

INTERNATIONAL HUMAN RIGHTS LAW IN INVESTMENT ARBITRATION: EVIDENCE OF INTERNATIONAL LAW'S UNITY

JAMES D. FRY*

Arbitration is justice blended with charity.
– Nachman of Bratslav

INTRODUCTION

A. Responding to Cynicism

The relationship between human rights and foreign investment law is recognized as complex,¹ yet commentators generally agree that international investment law and arbitration have an adverse impact on the promotion and protection of human rights. Ryan Suda summarizes his recent study by stating:

[Bilateral investment] treaties, which grant strong protections to investors of either state party who are operating in the territory of the other party, may impinge upon human rights enforcement and realization in several ways. . . . The analysis brings home the need for the investment treaty regime to be reformed to take better account of the human rights regime, ameliorating situations in

Copyright © 2007 by James D. Fry.

* James D. Fry is a Fellow at the University of Geneva Faculty of Law and a Teaching Assistant at the Graduate Institute of International Studies, International Law Section, in Geneva. He received an LL.M. from Leiden University Faculty of Law, a J.D. from Georgetown University Law Center, an M.I.A. from Columbia University and a B.A. from Brigham Young University. He would like to thank Professor Gabrielle Kaufmann-Kohler and Thomas Schultz of the University of Geneva, as well as Andrew Clapham, Jonathan Curci, David Fry, and Bertrand Ramcharan for their comments on earlier drafts of this Article. This Article is part of a research project funded by the Swiss National Science Foundation.

1. See U.N. Economic and Social Council [ECOSOC], Sub-Comm. on the Promotion of Human Rights, *Report of the High Commissioner for Human Rights, Human Rights, Trade and Investment*, ¶¶ 5-19, 56, U.N. Doc. E/CN.4/Sub.2/2003/9 (July 2, 2003) [hereinafter *High Commissioner Report*] (noting, *inter alia*, how the relationship depends on such factors as the country in question and investors' motives).

which states face conflicting international legal obligations under the two regimes.²

Rémi Bachand and Stéphanie Rousseau assert, “dispute settlement decisions that have a negative impact on policies related to rights protection,” among other things, fuel strong concerns over international trade and investment agreements undermining human rights protections.³ Luke Peterson and Kevin Gray summarize their arguments, noting:

The ability [of arbitral tribunals] to monitor the full human rights impacts of emerging investment treaty arbitration is hindered by various shortcomings of this process. Some reform of [the bilateral investment treaty regime], including greater transparency, is necessary at a minimum, as disputes are now implicating a broad range of public policy measures in host states. . . . [I]f investment tribunals will be expected to take account of a broader range of human rights and human security externalities related to investment, this might require further changes to the substantive and procedural rules of existing (and future) investment treaties.⁴

Jose Alvarez ironically characterizes the NAFTA investment chapter (Chapter 11) as “a human rights treaty for a special-interest group”—namely, foreign investors.⁵ Indeed, as he asserts, the NAFTA investment chapter is “the most bizarre human rights treaty ever conceived,” giving the bulk of the rights to the few and ignoring the rights of those who are otherwise affected by the investment, including individual economic rights, work-related rights as provided by Articles 22 to 24 of the Universal Declaration of Human Rights (UDHR), and other rights like the right to education under UDHR Article 26.⁶ All of these studies consistently set international

2. Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization* 2 (NYU Global Law Working Paper No. 01, 2005).

3. Rémi Bachand & Stéphanie Rousseau, *International Investment and Human Rights: Political and Legal Issues* 1 (Peter Feldstein trans., Rights & Democracy, Background Paper, 2003), <http://www.ichrdd.ca/english/commdoc/publications/globalization/thinkTank2003/bachandRousseauEng.pdf>. See also Peter Barnacle, *Promises and Paradoxes: Promoting Labour Rights in International Financial Institutions and Trade Regimes*, 67 SASK. L. REV. 609, 634-35 (2004) (“Enforcement of investor rights [through investment arbitration] will potentially affect a wide range of human rights . . .”).

4. Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration* 3 (The International Institute for Sustainable Development, Research Paper, 2003), http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf.

5. Jose Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 308 (1997).

6. *Id.* at 307-09.

investment law and international arbitration against human rights considerations.⁷

Surprisingly, these studies are light on tangible examples, instead relying on hypothetical situations and weak counterfactual reasoning.⁸ In contrast, this Study looks at actual international investment arbitration cases to determine the relationship between international investment law and arbitration, on the one hand, and human rights law, on the other. This Article seeks to undermine the general consensus that investment arbitration negatively impacts human rights and to present examples where the law applied by international investment arbitral tribunals is compatible with, and even supports, human rights law by relying on human rights jurisprudence to make key determinations. This Article goes beyond mere theoretical debate by looking into the facts in order to provide a solid foundation upon which a theory might then be erected, particularly the unification of international law.

In order to respond to the prior studies mentioned above, Part I of this Article takes a detailed look at actual tribunal decisions to determine the relationship between investment arbitration and human rights law.⁹ Part II expands on this critique by analysing the fundamental principles of international arbitration—namely, equality of parties and the opportunity to present one's case, which derive from international arbitration's wholehearted commitment to party consent.¹⁰ Part III, then, puts the analysis contained in Part I into a

7. As noted *infra* Part I(B), “international arbitration” and “international investment law” are occasionally used interchangeably in this Article due to the fact that arbitrators essentially are interpreting relevant international investment law provisions in a particular context. That said, it is acknowledged that the former is a subset of the latter, so the two can be distinguished.

8. See, e.g., Suda, *supra* note 2, at 85-86 (pointing out how Mexico *could have* argued certain things in the ICSID arbitration *Técnicas Medioambientales S.A. v. United Mexican States*); Ursula Kriebaum, *Privatizing Human Rights - The Interface Between International Investment Protection and Human Rights*, 3 TRANSNAT'L DISPUTE MGMT. No. 5, at 3-5 (2006) (asserting that there could be a “potential conflict between the consumers' right of access to water and the investor's right to property,” though leaving out that these two rights have not been brought into conflict in arbitral proceedings, and even relying on a “fictitious scenario” to support her arguments); Peterson & Gray, *supra* note 4, at 5-7, 16, 22-32.

9. The research dealing with international arbitration cases underlying this portion was intended to be as comprehensive as possible, though the Author cannot rule out the possibility that some examples unintentionally were overlooked.

10. See S. I. Strong, *Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?*, 31 VAND. J. TRANSNAT'L L. 915, 987 (1998); Robert H. Smit & Nicholas J. Shaw, *The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and*

broader theoretical context—the debate surrounding the fragmentation of international law—by illustrating how specialized bodies of international law can interact without necessarily creating conflicts and without an institutional hierarchy that might impose order.¹¹ These interactions between specialized bodies of international law demonstrate a procedural- or institutional-type of unity for the international arbitration regime, as well as a substantive-type of unity between these two bodies of law.¹²

B. Methodology

In terms of methodology, it is important to note three points. First, this Study initially delimited human rights to a general notion of human rights, looking at how international arbitral tribunals have relied on human rights jurisprudence in their awards and orders, without breaking human rights down into their various rights or categories.¹³ The approach of this Article in grouping all human rights together makes the analysis more manageable¹⁴ and makes an inductive analysis possible by letting the general conclusions flow directly from the unanticipated empirical findings. Despite this approach, the author acknowledges that not all human rights have (or

Comparative Commentary, 8 AM. REV. INT'L ARB. 275, 277 (1997); Frank-Bernd Weigand, *Introduction* to PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION 77-79 (Frank-Bernd Weigand ed., 2002).

11. Those readers who are more interested in theory might want to start with Part III and then return to Part II to see how those theoretical arguments fit within this particular context.

12. See Vera Gowlland-Debbas, Comment, *Unity and Diversity in the Formation and Relevance of Customary International Law*, in UNITY AND DIVERSITY IN INTERNATIONAL LAW 285-86 (Andreas Zimmermann & Rainer Hoffmann eds., 2006) (discussing the different types of unity within international law).

13. There generally are three types, or generations, of human rights, each type having a different level of acceptance in the international community. The first generation includes the civil and political rights contained in Articles 3 to 21 of the UDHR and the International Covenant on Civil and Political Rights, the second generation includes social, economic and cultural rights contained in Articles 22 to 27 of the UDHR and the International Covenant on Economic, Social, and Cultural Rights, and the third generation includes unofficial rights that go beyond these earlier categories, many of which deal with the right to a healthy environment and economic development. See MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 23-25 (2003). Advocates are eager to claim a whole host of activities, such as the practice of sport, as human rights even though they generally are not recognized as such. See James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161, 177-78 (2002) (quoting Olympic Charter, Fundamental Principle 8 (2001)).

14. Besides, a methodology that focused on searching for a discussion of specific human rights within arbitration cases likely would not have resulted in a different set of cases as those analyzed here, based on some test searches run towards the end of the research.

should have) equal weight,¹⁵ especially when comparing so-called third-generation rights (involving environmental and development rights) with first- and second-generation rights (civil, political, economic and social rights). In the same way that some international courts and tribunals do already, those rights that are better established generally will need to be taken into account to a greater extent than the others.¹⁶

Second, this Article disagrees with the approach that some commentators take of merely assuming that human rights are involved in an arbitration case dealing with public issues such as public health.¹⁷ Not only is this not necessarily the case, but the involvement of *individual* rights might not even implicate *human* rights, as the International Court of Justice (ICJ) hinted in the *LaGrand* case when it stated that it was sufficient that an individual's rights were violated without having to say that human rights were actually involved.¹⁸

Third, Part II somewhat distinguishes international investment *arbitration* from international investment *law* (the law that

15. It is interesting to note that many of the human rights cases cited by arbitral tribunals are some of the most important human rights cases. Moreover, arbitral tribunals seem to rely on these cases in their decisions, not merely in their *obiter dicta*. These points suggest that arbitral tribunals are not throwing in references to human rights cases merely for the sake of appearances.

16. See Andrew Clapham, *The Jus Cogens Prohibition of Torture and the Importance of Sovereign State Immunity*, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW / LA PROMOTION DE LA JUSTICE, DES DROITS DE L'HOMME ET DU RÈGLEMENT DES CONFLITS PAR LE DROIT, LIBER AMICORUM LUCIUS CAFLISCH 157 (Marcelo Kohen ed., 2007) (citing Appellate Body Report, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (Mar. 12, 2001); Appellate Body Report, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 162, WT/DS161/AB/R, WT/DS169/AB/R (Jan. 10, 2001)).

17. See, e.g., Kriebaum, *supra* note 8, at 18 (“*Methanex* did not arise in a privatisation context but still concerned public health and hence human rights.”); Peterson & Gray, *supra* note 4, at 20 (in explaining how tribunals sometimes allow non-parties to a dispute to “bring forward human rights facts and arguments for a Tribunal’s consideration,” the author gives as examples two NAFTA arbitrations where the “Tribunals have indicated that they are minded to allow written submissions by groups wishing to bring forward arguments based upon *sustainable development or environmental concerns*,” even those are not human rights arguments *per se*). Please note that this assertion does not mean that the Article rejects the notion that public health cannot be a human right. On the contrary, this right seems rather well established. See generally BRIGIT C.A. TOEBES, *THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW* (1999). The simple point being made here is that any reference to public health in an arbitral decision is not, *ipso facto*, a reference to a human right for the purposes of this Article.

18. See *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27).

international investment arbitration applies¹⁹) in order to analyze the relationship between arbitration and human rights. In this way, Part II seeks to respond to the criticisms levied against international arbitration, principally, that its lack of transparency, legitimacy and accountability frustrates states' efforts to regulate their internal activities vis-à-vis human rights obligations. While the alleged lack of transparency raises some concerns that uncertainty can create a regulatory chill in host states,²⁰ the dangers to human rights from these characteristics of investment arbitration are overexaggerated. On the contrary, investment arbitration can be seen as consistent with human rights in several different ways, as explained in Parts II and III below.

