

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 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[8]. 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; they also 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),

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[7] Cf M. Ignatieff, *The Ordinary Virtues: Moral Order in a Divided World* (2017).
[8] Cf S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

most 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.

Nevertheless, 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 in terms of human rights recognizing citizens as democratic authors and addressees of legitimate law and governance institutions.[9] 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, and the increase in number of trade and investment disputes (e.g. about 'forced technology transfers') involving China. The denial of human and constitutional rights in China's 'communist party state' 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.[10]

## C. Can human rights law legitimate investment adjudication?

Legitimacy challenges of courts differ depending on their judicial mandates, subject matters, specific goals, design choices, legal sources, processes, audiences, institutional contexts and jurisprudence.[11]The previous sub-sections argued that judicial disregard for human rights weakens *normative input-legitimacy* of courts, 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 the ISA, the more citizens and

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[9] Cf Petersmann (n 4). The drafters of the UDHR reached consensus by respecting disagreements on the moral and political theories justifying HRL.

[10] 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.

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

democratic institutions challenge also the *output-legitimacy* of investment adjudication and the 'constitutional justice' of the basic structure of societies. The judicial powers of promoting both input- and output-legitimacy in economic adjudication may differ depending on the normative goals of economic courts (e.g. prospective justice in WTO adjudication *vs* restorative justice through investment law remedies), the design of judicial institutions (e.g. regime-embedded or regime-independent tribunals), their 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).

*Sociological legitimacy* derives from empirical analysis 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).[12] ISA dominated by business-interests is criticized by 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 required for assessing and improving the normative legitimacy of courts. If law and justice are defined not only in terms of rules, principles and institutions (e.g. justice as protection of human and constitutional rights), 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.

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[12] 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.

Calls for 'constitutionalizing' ISA aim at 'inclusive justice' so as to render 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. 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. perceived 'judicial biases' of investment arbitrators, '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.[13]

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 developed and less-developed countries, and some of their BITs (e.g. based on the 2012

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

Model BIT of the Southern African Development Community, Article 12.1(v) of India's 2015 Model BIT, the 2018 Model BIT of the Netherlands) and the 'Draft Pan-African Investment Code'[14], also include provisions referring to human rights and investor obligations. As discussed in more detail in Section III below, such explicit references to HRL in IIL - and the strengthening of the public law dimensions of ISA- are increasingly recognized and pursued in the ongoing multilateral negotiations on amendments of IIL and arbitration procedures, as provided for in EU investment agreements, ICSID procedures and in the United Nations Commission on International Trade Law (UNCITRAL) arbitration procedures. Yet, as long as such amendments of IIL and arbitration procedures do not protect 'judicial administration of justice' more comprehensively, investment arbitrators and judges should explore how their inherent judicial powers enable judges to respond to human rights challenges in ISA.

## D. How should investor-state arbitrators respond?

How should international judges respond to the fact that

- 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?

The following *section III* answers these questions by discussing the 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 – may limit 'investor biases' in investment law and adjudication by justifying ISA procedures and investment regulations more inclusively *vis-à-vis* citizens.

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[14] 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).

*Section IV* explains why 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' inside many democracies aimed at institutionalizing 'public reason' and social support for reconciling IEL with HRL and constitutional law.[15] 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 republican, 'ordo-liberal investment paradigms' underlying EU law and the UN Guiding Principles on Business and Human Rights.[16]

This contribution argues that systemic treaty interpretation and human rights require reconciling IEL with civil, political, economic, social and cultural rights so as to limit '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* IV and V conclude 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

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

[16] 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.

EU institutions, including external policy powers of the EU[17]. Hence, ISA arbitration in intra-community relations challenging EU member states has been found to be inconsistent with EU constitutional law[18]; 'respect for human rights is a condition of the lawfulness of Community acts' also in the external relations of the EU.[19] The jurisprudence of European courts confirms 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.

## III. 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.[20] 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.[21]

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

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[17] 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 Art 21:2 and 3 TEU.

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

[19] 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 al* (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (2014).

[20] Cf A.Vermeer-Künzli, *Diallo: Between Diplomatic Protection and Human Rights*, 4 J. Int'l Disp. Settlement 487 (2013).

[21] Cf V. Kosta /B. de Witte, Human Rights Norms in the Court of Justice of the European Union, in: Scheinin (n 15), 263 ff.

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). The following sub-sections give an overview of invocation of human rights as investor claims, as a defense of the host state, by third party interveners and by adjudicators *ex officio*; the conclusions from sections II to III are then summarized. Section IV discusses the limited impact of HRL on past ISA and the need for amending IIL in order to protect justice and human rights more comprehensively in ISA.

## A. Human Rights as Investor Claims

In past investment disputes, investors invoked human rights either in support of claims based on breaches of the applicable IIL (e.g. based on 'systemic interpretation' pursuant to Article 31:3(c) VCLT) or 'independently' (e.g. claiming that the host state has – in addition to breaching an investment agreement – also violated its human rights obligations, and that these human rights violations are covered by the broad jurisdiction and applicable law clauses underlying the ISDS case). 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.

In this case, 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.[22]

In *Chevron* v *Ecuador I,* an independent assertion of denial of justice as a principle of customary law was accepted at the jurisdictional stage.

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

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'.[23]

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 argumentation.[24] The tribunal discussed which human rights were applicable to Lebanon (i.e., Article 14 ICCPR in conjunction with the interpretation by the ICCPR Commission).[25] It finally refused jurisdiction due to a lack of evidence presented by the claimant.

In *Spyridon 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 favorable 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 favorable.[26]

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 *I. Micula et al* v *Romania*, the tribunal declared that it would be 'mindful' of Article 15 UDHR when determining the legality of deprivation of nationality.[27] Nevertheless, the tribunal's subsequent rejection of the ICJ reasoning in the *Nottebohm* case demonstrated a reserved approach towards international law.

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

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

[25] *Toto* v *Lebanon*, §§ 157-60.

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

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

In *Grand River Enterprises Six Nations, Ltd et al* v *United States of America*, 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 the 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.[28]

In *United Parcel Service of America Inc* v *Govt. of Canada*, the claimants invoked collective bargaining rights of Canadian postal workers.[29] 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's 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

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

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

Postal Workers and the Council of Canadians filed a petition for amicus submission in which they supported UPS' assessment of the core labor rights 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.[30] 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.[31]

The investment arbitrations following Russia's criminal proceedings against its successful oil company Yukos and its management for tax evasion[32], 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 SA et al* v *Russian Federation* and *Veteran Petroleum Ltd (Cyprus)* v *Russian Federation* 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 SA et al* v *Russian Federation,* 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 Ltd (Cyprus)* v *Russian Federation,* 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

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[30] *United Parcel Service of America Inc* v *Govt. 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).

