Human rights and IP in investor to state dispute settlement

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1. Introduction

Investor to state dispute settlement (ISDS) has become the subject of public protests and calls for revision. The system is experiencing a legitimacy – or even an existential – crisis.[1] Bolivia, Ecuador, South Africa and Venezuela have unilaterally withdrawn from some of their investment treaties. India, Indonesia and South Africa have stated that they will no longer renew or conclude new investment treaties.[2] Bolivia, Ecuador and Venezuela also withdrew from the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).[3] In 2017, less international investment agreements (IIAs) were concluded than old ones terminated.[4]

The core of the critique has been that, when protecting the economic interests of foreign investors, IIAs and ISDS in particular interfere with states' sovereign capacity to legislate and take other necessary measures in the public interest in key sectors such as water services, environment and public health. Increasingly, such legislative renewals and other governmental measures could be defended by recourse to basic human rights as protected in domestic constitutions and international instruments. Foreign investors might also invoke human rights in their own interest to strengthen their claims based on IIAs. Finally, investors could jeopardize the realization of human rights in the host country. This raises the question about their own liability, or effects of their wrongdoing on the protection they receive under investment law. All these scenarios have emerged in ISDS practices. Hence, no wonder the position of human rights in ISDS has become a subject of controversy and prolific scholarly debate.[5]

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[1] See e.g. Schill SW, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Vanderbilt Journal of International Law 573, 575 and Burke-White WW and Staden A Von, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 Yale Journal of International Law 283, 285.

[2] See e.g. Baker McKenzie, Withdrawal from Investment Treaties: An Omen for Waning Investor Protection in AP?, 12.5.2017, https://www.bakermckenzie.com/en/insight/publications/2017/05/withdrawal-from-investment-treaties (last visited 21 April 2018).

[3] Rivera B., Carlos J. and Viscarra Azuga M., Life after ICSID: 10th anniversary of Bolivia's withdrawal from ICSID, Kluwer Arbitration Blog, 12.8.2017 http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivias-withdrawal-icsid/ (last visited 9 December 2018). The ICSID rules are now being amended. See about the reform https://icsid.worldbank.org/en/amendments (last visited 21 April 2018).

[4] UNCTAD World Investment Report 2018, Investment and New Industrial Policies (United Nations 2018), Key Messages and Overview, xi. On the other hand, this may have to do with the prior proliferation and saturation of IIAs internationally.

[5] Some recent contributions include e.g. Steininger S, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 Leiden Journal of International Law 33; Balcerzak F, Investor – State Arbitration and Human Rights (Brill 2017); Kube V and Petersmann EU, 'Human Rights Law in International Investment Arbitration' (2016) 11 Asian Journal of WTO & International Health Law & Policy 65; Davitti D, 'On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence' (2012) 12 Human Rights Law Review 421; Simma B, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International and Comparative Law Quarterly 573 and Dupuy PM and others, Human Rights in International Investment Law and Arbitration (OUP 2009).

As the few existing intellectual property (IP) related investment arbitration awards demonstrate, human rights issues such as protection of public health might appear in such contexts, making IP-related investment disputes prone to human rights argumentation. Many of the exclusions from patent eligible subject matter and exceptions to copyright, in particular, have to do with human rights.[6] States might thus defend their legislation or other measures affecting IP rights with arguments related to human rights and investors might seek to obtain stronger protection for their IP-based investments through analogies from human rights treaties, especially through the protection of property ownership as protected in the European Convention of Human rights (ECHR) and the case law of the European Court of Human rights (ECtHR). Under European Union (EU) law, the Court of Justice of the European Union (CJEU) has resorted to fundamental rights particularly actively in the area of copyright, when constructing exceptions to copyright and defining the remedies copyright owners have against copyright infringers and non-infringing intermediaries.[7] These multiple connections between IP and human rights also broaden their overlaps in ISDS.

This chapter focuses on the overlap of human rights, IP and IIAs. It will evaluate the impact human rights have had on the relevant ISDS practices. The main emphasis will be on the reasons for the increasing overlaps and the ways in which investment tribunals should approach them.

The chapter rejects human rights proportionality as the proposed solution to increase the legitimacy of investment treaty arbitration. Through proportionality, courts seek to define an appropriate relationship between different conflicting interests at hand, each entitled to legal protection. Human rights proportionality ultimately boils down to 'weighing' or 'balancing' the right(s) against (an)other right(s) or public policies and their background values and interests.[8] Human rights proportionality empowers the decision-maker but provides very little guidance on how to finally decide. Who the decision-maker is, matters greatly for the outcomes. In the hands of investment arbitrators, human rights proportionality would not change the inherent biases of the final outcomes. It would rather endow the outcomes with a human rights gloss and enable more pervasive review of host state measures. Instead of suggesting a broad integration of human rights law under the investment tribunals' operational sources of law, the chapter posits that a more legitimate way forward – pending more profound reform of the whole investment arbitration system – would be to decrease the overlaps through IIA design and to develop deference as an approach in ISDS, especially through the doctrine of margin of appreciation. The suggested measures reflect the author's understanding that the problem is not too little human rights in ISDS but too extensively applied and

[6] See for example CJEU, C-34/10, *Oliver Brüstle v Greenpeace eV, judgment of the Court* (Grand Chamber) of 18 October 2011, ECLI:EU:C:2011:669 (exclusion from patentability of uses of human embryos for industrial or commercial purposes) and CJEU, C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, judgment of the Court (Grand Chamber), 3 September 2014, ECLI:EU:C:2014:2132 (parody as an exception to copyright).

[7] See Mylly T (2019), 'Regulating with rights proportionality? Copyright, fundamental rights and internet in the case law of the Court of Justice of the European Union', in Pollicino O, Riccio GM and Bassini M (eds.) Copyright versus (other) Fundamental Rights in the Digital Age. A Comparative Analysis in search of a common constitutional ground (Edward Elgar Publishing 2019, forthcoming) and Mylly T (2019), 'Proportionality in the CJEU's Internet Copyright Case Law: Invasive or resilient?', in Bernitz U, Groussot X, de Vries S and Paju J (eds.), The Resilience of General Principles of EU Law and Fundamental Rights in the (digital) EU Legal Order (Kluwer 2019, forthcoming).

[8] See about human rights proportionality in general Christoffersen J, 'Human rights and balancing: The principle of proportionality', in Geiger C (ed.), Research Handbook on Human Rights and Intellectual Property (Edward Elgar Publishing 2015), 19 and about proportionality in general as part of international law Peters A, 'Proportionality as a Global Constitutional Principle' in Lang AF Jr (ed.), Handbook on global constitutionalism (Edward Elgar Publishing 2017), 248. See the subsequent critical discussion of rights proportionality.

interpreted investment treaty standards, encroaching on host states' regulatory powers and ability to protect and fulfil human rights obligations.

The chapter proceeds as follows. The first sub-section will discuss how ISDS transforms not only international economic law and the status of foreign investors as regards their capacity to initiate international adjudication, but also human rights and IP law. The second sub-section will address the reasons for the increasing overlaps of human rights, IIAs and IP. This is necessary for the critique of the mainstream argument and for proposing alternatives to address the overlaps in the third and fourth sub-sections. Conclusions will summarize and also provide a more system-level view on human rights and IP as part of ISDS and the system of IIAs.

2. ISDS as a Game Changer in International Economic, Human Rights and IP Law

2.1 Introduction

IIAs grant investors a strong position to challenge regulatory activities of states. They permit claims for substantial damages and allow investors to seek enforcement of awards directly before domestic courts. Whilst ISDS structurally resembles international commercial arbitration, it gives arbitrators broad jurisdiction over what are fundamentally regulatory disputes. Being subject to ISDS under IIAs does not signify subject matter or claimant specific jurisdiction, but general and prospective jurisdiction of the arbitral tribunal.

The protective concepts of investment law are not specific minimum standards like those of international IP law, but very generic and abstract notions like fair and equitable treatment (FET), prohibition of expropriation, full protection and impairment of use and enjoyment of investments. In particular, the FET standard quite problematically functions as a flexible and malleable gap-filling standard, protecting investors' legitimate expectations and hence also, to a certain degree, the legitimate expectations of an investor in the stability of the host state's legislative environment. Originally, it had the much narrower function of securing the minimum standard for the treatment of aliens as protected in customary international law.[9] Arbitrator authority is broad: it principally covers any state decision affecting investor's protected assets. Investment law norms resemble human rights in their abstract language and general scope of application. ISDS procedure is hence comparable to state submission to the jurisdiction of international courts exercising broad judicial review. Hence, ISDS has been analogized with judicial review of state measures before domestic courts under nation state constitutions and administrative law, or review before the ECtHR or World Trade Organization (WTO) panels under international law.[10]

Yet the analogy does not transform ISDS into judicial review: investment tribunals have, among others, narrower remedies at their disposal than domestic courts. The sole remedy is in practice damages.[11] Investment treaties thus indemnify investors rather than providing for a means of formal

[9] See more closely e.g. Davitti D, op. cit. note 5, and Knoll-Tudor, The Fair and Equitable Treatment Standard and Human Rights Norms, in Dupuy PM and others, op. cit. note 5, 310, both passim.
[10] Schill SW, op. cit. note 1, 78. Harten G van, Sovereign Choices and Sovereign Constraints – Judicial Restraint in Investment Treaty Arbitration (Oxford University Press 2013), 7; Harten G van and Loughlin M, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 European Journal of International Law 121.
[11] This depends on the IIA in question and the applicable arbitration framework. See more closely Demirkol B, 'Remedies in Investment Treaty Arbitration' (2015) 6 Journal of International Dispute Settlement 403. For example,

judicial review available for example under European Union law and many domestic constitutions.[12] The average damages claim has been reported to be almost USD 500 million. The average award where a claimant has succeeded has been around USD 80 million.[13] Also the costs of ISDS are significant. Party costs are around USD 5 million and the tribunal costs around USD 1 million.[14] All figures are on the rise. Only wealthy investors can pursue investment claims.[15] Moreover, the practicing lawyers and academics competing on the market for investment arbitration appointments have an incentive to increase the number of investment claims filed and processed.[16]

2.2 How Does ISDS Transform International Economic Law?

ISDS can be contrasted to the trade dispute settlement system under the WTO, where intergovernmental dispute settlement is the norm. Although instruments such as the Trade Barriers Regulation (TBR) of the EU help private corporations to initiate such trade disputes on the intergovernmental level and to participate in shaping the arguments presented by the states, only 24 TBR examination procedures have been initiated since 1996, some resulting in the negotiation solutions and some in WTO dispute settlement procedures.[17] This can be compared to ISDS: the total number of publicly known claims has reached 942 (from about year 1990). In 2017 alone, at least 65 new treaty-based ISDS cases were initiated. By the end of 2017, investors had won about 60 per cent of all cases that were decided on the merits.[18]

States filter the issues ending up in trade dispute settlement or trade negotiations under WTO law. In such processes, the likelihood of winning and broader governmental interest in the subject matter are not the only considerations of states, but also likely negative reputational and diplomatic repercussions. States also realise that they might sometimes face the same arguments in a subsequent

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Article 34(1) of the United States Model BIT (2012) allows only monetary damages and restitution of property. Other IIAs may provide broader remedies. Yet it may not be practical to order non-pecuniary remedies because of problems of enforcement and apparent conflict with state sovereignty. In *Philip Morris Brands Sárl, Philip Morris Products S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award July 8, 2016 (*Philip Morris v. Uruguay*), the claimant requested the tribunal not only to award damages, but also to order the respondent to withdraw the challenged regulations or refrain from applying them against claimant's investments.

[12] Similarly Sattorova M, The Impact of Investment Treaty Law on Host States: Enabling Good Governance? (Hart Publishing 2018) 17.

[13] Hodgson M and Campbell A, Damages and costs in investment treaty arbitration revisited, Global Arbitration Review on line news, 14.12.2017, http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf (last visited 23 April 2018).