I. INTERNATIONAL INVESTMENT ARBITRATION CASES DEALING WITH HUMAN RIGHTS

Investment arbitration awards refer to human rights and human rights jurisprudence in at least three different ways: (1) in determining substantive rules; (2) in determining procedural rules; and (3) in dealing with supposed conflicts between human rights and international investment law.²¹ As investment arbitral tribunals tend to rely on human rights considerations (with only two tribunals actually refusing to do so), it is apparent that international investment arbitration does not necessarily undermine human rights, and, in fact, tends to support human rights.

19. *But see* MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 133-44 (2001) (describing how international arbitration law is its own body of law, and quoting several cases to support this assertion); KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 181-82 (1993). This Article does not see a meaningful difference between referring to international arbitration law and the law that international arbitral tribunals apply. The Article uses the latter phrase because it would appear to be more of the mainstream approach.

20. Chill arises from a fear of claims regarding applicable standards, when this fear discourages a host state from even thinking of regulating the activities of investors. *See, e.g.,* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 132-35 (2003).

21. Interestingly, human rights and international investment law do not often expressly conflict, at least according to investment arbitration awards, hence the need for many of the earlier studies mentioned to rely on counterfactual reasoning and hypotheticals. *See text accompanying supra* note 8.

A. Substantive Rules

Investment arbitration tribunals rely on human rights jurisprudence, to varying degrees, to determine the contents of certain substantive rules. Some examples include the definition of regulatory expropriation, the need to exhaust local remedies, the assessment of damages and the allocation costs. This Part provides concrete examples of each.

1. Defining Regulatory Expropriation. In establishing the standards that governments need to abide by in order to avoid claims of regulatory expropriation, investment arbitration tribunals often have looked at the right to private property and related human rights jurisprudence. As the UNCITRAL tribunal in the *Lauder v. Czech Republic* case noted, “[BITs] generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession (‘dispossession’, ‘taking’, ‘deprivation’, or ‘privation’).”²² As a result, the tribunal had to look at some textbooks and the European Court of Human Rights case *Mellacher v. Austria* to derive a neat definition of the different types of expropriation: “a ‘*formal*’ expropriation is a measure aimed at a ‘*transfer of property*’, while a ‘*de facto*’ expropriation occurs when a State deprives the owner of his ‘*right to use, let or sell (his) property*.’”²³ The *Lauder* case involved the right to private property. Directly after quoting the *Mellacher* decision, the tribunal held:

[T]he Respondent did not take any measure of, or tantamount to, expropriation of the Claimant’s property rights within any of the time periods, since there was no direct or indirect interference by the Czech Republic in the use of Mr. Lauder’s property or with the enjoyment of its benefits. The Claimant has indeed not brought sufficient evidence that any measure or action taken by the Czech Republic would have had the effect of transferring his property or of depriving him of his rights to use his property or even of interfering with his property rights.²⁴

That UNCITRAL tribunal, which was convened in London and composed of three eminent arbitrators—Robert Briner, Lloyd N. Cutler, and Bohuslav Klein—involved a claim based on the U.S.-Czech Republic Bilateral Investment Treaty (BIT). In a parallel proceeding over that same underlying dispute but under the

22. Ronald S. Lauder v. Czech Republic, 2001 WL 34786000, para. 200 (UNCITRAL Final Award Sept. 3, 2001).

23. *Id.* (quoting *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) (1989)).

24. *Id.* paras. 201-02.

Netherlands-Czech Republic BIT, an equally eminent UNCITRAL panel in Stockholm, Sweden, composed of Wolfgang Kühn, Stephen M. Schwebel, and Ian Brownlie (who replaced Jaroslav Hándl), came to the exact opposite conclusion:

The Claimant's expropriation claim under Article 5 of the Treaty is justified. The Respondent, represented by the Media Council, breached its obligation not to deprive the Claimant of its investment. The Media Council's actions and omissions, as described above, caused the destruction of CNTS' operations, leaving CNTS as a company with assets, but without business. . . . The expropriation claim is sustained despite the fact that the Media Council did not expropriate CME by express measures of expropriation. De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims. This is undisputed under international law.²⁵

The second tribunal did not rely on human rights jurisprudence in establishing the standards for expropriation. One is left to wonder, therefore, whether this would explain how the two tribunals came to these opposite decisions.²⁶

Another clear case of such reliance on human rights jurisprudence is the International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Técnicas Medioambientales S.A. v. Mexico*, which often is referred to as the *Tecmed* case. This case is relevant for a number of reasons. First, the *Tecmed* tribunal looked to an Inter-American Court of Human Rights case to inform itself about the finer points of expropriation. In determining whether a certain type of expropriation took place, the tribunal noted that it should not "restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced." This approach was required by the Inter-American Court of Human Rights in *Ivcher Bronstein v. Peru*, which

25. CME Czech Republic B.V. v. Czech Republic, 2001 WL 34786542, paras. 591, 604 (UNCITRAL Partial Award Sept. 13, 2001) (internal citations omitted). See also *id.* paras. 591-609, 624; CME Czech Republic B.V. v. Czech Republic, 2003 WL 24070172, paras. 423-25 (UNCITRAL Final Award Mar. 14, 2003) (reaffirming the Partial Award's decision to hold the Respondent liable for the expropriation, *inter alia*, in breach of the underlying BIT).

26. For more information on these parallel proceedings and some interesting related issues, see generally Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835, 845-46 (2005); James D. Fry, *Quasi-In Rem Jurisdiction and Discovery in Enforcing an Arbitration Award: Understanding CME Media Enterprises B.V. v. Zelezny*, 6 INT'L ARB. L. REV. 100 (2003).

involved an individual's right to private property.²⁷ The *Tecmed* tribunal appears to have taken that case into consideration in determining whether a resolution of the National Ecology Institute of Mexico constituted an expropriation.²⁸

Second, the *Tecmed* tribunal relied on a European Court of Human Rights case for the standard of proportionality with regard to the public interest in the taking. Citing *Matos e Silva, Lda. v. Portugal*, the *Tecmed* tribunal considered whether such regulatory actions or measures of the National Ecology Institute of Mexico "are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality."²⁹ Citing to another two European Court of Human Rights cases, *Mellacher v. Austria* and *Pressos Compañía Naviera v. Belgium*, the *Tecmed* tribunal further developed the applicable rule on regulatory expropriation by pointing out that "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."³⁰ Yet again, the *Tecmed* tribunal quoted at length the European Court of Human Rights case *James v. United Kingdom* from 1986 as it explained more of the nuances of a legitimate public interest aim when the regulatory taking occurs:

Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest," but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. . . . The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden." . . . The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto. . . . [N]on-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption.

27. *Técnicas Medioambientales S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, May 29, 2003, 19 ICSID (W. Bank) 158, 219 (2004), 43 I.L.M. 133, 162-63 (2004) (quoting *Baruch Ivcher Bronstein v. Peru* (Ivcher Bronstein Case), 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, paras. 120-24 (Feb. 6, 2001)).

28. *Id.* at 220, 43 I.L.M. at 163.

29. *Id.* at 222, 43 I.L.M. at 164 (citing *Matos e Silva, Lda. v. Portugal*, 1996-IV Eur. Ct. H.R. para. 92).

30. *Id.* (citing *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) para. 48 (1989); *Pressos Compañía Naviera v. Belgium*, 332 Eur. Ct. H.R. (ser. A) para. 38 (1995)).

Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.³¹

Somewhat surprisingly, none of the members of the Tecmed panel were Europeans,³² which might have explained such reliance on European Court of Human Rights cases had it been otherwise. The tribunal in *Azurix Corp. v. Argentine Republic* indirectly cited this same human rights jurisprudence by relying on these portions of the *Tecmed* decision and even by quoting the European Court of Human Rights *James v. United Kingdom* case quoted above.³³

In the arbitration *Revere Copper & Brass, Inc. v. Overseas Private Investment Corp.*, Jamaica was held to have expropriated an investor's property when it imposed new tax measures that stopped the claimant from "exercising effective control over the use or disposition of a substantial portion of its property."³⁴ The dissenting arbitrator relied on a European Commission of Human Rights decision *Gudmundsson v. Iceland* and its interpretation of the general principles of international law contained in Article 1 of Additional Protocol No. 1 of the European Convention on Human Rights. Article 1 speaks of the "the right of a State . . . to secure the payment of taxes or other contributions or penalties."³⁵ When this same issue of expropriation through the imposition of new taxes came up in *EnCana Corp. v. Ecuador*, the London Court of International Arbitration (LCIA) tribunal discussed this language in *Revere Copper* at great length. In particular, the *EnCana* tribunal pointed out that the dissenting arbitrator's opinion in *Revere Copper*—that the tax there was not "unreasonable by normal standards of tax enactments in the international community"—did not mean that all unreasonable taxes will constitute an indirect expropriation.³⁶ The *EnCana* tribunal concluded that "[o]nly if a tax law is extraordinary, punitive in

31. *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) paras. 50, 63 (1986).

32. See Ben Hamida, *Investment Arbitration and Human Rights*, 4 TRANSNAT'L DISPUTE MGMT. No. 5, at 14 (2007).

33. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, June 23, 2006, 2006 WL 2095870, paras. 311-12 (ICSID (W. Bank)).

34. *Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp. (U.S. v. Jam.)*, 56 I.L.R. 258, 291-92 (Am. Arb. Ass'n 1978).

35. Convention on the Protection of Human Rights and Fundamental Freedoms, Protocol, art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

36. *EnCana Corp. v. Ecuador*, 2005 WL 3804543, para. 176 (London Ct. Int'l Arb. 2006).

amount or arbitrary in its incidence would issues of indirect expropriation be raised,” thus finding that “the denial of VAT refunds in the amount of ten percent of transactions associated with oil production and export did not deny EnCana ‘in whole or significant part’ the benefits of its investment.”³⁷ Although the *EnCana* tribunal cited a domestic arbitration case that quoted a decision of a human rights body, this can be considered indirect reliance on a human rights decision, even though the tribunal ultimately distinguished that decision from the case before it.

Yet another example of the usefulness of human rights decisions in the investment-arbitration context can be found in *International Thunderbird Gaming Corp. v. United Mexican States*, an ICSID case where Thomas Wälde explained in his separate opinion that the proper analogy in interpreting NAFTA Chapter 11 obligations was not to international commercial arbitration or general public international law, both of which traditionally involve disputants who are seen as equals, but rather to judicial review relating to governmental conduct, such as that observed in the European or Inter-American Human Rights Courts, where there is a power inequality between the parties.³⁸ Wälde’s discussion is not just theoretical, but actually relies on European Court of Human Rights cases to make his point. In particular, he relies, *inter alia*, on three European Court of Human Rights cases to establish that there is a key principle of international law known as “legitimate expectations” that governs the relationship between the state and individuals.³⁹ This principle requires the state to “respect legitimate expectations it has created with individuals, in particular if such expectations have become the basis for investment.”⁴⁰ Under NAFTA Article 1105, such a principle of international law “trump[s] the application of domestic law—such as Mexican gambling law as interpreted by the—then—new Mexican government.”⁴¹ Although this treatment of human rights jurisprudence within the international-arbitration context was done in a separate opinion, it shows the extent to which

37. *Id.* para. 177.

38. See *Int’l Thunderbird Gaming Corp. v. United Mexican States (U.S. v. Mex.)*, 2006 WL 247692, para. 13 (NAFTA Ch. 11 Arb. Trib. 2006) (Thomas W. Wälde, separate opinion).