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

[32] *Hulley Enterprises Ltd (Cyprus)* v *Russian Federation*, PCA Case No. 2005-03/AA226, Final Award (July 18, 2014); *Yukos Universal Ltd (Isle of Man)* v *Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, § 765 (July 18, 2014); *Quasar de Valors SICAV SA 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. 2005-05/AA228, Final Award, § 765 (July 18, 2014).

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).[33] No legal force was ascribed to ECtHR judgments for the arbitration proceedings; the human rights violations played only 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.[34] 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 Group NV* 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 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

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[33] *Veteran* v *Russian* (n 32) §§ 76, 765.

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

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.[35] 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.

In the *Mohamed Munshi* v *State of Mongolia* emergency measures application,[36] the investor brought human rights-related issues to the scrutiny of an arbitral forum. The British/Australian investor, conducting coal mining business activities in Mongolia, claimed to have been arrested there in 2015, denied departure, then tried about two years later and sentenced to 11 years imprisonment for defraud.[37] Since the arrest, the investor maintained that the Mongolian authorities froze his company's assets and suspended its operation licenses.[38] In the petition, he declared his intention to challenge these actions in an arbitration claim for their violation of 'fair and equitable' treatment, 'illegal expropriation, and denial of justice' under the Energy Charter Treaty (ECT).[39] But given the imprisonment circumstances, of which the investor complained in his urgent application, he could not yet initiate the proceedings.[40] Although the investor's situation directly impacted his human rights to life, health, security of person, access to legal counsel, and access to a fair trial, he did not invoke any specific human rights instruments or cite relevant legal provisions in that respect. Despite the acknowledgment of 'significant human rights issues', expressions of sympathy and concerns about the human rights conditions under which the investor was incarcerated,[41] the award did not approach the issue from a human rights perspective. The

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

[36] *Mohamed Munshi* v *State of Mongolia* (Award on emergency measures, 5 February 2018) Arbitration SCC Case No EA 2018/007 (Munshi).

[37] *Ibid* paras 13, 14, 16, 19. In the petition, the investor also contested the alleged crime of which he was convicted, and claimed that his arrest was 'orchestrated' by a Mongolian businessman and his family so as to 'force [Munshi] to pay large sums of money', *Ibid* paras 19, 24.

[38] *Ibid* para 20.

[39] *Ibid* para 20.

[40] *Ibid* para 25.

[41] *Munshi* (n 36) paras 47, 55.

application was examined under a four-criteria test for providing interim relief in international law, which the investor himself had highlighted.[42]

Being 'troubled' by the imprisonment conditions described by the investor and publicized by international media, the Emergency Arbitrator agreed that 'significant human hardship and serious risk to life and health' could constitute an 'irreparable harm', which constituted the first criterion in the test.[43]

Regarding necessity as the second criterion, he accepted that the investor's seeking confidential legal advice and freedom to initiate arbitration proceedings reflected a 'fundamental principle of the arbitral process', without which the 'basic procedural fairness of the future arbitration' would be 'seriously threaten[ed]'.[44] However, the Arbitrator disagreed that the investor's 'fundamental rights in the procedural running of the arbitration' went as far as entailing an interference with a sovereign state's judicial system by ordering his departure from Mongolia.[45] That was especially so since Mongolian courts had already convicted the investor of a crime and had given him a sentence.[46]

In the Emergency Arbitrator's viewpoint, a release order would thus be 'overturning' their decision in practice, in addition to exceeding what was 'strictly necessary' to permit the investor to submit his arbitration claim.[47] Concerning urgency as the third criterion, the Arbitrator found the investor's right of access to counsel to be urgent; for otherwise he would be denied 'access to justice'.[48] With proportionality as the fourth criterion, the arbitrator held that granting a release order would not be proportional to the 'considerable burden' to be placed on Mongolia, given that the issue involved interferences with sovereign state actions.[49] For the Arbitrator, filing for arbitration was not a 'sufficient reason' for such interferences.[50]

On the basis of all the aforementioned, the Arbitrator only ordered that the investor be allowed to have 'reasonable access' to his legal counsel with guaranteed confidentiality and non-interference.[51]

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42 *Ibid* paras 40-41.
43 *Ibid* para 44.
44 *Ibid* paras 46, 49.
45 *Ibid* para 47.
46 *Ibid* para 48.
47 *Munshi* (n 36) paras 47-48.
48 *Ibid* para 52.
49 *Ibid* para 56.
50 *Ibid* para 57.
51 *Ibid* para 63.1.

## B. Human Rights as a Defense of the Host State

In past ISDS cases, host states invoked human rights at the jurisdiction, merits or quantum phases of the arbitral proceedings in order to persuade ISDS tribunals that (1) they lacked jurisdiction (e.g. because the investment had been made in violation of applicable domestic HRL); (2) no investment protection standards had been violated (e.g. because the investor had no 'legitimate expectations' that his investment project and related government regulations could disregard HRL); (3) damages ought to be calculated in a certain manner (e.g. in case of complicity in human rights violations, or of non-discriminatory, non-compensable regulations protecting the human rights obligations of the host state in a severe financial crisis); and/or (4) the tribunal should accept jurisdiction for counterclaims by the state for damages due to human rights violations caused by the foreign investor in the conduct of its investment project.[52]

The latter situation arose 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.[53] 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.[54]

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

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[52] Cf F. Baetens, Invoking Human Rights: A Useful Line of Attack or a Defence Tool for States in Investor-State-Dispute Settlement? in: Scheinin (n 15), ch 8. Even though focusing on environmental law rather than HRL, in *Burlington Resources Inc* v *Republic of Ecuador* (ICSID Case No ARB/08/5), the Decision on Counterclaims of 7 February 2017 made history by ordering the investor to pay more than $39 million to Ecuador as compensation for the costs of restoring environmental damage caused by the complainant (a mining company).

[53] *Urbaser* v *Argentina* (n 3), §§ 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 (eg due to lack of a close 'connection' with the main claim), or lack of legal obligations of the investor concerned.

[54] *See, eg*, *Compañia del Desarrollo de Santa Elena SA* v *Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, a § 72 (Feb. 17, 2000).

'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);[55] 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.[56]

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 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.[57] 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.[58]

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'.[59] Nevertheless, it concluded that adopting measures in breach of investors' rights were not the only means

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[55] According to General Comment 15 the right to water is part of the right to an adequate standard of living (art 11), to adequte 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, UN Doc. E/C.12/2002/11 (Jan. 20, 2003).

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

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

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

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

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.[60]

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[61] or of Article XX of the General Agreement on Tariffs and Trade (GATT))[62] or on the 'exceptional circumstances', which should have influenced the 'legitimate expectations' of the investors.[63]

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

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

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

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

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

among creditor and debtor countries as among host states and foreign investors protected by BITs.

In *Philip Morris* v *Uruguay* the issue 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 property rights.[64] 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.[65]

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.