[14] Commission JP, How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years, Kluwer Arbitration Blog, 29.02.2016, http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/ (last visited 23 April 2018).

[15] Similarly van Harten G van and Loughlin M, op. cit. note 10, 138, noting that in practice only multinational enterprises can afford the cost of ISDS procedure.

[16] Harten G van and Loughlin M, op. cit. note 10, 148.

[17] See http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/trade-barrier-investigations/index_en.htm (last visited 23 April 2018). Overall, in the WTO Dispute Settlement framework over 500 disputes have been brought and over 350 rulings have been issued since 1995. See WTO, Dispute Settlement https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited 9.12.2018).

[18] UNCTAD World Investment Report 2018, Investment and New Industrial Policies (United Nations 2018), Key Messages and Overview, xi and Investment Dispute Settlement Navigator, https://investmentpolicyhubold.unctad.org/ISDS (last visited 2 June 2019).

dispute brought against them. Hence, they consider carefully whether to initiate a trade dispute with another country or not.[19]

ISDS individualizes the claims in that investors assume their full custody; they can decide the manner and extent to which international adjudication will be used to resolve a regulatory dispute.[20] This is the key feature of ISDS. Private investors have therefore become powerful international law actors capable of challenging nation state legislation before international fora, without any mediation of other states. They enjoy enhanced capacity to affect legislative policies globally, but without assuming new responsibilities. ISDS thus functions as a game changer in international economic law, empowering private corporations and ad hoc arbitral tribunals at the expense of nation states and their regulatory and administrative power. Bounded rationality and biases of decision-making explain why (developing) countries sign IIAs in the first place.[21]

The absolute number of ISDS awards in favour of investors does not reflect the full impact of ISDS. There are multiple reported instances where states have retreated from their legislative policies when investors have threatened to challenge the planned measures. Such threats – typically mounting to hundreds of millions USD in potential damages – have a chilling effect on government action and willingness to regulate in the public interest.[22] For example, Uzbekistan and Canada withdrew from their tobacco control legislation or made it more lenient after pressure from British American Tobacco in Uzbekistan and Philip Morris in Canada.[23] The companies, among others, denied the health effects of smoking, maintained that the planned legislation would seriously interfere with their commercial freedom and IIA-based rights, and threatened to pull all investments out of the country.

2.3 How Does ISDS Restructure Human Rights For Its Own Purposes?

Investment tribunals typically lack jurisdiction to apply human rights directly. However, they may use human rights in the interpretation of the IIAs to clarify and operationalize vague concepts or for example, as benchmarks for state responsibility. They might do so by recourse to Article 31(3)(c) VCLT,[24] through the notion of 'relevant principles of international law' as prescribed by several IIAs

[19] Similarly Dreyfuss RC and Frankel S, 'From Incentive to Commodity to Asset: How International Law Is Reconceptualising Intellectual Property' (2015) 36 Michigan Journal of International Law 557, 573.
[20] Harten, G van op. cit. note 10; Davies A, 'Scoping the Boundary Between the Trade Law and Investment Law Regimes: When Does a Measure Relate to Investment?' (2012) 15 Journal of International Economic Law 793, 794-5.
[21] See more closely Skovgaard Poulsen LN and Aisbett E, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 World Politics 273.
[22] The chilling effect is particularly noticeable where the IIA standard has started to protect regulatory stability, such as under the FET-standard. See e.g. Davitti D, op. cit. note 5, 434. Yet the chilling effect has not had noticeable impact on the considerations of arbitrators. See Harten G van, op. cit. note 10, 111. Investors might initiate ISDS procedure to delay harmful legislative developments elsewhere even where they know that they will likely lose. For example, *Philip Morris v. Uruguay* (op. cit. note 11) ISDS was initiated in 22 February 2010 and the award was dated 8 July 2016. Many states might have delayed their similar tobacco control laws in anticipation of this award and other processes initiated or supported by Philip Morris, such as the investment treaty arbitration against Australia. *Philip Morris Asia Ltd v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 (not admissible) and *Australia – Certain Measures Concerning Trademarks, Geographical Indications And Other Plain Packaging Requirements Applicable To Tobacco Products And Packaging,* WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, Reports of the panels 28 June 2018. (*Australia – Tobacco Plain Packaging*).
[23] See Sattorova M, op. cit. note 12, 171-2 (with respect to Uzbekistan) and Schneiderman D, Constitutionalizing Economic Globalization. Investment Rules and Democracy's Promise (CUP 2008), 120-129 (with respect to Canada).
[24] Article 31(3)(c) of the VCLT enables taking into account 'Any relevant rules of international law applicable in the relations between the parties'. See the subsequent critical discussion of this 'solution'.

or by referring to Article 42(1) of ICSID.[25] Drawing parallels, using comparative reasoning and cross-referencing to human rights constitutes the typical linkage to human rights in ISDS. Such cross-regime analysis is supposed to increase the legitimacy of international investment law and to converge fragmented segments of international law.[26] In practice, very few references have been made to global human rights instruments. More than 80 per cent of references have been to the ECHR and the case law of the ECtHR.[27]

The traditional approach of international investment tribunals has been described as unenthusiastic towards resorting to human rights instruments: they have developed diverse arguments to marginalize human rights when invoked by parties, such as lack of sufficiently elaborated arguments, lack of jurisdiction and the difference between international investment law and human rights law.[28] Yet the approach is much more diversified. Human rights have often substantiated the specific investment treaty standard, such as FET or expropriation, or they have provided a more general analogy for treating investors' rights similarly to human rights. When claimants have proposed a human rights analogy in order to elevate the status of investors' rights, many tribunals have accepted such calls and treated investors' rights as fundamental in that they are equated to rights under human rights treaties and, among others, not subject to modification or override by contract. Most arbitral tribunals have thus understood their own function as being a forum for rights-based adjudication.[29]

Investors have successfully invoked human rights in ISDS to support their claims even when the invoked human rights instrument, such as the ECHR, does not bind the host state.[30] This effectively universalizes the European standards of property protection. Moreover, IIAs enable claims against states without exhausting local remedies.[31] Nothing limits the general applicability of investment treaty norms to specific situations or norms of the host state,[32] in contrast for example with the provisions of the EU Charter of Fundamental Rights, which only apply to member state measures where they 'implement' EU law.[33] Human rights as part of investment law claims may then apply in many contexts where the same human rights instruments cannot be invoked directly to challenge the host state measure in question.

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[25] Enabling 'such rules of international law as may be applicable' among the permitted rules of law.
[26] Schill SW, op. cit. note 1, 88.
[27] Steininger S, op. cit. note 5.
[28] Hirsch M, 'Investment Tribunals and Human Rights: Divergent Paths', in Depuy PM and others (eds.), Human Rights in Investor-State Arbitration (OUP 2009) 106.
[29] See more closely Harten G van, op. cit. note 10, 77 and the arbitral awards referred to there.
[30] See e.g. *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, CASE No. ARB (AF)/00/2, Award May 29, 2003; *Mondev International Ltd v. United States of America*, ICSID Case No ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, paras 138 and 141-4. The said trend may have to do with the nationalities of arbitrators. They come typically from Europe, US, Australia, Canada or New Zealand. The few influential ICSID arbitrators from Latin America have typically been trained in Europe or the US. See Puig S, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387, 418-19.
[31] The ECHR, for example, requires the exhaustion of local remedies before enabling a complaint to the ECtHR. The exception is denial of justice as an IIA standard: it requires the exhaustion of local remedies. See e.g. *Philip Morris v. Uruguay* (op. cit. note 11), para 499.
[32] The ICSID Convention (Article 25) extends the jurisdiction of ICSID tribunals to 'any legal dispute arising directly out of an investment', however without defining what constitutes an 'investment'. See also Vadi V, Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration (Edward Elgar Publishing 2018), 21 and Harten G van and Loughlin M, op. cit. note 10, 127.
[33] Article 51(1) of the EU Charter. Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105 confirmed that implementation referred to in Art. 51(1) of the EU Charter is interpreted broadly so as to cover acting within 'the scope of application' of Union law.

Whilst investors may challenge domestic laws – often protecting human rights – and may benefit from human rights analogies in the ISDS, they are not themselves directly responsible for human rights breaches: their own liability (if any) is indirect, established by courts through the obligation of the state to protect human rights, comprising a duty to secure that private entities do not infringe the rights of others.[34] Due to considerable party and tribunal costs, the finding of a recent study is no surprise: claimants in ISDS cases with a human rights dimension have almost exclusively been wealthy and well-known multinational firms from Western industrialized countries.[35]

Yet foreign investors are often treated in ISDS practice as more vulnerable than host state citizens, who can allegedly influence politics and public decision-making to a greater extent than foreign investors. However, foreign investors – in practice powerful corporations – make states compete for their investments. They sign specific investment agreements with the host state and influence host state politics and decision-making in ways not available to citizens or small and medium-sized businesses of the host state in question.[36] This approach is visible in many of the awards discussed in more detail below. The foreign investor then appears as a privileged actor capable of invoking human rights against host states, but at the same time being shielded, due to its 'vulnerability', from host state measures to a greater extent than nationals of the host country.

ISDS thus enables the invocation of human rights – typically the protection of property ownership under the ECHR – by wealthy corporations, to support their claims for an IIA infringement and damages. Nationals of the host country, immigrants and even less affluent foreign investors cannot similarly invoke, for example, the provisions of the ECHR against governmental measures of a country not belonging to the European Convention. Unlike human rights treaties, IIAs do not establish erga omnes rights and corresponding obligations for states to protect.[37] They only protect investments and investors from the countries being parties to the applicable IIA. Such specific and selective effects of human rights instruments in the ISDS process benefit affluent foreign investors only, and to the exclusion of all others, therefore being far from any conventional idea of what human rights should be about. The meaning of human rights in investment arbitration is part of what has been described as a development towards 'trade-related market friendly human rights'.[38] ISDS restructures human rights to fit the system of investment protection and the epistemic knowledge of investment lawyers.[39] References to human rights instruments become highly selective,

[34] Davitti D, op. cit. note 5, 424. See more generally Clapham A, Human Rights Obligations of Non-State Actors (OUP 2006). See however the treatment of the *Urbaser* Award below note 106.

[35] With the exception of two foreign investors from Saudi Arabia and Syria, all other cases having human rights references concerned companies incorporated in Western, industrialized countries. Most foreign investors (34) originated from Europe, 11 claimants came from the US, three from Canada, and one each from Australia and Uruguay. See Steininger S, op. cit. note 5.

[36] As Sattorova M, op. cit. note 12, notes, the portrayal of foreign investors as more vulnerable victims is confounded by the fact that it is not uncommon for foreign corporations to affect politics in host states for example through lobbying and even illicit means, such as bribery and corruption.

[37] Vadi V, op. cit. note 32, 26 and Hirsch, op. cit note 28, 109.

[38] Baxi U, The Future of Human Rights (OUP 2008).

[39] See similarly with regard to WTO law Beckett J, 'Fragmentation, openness and hegemony: adjudication and the WTO', in Lewis MK and Frankel S (eds.), International Economic Law and National Autonomy (CUP 2010), 44, 57. Restructuring their meaning is hence not specific to ISDS: all regimes similarly restructure the meaning of norms borrowed from other regimes.

predominantly focusing on the protection of property ownership, yet ripped of all traces of its social function.[40]

2.4 How Does ISDS Transform International Intellectual Property Protection?

Finally, ISDS functions as a game changer with respect to international IP law. By privatizing the claims and enabling the integration of international IP norms as applicable law in ISDS at least to some extent and in some contexts, it offers an unprecedented opportunity for affluent corporations to challenge domestic laws with international IP law, normally being applied between governments only. It therefore offers investors a forum to litigate international IP law as part of their claims based on IIAs. All that is required is to repackage the presumed infringement of an international IP law norm in the language of vaguely expressed and broadly applied investment law protection standards.[41] This is particularly important with respect to TRIPS and other international treaties lacking the capacity to have direct effect in EU law, and typically missing self-executing effects elsewhere.[42] Although one important reason for denying their direct effect has been to preserve political discretion in their implementation as part of multilateral trade law and hence deference towards the legislature, the capacity afforded to foreign investors to invoke them in ISDS partly frustrates this motivation. But even when there is no infringement of domestic or international IP norms, investment law may protect the IP investment from measures lessening its value by limiting the ways the investor can use the IP, as discussed below.