39. *Id.* para. 27 (citing *Kopecný v. Slovakia*, App. No. 44912/98, 2004-IX Eur. Ct. H.R. para. 35; *Djidrovski v. Macedonia*, App. No. 46447/99, Eur. Ct. H.R. para. 68 (2005); *Dangeville v. France*, App. No. 36677/97, 2002-III Eur. Ct. H.R.).

40. *Id.*

41. *Id.* para. 26.

arbitrators are willing to base their analysis on human rights jurisprudence.

The final arbitration case to be discussed in this Section is the 2007 ICSID arbitration *Saipem S.p.A. v. Bangladesh*, which is quite unique from other expropriation cases in that it involved the alleged expropriation of an expropriation claim.⁴² There, Saipem, an Italian company, claimed that the respondent unlawfully disrupted an International Chamber of Commerce (ICC) arbitration through the interference by domestic courts.⁴³ The disruption frustrated the claimant's rights to arbitrate under the contract and constituted an expropriation of its arbitration award.⁴⁴ Somewhat surprisingly, Bangladesh did not argue that arbitral awards cannot be expropriated, despite the fact that a claim of expropriation of an expropriation claim appeared to be novel at that time.⁴⁵ More importantly for this Study, the tribunal cited several cases from the European Court of Human Rights—*Stran Greek Refineries and Stratis Andreadis v. Greece* and *Brumarescu v. Romania*—for the proposition that arbitration awards confer on parties a right to the sums awarded.⁴⁶

The tribunal was also faced with the question of whether the judicial branch of a government can expropriate an investor's property, since it usually is the executive branch that is charged with expropriation.⁴⁷ The tribunal found no reason why a judicial act could not rise to the level of an expropriation, especially as there was no mention of such a restriction in the relevant BIT and the respondent did not cite decisions to support its position.⁴⁸ The European Court of Human Rights case *Allard v. Sweden* seemed to be dispositive of the issue for the tribunal. There the Court concluded that a court

42. See generally *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, Mar. 21, 2007, 2007 WL 1215072 (ICSID (W. Bank)).

43. *Id.* para. 129.

44. See *id.* paras. 61, 129.

45. The tribunal had, however, pointed out that such an argument would not have been persuasive to them since the Iran-U.S. Claims Tribunal has held—for example, in the *Phillips Petroleum Co. v. Iran* case—that a state can expropriate immaterial rights. See *id.* para. 130 (citing *Phillips Petroleum Company v. Iran*, Award 425-39-2, 21 Iran-U.S. Cl. Trib. Rep. 79, para. 75 (1989)).

46. *Id.* (citing *Stran Greek Refineries and Stratis Andreadis v. Greece*, App. No. 13427/87, 301-B Eur. Ct. H.R. (ser. A) paras. 59-62 (1994); *Brumarescu v. Romania*, App. No. 28342/95, 1999-VII Eur. Ct. H.R., 10 HUM. RTS. CASE DIG. 237-41 (1999)).

47. *Id.* paras. 131-32.

48. See *id.* para. 132.

decision may constitute expropriation, even though the determination of whether there actually had been an expropriation was reserved until the merits phase of the dispute.⁴⁹ Thus, the *Saipem* case not only shows that even the most recent arbitral decisions are relying on human rights jurisprudence, but that they are relying on such jurisprudence to resolve a wide array of issues.

In sum, tribunals often rely heavily on jurisprudence from human rights courts to help them understand the limits of expropriation. This is largely due to the fact that the right to private property, or rather the right to the freedom from arbitrary deprivation of private property, is quite well developed there vis-à-vis international investment law.

2. *Exhaustion of Local Remedies.* Investment arbitral tribunal reliance on human rights jurisprudence as a guide to substantive rules is not limited to defining regulatory expropriation. For example, arbitral tribunals have looked to human rights jurisprudence when they have discussed exhaustion of local remedies, the assessment of damages, the allocation of costs, and the non-retroactivity of particular laws. Although the human rights cases involved in each category are far less noteworthy than the cases discussed in Part I(A)(1), these examples show the breadth of topics that investment arbitral tribunals look to human rights jurisprudence for direction.

Concerning the exhaustion of local remedies, the Loewen NAFTA tribunal relied on *Nielsen v. Denmark*, a decision in the Yearbook of the European Commission on Human Rights, to support the idea that a complainant must exhaust all adequate and effective remedies.⁵⁰ While this is a well established principle of international law, it is interesting to note that a tribunal that feels obliged to cite something for this proposition would cite a decision of a human rights treaty body, thus showing its respect for human rights jurisprudence.

3. *Assessment of Damages and Allocation of Costs.* In *Amco Asia Corp. v. Indonesia*, the ICSID tribunal considered human rights cases for substantive points of law dealing with the assessment of damages. In 1979, Indonesia gave the claimants an investment license

49. *See id.* (citing *Allard v. Sweden*, App. No. 35179/97, 2003-VII Eur. Ct. H.R. 310).

50. *The Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, June 26, 2003, 7 ICSID (W. Bank) 442, 42 I.L.M. 811, 838, para. 165 (2003) (citing *Nielsen v Denmark*, 1958-1959 Y.B. EUR. CONV. ON H.R. 412, 436, 438, 440, 444 (Eur. Comm'n on H.R.)).

for hotel management.⁵¹ In 1980, a military official took over management by a “Decree or Letter of Decision.”⁵² The Capital Investment Coordination Board of Indonesia, which was responsible for examining applications by foreign investors, making recommendations to the Indonesian Government and supervising the implementation of approved investments, terminated the license with the Indonesian President’s approval.⁵³ The claimant asserted that Indonesia unjustifiably cancelled its investment license.⁵⁴ The first arbitral tribunal agreed and ordered Indonesia to pay the claimants \$3.2 million.⁵⁵ Indonesia filed an application for annulment with the ICSID Secretariat, and the award was annulled in part.⁵⁶ The claimants then resubmitted the dispute under Rule 55 of the ICSID Arbitration Rules⁵⁷

After finding that the revocation of the investment license at issue was done in bad faith,⁵⁸ the tribunal turned to the question of the legal consequences for this and other findings.⁵⁹ After determining that Indonesian law did not provide for whether procedurally unlawful acts *per se* generate compensation,⁶⁰ the tribunal looked to see if international law provided for such compensation. Both Indonesia and a legal opinion by Professor Bowett cited numerous European Court of Human Rights cases to argue that “procedural violations do not generate damages where there remains the possibility that the substantive decision might be the same.”⁶¹ The *Sramek* case of 1984, for instance, was about whether Austria violated Article 6(1) of the European Convention on Human Rights, which provides for an individual’s right to have “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁶² While the court found there to have been a violation, the court refused to give the applicant pecuniary losses that

51. See *Amco Asia Corp. v. Indonesia*, ICSID Case No. ARB/81/1, Award for Resubmitted Case, May 31, 1990, 1 ICSID (W. Bank) 569, para. 9 (1993).

52. *Id.* para. 11.

53. *Id.* para. 12.

54. *Id.* para. 15.

55. *Id.* para. 16.

56. *Id.* paras. 17-18.

57. *Id.* para. 19.

58. *Id.* paras. 91-112.

59. *Id.* para. 113.

60. *Id.* para. 121.

61. *Id.* para. 125.

62. *Id.* (citing *Sramek v. Austria*, 84-I Eur. Ct. H.R. (ser. A) (1984)).

had been claimed.⁶³ The *Amco Asia* arbitral tribunal discussed that case at some length:

It is true that the European Court said that “the evidence in the file does not warrant the conclusion that had it been differently composed [the tribunal] would have arrived at a decision in Mrs Sramek’s favour.” It is against that background that Indonesia argues that no compensation was paid for a procedural violation, where there existed the possibility that the same outcome might have occurred even had there been no procedural violation.⁶⁴

Ultimately the tribunal distinguished *Amco Asia* from *Sramek* because the decision was made under Article 50 of the European Convention on Human Rights rather than under general international law.⁶⁵ Indonesia and Professor Bowett similarly attempted to use the European Court of Human Rights’ *Golder* case for the premise that not every violation (procedural or substantive) entitles an award of “just satisfaction” under Article 50 of the European Convention on Human Rights, though again this case was distinguished for not being on point.⁶⁶ Ultimately, the tribunal did not reject the reasoning or rights embodied in the European Court of Human Rights cases; it merely distinguished them on the facts, as tribunals often do.

In deciding how to allocate the costs for legal representation, Wälde, once again, referred to the European Convention on Human Rights (ECHR) in *International Thunderbird Gaming Corp. v. United Mexican States*. Wälde notes that the ECHR creates “[t]he judicial practice most comparable to treaty-based investor-state arbitration,” to assert that “states have to defray their own legal representation expenditures, even if they prevail.”⁶⁷ In reality, it is not the European Convention on Human Rights that established this, but rather the jurisprudence of the European Court of Human Rights. Regardless, it is another example of how a human rights court can influence the practice of investment arbitration.

4. *Retroactivity of the Law.* Yet another example of how investment arbitral tribunals consider human rights jurisprudence when reaching their decision is when a tribunal decides on the substantive law relating to non-retroactivity of law. The *Mondev*

63. *See id.*

64. *Id.* para. 126.

65. *See id.* para. 127.

66. *See id.* para. 128 (citing *Golder v. United Kingdom* 18 Eur. Ct. H.R. (ser. A) (1975)).

67. *Int’l Thunderbird Gaming Corp. v. United Mexican States (U.S. v. Mex.)*, 2006 WL 247692, para. 141 (NAFTA Ch. 11 Arb. Trib. 2006) (separate opinion of Thomas W. Wälde).

NAFTA arbitration involved *Mondev* (a Canadian corporation) that had brought a NAFTA Article 1105 (Minimum Standard of Treatment) claim against the United States when the Massachusetts Supreme Judicial Court upheld a trial court judgment notwithstanding the verdict in favour of the Boston Redevelopment Authority (BRA). The court determined that the Authority was immune from liability for interference with contractual relations by reason of a Massachusetts statute giving BRA immunity from suit for intentional torts.⁶⁸ Among *Mondev's* claims was one asserting that the Massachusetts court did not consider whether the statute on which it relied applied retroactively, in contravention of its own rules.⁶⁹ In deciding whether this was a valid claim, the tribunal made a very loose analogy to three European Court of Human Rights cases that apparently imposed criminal liability where no such criminal liability existed when the crime was committed.⁷⁰ The tribunal then went on to cite two European Court of Human Rights decisions involving civil matters where rules apparently were applied retroactively.⁷¹ On its way to eventually dismissing the claims against the United States, the tribunal dismissed the argument concerning retroactivity without much discussion.⁷² Just as with the *Tecmed* case, none of the arbitrators on that panel were European, which makes the panel's reference to the jurisprudence of the European Court of Human Rights that much more interesting.

In the *Tradex Hellas S.A. v. Albania* ICSID case, Albania objected to the jurisdiction of the tribunal because the dispute arose before a certain Albanian law was passed that allowed for arbitration of such disputes.⁷³ Albania claimed that allowing arbitration of the dispute there would be an unacceptable retroactive application of that Albanian law.⁷⁴ As support for this presumption of non-

68. *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Oct. 11, 2002, 6 ICSID (W. Bank) 192, para. 1 (2004), 42 I.L.M. 85, 86 (2003) (NAFTA Ch. 11 Arb. Trib.).

69. *See id.* para. 137, 42 I.L.M. at 112.

70. *See id.* para. 138, 42 I.L.M. at 112 (citing *S.W. v. United Kingdom*, App. No. 20166/92, 335-B Eur. Ct. H.R., paras. 34-36 (1995); *C.R. v. United Kingdom*, App. No. 20190/92, Eur. Ct. H.R. 51, paras. 32-34 (1995); *Streletz, Kessler & Krenz v. Germany*, App. Nos. 34044/96; 35532/97; 44801/98, 2001-II Eur. Ct. H.R. 230, para. 50).