The pending case of *Glencore Finance (Bermuda) Ltd.* v *The Plurinational State of Bolivia*[66] revolved around the nationalization without compensation of two smelters and a mine formerly purchased by a Swiss-based investor, a matter that the Bolivian state contested.[67] Among its arguments, the investor maintained that the applicable law in this dispute was limited to the UK-Bolivia BIT and only to be 'supplemented by general principles of international law or customary international law', dismissing the applicability of the respondent state's other international obligations and domestic law.[68] In response, the Bolivian state argued that international HRL constituted 'part' of the applicable 'rules and principles of international law', as confirmed by Article 31(3)(c) of the VCLT.[69] The state simultaneously highlighted Article 41(1) of the VCLT to affirm the prevalence of a human rights obligation over a conflicting investment treaty that was subsequently concluded, since the former dealt with 'erga omnes obligations' and third parties' rights that

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

[65] *Philip Morris* v. *Uruguay,* Award (n 64) § 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.

[66] *Glencore Finance (Bermuda) Ltd* v *Plurinational State of Bolivia* (Bolivia's reply on preliminary objections and rejoinder on the merits, 24 October 2018) PCA Case No. 2016-39/AA641 (Glencore).

[67] *Ibid* paras 3-9.

[68] *Glencore* (n 66) para 361.

[69] *Ibid* para 370.

might not be modified by the latter.[70] It went on to contend that investment treaties could not be considered as *lex specialis vis-à-vis* treaties of human rights on grounds of their different subject matters.[71]

Another of the state's responses invoking human rights pertained to its implementation of the full protection and security obligation. The background here was the social tension transpiring at the mine between the independent *cooperativistas* and the formal mine workers, which escalated to a 'violent confrontation' and the *cooperativistas*' occupation of the mine site.[72] According to the investor, the state did not comply with its obligation since it did not 'mobilize adequate resources and diligently protect lives and the integrity of [the] investment.'[73] On its part, the state interpreted such claim as expecting the intervention with force against the *cooperativistas*, a course of action that it rejected in light of the restrictions resulting from its human rights obligations.[74] It insisted that 'all reasonable and available measures' of protection were adopted, and the full protection and security obligation did not justify 'the violation of human rights obligations'.[75] Expounding on the latter point, the state specifically identified the rights to life and physical integrity provided for under the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR) and footnoted a string of human rights cases and international documents in support.[76] It maintained that the 'negotiations and pacific means' it employed to defuse the conflict were what its human rights obligations 'precisely … required'.[77] As the dispute has not yet been decided by a final arbitral award, it remains to be seen how the Tribunal will examine those human rights-based arguments of the host state.

In the *David Aven et al* v *The Republic of Costa Rica* case[78], the respondent state relied upon its domestic laws as incorporating international environmental protection obligations; it referred to human rights only briefly. The dispute related to state measures stopping the development of the investors' tourism project for the sake of environmental protection of 'wetlands and ground forests' reportedly located at the same site.[79] Since the issue involved environmental damage that occurred at the site, the state focused

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[70] *Ibid* paras 372, 373.
[71] *Ibid* para 375.
[72] *Ibid* para 7-8, 775.
[73] *Glencore* (n 66) para 770 referring to the Claimant's Reply paras 445.
[74] *Ibid* paras 749, 771 referring to the Claimant's Reply in paras 430, 445.
[75] *Ibid* para 750.
[76] *Ibid* para 772 referring to Statement of Defence para 542. *See* also *Ibid* fns 1164 -1165.
[77] *Ibid* para 779.
[78] *David R. Aven et al* v *Republic of Costa Rica* (Award, 2018) Case No UNCT/15/3 (Aven).
[79] *Ibid* paras 6 - 8.

- in its counterclaim's arguments - upon investors' violations of primarily domestic laws and the customary international law obligation to 'respect the environment'.[80] In that vein, the state referred to the *Urbaser* v *Argentina* award, and identified corporate social responsibility as a standard 'including commitments to comply with *human rights* in the framework of [companies'] operations . . . ,' in support of its argument for the application of the international responsibility principle to investors.[81] No further elucidation of those rights and those linked to the environment, the corresponding duties, or other human rights instruments was manifest. In its earlier Rejoinder Memorial of October 2016, Costa Rica was more explanatory with its integration of environmental human rights into its references to international environmental law in connection with the domestic legal framework. It cited several international environmental agreements for wetlands protection, which it ratified and incorporated into its domestic law.[82] The state was unequivocal in its consideration of environmental rights to be '*part of the third category of Human Rights*', adding that its domestic law conferred a 'supra-constitutional protection' upon the treaties embracing those environmental rights.[83] Thus, attention would principally, and eventually, revert to the Costa Rican domestic law and its requirements for environmental protection. On the whole, the respondent state's references to human rights remained general without providing detailed explanations.

In the award, it is worth noting that the Tribunal did not address those human rights-related arguments. The Tribunal accepted jurisdiction over the state's counterclaim, but dismissed it without examining its merits.[84] It reasoned that state's enhancements of its factual and legal arguments in the counterclaim were too late to be admitted, thus concluding the state to have failed to satisfy the UNCITRAL Arbitration rules requirements.[85] When commenting on the state-cited *Urbaser* award in the context of establishing jurisdiction over the counterclaim, the Tribunal concentrated on just the international environmental law dimension to reaffirm the possibility of subjecting foreign investors to international law obligations in the environmental realm.[86] Without specifically naming human rights, the Tribunal seemed to implicitly admit a possibility for their consideration. Tackling the question of investors' obligations under international law in deciding upon the

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[80] *Ibid* paras 633, 699, 721.
[81] *Ibid* paras 697-99, 701 (emphasis added).
[82] *David R. Aven et al* v *Republic of Costa Rica* (Costa Rica's Rejoinder Memorial, 28 October 2016) Case No. UNCT/15/3 para 323.
[83] *Ibid* (emphasis added).
[84] *Aven* (n 78) paras 742, 745 - 47.
[85] *Ibid* 745- 47.
[86] *Ibid* para 737.

admissibility of the state's counterclaim, the Tribunal initially agreed with the *Urbaser* Tribunal's viewpoint that investors' immunity 'from becoming subjects of international law' could 'no longer be admitted'.[87] It refrained from qualifying or specifying this legal statement, which it found '*particularly convincing*' in the case of 'rights and obligations that are the concern of all States, as [ ] in the protection of the environment'.[88]

Citing the *Barcelona Traction* judgment, the Tribunal highlighted the ICJ depiction of such obligations as *erga omnes*.[89] Since these obligations derive, among others, from 'the principles and rules concerning the basic rights of the human person',[90] this reasoning could support arguments that general human rights obligations can impact on investors' legal responsibilities as well.