Significantly, the new IP as an investment paradigm narrows its focus to the protection of property interests of IP owners only, to the exclusion of stimulating creation and innovation and weighing this aim against multiple other values and interests protected under IP law.[43] Like with human rights, investment law restructures IP law for its own purposes to fit its underlying rationales.

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[40] See Banning, TRG, The Human Right to Property (Intersentia 2002), for a study on the social function of property under European human rights law. See Mylly T, Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power (IPR University Center 2009) and Geiger Ch, 'The social function of intellectual property rights, or how ethics can influence the shape and use of IP law', in GB Dinwoodie (ed.), Methods and Perspectives in intellectual property (Edward Elgar Publishing 2013), 153 for similar argumentation in the context of IP in general and Sganga C, Propertizing European Copyright (Edward Elgar Publishing 2018) in the context of copyright.

[41] Ruse-Khan HG, 'Challenging Compliance with International Intellectual Property Norms in Investor-State Dispute Settlement' (2016) 19 Journal of International Economic Law 1, 10. Ruse-Khan (at p. 9) emphasizes that there must be a link or 'hook' in investment law enabling claims based on international IP law, such as umbrella or safeguard clauses or substantive standards like expropriation and FET. Like with human rights, investment tribunals normally lack jurisdiction as regards stand-alone international IP law claims.

[42] See about the effects of EU IP treaties Mylly T, 'Constitutional Functions of the EU's Intellectual Property Treaties' in Drexl J, Ruse - Khan HG and Nadde-Phlix S (eds.), EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse? (Springer 2014), 241, 255.

[43] Dreyfuss RC and Frankel S, op. cit. note 19, Frankel S, 'Interpreting the Overlap of International Investment and Intellectual Property Law' (2016) 19 Journal of International Economic Law 121, 124. Gathii JT and Ho CM, 'Regime Shifting of IP Lawmaking and Enforcement from the WTO to the International Investment Regime' (2017) 18 Minnesota Journal of Law, Science & Technology 428, 447, holding that corporations' shift to the investment regime is to *destabilize* the balances of the IP regimes such as TRIPS, to create counter-norms that rewrite national and international laws. Cf. Arato J, 'The Private Law Critique of International Investment Law' (2019) 113 American Journal of International Law 1, 49, is positive about the two major ISDS awards dealing with IP, *Philip Morris v. Uruguay,* op. cit. note 11 and *Eli Lilly and Company v. Government of Canada*, Case no. UNCT/14/2, award 16 March 2017. She says that the awards demonstrated sensitivity to the logic and functions of IP and give some cause for cautious optimism.

This becomes visible in three cases involving an alleged conflict between trademark rights and tobacco control measures affecting product packaging, *Philip Morris v. Uruguay* and *Philip Morris v. Australia* investment arbitration proceedings and the WTO panel decision concerning the TRIPS Agreement and other WTO norms (*Australia – Tobacco Plain Packaging*).[44]

The Philip Morris v. Uruguay investment tribunal discussed whether Uruguay's public health - motivated legislative restrictions on tobacco product packaging jeopardized the trademark rights of Philip Morris as protected investments. In its analysis of what encumbers the use of a trademark in the course of trade unjustifiably under Article 20 of TRIPS, the tribunal did not refer to the principles and objectives of the TRIPS Agreement, as written in Articles 7 and 8 of TRIPS and the Doha Declaration. Neither did the tribunal discuss the functions of trademark protection. In contrast, the WTO panel built the core parts of its related argumentation on the objectives and principles of TRIPS as explicated in the aforesaid norms, as well as on the functions of trademarks. Although both the tribunal and the panel found in favour of the respondent states, the differences in analysis under Article 20 TRIPS are notable. Since the investment tribunal has little expertise in IP and is less inclined to interpret IP rights from the perspective of their justifications, it could have reached the opposite conclusion.

Moreover, even absent the affirmative right to use the trademark under IP law, Uruguay's legislation could still have breached the expropriation standard, as absence of a right to use does not mean that trademark rights are not property rights under Uruguayan law. The tribunal continued that trademarks being property, their use by the registered owner is protected.[45] What constituted the primary reason for there being no indirect expropriation was not the absence of an affirmative use right under international or domestic IP law, but the fact that sufficient value remained after the Uruguayan measures with Philip Morris. According to arbitral practice, a partial loss of profits caused by the state measures does not confer an expropriatory character on the measure.[46] Hence, under changed factual circumstances there could be (indirect) expropriation irrespective of the fact that IP law does not establish an affirmative right to use the trademark.

The same applies to the FET-standard. Uruguay's legislation could still have breached the FET-standard by being disproportionate in relation to the public health objective, by depriving the claimant of the negative rights of exclusive use, or by being otherwise 'arbitrary', 'grossly unfair', 'unjust' or 'discriminatory'.[47] The measures were deemed justifiable partly because they had a relatively minor impact on the appellant's business and Uruguay's legislation clearly implemented an international obligation under the WHO Framework Convention on Tobacco Control (FCTC). But the tribunal was not unanimous: dissenting arbitrator Born thought there was a breach of the FET-standard, as the single representation requirement is unique in the world and was not mandated by international law. He considered the Uruguayan regulation to be arbitrary and disproportionate with regard to the objectives it pursued. He also considered there to be denial of justice, as there were two contradictory interpretations of the same statutory provision by Uruguay's two highest civil courts but no access to a judicial forum in which to present a presumptively serious constitutional challenge to that provision, as it had been authoritatively interpreted and applied to Philip Morris.

[44] *Philip Morris v. Uruguay*, note 11; *Philip Morris Asia Ltd v. The Commonwealth of Australia*, op.cit. note 22 and *Australia – Tobacco Plain Packaging,* op cit. note 22.
[45] *Philip Morris v. Uruguay*, note 11, paras 272-3.
[46] *Philip Morris v. Uruguay*, note 11, para 286.
[47] *Philip Morris v. Uruguay*, note 11, para 409-410.

As individual court judgments might trigger the application of IIA standards,[48] investors may also challenge judicial application of IP or other laws affecting the value of IP investments before investment tribunals. For example, judicial development of exclusions from protection and exceptions and limitations to exclusive rights might constitute acts triggering ISDS. The same applies to judicial orders invalidating existing IP rights, for example in case of patents or trademarks. But even judicial decisions not constituting an infringement of domestic or international IP law might qualify where they affect the value of IP investment, for example by restricting commercial freedom in how the IP could be used. Importantly, general doctrines and principles of law developed by courts enter the jurisdiction of investment tribunals. As court judgements in disputes between private parties could trigger the liability of the state in damages whenever a court rules against the investor, IIAs might start to assume significance on a horizontal level in disputes between private parties before domestic courts. Courts typically try to avoid conflicts with international obligations and might hence be inclined to rule in favour of the investor, whenever they become aware of such a potential conflict. Although direct effect in the EU has been excluded in the most recent EU treaties with investment chapters,[49] domestic courts in EU member states and EU courts might still be affected by the prospect of state or EU liability in damages.

The broad applicability of IIA norms to any host state measures affecting foreign investors' assets means that IIAs may typically be used more broadly than specific IP treaties – or human rights instruments – to challenge myriad non-IP measures and laws that have a potential impact on the use of IP, for example by affecting the related business model or profit margin. TRIPS Agreement and other international IP instruments, in contrast, provide negative rights to prevent certain acts. They hence grant states the freedom to pursue legitimate public policy objectives outside the scope of IP, needing no exception or limitation under the TRIPS Agreement.[50] Investment treaty protection of IP assets is not similarly limited to negative rights as understood in IP law.[51] Instead, it could reach any laws, measures or court rulings that affect the possibilities to positively use IP in the host state. These might include, for instance, health and environmental law, competition law and industrial policy measures, as well as social, labour and economic law. General doctrines of law, such as the prohibition of abuse of rights, are likely also affected, as the pending *Bridgestone*-arbitration demonstrates.[52]

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[48] *Eli Lilly v. Canada* op. cit. note 43. The tribunal held that as the judiciary is an organ of the state, judicial acts will in principle be attributable to the state. A judicial act or omission could thus constitute 'expropriation' (para 221-5). Denial of justice is hence not the only available option for an aggrieved party to proceed forward in ISDS. Although the tribunal emphasized deference towards domestic courts by limiting its review to 'very exceptional cases', still a 'fundamental or dramatic change' from previously established law might be caught by the applicable investment norms of NAFTA (para 337, 349-351, 380 and 387). However, as the doctrine underwent incremental and evolutionary changes, there was no breach. The pending *Bridgestone*-arbitration concerns similarly judicial order causing a potential infringement of the IIA. See *The Bridgestone Licensing Services Inc. and Bridgestone Americas Inc. v. Republic of Panama*, ICSID Case No ARB/16/34, Decision on expedited objections, 1 December 2017.

[49] Gallo D and Fernanda NG, 'The External Dimension of EU Investment Law, Jurisdictional Clashes and Transformative Adjudication' (2016) 39 Fordham International Law Journal 1081.

[50] See also Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, WT/DS174/25/Add.3 WT/DS290/23/Add.3, 11 April 2006, para. 7.246 and *Australia – Tobacco Plain Packaging* op. cit. note 22, para 7.1975.

[51] As Dreyfuss and Frankel say when anticipating *the Philip Morris v. Uruguay* arbitration award, 'it is possible that a substantive analysis of whether trademark holders have any interests beyond the right to exclude, which is contentious under Paris and TRIPS, will not even arise in the investment dispute', Dreyfuss RC and Frankel S, op. cit. note 19, 584.

[52] *The Bridgestone Licensing Services Inc. and Bridgestone Americas Inc. v. Republic of Panama,* op. cit. note 48. Generally about the multiple effects of ISDS on private law, see Arato J, op. cit. note 43.

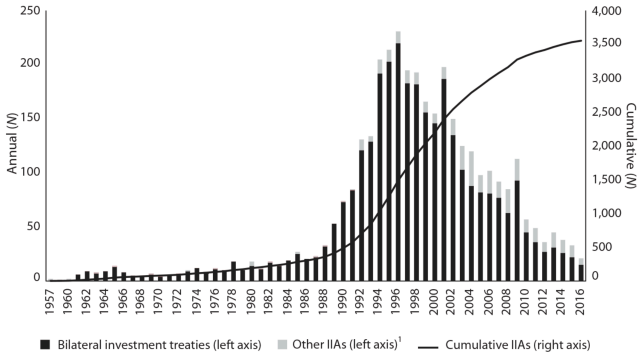
Investment treaty protection could thus signify a colossal shift in the international protection of IP assets, when the latter fall under the notion of an investment and hence the protective scope of IIAs.[53] Investment treaties could increasingly protect commercial freedom around IP assets and the positive 'right to make profit' with IP rights by regulating the relationship to and effects of any other laws on IP assets. At the same time, investment treaty protection focuses on the profit interests of the IP owner only, to the exclusion of an approach capable of incentivizing innovation and creation, and balancing this objective with other societally legitimate values and interests as protected under IP law. Investment treaties privatize the enforcement of international IP norms where they form part of applicable law in ISDS and subject court rulings and court-created general doctrines and principles to ISDS.

3. Why Is There an Increasing Overlap Between IP, IIA Norms and Human Rights?

Legislative measures pursuing legitimate public interests by necessity typically affect the economic interests and business activities of some investors in the host state. Therefore, even when the legislative measures implement international human rights obligations or pursue other legitimate public interests, the profit level or business model of some investors will be adversely affected. Moreover, as individual judicial decisions might also infringe IIA standards, the range of situations potentially falling under the protective sphere of IIAs is broad. The reasons for the overlaps are the exponential growth of IIAs in force, the treatment of IP as a protected investment in the IIAs, expansively interpreted protective standards of the IIAs, as well as the possibilities to maximize the coverage of IIA protection through corporate models and licensing schemes.