71. *See id.* n.75, 42 I.L.M. at 119 (citing *Carbonara & Ventura v. Italy*, App. No. 24638/94, 2000-VI Eur. Ct. H.R. 206, paras. 64-69; *Agoudimos & Cefallonian Sky Shipping Co. v. Greece*, App. No. 38703/97, 2001 Eur. Ct. H.R. 406, paras. 29-30).

72. *See id.*

73. *See generally Tradex Hellas S.A. v. Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, Dec. 24, 1996, 14 ICSID (W. Bank) 161 (1999).

74. *See id.* at 185-95.

retroactivity, Albania asserted that such a principle was “consistent with principles of general international law, supported by international jurisprudence, and by analogy to the protection of investment property rights in human rights law.”⁷⁵ The tribunal did not dismiss the existence of such a presumption in general international law or even human rights law, though it did not consider that such a presumption could be applied to international arbitration. In particular, the tribunal concluded that it was “not convinced that such a presumption can be established in international arbitration[; s]ubmissions to arbitration, both in arbitration between states and in international commercial arbitration, are found in practice both regarding disputes that have already arisen and regarding future disputes.”⁷⁶ This would appear to be the first of two examples in investment arbitration where human rights law or jurisprudence was mentioned but was *not* considered as useful to deciding an investment dispute.⁷⁷

5. *The Right to Water.* The right to water has been referred to in several investment arbitration cases. *Aguas del Tunari S.A. v. Bolivia* dealt with whether the claimant was a Bolivian entity “controlled directly or indirectly” by nationals of the Netherlands as required by the Netherlands-Bolivia BIT. The Respondents pointed to three statements of Dutch ministers dealing with whether they considered that BIT to be applicable in similar circumstances.⁷⁸ In the third statement, the exchange started with a group of five Dutch MPs asking three Cabinet-level ministers whether they were familiar with the publication *Water, Human Rights or Merchandise* and their general opinion of the publication.⁷⁹ The Ministers responded that “[a]ccess to safe and clean water is important” and concluded by saying that the Dutch Government “is of the view that the investment treaty is not applicable to this particular case.”⁸⁰ However, this reference to the right to water is not particularly relevant. This might have been different had the parties not settled their dispute and withdrawn the claim, which might have made it possible for

75. *Id.*

76. *Id.*

77. *See infra* text accompanying notes 136-43 (providing a discussion of the second example).

78. *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, Oct. 21, 2005, 20 ICSID (W. Bank) 450, 528-29, paras. 252-55 (2005).

79. *Id.* at 529, para. 255.

80. *Id.*

commentators such as Kriebaum to rely on an actual arbitration case as opposed to a fictitious scenario to make their points concerning the negative impact that international investment arbitration can have on the right to water.⁸¹

Still, the relationship between the right to water and investment arbitration would appear to be a favorite topic of commentators who make normative arguments for why investment arbitral tribunals ought to take into consideration the human rights obligations of states when they decide whether their treatment of foreign investors has violated any international investment law.⁸² After some research, it would appear that there are no positive examples of such a relationship. Some commentators talk about the *Compañía de Aguas del Aconquija S.A. v. Argentine Republic* ICSID arbitration where the right to water might arise during the rehearing,⁸³ but the award does not make it clear that Argentina relied on a perceived obligation to protect the right to water in defending itself. Rather, the tribunal noted the differences between the parties in “the method of measuring water consumption, the level of tariffs for customers, the time and percentage of any increase in tariffs, the remedy for non-payment of tariffs, the right of the (investor) to pass-through to customers certain taxes and the quality of the water delivered.”⁸⁴ Notably, a so-called right to water was not mentioned. The same appears to be true with the *Azurix Corp. v. Argentine Republic* (which involved a dispute over water),⁸⁵ even though commentators still cite it in the course of making their normative arguments.⁸⁶ Yet again, the same is true with *Aguas del Tunari* and the wishful thinking of commentators.⁸⁷ While commentators are correct in pointing out that Mexico could have argued in the *Tecmed* arbitration that it had to abide by its obligation to protect the right to water when it acted

81. Kriebaum, *supra* note 8, at 3-5. See also *High Commissioner Report*, *supra* note 1, at 28 (asserting that *Aguas del Tunari S.A. v. Bolivia* “while not necessarily the rule, does raise serious questions for the enjoyment of the right to water,” though this statement was made before the parties in the case settled the dispute).

82. See, e.g., Peterson & Gray, *supra* note 4, at 22-32.

83. See *id.* at 27. It is possible that Peterson and Gray were thinking of a different case than *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, though it is unclear from their writings.

84. See *id.* at 32.

85. See generally *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, June 23, 2006, 2006 WL 2095870 (ICSID (W. Bank)).

86. See, e.g., Peterson & Gray, *supra* note 4, at 27-28.

87. See, e.g., Kriebaum, *supra* note 8, at 3-5.

against the interests of the investors there,⁸⁸ this does not change the fact that Mexico did not make this argument, let alone was it relied on by the tribunal.

Admittedly, quite a few international instruments talk of the right to water.⁸⁹ Moreover, there have been pronouncements on the international level by human rights bodies that address the state obligations to protect the right to water. For example, the UN Committee on Economic, Social and Cultural Rights has provided a General Comment (its interpretation of the International Covenant on Economic, Social and Cultural Rights (ICESCR)) with regard to the right to water and the supposed obligations on states to take measures to protect that right, such as to ensure that water is affordable and is equitably distributed.⁹⁰ However, such ICESCR comments are non-binding and do not create enforceable entitlements. Contrary to the assertion of Peterson and Gray,⁹¹ the degree to which the ICESCR is binding on state-parties is even questionable due to the extremely vague and non-committal language of its Article 2:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁹²

Indeed, “undertakes to take steps” suggests that states are not committing to anything; “to the maximum of its available resources”

88. See Suda, *supra* note 2, at 86. See also *supra* text accompanying note 8.

89. See generally Pierre-Marie Dupuy, *Le Droit à l'Eau, Un Droit International? [The Right to Water, An International Right?]* (European Univ. Inst. Working Paper Law No. 2006/06, 2006) (discussing, *inter alia*, such instruments as the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Third Geneva Convention of 1949, and the Second Additional Protocol to the Geneva Conventions, all of which provide for a right to water or access to a water supply); LAURENCE BOISSON DE CHAZOURNES, *LES RESSOURCES EN EAU ET LE DROIT INTERNATIONAL [WATER RESOURCES AND INTERNATIONAL LAW]* (2005).

90. See General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. GAOR Comm. on Econ., Soc., and Cult. Rights, 29th Sess., 27 U.N. Doc. E/C.12/2002/11 (2002).

91. See Peterson & Gray, *supra* note 4, at 24. See also Kriebaum, *supra* note 8, at 11-13 (after discussing General Comment No. 15, stating, *inter alia*, that “[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use” (emphasis added)).

92. International Covenant on Economic, Social, and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

indicates that obligations depend on the size of a state's economy with states having discretion to decide; "achieving progressively" is entirely unclear; and "the adoption of legislative measures" is an insufficient measure for protecting any supposed rights that the ICESCR establishes. The vagueness of these so-called obligations under the ICESCR possibly is why Mexico did not make this argument in the *Tecmed* arbitration, and other states have refrained from even suggesting such a conflicting obligation under human rights law. This Article recognizes that more research needs to be done regarding this relationship, though the author is skeptical that there is any solid basis for requiring investment arbitral tribunals to give priority to states' human rights obligations over their investment treaty obligations, barring the involvement of *jus cogens* norms.

B. Procedural Rules

Just as investment arbitral tribunals have mentioned human rights and human rights jurisprudence to determine the contents of substantive rules, such tribunals also look to human rights and human rights jurisprudence to make procedural determinations, such as whether to allow *amicus curiae* and whether to set aside an award.

1. *Amicus Curiae*. Arbitral tribunal decisions which mention human rights jurisprudence have discussed whether *amicus curiae* briefs are acceptable in arbitral proceedings. When allowed to submit such briefs, the third-parties have relied on human rights considerations in their attempts to influence the tribunal.

In deciding whether to allow *amicus curiae* briefs in the *Aguas Argentinas v. Argentine Republic* ICSID investment arbitration, the tribunal determined that such briefs have been allowed in private litigation cases that "have involved issues of public interest . . . [and that they] have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case."⁹³ The tribunal applied this to the case before it and concluded that "[t]he factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities."⁹⁴ In particular, the tribunal placed

93. *Aguas Argentinas, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, 21 ICSID (W. Bank) 342, 347 (2006).

94. *Id.*

particular importance on the fact that such systems “provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations.”⁹⁵ The tribunal allowed a joint amicus curiae brief by five interested NGOs, because they were deemed to be well respected and to have sufficient expertise and experience with human rights and public services.⁹⁶ Though there do not appear to be any other decisions that have extended this line of reasoning, it is conceivable that such reasoning found in *Aguas Argentinas* will be applied where other investment arbitrations involve such human rights considerations.⁹⁷

It is important to note, however, that not all arguments that cite human rights considerations in support of allowing amicus curiae briefs are accepted by arbitral tribunals. For example, in the UNCITRAL case *United Parcel Service of America Inc v. Canada*, the Canadian Union of Postal Workers and the Council of Canadians petitioned the Tribunal to be given standing as parties to the dispute.⁹⁸ The petitioners’ amici curiae cited, *inter alia*, Articles 14 and 26 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights and International Labour Conventions for why they should be considered parties to the dispute because of the right to a fair and public hearing and equality before the law.⁹⁹ Although the respondent did not address the petitioners’

95. *Id.*

96. See *Aguas Argentinas, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, Feb. 12, 2007, paras. 25, 27 (ICSID (W. Bank)), available at <http://ita.law.uvic.ca/documents/SuezVivendiamici.pdf> (last visited July 14, 2007).

97. This decision appears to have been cited in only one other decision - by the claimant in the ICSID case *Biwater Gauff (Tanzania) Ltd. v. Tanzania* to argue that there is no broad trend on transparency as the respondent was claiming. See *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, Sept. 29, 2006, 2006 WL 2955444, para. 72. That tribunal concluded that there had been a trend towards greater transparency in ICSID proceedings but suggested that perhaps the trend was not as strong as the respondent had been claiming. See *id.* paras. 121-22 (asserting that there is no general duty of confidentiality in ICSID arbitrations, though there is no general rule of transparency either). The *Biwater Gauff* tribunal issued a Procedural Order on April 25, 2007, informing the third-party petitioners that the parties had agreed that “no further intervention of the Amici in these proceedings is necessary.” *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 6, Apr. 25, 2007, para. 3, available at http://ita.law.uvic.ca/chronological_list.htm.

98. See generally *United Parcel Service of America Inc. v. Canada (U.S. v. Canada)*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 2001 WL 34804267 (Nafta Ch. 11 Arb. Trib. 2001).

99. See *id.* para. 22.

right to participate under international law,¹⁰⁰ the tribunal rejected the petitioners' argument when it determined that "international law and practice and related national law and practice have either ignored or given very low priority to third party intervention."¹⁰¹ Thus, it would appear that this is a controversial point.