## C. 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 *amicus 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.[91] The applicable NAFTA and 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.[92]

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87 *Urbaser* v *Argentina* (n 3) para 1155 cited in *Ibid* para 738.
88 *Aven* (n 78) para 738 (emphasis added).
89 *Case Concerning The Barcelona Traction, Light and Power Company, Limited* (*Belgium* v *Spain*) Second Phase (Judgment) [1970] ICJ Reports 3, para 33 (Barcelona Traction) cited in *Aven* (n 80) para 738.
90 *Barcelona Traction* (n 89) para 34.
91 *Methanex Corpn* v *United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to intervene as 'amici curiae' (Jan. 15, 2001).
92 *Ibid* § 49.

*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.'[93]

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.[94]

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.[95] In *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.'[96]

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

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[93] *Suez et al* v *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.
[94] *See* (n 59), § 262.
[95] *UPS* v *Canada* (n 31).
[96] *Philip Morris* v *Uruguay*, n 64, § 30.

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'. [97]

A recent example for introducing human rights arguments in ISA cases through briefs submitted by non-disputing third parties is evident in a procedural order in the pending case of *Gabriel Resources Ltd and Gabriel Resources (Jersey) Ltd* v *Romania*.[98] The dispute was initiated under the Romania-Canada and UK-Romania BITs and pertained to the Romanian state's alleged measures and expropriation of a foreign investment aimed at developing an 'open-pit gold mine' with the use of cyanide.[99] Given the implications of the project, three non-governmental organizations -Alburnus Maior, Greenpeace Romania, and the Independent Center for the Development of Environmental Resources - filed a non-disputing parties' application to submit an amicus brief to the Tribunal.[100] This was allowed by virtue of Annex C - Part III(4) of the Romania-Canada BIT.[101] The brief included three sections, one of which was titled: 'The Claimant failed to comply with investor responsibilities under both international investment and *international human rights law*'.[102] One human rights issue related to implications for the cultural rights of the local residents living in the area, due to the project's potential endangerment of the area's 'cultural heritage' through the destruction of the 'industrial and archaeological heritage'.[103] Another human rights issue concerned health rights and environmental protection. Given the project's anticipated use of 'large quantities of cyanide' in mining activities, the applicants were apprehensive of a possible cyanide spill. They highlighted the 'serious environmental and health risks' for the communities living in the project's area. A third human rights-related argument involved the local communities' housing rights; the applicants criticized 'displacement of entire communities including their homes, public spaces, churches, cemeteries and forests' and destruction of 'other villages and small towns' in the vicinity.[104] In view of Romania's membership in the EU and the ECHR, fundamental rights and human rights guaranteed by EU law and the ECHR

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[97] *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).

[98] *Gabr' Resources Ltd and Gabriel Resources (Jersey) Ltd* v *Romania* (Procedural Order No. 19, 7 December 2018) ICSID Case No ARB/15/31 (Procedural order no 19).

[99] *Ibid* paras 1, 15, 18.

[100] *Ibid* paras 11, 16.

[101] *Ibid* para 24; Agreement between the Government of Romania and the Government of Canada for the promotion and reciprocal protection of investments (entered into force 23 Nov. 2011) annex C, Part III(4).

[102] Procedural Order No. 19 (n 98) para 66.

[103] *Ibid* para 18.

[104] *Ibid* para 22.

could be invoked as part of the applicable law or for purposes of its 'systemic interpretation'.

In the Procedural Order, the Tribunal granted the amici's submission, but only as far as it did not deal with legal issues or 'matters outside the [applicants'] competence', and excluded references to testimonies.[105] This limited acceptance of amicus submissions provoked unanswered questions regarding the basis for the Tribunal's claim that all legal matters of the dispute had been addressed by the claimants and the respondent state.

## D. 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.[106] 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.[107]

In *Saipem* v *Bangladesh*,[108] 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.[109] For example, in *Mondev* v *US*, when assessing the claim that the granting of a special governmental immunity for domestic

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[105] *Ibid* paras 60, 66.

[106] *See* n 57.

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

[108] *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)

[109] *See* n 57, § 122, with reference to ECtHR case law. Necessity and proportionality balancing are recognized as general principles in art 5:4 TEU (no action shall 'exceed what is necessary to achieve the objectives of the Treaties').

tort law was in breach of NAFTA law, the tribunal turned to ECtHR case law by stating that it could provide guidance by analogy.[110]

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.'[111] 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.

In the case of *Bear Creek* v *Peru*, for example, Philippe Sands issued a dissenting opinion that an ILO Convention on the protection of the rights of indigenous peoples was part of the applicable law and the investor's contribution to events which led to the indirect expropriation of its investment (i.e. social protests against its allegedly adverse environmental impact and disregard for indigenous rights) justified reduction of damages by 50 per cent.[112] Yet, the 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.

*Chevron Corporation and Texaco Petroleum Co.* v *Republic of Ecuador*[113] (concerning a dispute between the parties over 'crude oil pollution' in a former concession site) examined the claimants' contestation of an unfavourable Ecuadorian court decision and related allegations of 'procedural fraud and judicial misconduct' tainting the judicial process and resulting in denial of justice.[114] The claimants asserted that the domestic court judgment was 'ghostwritt[en]', and that the initial presiding judge of the contested domestic litigation had received a bribe. In its analysis of the investors' denial of justice claim and finding that international law's 'minimum standards for judicial

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

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

[112] *Bear Creek Mining Corpn.* v *Republic of Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, Partial Dissenting Opinion of Professor Philippe Sands QC, para 39. Using 'contributory fault' for reducing damages is based on the customary international law principle codified in Art 39 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts, which primarily deals with the determination of damages. Contributory fault must not be conflated with issues of illegality or corruption that concern the admissibility of a claim or a tribunal's jurisdiction, as opposed to its merits or quantum.

[113] *Chevron Corpn. and Texaco Petroleum Corpn.* v *Ecuador* (Second Partial Award on Track II, 30 August 2018) PCA Case No 2009-23 (Chevron v Ecuador).