IIAs have proliferated exponentially since the 1990s, nearly saturating the need for new IIAs. The following figure depicts the proliferation of IIAs.[54]

Figure 1
Number of international investment agreements (IIAs), annual and cumulative, 1957-2016



Source: Based on data from UNCTAD Investment Policy Hub, International Investment Agreements (http://investmentpolicyhub.unctad.org/IIA).
[1] Other treaties with investment provisions, such as investment chapters in preferential trade.

[53] Similarly Gathii JT and Ho CM, op. cit. note 43, 506, stating that the shift to ISDS in IP law is fundamental in many significant respects.
[54] Newcombe A, 'Canadian Investment Treaty Policy – Stay the Course on Progressive Developments', 18.01.2017, http://irpp.org/research-studies/canadian-investment-treaty-policy/ (last visited December 22, 2018).

The large number of existing IIAs implies that an individual country has typically multiple IIAs in force, protecting investors from numerous countries. The multiplicity of IIAs enables and facilitates forum shopping. By establishing a holding company in a state party to an IIA, even a local business might be able to benefit from the protection of an applicable IIA.[55] A group of companies might also structure their inter-relationship so as to maximise their protection under IIAs. Such practices have been characterized as 'perfectly legitimate' by the *Bridgestone* investment tribunal.[56] Yet such practices raise the question whether investment law protects actual flows of capital between the states parties to IIAs, or rather any investments made by affluent corporations, regardless of their home country and centre of business operations.

IP is regularly included within the notion of a protected asset in IIAs.[57] But in order to be protected as an investment, the asset must also have other characteristics of an investment, such as the commitment of capital or other resources, expectation of gain or profit, and assumption of risk. Other potentially relevant factors comprise a reasonable duration of the investment and a contribution made to the host State's development. Some of these factors are typically listed in modern IIAs.[58] They have also been developed in arbitral practice.[59]

The Bridgestone-tribunal discusses at length the conditions under which trademarks and trademark licenses are protected as investments.[60] According to the tribunal, mere registration in the host country is not enough, but basically any exploitation or promotion of the trademark that exceeds a simple sale transforms the trademark asset into a protected investment. Interrelated activities relating to the promotion and sale of trademarked products or services likely satisfy the requirement.[61] A trademark license also qualifies as an investment, following similar principles. The lax treatment of trademark licenses as investments enables innovative inter-group licensing schemes to maximize protection under IIAs. Some IIAs also enable the treatment of patentable inventions and patent applications as protectable investments. A mere denial of patent protection for a patentable invention might therefore in specific circumstances constitute a violation of the applicable investment standards.[62]

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[55] Harten G van and Loughlin M, op. cit. note 10, 122 and 138-139. Such possibilities might yet be limited by the abuse of rights doctrine. See *Philip Morris Asia Ltd v. Australia*, op. cit. note 22. See also Vadi V, op. cit. note 32, 153.
[56] *Bridgestone v. Panama*, op. cit. note 48, para 161, however noting that such practices might be caught by the (possible) denial of benefits provision of the applicable IIA.
[57] See e.g. Vanhonnaeker, L, Intellectual Property Rights as Foreign Direct Investments: From Collision to Collaboration (Edward Elgar 2015), 9-19.
[58] See about the EU's criteria of IP as an investment in the new generation of IIAs, Lentner GM and Fina S, 'The European Union's New Generation of International Investment Agreements and Its Implications for the Protection of Intellectual Property Rights' (2017) 18 The Journal of World Investment & Trade 271.
[59] The *Salini*-case, in particular, discusses the factors turning an asset into a protectable investment. *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).
[60] *Bridgestone v. Panama,* op. cit. note 48.
[61] *Bridgestone v. Panama,* op. cit. note 48, paras 169-175.
[62] See Vanhonnaeker, L, op. cit. note 57, 17. It should be noted that the ECtHR has in *Anheuser-Busch Inc. v. Portugal*, Appl. No. 73049/01 (Grand Chamber, 11 January 2007), defined a mere trademark application as a possession protected under the protection of property ownership (Article 1 of Protocol no. 1 to the ECHR). Some investment tribunals might well follow this approach in their interpretations of what constitutes a protected asset under the notion of IP, provided applications are not specifically excluded.

Vague and broadly interpreted investment treaty standards such as FET and indirect expropriation are another cause for overlaps with IP or human rights norms.[63] They define the basic conditions under which host state legislation and measures could breach IIAs. Such overlaps may appear as conflicts between IIA standards and host state measures related to human rights or IP. Broadly interpreted protective standards intrude further into legislative and other sovereign powers of host states, thus accentuating the need to develop countervailing international law principles in the context of investment treaties, such as police powers and margin of appreciation, capable of introducing state sovereignty as a limiting factor to ISDS.

The overlaps between IIAs and human rights need not always be conflictual. Human rights and IIAs may provide for some analogous substantive standards of protection. For example, the prohibition of discrimination and protection of property are shared by both IIAs and many human rights instruments.[64] Yet their substantive content differs: with regard to non-discrimination on the basis of nationality, the nationality of the investor does make all the difference as regards the jurisdiction of the arbitral tribunal. With regard to the protection of property ownership, investment tribunals neither cater to the social obligation underlying the protection of property, nor consider the amount of compensation as one factor of the proportionality exercise.[65] Hence, substantive analogies might often fail.

Analogies also exist with regard to procedure: access by private investors to ISDS has been analogized to access of individuals to international human rights courts, such as the ECtHR.[66] However, in distinction to human rights, the function of IIAs is to reciprocally protect the economic incentives of respective treaty party nationals – typically wealthy multinational corporations – to invest. As IIAs do not establish obligations for the benefit of all humans, the procedural human rights analogy fails too. Even where the nationality of the investor is right, the investment tribunal may decline jurisdiction over independent human rights issues based on the consent clause of the applicable IIA: an investor may end up empty-handed where the human rights argument does not link sufficiently to the protection of the investment, for example by reinforcing the expropriation standard of the IIA with a reference to the ECHR.[67]

The increasing overlaps between IIAs, human rights and IP are also extended from the other ends: the human rights and IP regimes. What falls under the scope of human rights norms has expanded during the recent decades due to rights inflation and new human rights instruments. In Europe, almost any value or interest can be expressed in human rights language. As rights are manifold and broad, they are also relative and negotiable against other rights and public policies. Almost any legislation an investor challenges could be defended with human rights arguments. Rights

[63] Davitti D, op. cit. note 5, 430-3 states that recourse to the FET-standard has grown exponentially over the last decade, together with an increased recognition of the doctrine of legitimate expectations as one of the key elements of the standard, ultimately leading to a requirement of a stable regulatory environment for the investment.
[64] Vadi V, op. cit. note 32, 25; Kube V and Petersmann EU, op. cit. note 5, 100-102.
[65] Reiner C and Schreuer C, 'Human Rights and International Investment Arbitration', in Dupuy PM and others (eds.), Human Rights in International Investment Law and Arbitration (OUP 2009), 95.
[66] Vadi V, op. cit. note 32, 25, Reiner C and Schreuer C, in Dupuy PM and others, op. cit. note 65, 82-96.
[67] See e.g. *Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184. The Syrian investor Biloune had been arrested and held in custody for a long period without a due cause and ultimately deported from Ghana to Togo. The tribunal held that its jurisdiction is limited to commercial disputes and does not cover as an independent cause of action a claim of violation of human rights.

regularly conflict with one another and stand opposed to many settled instances of legal regulation.[68] Economic, social and cultural rights,[69] rights of indigenous peoples,[70] environmental rights,[71] and health related rights,[72] in particular, relate to many host state legislative renewals with adverse consequences for some foreign investors.

Investors' claims are also often boosted with human rights arguments, especially the protection of property ownership as a human right. However, we only know after proportionality analysis whether an infringement of a right also constitutes its violation. Human rights rarely establish clear lines on what is permitted or prescribed and what is not, especially where two or more rights pull in different directions. In ISDS, investors could always invoke the protection of property ownership to support their claim based on the investment. Human rights proportionality thus empowers investment arbitrators. The simultaneous expansion of human rights and broadly interpreted investment treaty norms connotes that potential overlaps between IIA and human rights norms are inevitable.

Finally, IPRs are ever stronger and broader, signifying deeper limitations on expression, communication, research, economic liberty, public health and any policies implementing human rights. IP expansion means that IP law increasingly regulates fundamental questions related to the Internet, bio- and gene-technology, medicine etc. At the same time, IP has become the most valuable asset of many corporations. But the existence and contours of IP are typically uncertain. Human rights also increasingly affect the creation of international IP norms. The Marrakesh Treaty under the WIPO, providing compulsory exceptions to copyright to protect the blind and visually impaired, has been characterized as a de facto human rights treaty.[73] Human rights are also increasingly used in the interpretation of IP, especially concerning copyright in the Internet.[74] This development means that whilst IP has become one of the most important protected assets of corporations, regularly covered by the protection of property ownership as a human right, IP also frequently affects other rights.

How do these overlaps operate together in practice? In ISDS, both investors and respondent states have presented human rights arguments: human rights may function as swords and shields before arbitral tribunals. Rights often strengthen IP in ISDS through the invocation of the protection of property ownership as a human right. An investor could for example successfully invoke property ownership as a human right to support its IIA-based indirect expropriation claim where a compulsory license has been granted or a patent has been invalidated,[75] or where a host state has enacted a new

[68] See Gregoire Webber, 'On the Loss of Rights', in Huscroft G, Miller BW and Webber G (eds.), Proportionality and the Rule of Law (CUP 2014).
[69] The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the main international instrument protecting these rights. The International Covenant on Civil and Political Rights (ICCPR) protects some economic, social and cultural rights as well, such as the right to join trade unions, and the right of ethnic, religious or linguistic minorities to engage in their culture, practice their religion and use their language. The conventions of the International Labour Organization (ILO) protect economic, social and cultural rights related to work on the international level.
[70] Rights of indigenous peoples are protected under the United Nations framework, as well as under ILO 169 Convention, protecting tribal people's rights (including the preservation of their land, language and religion).
[71] Protected on the international level for example through the United Nations Framework Convention on Climate Change (UNFCCC) and Convention on Biological Diversity. The Kyoto Protocol extends the UNFCCC.
[72] Many Conventions exist under the World Health Organization (WHO), such as the WHO Framework Convention on Tobacco Control. Of particular importance for IP law are also Convention on the Rights of Persons with Disabilities, as well as the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities.
[73] Ruse-Khan HG, The Protection of Intellectual Property in International Law (OUP 2016).
[74] See Mylly T 2019, op. cit. note 7.
[75] For the possibility of a compulsory license constituting an indirect expropriation under IIAs, see Gibson CS, 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation' (2010) 25 Transnational

exception or limitation to IP rights. Due process rights – through a combined reading of human rights provisions and especially the FET-standard – could also affect the remedies available for IP owners under host state legislation. Indeed, according to a recent study, investors have invoked human rights more often than respondents and tribunals have also referred to human rights in their substantive argumentation more often at the investors' motion.[76] However, cases where human rights have been invoked by the respondent states have been discussed more in legal scholarship and have attracted more publicity. The potential of ISDS to strengthen the protection of IP assets is notable.

As argued towards the end of this chapter, the systemic effect of these overlaps is to inhibit – on a global level – legislative and judicial changes that might threaten strong protection of IP assets. The function of these overlapping global-level protections is, in other words, to lock-in current levels of IP protections, to function as a kind of insurance policy against unpredictable political majorities and progressive courts.