2. *Setting Aside Arbitral Awards.* In an effort to have the UNCITRAL award in *Republic of Ecuador v. Occidental Exploration* set aside, Ecuador challenged, in English court, the award granted by arbitrators appointed according to the U.S.-Ecuador BIT.¹⁰² Occidental Exploration raised an objection as to whether the English courts could interpret provisions of the BIT,¹⁰³ but the trial judge decided that it was justiciable. Occidental appealed.¹⁰⁴ The decision by the Supreme Court of Judicature, Court of Appeal (civil division) dealt with the issue of whether Occidental (a U.S. corporation) was enforcing rights of the United States under the U.S.-Ecuador BIT.¹⁰⁵ After relying on cases by the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), among other sources, the Court of Appeals determined that the "[o]ne feature of the traditional protection is that it is up to the protecting State of the injured national whether and how far to make it available."¹⁰⁶ The Court then pointed out:

Bilateral investment treaties such as the present introduce a new element, and create a "very different" situation . . . [where t]he protection of nationals is crystallised and in the present Treaty expanded to cover every kind of investment "owned or controlled directly or indirectly by nationals or companies of the other Party" (Article 1), but the investor is given direct standing to pursue the State of the investment in respect of any "investment dispute."¹⁰⁷

The Court concluded that it is well established that treaties in contemporary international law give rise to direct rights for individuals, "particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals

100. *See id.* para. 34.

101. *Id.* para. 40.

102. *Republic of Ecuador v. Occidental Exploration & Prod. Co.*, [2005] EWHC (Comm) 774 (Q.B.) (U.K.).

103. *Id.*

104. *See id.* para. 86.

105. *See Occidental Exploration & Prod. Co. v Ecuador*, [2005] EWHC (Civ) 1116, para. 14 (U.K.).

106. *See id.* para. 15.

107. *Id.* para. 16.

acting on their own behalf and without their national state's involvement or even consent.”¹⁰⁸ In reaching this conclusion, the Court relied, *inter alia*, on the European Convention of Human Rights, which provides that the Convention is “enforceable by victims of the breach of such rights, and ‘any person, non-governmental organisation or group of individuals’ may seek to establish that he is a victim by bringing a direct claim before the European Court of Human Rights in Strasbourg.”¹⁰⁹ The Court turned immediately to analogizing this to the instant BIT, where the Court found that “its language makes clear that injured nationals or companies are to have a direct claim for their own benefit in respect of all [the types of claims made].”¹¹⁰ Therefore, the Court concluded that the investors were correct in pursuing their rights under the BIT.¹¹¹

3. *General Procedural Similarities.* Arbitral tribunals have noted the procedural similarities with human rights courts. The separate opinion by Bryan Schwartz in *NAFTA S.D. Myers, Inc. v. Canada* indicates that arbitral tribunals, when determining whether there has been a denial of national treatment (there, under NAFTA Article 1102), will look at the same list of factors as a human rights court would look at to determine whether someone's right to freedom from discrimination had been violated.¹¹² In fact, he seems to equate “national treatment” with a human-rights type of discrimination, concluding the following:

The export ban did not, on its face, expressly discriminate in favour of Canadian operators and against U.S. operators. Both were prohibited from engaging in exports. The intent and practical effect of the measure, however, make it clear that it was discriminatory and inconsistent with Articles 1102(1) and 1102(2) of NAFTA.¹¹³

From the cases discussed above, one cannot help but get the sense that human rights and human rights jurisprudence has a far greater influence on investment arbitration (both substantively and procedurally) than the prior studies on this subject have indicated.

108. *Id.* para. 19.

109. *Id.* (quoting European Convention art. 34, Nov. 4, 1950, 213 U.N.T.S. 221).

110. *Id.* para. 20.

111. *See id.* para. 22.

112. *S.D. Myers, Inc. v. Canada*, Nov. 12, 2000, 40 I.L.M. 1408, 1447 (2001) (separate opinion of Bryan Schwartz) (concurring except with respect to performance requirements in the partial award of the tribunal).

113. *Id.* at 1476, para. 184.

C. Cases Where Human Rights and International Investment Law Supposedly Conflict

Some commentators assert that “there have been no known investment treaty arbitrations where host states have adverted to . . . human rights obligations.”¹¹⁴ This is not actually the case. There are an extremely limited number of investment arbitration cases where human rights obligations have been pitted against BIT obligations. Tellingly, the tribunals in these cases did not seem to take the argument seriously. Argentina in *Azurix Corp. v. Argentine Republic* argued that its obligations under human rights treaties to protect consumers’ rights conflicted with its U.S.-Argentina BIT obligations. Human rights obligations, it argued, ought to trump the private interests of service providers. Argentina appears to have made a half-hearted effort to argue this, because the tribunal noted that “the matter has not been fully argued,”¹¹⁵ which could possibly indicate that this argument was not made in good faith. Azurix responded that the user’s rights were protected by the provisions made in the Concession Agreement, and that it was unclear how termination impacted such rights.¹¹⁶ Regardless, the tribunal noted that it “fail[ed] to understand the incompatibility in the specifics of the instant case,” and that “[t]he services to consumers continued to be provided without interruption by ABA during five months after the termination notice and through the new provincial utility after the transfer of service,”¹¹⁷ thus indicating that, though open to the consideration of the issue, it saw the alleged conflict as spurious.

Again, Argentina made the same type of argument in *CMS Gas Transmission Co. v. Argentine Republic*. First, Argentina pointed out that “the protection of the right of property enshrined in the Constitution has been interpreted by the Courts as not having an absolute character and that State intervention in the regulation of individual rights is justified, provided such intervention is both legal

114. Suda, *supra* note 2, at 63; Peterson & Gray, *supra* note 4, at 24; *see also id.* at 33-34 (though petitioners couched the argument about the effect of damages on the state’s ability to provide water to its citizens in ‘rights’ language, they “did not advert to any national or international human rights norms which might have reinforced their arguments”).

115. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, June 23, 2006, 2006 WL 2095870, para. 261 (ICSID (W. Bank)).

116. *See id.* para. 254.

117. *Id.* para. 261.

and reasonable when factoring in social needs.”¹¹⁸ Argentina then asserted the following:

[W]hile treaties override the law they are not above the Constitution and must accord with constitutional public law. Only some basic treaties on human rights have been recognized by a 1994 constitutional amendment as having constitutional standing and, therefore, in the Respondent's view, stand above ordinary treaties such as investment treaties. It is further argued that, as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights.¹¹⁹

However, the tribunal, in upholding Argentina's BIT obligations, concluded:

In this case, the Tribunal does not find any such collision. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties.¹²⁰

Thus we see again how an ICSID tribunal found human rights obligations while valid, not in conflict with BIT obligations.

There appear to be only two cases where the investment arbitral tribunal expressly dismissed human rights arguments that were before it. The first example, *Tradex Hellas S.A. v. Albania*, already was discussed in Part I(A)(5) above.¹²¹ In the UNICTRAL case of *Biloune v. Ghana Investments Centre*, the claimant brought claims against Ghana for damages from expropriation, denial of justice and the violation of his human rights.¹²² Ghana allegedly interfered with the investments and other activities of both the claimant and the Ghanaian corporation of which he was the principal shareholder when it arrested and deported him out of Ghana.¹²³ Ghana asserted that he was arrested and deported for reasons other than his investments there.¹²⁴ Moreover, Ghana claimed that he had participated in the arbitration, and that the tribunal lacked the requisite jurisdiction to hear claims of human rights violations.¹²⁵ As

118. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Apr. 25, 2005, 44 I.L.M. 1205, 1217, para. 113 (2005) (ICSID (W. Bank)).

119. *Id.* at 1217, para. 114 (internal citations omitted).

120. *Id.* at 1218, para. 121.

121. See text accompanying *supra* notes 73-76.

122. See generally *Biloune v. Ghana Investments Centre*, 95 I.L.R. 183 (UNCITRAL 1989).

123. See generally *id.*

124. See *id.*

125. See *id.*

to the claims of human rights violations, the tribunal characterized the claimant's argument as being "that the Government's allegedly arbitrary detention and expulsion of Mr. Biloune and violation of his property and contractual rights constitute an actionable human rights violation for which compensation may be required in a commercial arbitration pursuant to the GIC Agreement," and the tribunal "should consider this portion of the claim because this is the only forum in which redress for these alleged injuries may be sought."¹²⁶ While the tribunal saw that international law grants individuals fundamental human rights such as property rights and personal rights, the tribunal determined that "it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights."¹²⁷ The tribunal concluded on this point:

This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes "in respect of" the foreign investment. Thus, other matters—however compelling the claim or wrongful the alleged act—are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.¹²⁸

Here we see how an arbitral tribunal expressly sidestepped an important human rights issue entirely. Admittedly, arbitral tribunals have limited jurisdiction, so that tribunal may have been correct in avoiding a pronouncement on the issue. Still, it is important to keep in mind that the tribunal did not reject or somehow denigrate the notion of human rights. On the contrary, the tribunal expressly acknowledged that there are fundamental human rights that governments are not allowed to violate, and even went so far as to say that the claimant's human rights "may be relevant in considering the investment dispute under arbitration," thus showing that investment arbitration supports human rights even when the relevant arbitral panels refuse to pronounce upon such rights due to a perceived lack of jurisdiction.

126. *Id.* at 202-03.

127. *Id.*

128. *Id.*

This Section has discussed actual cases where international arbitral tribunals have dealt with human rights or human rights jurisprudence in an effort to show that international arbitration, if anything, supports human rights, instead of undermining human rights.¹²⁹ The following Section looks at the logic of international investment arbitration to assess how accurate prior studies on international arbitration and human rights have been in concluding that the former undermines the latter.

II. THEORETICAL CONFLICTS BETWEEN HUMAN RIGHTS OBLIGATIONS AND INVESTMENT ARBITRATION

A. Introduction

As noted in the introduction above, there are numerous studies that indicate that international investment law and arbitration negatively impact human rights. Before addressing their points on investment arbitration, four separate points must be made by way of introduction. Admittedly, international investment law, as embodied in BITs, gives certain rights to investors without imposing corresponding obligations that would absolutely protect human rights.¹³⁰ However, one must not forget that international investment law (at least the law coming from BITs) only freezes the human rights situation in the host state at the time the BIT was entered into, thus making it difficult for the host state to change the situation in its

129. Passing reference occasionally is made to human rights conventions or human rights courts without citing or relying on any of the substantive rights within those conventions or decisions of those courts. For example, in the *Pan American Energy (PAE) v. Argentine Republic* ICSID arbitration, Argentina objected to PAE not using Argentine courts to hear its claim based on an estoppel argument where PAE asserted in an earlier case against Forestal Santa Bárbara (a Delaware company) that conflicts over hydrocarbon concessions were exclusively for Argentine federal courts to decide, and that such matters were governed by the U.S.-Argentina BIT, the Washington Convention and the *1969 American Human Rights Convention, inter alia*. See *Pan American Energy LLC v. Argentine Republic*, Decision on Preliminary Objections, ICSID Case No. ARB/03/13, 2006 WL 2479770, para. 141 (ICSID (W. Bank)). Further, that Argentina relied on this case and this argument in the other cases it has faced. See, e.g., *BP America Production Co. v. Argentine Republic*, ICSID Case No. ARB/04/8, 2006 WL 2479771 (APPARD), para. 141 (ICSID (W. Bank)).

130. See, e.g., Bachand & Rousseau, *supra* note 3, at 16 (discussing how BITs provide investors with the national treatment and MFN status, rules favoring capital transfers, a ban on performance requirements, and implementation of dispute settlement mechanisms enabling investors to appeal to international arbitration).

pursuit of development.¹³¹ The situation itself does not deteriorate on account of these bilateral agreements. In fact, the popular principles of investment liberalization dictate that developing countries refrain from intervening in their own economies as much as possible, even when human rights are involved, which itself would limit the ability of these states to control their development, with or without the strictures imposed by BITs.¹³² Nonetheless, it might be enough that BITs deny states the opportunity to develop in order to denounce these agreements, since, as Mary Robinson has stated, “Denial of the right to development puts all other rights at risk.”¹³³ At a minimum, this Article acknowledges the imbalance between these aspects within BITs of giving investors rights without corresponding obligations.