[114] *Ibid* paras 4.71, 4.74, 5.211, 8.28.

conduct' had not been followed in the domestic judicial proceedings involving the investors, the Tribunal made use, *inter alia*, of relevant human rights provisions and instruments to which Ecuador was party, as referenced also in a decision of the Ecuadorian Constitutional Court.[115] It quoted verbatim Article 10 of the Universal Declaration of Human Rights as well as Article 14 of ICCPR, both granting the right to a 'fair and public hearing' before independent and impartial tribunals.[116] The Tribunal additionally reiterated the Constitutional Court's mention of Article 8 of the ACHR, which guarantees the 'right to a fair trial by a competent, independent and impartial tribunal'. Noting that the violation of the right to fair trial by 'judicial corruption' was disallowed under the UN Convention against Corruption ratified by Ecuador, it further cited an arbitral award that held bribery to be in conflict with 'international public policy'.[117]

In light of its view that 'judicial bribery' was 'one of the more serious cases of corruption', the Tribunal ultimately held the contested domestic judgments to be contravening 'international public policy' and ordered their non-enforcement.[118] Part III of the award (titled 'Principal Legal and Other Texts') cited, though only once, the text of Article 2 of the ICCPR that prescribes states' duties under the Covenant, including those ensuring a domestic implementation of the Covenant's rights, including in cases of violation.[119] This employment of the international and regional human rights provisions in the Tribunal's analysis did not exceed the referencing of human rights instruments, already present in the Ecuadorian Constitutional Court decision. The Tribunal did not engage in a deeper analysis of the relevant human rights provisions on state's conduct, thereby giving the impression that HRL was simply cited as a supplementary source for the Tribunal's conclusions on state obligations. The Tribunal proceeded from highlighting access to a fair trial as a right under human rights instruments to focusing on corruption and its violation of the international public policy. The focus on the international standards of judicial conduct - rather than on HRL per se -confirms that arbitrators often refer to HRL in support of procedural rights and due process rather than more controversial, substantive human rights.

The previously reviewed *Aven* award offered another instance of a Tribunal introducing human rights citations, on its own initiative. That was particularly in response to the parties' arguments on exhaustion of local remedies and denial of justice, yet without being prompted by human

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[115] *Ibid* paras 8.56-8.58.
[116] *Chevron* v *Ecuador* (n 113) para 8.57.
[117] *Ibid* para 9.16.
[118] *Ibid*.
[119] *Ibid* para 3.31.

rights references to such principles in the parties' claims or rebuttals. For its analysis of whether the exhaustion of local remedies was a mandated treaty requirement, the Tribunal evaluated the submitted arguments in view of 'certain general principles under international law'. It stated that 'certain human rights references' explicitly mentioned local remedies' exhaustion as a condition for claims' admissibility.[120] As examples, the Tribunal *footnoted* articles 35 and 46 of the ECHR and the ACHR respectively.[121] Furthermore, in connecting local remedies to denial of justice, another footnote by the Tribunal briefly contrasted human rights conventions' application of the right to due process with that under the customary minimum standard of treatment, with the former being considered as 'more generous' than the latter.[122] But the Tribunal did not thoroughly engage in its reasoning with the human rights instruments or related jurisprudence. The reason for alluding to HRL principles remained unclear.

## E. Conclusions from sections I to III

*Section* II explained why HRL - as part of the applicable law in ISA or relevant context for interpreting 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.'[123]

It is doubtful whether such unilateral 'constitutional interpretations' by the CJEU will effectively constrain ISA in CETA member states (like Canada) in view of the few references to human and constitutional rights in CETA law; as states cannot invoke their national laws to justify breaches of international law, references to domestic human rights guarantees (e.g. in *Chevron*

[120] *Ibid* para 353.
[121] *Ibid* para 353 fn 282.
[122] *Ibid* para 353 fn 283.
[123] n 13.

v *Ecuador*) remain rare. Yet, HRL has 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 III, the increasing calls for protecting sustainable development and for enhancing transparency, inclusive participation, rule of law, democratic legitimacy and 'corporate social responsibilities' in investment regulation have enhanced also the willingness of arbitrators to use the potential 'entry points' in the applicable law for considering human rights arguments, notably.

- jurisdiction-, applicable law- and 'human rights-clauses' in investment treaties;
- definitions of protected 'investments' in terms of their legal conformity with local and international law;
- the customary rules of treaty interpretation;
- BIT references to public interests;
- investment law protection standards (like 'full protection and security', 'fair and equitable treatment', non-discrimination); and
- rules on awarding damages and quantification of compensation.

As neither the foreign investor nor the government of the host state (notably in authoritarian and non-democratic regimes) may have self-interests in invoking HRL as constitutional constraints, HRL is often invoked only through third party interventions or by arbitrators *ex officio* (e.g., in order to promote 'access to justice' for all interested and affected parties). The 'structural biases' of IIL (e.g. in case of 'negative discrimination' against domestic investors) and of ISDS arbitration (e.g. in terms of procedural and substantive legal privileges for powerful foreign investors) often reflect 'constitutional failures' and inadequate protection of human rights in host states.

The less the historical justification of BITs in terms of exporting 'principles of justice' compensating for inadequate legal and judicial protection of foreign investors inside less-developed, capital-importing host states continue to exist (e.g., in free trade and investment agreements between constitutional democracies), the more important becomes promotion of mutual coherence of fragmented HRL and IIL regimes through non-discriminatory, constitutional protection of domestic and foreign investors in domestic courts, with due respect for the legitimate reality of 'constitutional pluralism' and the diversity of national and international legal systems and human rights regimes. This diversity of national and international HRL (e.g., in

countries like the US opposing regional and many UN human rights treaties) may also explain the reluctance of IS arbitrators to develop more systematic approaches to interpreting IIL in conformity with HRL. Another reason for this contingency of human rights arguments in ISA may be that the *indivisibility* of human rights seems to exclude *balancing* among economic and non-economic human rights on the basis of *hierarchy* among different human rights without justifying *proportionality balancing* more specifically in terms of the applicable investment or trade rules.[124]

If neither the investor nor the host state refers to human rights, arbitrators may also prioritize their dispute settlement mandate by avoiding human rights arguments (e.g. on indigenous peoples' rights, the human right to water) that risk complicating voluntary compliance with the arbitral award and may trigger annulment proceedings criticizing judicial human right arguments. Ultimately, both ISDS and WTO dispute settlement bodies are economic courts with limited mandates. Even though economic courts increasingly recognize duties to justify law and adjudication vis-à-vis all affected persons and to reconcile ('balance') economic with non-economic regulations, the emerging 'human rights constitutionalism' remains a highly incomplete project in most legal jurisdictions. Depending on whether arbitrators perceive IIL and ISDS primarily from commercial and private law perspectives, a public law perspective (e.g., recognizing HRL as integral part of the applicable domestic law of the host state), or from an international public law perspective (e.g. in ICSID arbitration based on bilateral and multilateral international treaties), their judicial references to, interpretations and application of procedural, civil, political, economic, social and cultural human rights and 'fundamental rights' – e.g, as due process rights, part of the applicable substantive law, or in the context of 'systemic integration'[125] - often lack coherent methodologies.[126] Similar legal, procedural and systematic problems exist in the controversial relations between HRL and international trade law and adjudication,[127] in the limited number of investment disputes before the International Court of Justice initiated at the request of

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[124] Cf Petersmann (n 12).

[125] Cf P. Merkouris, *Article 31(3)(c) and the Principle of Systemic Integration : Normative Shadows in Plato's Cave* (Leiden : Brill 2015).