4. The Mainstream Argument: Greater Integration of Human Rights and IP with IIAs

4.1 The Mainstream Argument

How to address the increasing overlaps between investment law and human rights described above? The mainstream recommendation appears to be that human rights should be integrated in ISDS through treaty interpretation, in particular by interpreting the legal terms of IIAs by having recourse to human rights proportionality. Article 31(3)(c) of the VCLT and systemic integration allegedly enable such a strategy.[77] Recent IIAs have also allegedly sought to include human rights treaties within the investment treaty's general provisions on governing or applicable law for example by reference to 'any relevant rules of international law applicable'. They could also incorporate specific human rights-based provisions into the IIA itself.[78] Article 42(1) of the ICSID Convention also

Dispute Management 357. Yet some new IIAs such as Canada-EU Comprehensive Economic and Trade Agreement (CETA) contain limitations on the possibility to apply the expropriation provision to compulsory licensing, revocation, limitation or creation of IP rights. See Article 8.12 (5) and (6) of CETA, excluding compulsory licencing of patents, as well as revocation, limitation or creation of intellectual property rights, when in conformity with TRIPS from the expropriation standard. Moreover, a determination that revocation, limitation or creation of intellectual property right is inconsistent with TRIPS does not automatically establish an expropriation. See also Mercurio B, 'Safeguarding Public Welfare? Intellectual Property Rights, Health and the Evolution of Treaty Drafting in International Investment Agreements' [2015] Journal of International Dispute Settlement 252, 260-261. For the possibility of a patent invalidation constituting a breach of an IIA obligations, see the *Eli Lilly v. Canada* award op. cit. note 43.

[76]See Steininger S, op. cit. note 5. Cf. with Reiner C and Schreuer C, in Dupuy PM and others., op. cit. note 65, holding that human rights are rarely invoked by the investor in investment arbitration(p. 88). This conclusion by Reiner and Shreuer only refers to the ICSID homepage without detailing what has been the sample of cases to support their conclusion, whereas Steininger is more explicit in this respect.

[77] Kube V and Petersmann EU, op. cit. note 5, 98-99. The authors recognize that the wording of the preamble might also suggest integration of human rights in the interpretation, as suggested by Article 31(1), (2) of the VCLT. See also Simma B, op. cit. note 5, passim. Simma proposes a human rights audit as part of the due diligence to be conducted by the investor and the host State when assessing the host state's pre-establishment regulatory information. It would detail the host state's human rights commitments and thus affect the investor's legitimate expectations. Scheu J, 'Trust Building, Balancing, and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration' (2017) 48 Georgetown Journal of International Law 449, 494 holds that in order to avoid unbearable restrictions, the arbitral tribunal 'needs to assess in light of all the circumstances of the case whether the measure and its effects are proportional to the public purpose'.

[78] Simma B, op. cit. note 5, 581.

provides that in the absence of an agreement of the parties on the applicable law, the arbitral tribunal's available norms comprise 'such rules of international law as may be applicable'. Based on such strategies, the mainstream argument in other words seeks at least a partial merger of human rights norms with IIAs. The expectation is that such integration would somehow cure the investor-friendly bias of ISDS and lead to outcomes representing a fairer balance of rights.

There are variations of the mainstream argument. Schill argues that investment law concepts should be conceptualized as public law concepts, by drawing comparisons with domestic and international public law, including human rights law. This is supposed to enable a balance between investment and non-investment concerns.[79] Gervais also suggests factoring in human rights treaties through an integrative method based on the VCLT: human rights obligations brought to the attention of investment arbitrators 'should be fully considered in interpreting the scope and depth of the regulatory leeway used by the State before an unjustified violation of its investment obligations is found'.[80] In line with this, arbitral tribunals should be directed to avoid any interpretation of the IIAs that would contravene a host state's human rights obligation whenever possible.[81] Gervais comes closer to the thesis advanced in this chapter by connecting the effect of human rights on the scope and depth of the state's regulatory leeway. Still, he seems to be in favour of deeper substantive integration of human rights in ISDS.

With respect to IP treaties, Frankel similarly recommends recourse to Articles 31 and 32 VCLT as the means for investment tribunals to be able to consider the multiple objectives and social functions of IP as manifested in IP treaties.[82] Through such systemic integration, competing and complementary objectives of IP related for example to competition, public health, education and research, development, and transfer of technology become supposedly more fully considered by arbitral tribunals. Calls to integrate IP treaties under ISDS thus essentially serve a similar function as the more generic invitation to integrate human rights under investment law: to bring in multiple new values under the proportionality analysis that are capable of forming meaningful counterweights to the now prevailing values that only benefit the investor.

4.2 Why Does the Mainstream Argument Fail with Respect to Human Rights?

[79] Schill SW, op. cit. note 1, 88. See *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability (December 27, 2010), at para 128-134, where the comparative approach extended not only to the case law of the European Court of Human Rights, but also European Union law.

[80] Gervais DJ, 'Investor-State Dispute Settlement: Human Right and Regulatory Lessons from Lilly v. Canada' (2018) 8 UC Irvine Law Review, 459, 506.

[81] Gervais DJ, op. cit. note 80, 506-7. Gervais also states that the constitutional approach is 'certainly worth investigating, even though [it] may lead to a risk that human rights and other key public policy objectives will play second fiddle in an orchestra of norms conducted by trade law'. In the opinion of the current author, investment tribunals should abstain from finding an infringement of investment treaty norms where the challenged host state measure is taken to comply with its specific human rights obligations, *as already interpreted by the rulings of the relevant human rights courts or other authoritative human rights organs*. Otherwise, the arbitral tribunal would effectively contravene the applicable human rights norm as interpreted by its authoritative court and make the host state infringe – or at least pay damages for – its international or regional human rights obligations.

[82] Frankel S, op. cit. note 43, 133. Gathii JT and Ho CM, op. cit. note 43, 497-500. Cf. with Dreyfuss RC and Frankel S, op. cit. note 19, who recommend a broader reform of ISDS, based on the creation of a central appellate body for investment disputes, having the capacity to develop IP rationales during a longer time span of its operation when compared to the *ad hoc* composition of the tribunals in the current system. The authors would also 'expand the vision of arbitrators, including through the participation of third party countries'. Discussing any such reform falls outside the scope of this chapter.

The diverse alternative and complementary methods of treaty interpretation as codified in the VCLT provide the decision-maker a broad range of interpretative options from which to choose from.[83] In investment disputes, too, the VCLT enables diametrically opposed interpretations.[84] The VCLT and its methods of treaty interpretation have already been at the disposal of investment arbitrators, with known results. Exactly how a call to revisit the VCLT provisions would lead to the desired change in the outcomes is not made clear. The interpretive community of investment arbitrators is not saved from itself by a well-meaning advice to revisit the loose canons of treaty interpretation as suggested by the VCLT.

What matters more for the outcomes and patterns of argumentation than the provisions of the VCLT are the characteristics of the epistemic community of investment arbitrators. They consist of a relatively small group of tightly networked lawyers from a handful of countries and with strikingly similar backgrounds. Competence in commerce, industry or finance is cherished in addition to specialist knowledge of international investment law. There is also substantial overlap between arbitrators and counsel involved in commercial arbitration and ISDS. The room for alternative focus, for example in environmental issues or human rights, is hence restricted.[85] Considering their professional background, it is doubtful how human rights proportionality could automatically lead to a change in the current typical outcomes. It is more likely that the additional indeterminate element brought by the proposed integration of human rights to ISDS would bend along the structural bias of investment law,[86] its deeply embedded preferences geared to protect the investor at the expense of other aims and values.

Where an investor's business is being harmed by legislative or other measures of a host state, the latter would still have to defend and justify such measures against investment treaty standards,

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[83] See J Klabbers, 'Virtuous Interpretation', in Fitzmaurice M, Elias O and Merkouris P (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On (Martinus Nijhoff Publishers 2010), 31-34. As he points out,

> "*whatever the good that rules on interpretation can do, they cannot prevent that people come to a text with widely diverging background assumptions and knowledge packages; they cannot prevent that people approach a text from very different backgrounds – and this does not even factor in the will to power. At best, groups of people who have undergone similar training, who have been exposed to similar earlier experiences, and who have acquired similar sensibilities, may come to form an interpretive community* […]."

See also M. Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the Biotech Case'(2007) 56 The International and Comparative Law Quarterly 907, 920–1 and Beckett J, op. cit. note 39.

[84] See about the role of the VCLT in ISDS, C Schreuer,'Diversity And Harmonization Of Treaty Interpretation In Investment Arbitration', in Fitzmaurice M, Elias O and Merkouris P (eds.), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On (Martinus Nijhoff Publishers 2010), 129.

[85] There has also been very little room for women as ICSID arbitrators: the male–female composition of arbitrators in a recent study was 95 per cent to 5 per cent proportion. Finally, arbitrators coming from seven nations (New Zealand, Australia, Canada, Switzerland, France, the UK, and the US) represented almost half of the total appointments, at least in the context of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). See Puig S, op. cit. note 30, 402 and 405.

[86] See about structural bias Koskenniemi M, From Apology to Utopia (CUP 2005), sub-chapter 3.3. of Epilogue. For a discussion in the context of international and European IP law, see Mylly T, Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power (IPR University Center 2009), 112-120 and 212-220. There is no solid methodology for balancing the host states' right to regulate to protect human rights and investor's property rights. See more generally Urbina FJ, 'Incommensurability and Balancing' (2015) 35 Oxford Journal of Legal Studies 575 and Urbina FJ, A Critique of proportionality and balancing (CUP 2018). In the absence of such methodology – or any consensus on how to conduct the *stricto sensu* proportionality test – personal value judgments of arbitrators come to dominate the interpretation of rights and their constant conflicts with other rights.

even where the state measures are to protect human rights or related collective goods. But states might be barred from invoking human rights to justify their legislation for political reasons, as it might backlash in other contexts. Most typically, they invoke their regulatory freedom without explicating the human rights in the background.[87] Investors do not experience similar limitations: there are no political impediments. Investments always enjoy protection under property ownership. It is doctrinally easier for the investor – a private entity – to invoke rights against the host state than vice versa. Even where both invoke human rights, the balancing exercise is conceptually different from private law cases where both parties invoke human rights, resulting in double proportionality analysis. In other words, the institutional setting of ISDS is far from ideal for human rights proportionality.

Investment tribunals have already used the language of balancing or proportionality to expand their role beyond customary approaches to investment treaty standards such as expropriation. Proportionality analysis permits the arbitrators to address and weigh the purposes of the national measures more freely than under qualified abstention or overall institutional deference based, for example, on the institutional functions of the margin of appreciation or police powers. Concepts like balancing and proportionality might try to signal restraint, but they could at the same time be used to expand the domains of state decision-making subject to arbitral scrutiny. In many instances, host states and amicus parties opposed the transition to proportionality and balancing, whilst claimant investors encouraged it.[88]

In addition to the expectation that the interpretative methods listed in the VCLT possess magic powers, the mainstream argument presumes that human rights and proportionality retain their original meaning and effects when transplanted into the very different environment of investment arbitration. This is not the case. Investment arbitration restructures the meaning of rights to fit its own biases and epistemic knowledge of investment arbitrators. A few examples will serve to illustrate this.

In the *Tecmed v. Mexico* award[89], the tribunal referred to ECtHR case law and held that when evaluating the potentially expropriatory character of Mexico's measures, the tribunal will consider whether the negative financial impact of the measures on the investments is proportional to the public interest presumably protected thereby. There must be a reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realized by any expropriatory measure. The tribunal stated that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, among others, as the investors are not entitled to exercise political rights reserved to the nationals, such as voting for the authorities that will issue the decisions that affect such investors. The tribunal referred to the ECtHR's *James and Others*, where that court had a similar argument, concluding that non-nationals are more vulnerable to domestic legislation and that different considerations may apply to nationals and non-nationals in case of expropriation and that there may well be a legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.[90]

Although the *Tecmed* tribunal recognized that the investor had, in the transportation and discharge of the hazardous waste, breached a number of Mexican laws and the conditions under which the original permit was first issued, the denial of the authorization to operate the landfill and ordering its closedown was considered to constitute expropriation. Although there were concerns related to

[87] Kube V and Petersmann EU, op. cit. note 5, 80.
[88] Harten G van, op. cit. note 10, 101-2.
[89] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, op. cit. note 30.
[90] *Ibid*. at para 122.

the protection of the environment and public health, as well as community pressure and unrest resulting from the investor's violations, the tribunal considered that it was mainly the location of the landfill authorized in the original permit that was the main reason for the discontinuation of the authorization.