Still, it is one thing to say that there is an imbalance and quite another thing to say that international arbitration undermines human rights obligations. After all, international arbitration as a dispute settlement mechanism is based on neutrality and consent of the parties, so arbitral tribunals cannot force a state to act in ways that were reasonably foreseeable when the state agreed to the BIT.¹³⁴ As David Caron emphasizes, international arbitration, whether interstate or private, is “created and defined by the joint will of the parties.”¹³⁵ Even though average individuals—people whose rights are supposedly impacted by foreign direct investment (FDI) and portfolio investment by foreign investors—do not expressly agree to BITs (which often act as the jurisdictional bases for international investment disputes), the governments that represent them do, thus providing a type of derived consent by the people, though this admittedly cannot shield governments from criticisms concerning the evolution of the substantive rights of their citizens.¹³⁶ With

131. Interestingly, by entering into the BIT, the host state has used its sovereignty to relinquish a portion of its sovereignty, so the fact that the state loses some of its options by entering into the BIT does not mean that the state’s sovereignty has been denigrated.

132. See Bachand & Rousseau, *supra* note 3, at 3.

133. Mary Robinson, *Constructing an International Financial, Trade and Development Architecture: The Human Rights Dimension*, in HUMAN RIGHTS AND ECONOMIC GLOBALISATION: DIRECTIONS FOR THE WTO 187, 199 (Malini Mehra ed., 1999).

134. See, e.g., ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 5-13 (4th ed. 2004).

135. David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT’L L. 104, 109 (1990).

136. Interestingly, the European Court of Human Rights made this same point when it noted how non-nationals are “more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been

“government by consent of the governed,” as proposed by Locke, Hobbes, and Rousseau, this metaphoric consent to government is forward looking without the electorate knowing what the government will actually do with its so-called mandate.¹³⁷ While states should be held responsible for the abuse of their citizens’ rights, investors ought not to be held responsible for the myopia (or perhaps even negligence) of the host state (and by extension, its own people in democratic states) in the context of BITs affecting human rights standards, because states expressly agreed to such arrangements. On its surface, international arbitration *per se* would not seem inclined to undermine human rights obligations in a way beyond how host states are prepared to undermine them.

Where international arbitration gets a bad name is from its conservative reputation (whether justified or unjustified) of so-called splitting the baby between the two parties.¹³⁸ At the same time, the protection of human rights would appear to be an absolute endeavor, at least from the perspective of advocates. Therefore, by its very nature, international arbitration is prone to disappointing human rights promoters who tend to think in terms of absolutes, whereas investors’ rights advocates are far more pragmatic and willing to live with compromises that still deliver adequate profits to their clients. Human rights advocates might call this a bias away from human rights, when in reality international arbitration is not about all-or-nothing solutions. This does not mean that arbitrators are unethical for refusing to grant the full demands of human rights advocates. Rather, they are pragmatic decision-makers who are conscious of the complexities that sovereignty adds to any case involving a state.¹³⁹

consulted on its adoption.” *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) paras. 50, 63 (1986).

137. See generally *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* (David Boucher & Paul Kelly eds., 1994).

138. See, e.g., Julia A. Martin, *Arbitrating in the Alps Rather than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolutions*, 49 STAN. L. REV. 917, 955 (1997). Please note that the Author does not share this opinion that international arbitration involves so-called splitting the baby. Indeed, a recent American Arbitration Association (AAA) statistical study would seem to go a long way in dispelling that myth. See AMERICAN ARBITRATION ASSOCIATION, *SPLITTING THE BABY: A NEW AAA STUDY* (2007), available at <http://www.adr.org/sp.asp?id=32004> (last visited July 13, 2007). Nonetheless, this general issue falls outside the scope of this Article.

139. See Robert A. Kearney, *Arbitral Practice and Purpose in Employee Off-Duty Misconduct Cases*, 69 NOTRE DAME L. REV. 135, 155-56 (1993) (concluding that arbitrators are generally pragmatists).

Finally, one must not forget that there likely is a complex, non-linear relationship between international investment and human rights, or rather the denigration of human rights. For example, when the private sector is favored, there gradually will be more FDI flowing into that particular host state. It is no secret that multi-national corporations (MNCs) strategically choose their locations of investment to take advantage of tax laws, corporation laws and even human rights law, among other reasons. Some commentators assert that MNCs have a legal duty to act in this manner in an effort to maximize profits however legally possible.¹⁴⁰ This increase in investments in turn should accelerate development, which helps improve human rights for the local population.¹⁴¹ Moreover, as human rights are observed in a host state, especially rights dealing with education, work conditions and health services, work force productivity likely will improve, thus making investor promotion of human rights a sound business strategy. Raising this point is not to endorse a type of human rights protection through human rights violation, but is merely to highlight the oft forgotten human rights advantages that can flow from foreign direct investment in developing countries. While some commentators point out that there is little evidence to show that BITs stimulate FDI,¹⁴² one must not neglect the possibility that international investment law and human rights effectively can complement each other.

140. See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 60-84 (2004); Laura Spitz, *The Gift of Enron: An Opportunity to Talk About Capitalism, Equality, Globalization, and the Promise of a North-American Charter of Fundamental Rights*, 66 OHIO ST. L.J. 315, 367 n.214 (2005).

141. *High Commissioner Report*, *supra* note 1, ¶¶ 8, 24-25. See also Michael Hart, *A Multilateral Agreement on Foreign Direct Investment: Why Now?*, in *INVESTMENT RULES FOR THE GLOBAL ECONOMY* 36, 43 (Pierre Sauve & Daniel Schwanen, eds., 1996) (giving such examples as job creation, the availability of development capital, the transfer of needed technology, and increased exports and tax revenue); Peter Prove, *Human Rights at the World Trade Organization?*, in *HUMAN RIGHTS AND ECONOMIC GLOBALISATION*, *supra* note 133, at 23, 26-27 (making these same arguments though more in the context of trade generally). However, these perceived benefits from FDI probably should not be taken as a given, nor should the possibility that MNCs involved in FDI can be involved in human rights violations. See, e.g., Peter T. Muchlinkski, *Human Rights and Multinationals: Is There a Problem?*, 77 INT'L AFF. 31 (2001). That said, these points are not directly related to the thesis here, and so are left for future publications.

142. See Suda, *supra* note 2, at 2 (citing MARY HALLWARD-DRIEMEIER, WORLD BANK, *DO BILATERAL INVESTMENT TREATIES ATTRACT FDI?* 22-23 (2003)).

B. Arguments for How Human Rights Ought to be Considered

This Section analyzes the feasibility of some of the normative arguments that commentators have made in arguing that arbitral tribunals must take human rights obligations into consideration when determining BIT obligations. Please note that this Section is not intended to be a mere literature review or to offend those that have suggested these changes. Rather, this Section is aimed at supporting the notion that international arbitration does not necessarily have to change, and instead prefers placing the burden squarely on states to take greater care in protecting the rights of their citizens, which is the founding principle underlying the entire field of human rights.

One normative argument that is worth mentioning in this brief introduction involves the U.N. High Commissioner for Human Rights, which relied in 2003 on the fact that individuals currently have no mechanism for lodging complaints against states for human rights violations dealing with economic, social and cultural rights. It, then, concluded that this is the reason why arbitral tribunals ought to consider such rights when making their decisions, thus enabling individuals and communities to have a voice in cases where investor interests and human rights appear to conflict.¹⁴³ This essentially is what the claimant argued in the UNCITRAL case *Biloune v. Ghana Investments Centre*.¹⁴⁴ Unfortunately, nothing in international law obliges arbitral tribunals to take into account such considerations when making their decisions, assuming these rights have not risen to the level of *jus cogens* norms. To the contrary, such arbitral tribunals are of limited jurisdiction as provided by the arbitration clause in the underlying instruments of the dispute,¹⁴⁵ though this is not to say that the scope of applicable law for these tribunals is limited in interpreting and applying the relevant arbitration clauses and laws.¹⁴⁶ It is fine to wish that arbitrators would use their discretion to reach certain conclusions, but this Article prefers to talk in terms of rights, duties and obligations when allocating blame or even responsibility.

1. States Could Raise Human Rights Obligations. Admittedly, states could raise human rights obligations in their pleadings before arbitral tribunals to help them consider such points, as the UN High

143. See *High Commissioner Report*, *supra* note 1, ¶¶ 41, 54-55.

144. See text accompanying *supra* notes 122-28.

145. See REDFERN ET AL., *supra* note 134, at 255.

146. See *infra* text accompanying note 318.

Commissioner for Human Rights encourages.¹⁴⁷ Indeed, such a practice likely would jumpstart the interconnectedness of international arbitration and human rights. However, as litigants often include an overabundance of arguments to support their position (either out of necessity or strategic planning), that states currently do not seem to make such arguments could be interpreted as meaning that they have strong incentives not to do so. Such incentives might be to avoid the negative repercussions that could result from investors pulling their investments in the host state and future investors deciding to invest in other states that do not place human rights obligations over the interests of investors. Even if states chose to include such arguments in their pleadings, there are no guarantees that tribunals will “take into account the wider legal and social context,”¹⁴⁸ thus providing an additional (perhaps even insurmountable) hurdle to states in relying on such human rights obligations to defend against expropriation claims. Indeed, high financial risks coupled with no guarantees of human rights arguments being considered by the tribunal make for quite a predictable incentive calculation.

Still, some commentators push for arbitral tribunals to take human rights obligations into account when reaching their decisions. At least one commentator has relied on Article 42(1) of the ICSID Convention to claim that “[i]n many cases, then, international law will be applicable to investment disputes to some extent, and in disputes where that is the case, arbitral tribunals may have the opportunity to consider international human rights obligations of states.”¹⁴⁹ Article 42(1) of the ICSID Convention reads:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.¹⁵⁰

147. See *High Commissioner Report*, *supra* note 1, ¶ 55.

148. *Id.*

149. See Suda, *supra* note 2, at 66; Peterson & Gray, *supra* note 4, at 11.

150. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Mar. 18, 1965, 17 U.S.T. 1270, 1286, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (entered into force Oct. 14, 1966); NAFTA Article 1131 has a similar provision that tribunals can decide disputes before them “in accordance with this Agreement and applicable rules of international law.” North American Free Trade Agreement, U.S.-Can.-Mex., art 1131, Dec. 17, 1992, 32 I.L.M. 605 (1993).

The qualifier “may” in the commentator’s statement above seems like a slight overstatement, especially when international law is designated as a somewhat supplementary source of applicable law under the ICSID Convention. Moreover, human rights might exist in general international law only where they have reached the level of custom, assuming no particular human rights treaty language is applicable to the particular case. According to Section 702 of the Restatement (Third) on Foreign Relations Law of the United States, such customary human rights are limited to genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.¹⁵¹ While this is a conservative list of customary human rights norms, the actual list likely does not necessarily include the type of second-generation human rights that deal with social, economic and cultural rights that would be implicated in an investment dispute. Moreover, while some commentators might claim that BITs are derogations from customary international law standards¹⁵²—which conceivably could include human rights customary norms—states generally cannot derogate from human rights norms through the use of contract and treaties.¹⁵³ In short, it would seem unlikely that states will raise human rights obligations in response to allegations of investment treaty violations, or that tribunals will raise human rights obligations *sua sponte* when reaching their decisions.

2. *Allowing NGOs to Bring Arbitration Proceedings.* Some commentators posit that human rights situations throughout the world might improve if NGOs were given the ability to bring arbitration proceedings against corrupt host states for diverting humanitarian resources.¹⁵⁴ However, even these commentators seem

151. RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

152. See Paul Peters, *Investment Risk and Trust: The Role of International Law*, in INTERNATIONAL LAW AND DEVELOPMENT 131, 153 (Paul de Waart et al. eds., 1988).

153. See generally Ontario v. Etobicoke, [1982] 1 S.C.R. 202 (Can.); See also John-Paul Alexandrowicz, *A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada*, 23 COMP. LAB. L. & POL’Y J. 1007, 1038-39 (2002).