[126] Cf V. Kube/E.U. Petersmann, Human Rights Law in International Investment Arbitration, in: Fontanelli/Gattini/Tanzi (eds), *General Principles of Law and International Investment Arbitration* (The Hague: Brill 2018), 221-268. As every UN member state has accepted UN human rights conventions building on the 1948 UN Declaration of Human Rights (UDHR), the human rights guarantees listed in the UDHR and recognized also in many national Constitutions are increasingly acknowledged as general principles of international law.

[127] Cf E.U. Petersmann, International Trade Law, Human Rights and the Customary International Law Rules on Treaty Interpretation, in: Sarah Joseph et al (eds), *The World Trade Organization and Human Rights* (Cheltenham: Elgar 2009), 69-90.

home states exercising diplomatic protection for foreign investments by their nationals[128], and in commercial contract law and related commercial arbitration if UN 'corporate social responsibility principles' are incorporated into long-term investment contracts, 'supply chain contracts', merger and acquisition agreements, joint ventures, licensing and franchise agreements.[129]

'Systemic interpretation' of IIL in conformity with human rights obligations of the home and host states reduces the risks of 'legal fragmentation' and discrimination (e.g. of labor rights) by promoting a more comprehensive framework for evaluating 'social justice' reconciling all affected, private and public interests. HRL can, thereby, reinforce 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 of adversely affected, indigenous people to information, consultation, due process and consent in case of investment concessions in tropical forests, reduction of the amount of compensation in case of 'contributory fault' of the foreign investor to human rights violations).

Yet, administration of justice in ISA must take into account also social realities (like scarce resources and social disorder in bankrupt host states) and legal disagreements (e.g. on 'corporate responsibilities' to *protect* human rights, lack of protection of property rights in Canada's federal Constitution). ISA and HRL can act as legal constraints on only partial rule-compliance in many (e.g. authoritarian or corrupt) 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'[130]: 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

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[128] Cf Vermeer-Künzli (n 20).

[129] Cf J. G. Ruggie/J.F. Sherman, III, Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice, 6(3) *Journal of Int'l Dispute Settlement* (2015), at 455-61.

[130] This draft agreement was elaborated and published, on 16 July 2019, by the UN's 'Open-Ended Intergovernmental Working Group on Business & Human Rights'. The draft treaty draws heavily on the United Nations Guiding Principles on Business and Human Rights attempting to give legal teeth to the non-binding obligations they impose. For example, it mandates that state parties to the Draft Treaty hold multinational corporations operating in their jurisdiction criminally, administratively or under civil law liable for violations of human rights undertaken in the context of business activities of transnational character.

functions' of judicial administration of justice – rather than by pronouncing on contested human rights claims and on diverse national systems of HRL.[131] Judicial weighing of *domestic* human rights concerns with *foreign investment protection* may require focusing not only on democratic regulation in the host state and respect for BITs and foreign property rights, but also on other rights and values protected by HRL and by judicial administration of justice.

*Section III*'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

[131] Cf. E.U. Petersmann, Human Rights, Constitutional Justice and International Economic Adjudication: Legal Methodology Problems, in: Scheinin (n 15). 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 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 (e.g. inside monetary and economic unions like the EU). 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.

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 corresponding *human rights* (e.g. to protection of health).

As IIL protects investor rights more specifically, protection of property rights in HRL plays only a marginal role in ISA.[132] Acceptance and impact of human rights arguments made by third parties remain subject to the discretion of the arbitrators. As the arbitrators and legal contexts vary from case to case (e.g. depending on the applicable national laws, transnational concession contracts and international legal obligations of the host state concerned), it may be too much to expect that ISA awards could develop a consistent, transparent methodology for responding to human rights claims.

Even if, as in the *Urbaser* arbitration, the foreign investors had committed themselves to comply with the human rights principles in the UN Global Compact and in the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, 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, labour, health, environmental, social and emergency regulations remain controversial.[133]

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[132] 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.

[133] E g, in case of investment disputes over 'necessity defenses' raised by an over-indebted host State (like Argentina) to justify expropriation of foreign investor rights without full compensation so as to protect access to water for domestic citizens. For a criticism of lack of coherent methodologies concerning protection of intellectual property rights in recent ISDS awards (like P. Morris v Uruguay and E. Lilly v Canada) *see*: D.J. Gervais, Intellectual Property: A Beacon for Reform of ISDS, in: *Michigan Journal of International Law* 40 (2019), forthcoming.

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

This concluding *section IV* briefly examines the following two questions arising from the preceding analyses: Are the universal recognition of human rights by all UN member states – and the continuing legislative reforms of IIL and ISA procedures – likely to increase the impact of HRL on IIL and ISA? Or do the geopolitical rivalries between authoritarian states (like China and Russia) and the USA, the preferences for 'soft-law' instruments (e.g. conciliation) and 'ordinary virtues' (e.g. Confucian values) in many Asian countries, and the increasing invocation of 'national security' exceptions (e.g. for US restrictions of Chinese technology companies) risk increasing the 'politicization' of IIL and pragmatic avoidance of human rights discourse in ISA (e.g. in commercial arbitration governing most infrastructure investments in the context of China's One Belt, One Road projects)?

### A. The impact of HRL on IIL is likely to remain limited

The new regulatory challenges of international economic integration – like 'prudential regulations' of tax and financial systems, regulatory responses to climate change (e.g. introduction of carbon taxes, carbon emission trading systems, border carbon adjustments, limitation of fossil fuel subsidies), restrictions of digital trade and cross-border electronic commerce (e.g. on grounds of cyber-security, data protection and data localization requirements), the 'new economic nationalism' (e.g. in the USA, Brexit), 'hegemonic bilateralism' (e.g. by China and President Trump), unilateral trade restrictions and economic sanctions (e.g. by the USA) - are likely to entail increasing trade and investment disputes with human rights dimensions. The ongoing negotiations on changing ISA procedures (e.g. ICSID-, UNCITRAL- and EU-arbitration procedures) and substantive BIT- and IIL rules aim at strengthening the 'public law dimensions' (e.g. governmental rights and duties to regulation and protection of public interests) vis-à-vis the private law dimensions of transnational arbitration.

In relations among democracies, the path-dependent investor privileges under BITs are likely to be progressively constitutionalized, similar to the replacement of power-oriented GATT/WTO dispute settlement procedures among European states by legal guarantees of 'access to justice' in domestic and European courts. Interpretation, application and judicial protection of human rights by economic and other non-human-rights-courts may, thereby, help to transform otherwise non-justiciable human rights (e.g. certain health

rights, indigenous peoples' rights) into justiciable rights and protect related PGs (like restrictions of toxic tobacco products and of related abuses of intellectual property rights by tobacco companies) more effectively than it may be possible through HRL.[134] This can also contribute to 'civilizing' and 'constitutionalizing' IEL agreements among states (e.g. BITs) - and their path-dependent 'structural biases' (e.g. favoring foreign investors and powerful corporate interests) and neo-liberal neglect for 'market failures' as well as 'governance failures' - by protecting equal fundamental rights and remedies of all affected citizens, thereby reducing the 'fragmentation' of the different layers of international public law, international private law, 'global administrative law', multilevel economic regulation and multilevel constitutionalism in European and international economic law.[135]

Yet, China's network of more than 60 bilateral 'Silk Road Agreements' promoting transnational, territorial and maritime infrastructures tend to be governed by power-oriented 'soft law instruments' (e.g. memoranda of understandings rather than formal treaties), state-owned enterprises' (SOEs) and commercial law arbitration (e.g. by arbitration centers in China). The geopolitical rivalries between China, Russia and the USA lead to ever more frequent invocations of (inter)national 'security exceptions' (e.g. targeting Chinese technology companies, interrupting global value chains) that risk undermining transnational rule of law, third-party adjudication, and the influence of HRL (e.g. inside authoritarian states like China and Russia).