The *Tecmed* tribunal did not consider it problematic to extend the applicability of the *James and Others* ruling from protecting property rights of private landlords to the regulation of a multinational corporation involved in landfill operations of hazardous industrial waste. Yet the ECtHR has applied a broad margin of appreciation when rights of corporations – especially property rights – are at stake. States' margin of appreciation is at its broadest with respect to property ownership when compared to other ECHR rights: no other human right in the ECHR is subject to more qualifications and limitations.[91] The ECtHR stated in *James and Others* that the decision to enact laws expropriating property often involves consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court found 'it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one'. It said that it will 'respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation'.[92] This deferential approach is in stark contrast with the arbitral tribunal's approach in *Tecmed*.

Investment tribunals have invoked human rights ex officio only when defining the scope of property rights in expropriation cases.[93] For example in *Azurix v. Argentina*,[94] the tribunal failed to address the right to water in the background of the disputed measure, but on the other hand it did not find any difficulties in following the *Tecmed* tribunal that had used the protection of property ownership under the ECHR and related case law in its interpretation of expropriation. This led the *Azurix* tribunal to decide in the investor's favour, characterized by the tribunal as a vulnerable entity in a foreign country, following the argumentation of the *Tecmed* tribunal. On the other hand, Argentina failed in its attempt in Siemens arbitration to invoke the same *James and Others* case investment tribunals in *Tecmed* and *Azurix* used in favour of the investor without any problems. The attempt to use it failed, as now the margin of appreciation doctrine used in *James and Others* was only part of the European Convention and not found in customary international law or the applicable IIA.[95]

Moreover, arbitral tribunals have understood the protection of property ownership in its negative dimension only: the prohibition on the state to interfere with the investor's property (obligation to respect).[96] States' positive obligation to actively protect property might be in tension

[91] See also Banning TRG, op. cit. note 40, 2 and 92 and Harten G van, op. cit. note 10, 37.
[92] ECtHR, *James and Others v. the United Kingdom*, 21 February 1986, App no 8793/79, at para 46.
[93] Kube V and Petersmann EU, op. cit. note 5, 92.
[94] *Azurix v. Argentina Republic*, ICSID Case No. ARB/01/12, Award 261 (July 14, 2006). See also Kube V and Petersmann EU, op. cit. note 5, 81-82.
[95] *Siemens AG v Argentina*, Award 6 February 2007, ICSID Case No ARB/02/08, paras 346 and 354.
[96] It is now common to distinguish the obligations to respect, to protect and to fulfil fundamental rights. The obligation to respect is restricted to abstention of state from interference. Obligation to protect obliges the state to prevent interference from others, thus also extending to horizontal relations and to designing institutions preventing and controlling private infringements of fundamental rights. Obligation to fulfil requires positive measures on the part of the state to enable the individuals to enjoy the rights concerned. See Eide A, 'Economic, Social and Cultural Rights as Human Rights', in Eide A, Krause C and Rosas A (eds.): Economic, Social and Cultural Rights: A Textbook (Martinus Nijhoff Publishers, Netherlands 1995), 21-40, 37-40 and Eide A, 'Cultural Rights as Individual Human Rights' in Eide A, Krause C and Rosas A (eds.): Economic, Social and Cultural Rights: A Textbook (Martinus Nijhoff Publishers,

with this negative obligation. For example, the positive obligation to protect property might require the state to interfere with the mining operation of the investor, should it turn out to jeopardize the surrounding environment. In such situations, the state may have an obligation to protect the homes and private and family lives of people living nearby.[97] The same applies for the states' obligation to fulfil their human rights obligations: state's obligation to provide water, sewage or roads to local people might be in tension with the investor's use of property rights. For example, privatization of water, road or sewage infrastructure might risk the continuing state obligation to provide such essential services, especially where the foreign investor, now in control of the privatized assets, does not comply with its contractual obligations with the host state or acts otherwise abusively or against the social function of property.

In other words, this simplified notion of property ownership does not cater to the interaction of property ownership with other rights or the social function of property. It integrates neither the state obligation to protect or fulfil under the notion of property protection, nor the notion of abuse of property rights. Hence, ISDS references to human rights instruments remain selective by focusing on the states' obligation to respect investor's property ownership. Such selectivity even extends to quotations from individual ECtHR judgments like *James and Others*, as the *Tecmed* and *Azurix* tribunal awards demonstrate – ritualistically referring to the same paragraphs of *James and Others* or *Tecmed* to the exclusion of others.

Human rights proportionality empowers the tribunals and broadens their discretion to consider the human rights related justifications underlying the host state legislation or measure, but provides very few limitations or guidelines on how to decide. In the absence of robust proportionality methodology, the underlying structural bias is allowed to play the decisive role. The existing record demonstrates that arbitral tribunals restructure the rights to fit the investment law paradigm. Broader introduction of human rights proportionality through systemic integration or incorporation of human rights treaties within the IIA's general provisions on applicable law would not change the investor protection bias of the interpretations. But it would expand the institutional role of investment arbitration and the possibilities to further prioritize property ownership – eradicated of its social function – over virtually all other rights. Wealthy investors capable of initiating these processes – to the exclusion of all others – could have investor-friendly tribunals review host state legislative measures not only against investment treaty standards, but also against human rights law whenever host states invoke, or arbitral tribunals discuss ex officio, human rights norms in the background of the host state's challenged legislation.

As investment treaties are prevalent and bind most states in the world, the effect would be systemic, global-level protection against undesirable socio-economic changes multinational investors might otherwise have to face. Even more intensely and pervasively than at the moment, investment tribunals could become organs second-guessing legislative choices of states by resorting to a combination of IIAs and human rights proportionality. It is hard to imagine any justification for this. Investment tribunals would still represent very limited expertise in human rights law. The institutional structure of investment arbitration, its composition of ad hoc arbitrators, its processes and the outcomes it sanctions do not form an appropriate background for human rights proportionality

Netherlands 1995) 229-240, 234. For an application of this division to property, see Banning TRG, op. cit. note 40, 226-233. See also Mylly T, op. cit. note 40, 182.

[97] See ECtHR, *López Ostra v Spain*, 9 December 1994, Application no. 16798/90, where Spain failed to protect the home and private and family life of its citizens from the pollution caused by a waste treatment facility.

analyses on a global level.

The vain attempt to broaden the mindset of investment arbitrators through human rights proportionality could also have the negative effect of impeding a broader reform of investment arbitration. The false promise of more balanced outcomes through human rights proportionality *still has a legitimating effect on investment arbitration* even when the substantive outcomes would remain unchanged or even become worse.

4.3 Why Does the Mainstream Argument Fail with Respect to IP?

Roughly similar concerns emerge in connection with the calls to integrate IP treaties more fully under ISDS. Being able to interpret IP treaties as an interpretative body of applicable law relevant to the investment dispute at hand could well enable using the flexibilities inherent to IP treaties in favour of host states. An investment tribunal could for example refer to Article 8 of the TRIPS Agreement and emphasize the protection of public health and nutrition in its interpretation of the applicable IIA standard, following the example of the WTO panel in its recent decision (*Australia – Tobacco Plain Packaging*). But it could also use more categorically and clearly pronounced minimum rights of TRIPS in favour of the IP owners, as well as its strict provisions like the three-step test (censoring exceptions and limitations to exclusive IP rights),[98] likely contributing towards a strict review of disputed host state IP exceptions under the applicable IIA standards.

It is still uncertain whether and under what conditions an investment tribunal could apply an IP treaty binding the host state to find a host state breach thereof, constituting the basis for an infringement of the applicable IIA standard, such as (indirect) expropriation or FET.[99] Greater inclusion of IP treaties as applicable law in investment arbitration through an integrative method based on Article 31(3)(c) of the VCLT would likely contribute towards increasing willingness of investment tribunals to pronounce on substantive norms of international IP law, thus shifting decision-making power over international IP law to investment tribunals.

Direct references to the TRIPS Agreement in IIAs could similarly expand the competence of investment tribunals to apply the referred provisions. Such clauses, intended to limit the power of investment tribunals for example to apply the expropriation standard to compulsory licensing where it conforms with TRIPS, have the consequence that the arbitral tribunal likely becomes competent to

[98] See about the three-step test Mylly T, op. cit. note 40, chapter 5.

[99] See e.g. Frankel S, op. cit. note 43, 128-131; Klopschinski S, 'The WTOs DSU Article 23 as Guiding Principle for the Systemic Interpretation of International Investment Agreements in the Light of TRIPs' (2016) 19 Journal of International Economic Law 211; Ruse-Khan HG, op. cit. note 41; and Stepanov I, Eli Lilly and Beyond – The Role of International Intellectual Property Treaties in Establishing Legitimate Expectations in Investor-State Dispute Settlement (Nomos Verlagsgesellschaft mbH & Co KG 2018), with respect of the FET-standard and legitimate expectations. In *Philip Morris v. Uruguay*, the tribunal used Article 20 of the TRIPS Agreement, but said it was 'assuming its applicability' (para 262), finally concluding that 'under Uruguayan law or international conventions to which Uruguay is a party the trademark holder does not enjoy an absolute right of use […].' (para 271). The *Eli Lilly* award (op. cit. note 43) stated in footnote (515) that it had considered the parties' related submissions, for example based on the Patent Cooperation Treaty, but the claimant had failed to establish that Canada breached any international obligations by invalidating the disputed patents. The tribunals did not have to answer what would have happened should they have found a breach of international IP law.

establish whether the TRIPS Agreement has been breached or not.[100] Although it has been argued that investment tribunals should not use IIAs for evaluating potential infringements of TRIPS due to Article 23 of the WTO Dispute Settlement Undertaking,[101] investment tribunals might for a variety of reasons be willing to provide complementary protection for the investor's 'private TRIPS rights' through the ISDS procedure, where the applicable IIA enables this. When there is direct reference to TRIPS in the IIA as an applicable norm under the expropriation or other investment law standards, it might be difficult for the investment tribunal to avoid pronouncing on TRIPS compatibility.

In any event, as *Philip Morris v. Uruguay* and *Ely Lilly v. Canada* awards demonstrate, flexibilities inherent to IP law could not save us from the massive expansion of the de facto IP protection that investment law signifies. As argued above, even where an investment tribunal agrees that a host state has neither breached its international IP obligations nor its own IP legislation, a host state measure that affects the value or use of the protected IP investment might still infringe investment treaty standards, such as indirect expropriation or FET. In other words, greater systemic integration of IP treaties in investment arbitration could empower an alternative – a more IP-investor friendly – forum for finding a state liable for its IP treaty breach, but even absent such IP treaty breach the IP owner might prevail!

5. Alternatives for the Mainstream Argument

5.1 Introduction

The foregoing suggests that it might be worthwhile to discuss alternative strategies to rights proportionality. One such strategy considered below is using human rights as part of a counterclaim against the investor. Quite often, the investor has not lived up to its obligations under host state law. In some instances, it could have jeopardized human rights in the host country. In such situations, the host state could try to invoke human rights against the investor as part of a counterclaim.

A more typical strategy is to develop deference towards host state legislature in ISDS. Appropriate ways for doing so include the police powers and margin of appreciation doctrines. The emphasis will be on the latter. These doctrines could assume particular relevance where the host state measure is to implement a human right obligation. Provided such doctrines are applied as part of customary international law applicable in all investment treaty arbitration irrespective of the applicable IIA and the formulation of the protective investment treaty standard, they might manage to reduce some of the harmful intrusions of IIAs into human rights. However, they are more typically applied as concepts inherent to the protective standards of the investment treaty, thus having less structural and limiting effects on ISDS practices.