154. See generally Gregory W. MacKenzie, *ICSID Arbitration as a Strategy for Levelling the Playing Field Between International Non-Governmental Organizations and Host States*, 19 SYRACUSE J. INT’L L. & COM. 197 (1993).

to acknowledge that this argument is largely hypothetical inasmuch as NGOs typically do not have arbitration clauses in their agreements with host states, and NGOs have little leverage in negotiating greater rights in these agreements.¹⁵⁵ While there might be considerable benefits to involving NGOs in the manner proposed, they have no standing to bring claims under the current approach to drafting BITs since BITs typically give *investors* of one state the ability to bring *investment-related* claims against the other state, and neither NGOs nor their disputes would be covered.¹⁵⁶ Gregory MacKenzie appears to assume that arbitration is the only option for NGOs to pursue their concerns with host states.¹⁵⁷ However, arbitration is not an option unless the host state consents to this, which generally has not been the case.

3. *Allowing Individuals to Sue Investors for Human Rights Violations.* Still other commentators devote entire articles to asserting that future BITs ought to include language that allows nationals of the host state to sue investors for alleged human rights violations.¹⁵⁸ Weiler explains his goal in proposing such changes to BITs:

By grafting a human rights claim mechanism onto the existing structure of international investment protection treaties, one can both recognize the growing place of the transnational corporation in human rights law and practice and improve upon the Achilles heel of human rights— effective enforcement.¹⁵⁹

Admittedly, if an investor had a sufficient degree of bargaining power, as Ian Eliasoph points out, then the investor could negotiate the inclusion of various human rights standards, including labor standards, within the obligations that an arbitrator would then have

155. *See id.* at 217 (noting how CARE's agreements with host states require merely negotiation in cases of disputes and that their bargaining position vis-à-vis host states is inherently unequal).

156. *See, e.g.,* 2004 U.S. Model Bilateral Investment Treaty, art. 1., <http://www.state.gov/documents/organization/38710.pdf> (defining "claimant" as "an investor of a Party that is a party to an investment dispute with the other Party").

157. *See* MacKenzie, *supra* note 154, at 217-18 (asserting that "aside from state espousal of the international agency's claim which appears to be impractical, the international agency is limited to arbitration to settle its claim against a host state").

158. *See generally* Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429 (2004).

159. *Id.* at 450.

to address if such provisions were alleged to have been violated.¹⁶⁰ Then the powerful enforcement regime of the New York Convention could be useful in enforcing human rights obligations.¹⁶¹ The one problem with this hypothetical situation is that investors have little incentive to include human rights standards that would then open them up to potential liability or at least a certain amount of risk, assuming they have not yet internalized the point about the promotion of human rights being a wise business strategy.

Without entirely discounting this possibility, international investment arbitration seems like an inappropriate forum in which to sue for respect for human rights standards, especially given that there currently exist supervision mechanisms that allow for adjudication of certain human rights concerns.¹⁶² As Peterson and Gray indicate:

[T]he inclusion of investor responsibilities in investment treaties[] would necessarily require that investment tribunals grapple more frequently and at an ever-greater level of sophistication with human rights norms. This presupposes ever-greater human rights expertise on the part of arbitrators, and invests these Tribunals with greater authority as fora where human rights concerns will be elaborated and interpreted. It must be stressed that investment tribunals would not become an adjudicative forum for human rights norms. Rather, they would only adjudicate investor rights, but in a manner which conditioned these investor rights on compliance of the investors with minimum human rights responsibilities. Naturally, it should be asked whether these ad-hoc Tribunals can be expected to have the legitimacy to be entrusted with such a critical task.¹⁶³

Indeed, while there are several eminent arbitrators who are equally competent in working with human rights law, such as ICJ Judges Rosalyn Higgins and Thomas Buergenthal as well as Cambridge Professor James Crawford and HEI Professors Lucius Caflisch and Brigitte Stern,¹⁶⁴ investment arbitrators in general come from the private international law sphere that relies on distinct skills and philosophies from those in the public international law sphere. While

160. See Ian H. Eliasoph, *Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms*, 10 NEW ENG. J. INT'L & COMP. L. 83, 106-08 (2004).

161. See *id.*

162. See Peterson & Gray, *supra* note 4, at 35-36; Suda, *supra* note 2, at 92.

163. Peterson & Gray, *supra* note 4, at 36.

164. See, e.g., Rosalyn Higgins, President, Int'l Ct. of Justice, *The International Court of Justice and Some Private International Law Thoughts*, HEI Lalive Lecture (July 8, 2007) (notes on file with the author). But see J.G. WETTER, 1 THE INTERNATIONAL ARBITRAL PROCESS - PUBLIC AND PRIVATE 12 (1979) (explaining why public and private international law arbitrators do not share the same skills).

it is highly likely that arbitrators would spend the requisite time and energy to become well versed in human rights law when faced with such issues, such an arrangement certainly is less than ideal in light of the overwhelming importance of human rights to the people involved. That said, solutions need not be ideal if they are actual solutions to a problem.

4. *Modifying Investment Law to Provide More Economic Development.* Some commentators assert that BITs do not even encourage investment in host states. Peterson and Gray assert:

[A]s treaties continue to proliferate, they have not been matched by evidence that they contribute to enhanced flows of investment. Indeed, a recent report of the World Bank is the latest to point to the lack of correlation between investment flows and the conclusion of these treaties. Given that the standard rationale for the creation and extension of such investor rights has not stood the test of time, it stands to reason that states might wish to consider new rationales for negotiating investment protection treaties.¹⁶⁵

If this is, indeed, the case, one is left to wonder whether the investment regime can be modified to place more emphasis on such human rights as the right to economic development, if not other rights. The UN High Commissioner for Human Rights in 2003, Sergio Vieira de Mello, seemed to think this was possible when he called for a “human rights approach to investment liberalization,”¹⁶⁶ and quite a few commentators agreed with that sentiment.¹⁶⁷ What seems particularly unfair is that BITs give investors rights without any particular responsibilities.¹⁶⁸ It certainly is not a crime for investors to want the best deal possible. In fact, as already mentioned, multinational corporations may be under a duty to their shareholders to seek the best terms for their investments.¹⁶⁹ However, a public good seems to be involved here that the market does not adequately provide protection for human rights considerations in the host state. As Weiler argues, the investment regime ought to change in order to take care of this negative externality. In the end, investors hopefully will realize that encouraging observance of human rights obligations will increase returns on their investments, as the host state’s labor

165. Peterson & Gray, *supra* note 4, at 35-36.

166. *High Commissioner Report*, *supra* note 1, ¶ 56.

167. See Suda, *supra* note 2, at 92-93; Peterson & Gray, *supra* note 4, at 29-30; Bachand & Rousseau, *supra* note 3, at 33-34.

168. Suda, *supra* note 2, at 97; see Peterson & Gray, *supra* note 4, at 35.

169. See *supra* text accompanying note 142.

force becomes healthier, better educated, and possibly even future clients of the investors, not to mention improve the investors' public relations and overall image.¹⁷⁰

5. *Improving the Precision of Investment Law.* Finally, some commentators say that investment agreements impact human rights because investors use them to bypass the normal legal channels and domestic laws that were enacted to protect the rights of individuals. They assert that this can and should be fixed by improving the precision of such agreements by limiting the application of investor protections in favor of human rights considerations.¹⁷¹ However, this precision will make the host state appear less favorable to investors, thus defeating the purpose of developing states agreeing to BITs, so any such limitation on investor protection likely will have an adverse impact on investment. This, in itself, can also have an adverse impact on human rights, since investment helps with the economic development of the host state.¹⁷² Whether the state can actually get such limited protection will depend on that state's bargaining position vis-à-vis its counterpart—for example, if it has particularly rare resources or is in an ideal strategic position.

Again, no disrespect is intended by pointing out some of the practical and theoretical difficulties with these suggestions. Many of these proposals certainly could improve the human rights situation in the world, and the descriptive arguments provided here do little in adequately rebutting their normative arguments. Still, care should be taken so as not to shift the burden entirely onto the shoulders of the international arbitration regime, thus relieving states of their responsibilities.

C. Perceived Problems with Investment Arbitration and Human Rights

Commentators cite three aspects of international investment arbitration that have a negative impact on the human rights situation in host states: a lack of transparency, a lack of legitimacy and a lack of accountability. Each makes it harder for the host state to regulate its

170. See generally Suda, *supra* note 2, at 102 n.421 (talking about how “strong human rights enforcement and other forms of public interest regulation may in fact enhance rather than decrease business profitability”).

171. See, e.g., Gus Van Harten, *Guatemala's Peace Accords in a Free Trade Area of the Americas*, 3 YALE HUM. RTS. & DEV. L.J. 113, 157-58 (2000).

172. See *supra* text accompanying note 143.

internal activities and favors the interests of investors.¹⁷³ This Section explores how the impact of each might not necessarily be negative for human rights.

1. Transparency. Proceeding from the most likely to impact human rights to the least likely, this Section begins with the perceived lack of transparency in international investment arbitration. As the UN High Commissioner for Human Rights asserted in 2003,

Transparency is essential for the realization of human rights as it promotes access to information concerning the allocation of resources in the context of progressively realizing economic, social and cultural rights, including the right to water. Such information is essential for effective public action and monitoring of both the public and private sector.¹⁷⁴

It would seem that few would argue against the importance of transparency in promoting the rule of law generally.

The question, rather, is whether international arbitration provides for adequate transparency. Investment treaty dispute settlement is known for its opacity.¹⁷⁵ Nonetheless, numerous arbitration institutions provide for some transparency. For example, ICSID publicly registers many of the details of the disputes before its panels as well as many decisions, even though Article 48(5) of the ICSID Convention requires the consent of the parties for an award to be published.¹⁷⁶ The Iran-United States Claims Tribunal publishes all of its decisions, not only in hard copy but on the electronically searchable database Westlaw, which has had a tremendous impact on the development of international investment law. Arbitrations under other procedures, however, allow for publication of dispute details much more sporadically, if at all.¹⁷⁷ This might be changing, though, even if the published version is somewhat sanitized.¹⁷⁸

173. See Suda, *supra* note 2, at 5, 47-52.

174. *High Commissioner Report*, *supra* note 1, ¶ 28.

175. See Peterson & Gray, *supra* note 4, at 15, 34.

176. See ICSID Convention, *supra* note 150, at 1288, 575 U.N.T.S. at 188.

177. See Peterson & Gray, *supra* note 4, at 10 (noting how the ICC, the Stockholm Chamber of Commerce and UNCITRAL all lack a requirement to publicize arbitration proceedings); Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 256-57 (2007) (pointing out how many arbitration rules require that parties give their consent before an award is published).

178. See Hans Smit, *Breach of Confidentiality as a Ground for Avoidance of the Arbitration Agreement*, 11 AM. REV. INT'L ARB. 567, 579 (2000) (asserting that the ICC and AAA have been expanding publication of their awards in recent years); Gu Weixia, *Confidentiality*

Transparency is a problem for investment arbitration because arbitral awards often are kept confidential. States generally do not know, therefore, the substantive rules of international investment law that an arbitral tribunal will apply in the future. Thus, there is a likely chill on the regulatory activities of states that fear that they will be sued for any regulatory activity whatsoever, regardless of whether or not the BIT has a stabilization clause.¹⁷⁹ As Peterson and Gray point out:

Confusion as to the boundaries of acceptable government regulation in this realm prevails at a worrying time, as there is clear evidence that investors have awakened to the existence of the full constellation of international investment treaties and are challenging host state laws in record numbers.¹⁸⁰

That said, investors do not know the current standards used in investment arbitration, either, as those standards are not made public. However, investors' incentive structures make it so that they have more to gain and less to lose than host states, and so the uncertainty affects the state to a greater degree. Please note, however, that the perceived secrecy itself (or the difficulty in getting the decisions for known awards) does not necessarily "skew the playing field" in favor of investors, as some commentators assert,¹⁸¹ as investors and states face the same hurdles in gaining access to key awards in crafting their cases.¹⁸²

2. *Legitimacy.* Some commentators assert that investment arbitration's perceived lack of legitimacy affects human rights.¹⁸³ Admittedly, the international arbitration community is relatively small and connected, leading to the occasional conflict of interests, and arbitrators do not all have the same qualifications. However, this

Revisited: Blessing or Curse in International Commercial Arbitration?, 15 AM. REV. INT'L ARB. 607, 632-33 (2004).