Investment arbitrators will continue 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 economic choices' by considering not only their economic utility maximization (e.g.

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[134] Scheinin (n 15), ch 14.

[135] On these five path-dependent 'levels of multilevel economic regulation' and the controversies over coherent 'principles of justice' justifying international economic law as a democratically legitimate system of multilevel governance of transnational public goods empowering and protecting all citizens *see*: E.U.Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford: Hart, 2012), chs I-III. On European 'ordo-liberalism' emphasizing that the liberal ideal of voluntary, welfare-increasing exchanges between citizens with equal rights in 'economic markets' (e.g. aimed at maximizing economic efficiency, consumer welfare and private freedom of choice through EU common market freedoms, competition and social law) as well as in 'political markets' (e.g. aimed at protecting individual and democratic self-governance through 'social contracts' and constitutional, parliamentary, deliberative and participatory 'democratic principles' and institutions as protected in EU law) requires coherent, constitutional foundations of the interdependent social, economic, political and legal 'orders' *see idem*, at 378ff. The rights-based 'republican conceptions' of IEL in Europe remain rare outside Europe, where IEL is dominated by Anglo-Saxon utilitarianism or authoritarian conceptions of IEL (e g in many Asian countries like China).

in claiming 'regulatory takings' and compensation due), but also whether the 'framing' of arguments should take into account insights from cognitive psychology; for example, 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' of investor rights and other competing rights), and the relevant factual contexts (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'.[136]

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.[137] As IIL regulates property and investor rights more specifically 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 1,020 known ISA cases) is likely to continue in view of the diversity of national systems of HRL and of judicial traditions in the 193 UN member states.

## B. Can HRL contribute to 'economic constitutionalism' protecting justice and rule of law?

From the 1944 Bretton Woods-Agreements up to the British 'Brexit referendum' and the election of US President Trump in 2016, the multilateral

[136] *Suez* (n 59), § 262.

[137] 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 n 3, § 1210).

monetary, trade and investment systems were dominated by hegemonic US leadership and utilitarian Anglo-Saxon neo-liberalism. The rights-based design of BITs since 1959 was, by contrast, shaped more by the ordo-liberal, republican legal traditions of European capital-exporting countries (e.g. the BITs concluded by Germany and Switzerland since 1959) than by Anglo-Saxon utilitarianism.[138]

The continuing review and revision of national investment laws and ISA procedures reflects increasing social and democratic discontent with utilitarian, 'embedded neo-liberalism' underlying post-war IEL, for example in order to better reconcile legal protection of *foreign* investments with governmental 'rights to regulate' and duties to protect public interests and related human rights.

In IIL and arbitration, transnational investments and related disputes tend to be governed by (1) the national laws of both the host country and the investor's home country; (2) contracts between the investor and the host country or among investors and their associates; and (3) applicable international treaties, customary law rules and general principles of law.[139]

The more the applicable national and international legal systems include guarantees of human rights, private property rights and related judicial remedies, the more frequently complainants, defendants, judges or third party participants in investment disputes invoke human rights. The historical influence of commercial arbitration on the design, composition and development of 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 ongoing EU-, ICSID- and UNCITRAL-initiatives for strengthening the public law dimensions in ISA procedures. 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 illustrate - and confirm - the 'constitutional significance' of HRL for protecting individual access to justice and judicial protection of economic and non-economic rights in transnational economic cooperation.[140]

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[138] Cf N. Tzouvala, The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale, in *European Yearbook of International Economic Law* (Heidelberg: Springer 2018), 37-54.

[139] Cf J.W. Salacuse, *The Three Laws of International Investment. National, Contractual and International Frameworks for Foreign Capital* (OUP 2013).

[140] On 'economic constitutionalism' in Europe and the EU's sectoral (e.g. micro-economic, macro-economic and social) 'constitutions' *see* : K. Tuori, *European Constitutionalism*

Similar to the increasing democratic challenges of one-sided legal protection of foreign investor rights in IIL, also the EU's 'macro-economic monetary constitution' and one-sided protection of foreign creditor rights in over-indebted EU member states (like Greece) are increasingly challenged by citizens and courts of justice inside the EU, for instance if citizens are adversely affected by the 'financial conditionality' and austerity measures imposed by creditor states.[141]

This 'constitutional dimension' of ISA was illustrated by the *Achmea* judgment of the CJEU[142], 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'.[143] In democracies, the ongoing negotiations on reforming ICSID-, UNCITRAL- and other ISA procedures - and on strengthening 'corporate social responsibilities' –are driven by social and democratic claims that justice and HRL – even if they may not 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 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 underlying HRL are increasingly challenged by Anglo-Saxon, neo-liberal interest group politics, nationalist restrictions on immigration and on religious or cultural minorities and by health and environmental pandemics.

President Trump's hegemonic mercantilism (e.g. invoking national security exceptions for justifying trade and investment restrictions adversely affecting many countries) and China's totalitarian state-capitalism (e.g. denying internet-freedoms and many human rights) threaten mutually beneficial trade, transnational rule of law and human rights (e.g. of indigenous

(Cambridge: CUP 2015), 127 ff; 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.

[141] Cf the case-studies in Parts II and III of H.C.H. Hofmann/L. Pantazatou /G.Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Cheltenham: Elgar 2019).

[142] n 18.

[143] 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.

peoples adversely affected by foreign investments and by their environmental pollution, labor rights neglected by foreign investors). The return to intergovernmental power politics (e.g. disrupting the WTO legal and dispute settlement systems) risks adversely affecting HRL, IIL, and the influence of human rights and rule of law principles on ISA.