My overall argument is that instead of searching for as many entry points for human rights argumentation in ISDS as possible,[102] or integrating IP treaties more fully under the interpretative

[100] The US and the EU have used such clauses. In the Canada-EU Comprehensive Economic and Trade Agreement (CETA), similar references to TRIPS conformity were also included in clauses on revocation, limitation or creation of IPRs. See more closely Mercurio B, op. cit. note 75, 261-2 and Ruse-Khan HG, op. cit. note 41, 25-33.
[101] See Klopschinski S, op. cit. note 99. Article 23 of the WTO Dispute Settlement Undertaking prohibits the enforcement of WTO law outside the WTO Dispute Settlement Body.
[102] Kube V and Petersmann EU, op. cit. note 5, 96-103.

competence of investment arbitrators, a preferable approach would consist of measures reducing the overlaps between investment, IP and human rights law, thus reducing instances where host state laws protecting IP and human rights fall under IIAs in the first place. There are multiple possible strategies to further this end, falling beyond the core focus of this chapter and each meriting a separate discussion.[103] In particular, investment treaty standards should be drafted with much more precision and they should contain substantive limitations, as has already been done to some extent in the more recent investment treaties, such as Canada-EU Comprehensive Economic and Trade Agreement (CETA).[104]

5.2 Human Rights Counterclaims against Investors

Human rights could also be invoked as part of a counterclaim against an investor.[105] This would enable denial of benefits accruing from the IIA in case of misconduct on the part of the investor at any stage of the investment, for example when the investment was initially made. Investor's conduct breaching human rights could in other words lead to denial of protection. This could also prove significant in cases where the protected investment is IP. Yet the existence and potential effects of such a principle are uncertain and contested.

In *Urbaser v. Argentina*[106], the tribunal recognized for the first time that a human rights breach of the investor could potentially function as a counterclaim when the IIA has a wide enough jurisdiction clause. Argentina argued in its counterclaim that because the investor did not perform its concession obligations related to water supply, it 'did not only affect mere contractual provisions, but basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty'.[107] Having analysed the UDHR, the ICESCR and a related Committee Comment, the tribunal concluded that 'the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights.'[108] The tribunal thus argued that companies operating internationally could be subjects not only of human rights, but also of human rights obligations. However, the tribunal finally said that the human right to water only obliges states, to the exclusion of private investors. Nevertheless, the argumentation of the tribunal was promising in that it recognized the theoretical possibility of investor's human rights obligations and their effect on protection under some circumstances.

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[103] For example, future IIAs could include an obligation to exhaust domestic remedies before enabling access to ISDS. This would likely reduce the total number of ISDS procedures, avoid the prospect of multiple claims with regard to the same underlying dispute and also feed the perspective of the national legal system to ISDS. Similarly, pending regional or international procedures for example before the ECtHR, Inter-American Court of Human Rights (IACHR) or CJEU on the same subject matter should block related ISDS procedure. Such typically more specialized procedures could ultimately lead to the condemnation of the host state measure in question, as well as to damages granted to the investor. However, ISDS is the most generous with respect to damages.

[104] See Henckels C, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 Journal of International Economic Law 27.

[105] See e.g. Kim H, Regime Accommodation in International Law – Human Rights in International Economic Law and Policy (Brill Nijhoff 2016), 286-7. See also Kube V and Petersmann EU, op. cit. note 5, 80 and 96-98.

[106] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award December 8, 2016.

[107] *Ibid*., at para 1156.

[108] *Ibid*., at para 1199.

The *Bear Creek v. Peru* award[109] brought the idea of investors' human rights obligations back to ground. The award deemed Bear Creek's misconduct when obtaining the mining license – said to infringe Peru's constitutional law – as immaterial, as Peru had not made use of an option in the Peru-Canada Free Trade Agreement (FTA) to prescribe special formalities in connection with the establishment of covered investments. The tribunal did not accept that such assessment could be based directly on international law, as Peru had argued. Although the tribunal stated that Bear Creek could have gone further to obtain the 'social license', it stated that doing so is not a legal requirement on investors. It also denied considering Peru's invocation of the doctrine of police powers as a general doctrine of international law. Instead, it resorted to the exhaustive list of three exceptions to breaches of the investment chapter in the FTA. According to the tribunal, it followed from the FTA that 'no other exception from general international law or otherwise can be considered applicable in this case'.[110]

Arbitrator Sand's dissenting opinion in Bear Creek argued more promisingly that, in line with *Urbaser v. Argentina*, the investor also plays an important role in gaining the trust of the local population. He stated that the ILO Convention 169 on Indigenous and Tribal Peoples had indirect effects on foreign investors as well – not only on the host states who assume direct obligations thereof. Sand argued that the investor's behaviour, its conduct in obtaining the mining license and its subsequent failure to obtain the 'social license' among the local population, should have an effect on the amount of damages. Although the majority did not share Sand's views and accepted that Bear Creek is entitled to compensation on the basis of indirect expropriation of its investment, the damages were based on sunk costs, not on the potential profitability as Bear Creek had argued.

One arbitral award and one dissenting opinion leave the applicability of human rights based counterclaims as a defense for host states highly uncertain. It is possible that the doctrine develops in subsequent arbitral practice, perhaps assuming more practical significance. Although corporate liability and international accountability of foreign investors for human rights breaches are emerging and much discussed topics in international human rights law, building more broadly on a setting whereby a state invokes human rights against a private firm's claim as a defence of its own disputed action, is not necessarily a pattern easily justifiable in human rights law. Using human rights as part of host state's counterclaim would likely be limited to serious enough cases. In any case, such counterclaims cannot provide a generic 'solution' to the use of human rights to strengthen the protection of the investors' investments or to the use of ISDS to challenge domestic policies implementing human rights. There must hence be other strategies to approach these issues.

5.3 Deference and the Potential of the Margin of Appreciation Doctrine

Although the existing record of arbitral tribunals to practice deference is not encouraging,[111] there

[109] *Bear Creek Mining Corporation v. Republic of Perú* (ICSID Case No. ARB/14/21), Award November 30, 2017.
[110] *Ibid*., at para 473.
[111] See Harten G van, op. cit. note 10, 15-18 and also passim. According to van Harten (17), arbitral tribunals 'assumed far-reaching authority to oversee states intensively in relation to legislative and executive decision-making and in spite of the overlapping role of other adjudicators'. Furthermore (78):

> "*tribunals did not take a position of general deference in the review of legislatures, with three exceptions across about 60 cases in which legislative measures were reviewed. – They did not engage in abstention or general*

may be ways to facilitate it. A potentially promising option would be to build on the combination of international law doctrine of margin of appreciation and the specific impact of human rights on treaty interpretation.[112] In line with this approach, investment tribunals should leave a broad margin of appreciation for host states especially when the latter have made a reasonable claim that the challenged measures relate to the realization of human rights or related collective goods. The doctrine of margin of appreciation has been developed in the case law of the ECtHR, among others. The WTO Appellate Body, too, has adopted a nonintrusive standard of review in some of its rulings.[113] In addition to the *Philip Morris v. Uruguay* award discussed above, a few investment tribunals have also invoked the doctrine. However, for example, Vadi states that the margin of appreciation doctrine has, at least to date, remained an outsider in investment arbitration.[114]

Philip Morris v. Uruguay is one of the few cases where tribunals have discussed socio-economic rights.[115] The case is exceptional also from the perspective that the tribunal built on the doctrine of margin of appreciation known especially from the case law of the ECtHR. The latter connects the margin of appreciation to proportionality in the sense that a wide margin of appreciation leads to a deferential proportionality test, whereby the state has a broader range of permissible policy choices than under a narrower margin.[116] The WHO amicus brief and the publicity of the *Philip Morris v. Uruguay* case likely affected the tribunal's approach. Born's dissenting opinion demonstrates a more traditional investment lawyer's approach.

The tribunal justified its finding of no infringement of indirect expropriation standard with an 'additional reason' based on the tribunal's view that the Uruguayan measures constituted a valid exercise of the state's police powers, thus defeating the claim for expropriation. The tribunal integrated the police powers doctrine to its decision on the basis of Article 31(3)(c) VCLT by interpreting the treaty in the light of international law, including customary international law, which does not need incorporation in a treaty to be applicable. Protecting public health, the undisputed aim of the Uruguayan measures, was held to be a long-standing manifestation of the state's police powers.[117]

The *Philip Morris* tribunal also referred to 'right to legislate' clauses of recent trade and investment treaties to strengthen its position that the position under general international law is that proportionate and non-discriminatory measures taken to protect legitimate public welfare objectives, relating in this case to public health, do not constitute indirect appropriation.[118] In other words, the

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balancing except in two cases that were not adopted by subsequent tribunals. Overall, the arbitrators did not signal respect for legislatures."

[112] See about the doctrine of margin of appreciation as part of international law e.g. Shany, U, 'Toward a General Margin of Appreciation Doctrine in International Law?', (2005) 16 The European Journal of International Law 907, passim, and from an investment law perspective Burke-White WW and Staden A Von, op. cit. note 1, passim. See also Vadi V, op. cit. note 32, chapter 5.5 (being more sceptical about the potential of the margin of appreciation doctrine in ISDS). See Scheinin M, 'Impact on the Law of Treaties', in Kamminga MT and Scheinin M (eds.) Impact of Human Rights Law on General International Law (OUP, USA 2009), 23-36, for an argument that human rights should have an impact on treaty interpretation because of their *specific content and value*, not so much because of the VCLT or other formalistic arguments.

[113] See e.g. *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/ AB/R and WT/DS48/AB/R, (16 January 1998) (Adopted 13 February 1998). See also Shany U, op. cit. note 112, 928-929, for additional WTO-level case law connected to the doctrine of margin of appreciation.

[114] Vadi V, op. cit. note 32, 225.

[115] There have been only three of such cases according to Steininger S, op. cit. note 5, 39.

[116] Burke-White WW and Staden A Von, op. cit. note 1, 308.

[117] *Philip Morris v. Uruguay* award, op. cit. note 11, at paras 287-295.

[118] *Philip Morris v. Uruguay* award, op. cit. note 11, at paras 300-301.

tribunal considered such clauses as codifications of the police powers doctrine. It referred to Uruguay's Constitution and the FCTC, 'guaranteeing the human rights to health'.[119] But it retained the power to evaluate whether the measures are taken bona fide for the public welfare purpose and whether they are non-discriminatory and proportionate.[120] Importantly, it accepted that the challenged measures were taken by Uruguay with a view to protect public health in fulfilment of its domestic and international obligations. It accepted without detailed proportionality analysis that the measures were adopted in good faith and were non-discriminatory and proportionate to the objective they meant to achieve, in relation to their limited adverse impact on the investor.[121]

It is somewhat contradictory that the tribunal treated the police powers doctrine as part of customary international law, but did not extend its effects beyond the expropriation standard to the rest of the award addressing other investment standards, such as FET. Police powers doctrine should be seen as expressing the principle of sovereignty and the right to legislate generally, not capable of being limited to an individual investment treaty standard.[122] In practice, the tribunal reduced it to an international law-based exception under the expropriation standard.

But the *Philip Morris* tribunal also emphasised the integration of international law in the interpretation of the FET-standard. This contributed to interpreting the FET-standard in the light of the FCTC and what the tribunal considered to be a customary international law principle of margin of appreciation.[123] The analysis below will focus on the latter aspect.