The reluctance of investment arbitrators to engage in human rights discourse often reflects their limited judicial mandates and the diversity of the applicable national and transnational legal rules rather than judicial disregard for legitimate public interests. But reliance on investors and host states to present the relevant human rights issues to investment arbitrators may not be sufficient, for instance if corrupt governments collude with foreign investors in circumventing human rights obligations or have political self-interests in avoiding judicial accountability.[144] As investor rights need to be reconciled with all other human and constitutional rights of citizens, the civil society opposition against investor-state arbitration privileges and related collusion among foreign investors and host state rulers is constitutionally justified.[145]

Remedying the current situation that – apart from references to procedural rights and property rights – references in investment arbitration to civil, political, economic, social and cultural human rights and collective 'third generation rights' remain rare and of marginal legal importance, would require investment treaty clarifications (like insertion of 'human rights

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[144] This ubiquity of conflicts between general and special, public and private interests of self-interested people (e g as 'rational utility maximizers') – in economic markets as well as in 'political markets' (democracy) – is the main reason why both 'market failures' (like harmful abuses of market power, 'external effects', of information asymmetries and other social injustices) and 'governance failures' (e g in providing public goods) require constitutional restraints on discretionary economic regulation (e g 'concession contracts' between foreign investors and authoritarian rulers) and stronger legal, democratic and judicial accountability mechanisms in multilevel economic regulation; cf Petersmann (n 140). On global (e.g. financial) markets as 'complex systems' where constitutional and competition rules protecting undistorted competition (as spontaneous information, coordination and sanctioning mechanism promoting 'decentralized planning' by millions of economic actors making fuller use of knowledge and of other, decentralized resources) are often superior to discretionary, government regulation in limiting the knowledge problems, incentive problems and reputation problems of private market actors *see*: V. Vanberg, Consumer welfare, total welfare and economic freedom – on the normative foundations of competition policy, in: J.Drexl and others (eds), *Competition Policy and the Economic Approach. Foundations and Limitations* (Cheltenham: Elgar 2011), 44-71.

[145] The conflicting economic paradigms of hegemonic US neo-liberalism, Chinese state-capitalism and ordo-liberal WTO rules (e.g. for compulsory third-party adjudication of trade disputes) resulting in the ongoing WTO governance crises and 'trade wars' are increasingly also affecting investment regulation (like Chinese conferral of legal and economic privileges on state-owned enterprises, compulsory joint ventures and licensing of intellectual property rights, distortion of competition in China's 'Belt and Road' investment governance, US criminal law sanctions against Chinese companies); cf Petersmann (n 16).

clauses' into BITs) and judicial reforms (as promoted by the EU and pursued also in ICSID and UNITRAL negotiations on reforming ISA procedures).

## V. CONCLUSION

HRL, IIL and ISA increasingly interact and, thereby, reduce problems of 'structural biases' (e.g. resulting from 'legal fragmentation' and 'forum shopping' driven by vested interests); they enhance the legitimacy of law and adjudication (e.g. in terms of access to justice, due process rights, legitimacy of rule-making, justification of adjudication vis-à-vis citizens in terms of their human rights). The path-dependent prioritization of protection of foreign investments in IIL and ISA procedures prompts ever more countries to review and change their national investment laws, BITs and multilateral regulation of ISA procedures. Also in ISA practices, foreign investors, host states, third party participants and arbitrators increasingly invoke HRL and 'principles of justice' for reconciling the narrow focus of IIL on protecting foreign investments with the legitimate, private and public interest of other actors adversely affected by foreign investments (e.g. local workers, consumers, indigenous people) or by governmental interferences with human rights (e.g. of foreign investors, price increases for water and health services for domestic citizens).

Section II explained why HRL and related procedural and substantive 'principles of justice' – notably if they are part of the applicable law in ISA and relevant context for 'systemic interpretation'of IIL (e.g. BITs) – can assist all parties in ISA to reconcile protection of foreign investments more comprehensively with procedural and substantive rights of other, private and public actors adversely affected by foreign investments or by the narrow focus of ISA procedures on protection of foreign investors.

Section III gave a detailed overview of how arbitrators responded in ISA practices to such invocations of human rights. Section IV concluded that – unless national investment laws and ISA procedures regulate more specifically the reconciliation of privileged procedural and substantive rights of foreign investors with other private rights (e.g. of workers, consumers, indigenous peoples), public 'rights to regulate' and 'corporate responsibilities' (e.g. to respect HRL and protect the environment) – the impact of HRL on the outcome of ISA based on existing BITs and ISA procedures risks remaining limited.

Economic law and adjudication can complement HRL by offering legal and judicial remedies and protecting PGs (including human rights) beyond

the still limited scope of HRL and limited jurisdiction of human rights courts. Inside constitutional democracies (like in India, Europe), regulation of investment law, property rights of investors, and judicial administration of justice in ISA have become restrained by constitutional law guarantees of human and constitutional rights, notably in EU member states (e.g. in view of their multilevel common market freedoms, non-discrimination rules, fundamental rights and judicial remedies) and in the 47 member countries of the ECHR with its multilevel guarantees of human and property rights and remedies also for companies. IIL treaties and ISDS practices offer many possibilities for interpreting IIL 'in conformity with the principles of justice and international law', including 'human rights and fundamental freedoms for all', as required by the customary rules of treaty interpretation.[146] Reconciling the diverse 'principles of justice' underlying the commercial and private law dimensions of IIL (e.g. in UNCITRAL arbitration and its enforcement through national courts), its transnational law dimensions (e.g. in concession contracts of foreign investors and host states), and the public international law dimensions of IIL and related ISA remains a challenging task. The UN Conference on Trade and Development and its 'World Investment Network' have recommended numerous reforms of ISA procedures and of substantive IIL (e.g. BITs).[147]

If international economic law is interpreted as a *law of citizens and peoples* rather than only of states, economic adjudication must be embedded – as inside constitutional democracies and European law - into republican and cosmopolitan constitutionalism protecting due process of law and equal rights not only among states, but also among citizens interested in transnational rule of law, judicial remedies and protection of social welfare for all in mutually beneficial, transnational cooperation. Without recognition of citizens as 'democratic principals' of multilevel governance agents and judicial protection of human rights and related 'constitutional law principles' – either explicitly or implicitly (e.g. by legislative and judicial balancing of economic and non-economic treaty provisions) - the democratic legitimacy of IIL and support of investment arbitration by citizens and local communities risk being further eroded.

Justifying international trade and investment regulation and adjudication in terms of protecting human rights helps citizens to understand that the constitutional principles justifying voluntarily agreed trade and investment transactions in the economy must remain consistent with 'social contracts' and 'constitutional contracting' among citizens in the polity in order

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[146] The quoted texts are from the Preamble and Article 31 VCLT and are widely recognized as customary law principles of treaty interpretation: cf. Petersmann (n 127).

[147] *See*, e g, UNCTAD, *World Investment Report 2019*.

to protect rule of law and civil society support for economic law. Yet, the increasing challenges - by civil societies and governments - of the post-war 'embedded neo-liberalism' underlying international trade and investment law, the increasing geopolitical rivalries, and the hegemonic 'weaponisation' of trade, investment and internet restrictions (e.g. by China, Russia and the USA) suggest that the impact of HRL on ISA will remain contested and limited.