In its analysis of the arbitrariness of the state's measures under the FET standard, the tribunal agreed with Uruguay 'that the margin of appreciation is not limited to the context of the ECHR but applies equally to claims arising under BITs, at least in contexts such as public health.' It specified that:[124]

> "*The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith […] involving many complex factors.*"

The tribunal referred approvingly to two previous arbitral awards, concluding on the basis of those awards that the remaining question is 'whether or not there was a manifest lack of reasons for the legislation'.[125] The tribunal then operationalized the notion of margin of appreciation when analysing the measures in question. Although the analysis of the Single Presentation Regulation (SPR) was

[119] *Philip Morris v. Uruguay* award, op. cit. note 11, at paras 302 and 304.
[120] *Philip Morris v. Uruguay* award, op. cit. note 11, at para 305.
[121] *Philip Morris v. Uruguay* award, op. cit. note 11, at para 306.
[122] See about the police powers doctrine as an expression of the right to legislate and sovereignty Viñuales JE, 'Sovereignty in Foreign Investment Law' in Douglas Z, Pauwelyn J and Vinuales JE (eds.), The Foundations of International Investment Law – Bringing Theory Into Practice (OUP 2014), 332-7. As Viñuales explains, the police powers doctrine developed for long in expropriation cases, likely explaining the limitation of this principle to expropriation cases in subsequent investment arbitration practice.
[123] All legal measures Uruguay had taken internally to implement tobacco control were expressly adopted in conformity with the FCTC and in order to give effect to general obligations thereof. Although Switzerland is not a party to the FCTC, the tribunal held the FCTC is a point of reference on the basis of which to determine the reasonableness of the Uruguayan measures (para 395 and 401 of the *Philip Morris v. Uruguay* award op. cit. note 11).
[124] *Philip Morris v. Uruguay* award, op. cit. note 11, para 399.
[125] *Philip Morris v. Uruguay* award, op. cit. note 11, para 399.

relatively detailed, in the end the tribunal applied a relatively relaxed standard of review in conformity with the idea of margin of appreciation.[126] The tribunal similarly applied a relaxed review as concerns the second measure, the so-called 80/80 Regulation, stating that some limit had to be set, and the balance to be struck between conflicting considerations was very largely a matter for the government and that the way in which a government requires health risks to be communicated to persons at risk 'is a matter of public policy, to be left to the appreciation of the regulatory authority'.[127]

It also rejected the investor's claim that the measures would be against the investor's legitimate expectations or legal stability of the host state as part of the FET standard. The *Occidental v. Ecuador* award had considered stability and predictability of the legal and business framework as significant objects of protection under international law, thus concluding that there was an obligation not to alter the legal and business environment in which the investment had been made.[128] In contrast, the Philip Morris tribunal read the relevant standards in the light of the states' right to regulate. However, changes to general legislation may not exceed the exercise of the host state's 'normal regulatory power in the pursuance of a public interest' and measures must remain within 'the acceptable margin of change'.[129] The tribunal emphasized that Uruguay had not made any specific commitment to Philip Morris and that in an area like tobacco control, the expectation could only have been more stringent regulation of the sale and use of tobacco products. The tribunal's arguments reflected the margin of appreciation doctrine also as regards this part of the FET-claim. The tribunal referred to its FET-analysis also under impairment of use and enjoyment-standard, thus effectively extending the margin of appreciation argumentation to that standard.[130]

Although the arbitral tribunal in *Philip Morris v. Uruguay* resorted to language of deference and the doctrines of police powers and margin of appreciation, this was still under discrete investment standards, not on the level of the case as a whole. This could be seen to subject the said doctrines and sovereign right to legislate in the public interest under the language of the investment treaty standards. According to van Harten, investment arbitrators have referred to the concept of margin of appreciation as a device for general and institutional deference only once, in *Continental Casualty*.[131] Other times they have referred to it as an in-built restraint under the FET standard. In most cases, the tribunals have either rejected the invocation of the doctrine or invoked it to assist the investor and expand the tribunal's authority. Referring to the doctrine of margin of appreciation as an in-built restraint does not prevent the investment tribunal from proceeding with more categorical review under another standard, possibly leading to an award involving the same amount of compensation. Such practices frustrate the institutional meaning of the doctrine of margin of appreciation and could be interpreted to signify a rejection, not acceptance, of the margin of appreciation on institutional grounds.[132]

The approach favoured in this chapter would mean the following. The doctrine of margin of appreciation in the investment law context would subject arbitral tribunals under an obligation to exercise restraint and deference especially when the host state measures relate to the protection of human rights. Investment treaty norms, such as the expropriation and FET standards, are formulated

[126] *Philip Morris v. Uruguay* award, op. cit. note 11, para 410.
[127] *Philip Morris v. Uruguay* award, op. cit. note 11, paras 418-19.
[128] *Occidental Exploration and Production Company v Ecuador*, Award, 1 July 2004, LCIA, Case No UN 3467.
[129] *Philip Morris v. Uruguay* award, op. cit. note 11, para 423.
[130] *Philip Morris v. Uruguay* award, op. cit. note 11, para 445.
[131] *Continental Casualty Company v. Argentine Republic*, ICSID Case no ARB/03/9, September 5, 2008.
[132] Harten G van, op. cit. note 10, 20, 92 and 98-100.

as flexible, standard type discretionary norms. They provide very limited conduct-guidance and should preserve a significant zone of legality within which host states should be free to choose among reasonable policy options. Investment treaty norms are therefore particularly suitable to the application of the doctrine of margin of appreciation.[133] Yet the same argument based on margin of appreciation should apply similarly to all investment treaty standards, unlike in *Philip Morris v. Uruguay*.

The judicial deference required from arbitral tribunals would thus mean that, provided the host state makes a reasonable, good-faith claim that the host state measure is based on the protection of human rights or related collective goods, the arbitral tribunal should show judicial restraint on the level of the whole case and accept that the measure is within the zone of legality. It would not need to enter into substantive human rights balancing, but merely recognise the limits of the investment law acquis. The investment law review would then be operationally limited in such situations, but not precluded. As the doctrine of margin of appreciation may be seen as a general doctrine of international law, it could serve as a guiding principle for ISDS without any changes in IIAs. To the extent that human rights law requires its integration in ISDS, building on the doctrine of margin of appreciation could constitute the most realistic and least problematic way for the arbitral tribunals to do so.

As Burke-White and von Staden have also argued, the doctrine of margin of appreciation forms the most legitimate basis for a consistent and coherent approach to reviewing host states' regulation, as investment tribunals' lack of expertise in public law and embeddedness in the host states' political communities speaks against more intrusive approaches, including proportionality. After first evaluating the width of the margin on the basis of an order-of-magnitude calculation based on the characteristics of the rights and situation in question, the residual balancing test would not in practice question the state's reasonable exercise of discretion whenever the margin of appreciation is deemed broad.[134] The standard is less intrusive than the test of less restrictive means or material proportionality analysis in the form of balancing the values and interests behind the state measure against the material harm imposed on the investor. Material proportionality analysis enables judge-made law, which is notoriously difficult to correct, as there is no international legislature capable of changing the outcome of the proportionality analysis by enacting a new law. Replacing the interpretation through a new international treaty in turn is exceedingly difficult.[135] The residual proportionality test would rather evaluate whether the state measure falls within the range of reasonable policy options in the given context. The broader the margin, the broader the range of acceptable policy options and measures.

It is not a panacea, but developing freedom to legislate clauses for future IIAs and adding limitations to open-ended IIA standards could have some desirable effects. Such measures could encourage self-restraint and deference on the part of the investment tribunals, without the need to enter into substantive human rights balancing and proportionality analysis. As the *Philip Morris* award indicates, they might even affect what forms customary international law.

[133] See Shany U, op. cit. note 112, 912-917, for types of norms amenable to the application of the doctrine.
[134] Burke-White WW and Staden A Von, op. cit. note 1, 323.
[135] See Peters A, op. cit. note 8, 262.

6. Conclusions

Despite the above criticisms and concerns regarding likely future developments, the *Philip Morris v. Urguay* award goes in the right direction by building on deference towards host state legislature. It emphasizes the police powers and in particular the margin of appreciation doctrines as part of customary international law being applicable in ISDS due to systemic integration, enabled by Article 31(3)(c) of the VCLT and the ICSID Convention. Building on such doctrines is particularly motivated when the objective of the host state legislation is to implement human rights, like in the circumstances of the *Philip Morris* award. As argued in this chapter, such deferential approach is preferable to more intrusive human rights proportionality, especially where the host state measure is to give effect to human rights.

Yet the core reason for building on deference when hosts state laws implement human rights is not the VCLT enabling a plethora of interpretative methods, but the specific content and impact of human rights on treaty interpretation.[136] To an extent human rights require their integration to investment law, building on deference and doctrines like margin of appreciation constitutes the most realistic and least problematic way for doing so. Arbitral tribunals should apply such doctrines as limitations on the level of the whole case, not under the terms of individual investment treaty standards. Although the *Philip Morris* award could be seen as one reaction to the legitimacy crisis of ISDS, it is still just one small step in the right direction. Future investment tribunals simply might not follow it.

Investment treaty norms, international IP norms such as the three-step tests of TRIPS and protection of property ownership as a human right, provide IP rights global constitutional protection largely detached from nation state constitutions. They create new and strengthen existing barriers to progressive law reforms by extending protection beyond the traditional domain of IP rights – the exclusive right to prohibit others from certain uses of protected subject matter. They also strengthen existing IP rights by enabling direct invocation of international IP norms for private investors, otherwise excluded from such possibilities in the WTO framework and by offering an investor-friendly forum for the interpretation and application of IP norms. Crucially, they also protect IP investments from the limiting effects of other laws, hence shielding positive use rights around the negative right protected by traditional IP norms. As I have argued above, this signifies a massive structural shift in the international protection of IP assets, with significant repercussions. Evaluated as a whole, these three norm complexes should be seen as a form of new constitutionalism,[137] a form of global constitutionalization and regulatory innovation that reinforces economic interests by limiting the available policy options.

The complementary role of these norm complexes is to increasingly immunize exclusive IP rights from perceived internal threats, such as the expansion of IP law's own exceptions and limitations or exclusions from protectable subject matter. The role of investment treaty norms, in particular, is to provide protection against external threats arising from conflicting norms in cultural, environmental, competition, human rights and other laws. Having double or even triple constitutional protection on the global scale makes interferences with IP rights riskier for countries, and backward steps in treaty-based protection more complex and therefore improbable. These three legal regimes

[136] See Scheinin M, op. cit. note 112.
[137] See e.g. the contributions in Gill S and Cutler AC (eds.) New Constitutionalism and World Order (CUP 2014), all discussing different themes under the banner of new constitutionalism.

may be invoked complementarily even in a single case, as the recent disputes before national courts, investment treaty tribunals and WTO dispute settlement panel concerning tobacco package regulations demonstrate.[138]

Integrating human rights proportionality to ISDS through systemic integration could not save the social function of IP or secure more just outcomes informed by all human rights in a balanced manner. As has been pointed out above, the protection of investors' property ownership has been the dominating reference to human rights in ISDS. Human rights have hence rather appeared as 'part of the problem'.[139] Greater integration of human rights in ISDS would expand the overlaps between investment law, human rights and IP law and empower investment arbitrators through proportionality analysis. It would also provide the awards with a human rights gloss, without substantively changing the outcomes. Human rights become restructured in ISDS: they must reach a simplified and partial form to match the epistemic knowledge, rationales and biases of investment lawyers. Such reconstruction entails assuming authority over the integrated human right norms and their meaning in ISDS. By so doing, ISDS practices reinforce the hierarchical superiority of investment treaty law.[140] As long as there is no complete restructuring of ISDS – perhaps a permanent investment court with tenured judges having their background in human rights and public law rather than commercial law and arbitration – greater integration of human rights to ISDS practices would produce more damage than good. Under such circumstances, the best use of human rights is to sharpen the deferential doctrines, such as the margin of appreciation.

[138] Griffiths J, 'On the Back of a Cigarette Packet': Standardised Packaging Legislation and the Tobacco Industry's Fundamental Right to Intellectual Property' (2015) 19 Intellectual Property Quarterly 343.
[139] Kennedy D, 'International Human Rights Movement: Part of the Problem?' (2012) 15 Harvard Human Rights Journal 101.
[140] See for a similar argument in the context of WTO law, Alston P, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 European Journal of International Law 815. See also in the WTO context Beckett J, op. cit. note 39. Human rights have already become a strategic tool at the hands of investment arbitrators, having the function to boost the protection of investments or to bring legitimacy to the ISDS awards. Yet because of the simplified human rights discourse focusing on individual rights only, such legitimacy is superficial.