179. See Paul E. Comeaux & N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 30-31 (1994) (discussing the affects of stabilization clauses on states implementing human rights obligations).

180. Peterson & Gray, *supra* note 4, at 134.

181. See Suda, *supra* note 2, at 48 (asserting that "[t]he secrecy enshrouding arbitral awards under BIT's 'contributes to a skewed playing field'").

182. One ought not to assume that investors have greater access to awards through their representation by major law firms, which tend to have relatively high access to awards through the gradual accumulation of relevant practice, because governments can and often are represented by major law firms as well.

183. See Suda, *supra* note 2, at 49-50.

does not necessarily translate into host states being put at a disadvantage vis-à-vis investors to the point that their capacity to implement human rights obligations is diminished. On the contrary, these characteristics of arbitration could be an advantage to either side, depending on the arbitrator and the issues.

Legitimacy ought not to be seen as a simple concept that merely involves a tribunal's justification of authority, as Daniel Bodansky might define it.¹⁸⁴ Rather, legitimacy is multifaceted and involves a host of factors. As Thomas M. Franck sees it, legitimacy must be "firmly rooted in a framework of formal *requirements*" in order for a system of rules to have the fairness that society expects.¹⁸⁵ For him, the requirements for legitimacy include determinacy, symbolic validation, coherence and adherence.¹⁸⁶ Justification of authority might be included under the element of symbolic validation, whereas the others open up the definition of legitimacy considerably. Further, the level of participation of the parties in a dispute and the quality of their communications can determine legitimacy,¹⁸⁷ in addition to the tribunal's justification of authority. Such participation often derives from the consent of the parties to that process.¹⁸⁸ With arbitration's central tenets being party consent and participation, arbitration would appear to have other characteristics that support its overall legitimacy, in theory, even if the occasional tribunal might have less-than-impeccable impartiality. As Franck's voluminous writings indicate, the concept of legitimacy is intricate, and it would be outside the scope of this Article to defend the overall legitimacy of international arbitration here. Nonetheless, commentators should hesitate before castigating, on grounds of illegitimacy, such a dispute

184. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 600-01 (1999).

185. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 8 (1995) (emphasis added).

186. See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990). Please note that citing Franck's four components of legitimacy here does not necessarily mean that this Article supports the idea that there are only four components. The Article rather believes that there are many relevant components to legitimacy.

187. See JURGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178-79 (Thomas McCarthy trans., 1979).

188. See Robin Stryker, *Rules, Resources, and Legitimacy Processes: Some Implications for Social Conflict, Order, and Change*, 99 AM. J. SOC. 847, 856-58 (1994) (listing several aspects of legitimacy).

settlement mechanism (and the law it interprets) that prides itself on its fairness of process.¹⁸⁹

3. *Accountability.* Just as with the issues concerning legitimacy, it is not entirely clear that investment arbitration's perceived lack of accountability affects human rights. Suda asserts that "contributing to the legal uncertainty of investor-state arbitrations under BITs are the lack of a consistent and binding body of precedent and the variances of review possibilities among the arbitral mechanisms."¹⁹⁰ First, it must be noted that the link between accountability and predictability seems somewhat counter-intuitive. A link is possible inasmuch as prior cases make it possible to measure the arbitral tribunal at hand against the average (or reasonable) arbitral tribunal in handling a particular issue, assuming these decisions are accessible.

Assuming there is a valid link, it does not necessarily mean that arbitral tribunals are any less accountable than many domestic courts for not having binding precedent or the principle of *stare decisis*. After all, states with a civil law system do not have a binding body of precedent, though admittedly many do have elements that resemble *stare decisis*.¹⁹¹ Even the body of precedent in states with a common law system is inconsistent due to the art of distinguishing cases. Moreover, the level of review of decisions varies between states and even within states (at least with federal states). While these factors lead to uncertainty, it is not particularly different from that uncertainty in domestic litigation or even in other international adjudicative bodies, nor is the uncertainty different for the different parties to an arbitration proceeding.

The difference lies in the relative costs to the parties from these uncertainties. The costs are primarily the costs of bringing and defending a case, as well as the magnitude of the award. The larger the number of investors in a state makes the potential costs to that state significantly higher in defending against a host of complaints than the costs of defending such a case against any one investor. This greater cost for states derives from the inefficiencies of arbitration,

189. See, e.g., Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 985 (2005).

190. Suda, *supra* note 2, at 50.

191. See Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 ARB. INT'L 357 (2007).

including norequirement to consolidate related cases.¹⁹² Suda would appear to lump the inefficiencies of arbitration into accountability,¹⁹³ which seems incorrect. These inefficiencies have the second greatest impact on human rights because the costs to states of greater litigation magnifies the regulatory chill, thus discouraging states from regulating in any way that might raise concerns for investors.

Finally, while arbitral awards are subject to limited reviews, this does not necessarily mean that human rights suffer on account of this limitation. With institutional arbitration, arbitrators are effectively held accountable when the institution reviews the award to ensure its enforceability in domestic courts, as the ICC International Court of Arbitration does.¹⁹⁴ With most types of investment arbitration, enforcing courts themselves review awards for compliance with the seven bases for refusal to recognize and enforce under Article 5 of the New York Convention:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that

192. See generally Gabrielle Kaufmann-Kohler et al., *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently?*, 21 ICSID REVIEW 59 (2006).

193. See Suda, *supra* note 2, at 50-51.

194. ICC International Court of Arbitration, Rules of Arbitration, art. 27, Jan. 1, 1998, http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (“Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal’s liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.”).

part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.¹⁹⁵

The fact that there is a high rate of enforcement of awards under the New York Convention does not mean that the awards have not been reviewed by domestic courts. As for their precedential value, no awards are binding on another tribunal given the absence of the principle of *stare decisis* on the international level, but neither are judicial cases in civil law systems or within international tribunals, yet this characteristic in itself does not necessarily make these courts and tribunals unaccountable. On the contrary, the principle of accountability has many different facets, most of which do not depend on the following of precedent.¹⁹⁶

Some commentators see international arbitration as inherently skewed in favor of investors because arbitrators usually lack the expertise to fully take into consideration issues of public interest.¹⁹⁷ However, as shown in Part I, arbitrators have shown a surprising willingness and ability to take into consideration decisions from

195. See U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38. The main exception where courts do not review investment arbitral awards in light of New York Convention Article V is with ICSID awards. See generally Edward Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23 J. INT'L ARB. 1 (2006).

196. See generally Robert O. Keohane & Joseph S. Nye, Jr., *Democracy, Accountability and Global Governance* (Harvard Univ. John F. Kennedy Sch. of Gov't, Politics Research Group Working Papers on Int'l Relations No. 01-4, 2001) (discussing the different types of accountability).

197. See Suda, *supra* note 2, at 15 (citing RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 17 (1995)).

human rights tribunals. Ultimately, this perceived bias, therefore, is likely not as strong as these commentators suggest.

This Part has attempted to rebut many of the assertions that commentators have made concerning the negative impact that international investment arbitration has had on human rights. Part I laid out the various ways in which international investment arbitral tribunals have relied on human rights in reaching their decisions, in an effort to support the thesis that international arbitration actually supports human rights. Indeed, the UN Sub-Commission on the Promotion and Protection of Human Rights declared that human rights have “centrality and primacy . . . in all areas of governance and development, including . . . investment and financial policies . . .”¹⁹⁸ Although the cases in Part I might not demonstrate “centrality and primacy” of human rights within investment arbitration, these cases do support the underlying premise (and thesis of this Article) that one specialized body of law—human rights law—impacts another specialized body—international arbitration. Such a notion is relevant to the debate surrounding the fragmentation of international law. In particular, the arguments made in Parts I and II above undermine several of the key assertions that commentators within the fragmentation-camp make,¹⁹⁹ and thus supports the theory that there are unifying forces within international law that ought not to be ignored.

III. THE UNITY OR FRAGMENTATION OF INTERNATIONAL LAW?

Having looked at the specific arbitration cases that rely on human rights jurisprudence, this Part explains the theoretical debate between whether unity or fragmentation better characterizes the field of international law, since this debate appears to influence the studies mentioned in the Introduction when they assume that these two specialized bodies of international law are incompatible. Beyond helping respond to these studies, an understanding of this debate is important because the analysis provided in Part I impacts this debate as it shows how the two specialized regimes are able to coexist and even intermingle to some degree. This conclusion suggests that

198. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, pmb. ¶ 10, U.N. Doc. E/CN.4/Sub.2/1998/12 (Aug. 20, 1998).

199. This assumes one accepts the accuracy of those arguments, which is not a given.

international law, at least, is not as hyper-fragmented as some commentators assert, nor is the unity of international law merely a construct of legal scientists. Moreover, this Part responds to some of the assertions made by the Study Group of the International Law Commission (ILC) on the Fragmentation of International Law, which generalized in its consolidated report that specialized bodies of law such as human rights law and “such exotic and highly specialized knowledges as ‘investment law’ . . . each possessing their own principles and institutions . . . [show] relative ignorance of legislative and institutional activities in the adjoining fields.”²⁰⁰ However, as the preceding portions of this Article have demonstrated, a close study of international arbitral decisions indicates that arbitral panels have borrowed on numerous occasions from human rights law and otherwise have shown how they are not entirely ignorant of the activities there.²⁰¹

So that the key terms are clear, Martti Koskenniemi recently defined fragmentation as “the breakdown of the *substance* of general international law into allegedly autonomous, functionally oriented, ‘self-contained’ regimes.”²⁰² Self-contained regimes are seen as being

200. Int'l Law Comm'n, 58th Session, *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 8, UN Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter Consolidated Report] (finalized by Martti Koskenniemi). See also Int'l Law Comm'n, 58th Session, *Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 6, U.N. Doc. A/CN.4/L.702 (July 18, 2006) [hereinafter ILC 58th Session Report].

201. It is not unusual for arbitral tribunals to be required to consider multiple bodies of law at the same time. For example, the arbitral tribunal in the OSPAR/Mox Plant arbitration had to consider the law under the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the European Community and Euratom Treaties, the U.N. Convention on the Law of the Sea, and relevant custom and general principles of law, though the tribunal did not apply the Rio Declaration or the 2001 Aarhus Convention on the Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters because it deemed these to be merely emerging international law. See generally *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ir. v. U.K.)*, 42 I.L.M. 1118 (2003) (Perm. Ct. Arb.). See also Consolidated Report, *supra* note 200, ¶¶ 439-42. What makes the cases discussed in Part I special is that these tribunals rely on human rights law usually without human rights law being directly implicated in the dispute. For example, even though the ICJ in the Nuclear Weapons advisory opinion dealt with a host of specialized bodies of international law, such as human rights law, humanitarian law, environmental law and the law of the use of force, all of these had been invoked. See *id.* ¶ 118.

202. Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQ. L. 9, 18 (2007) [hereinafter Koskenniemi, *Mindset*]; Martin Koskenniemi & Paivi Leino, *Fragmentation of International*

autopoietic regimes in that “autonomic” and “autopoietic” mean self-governing or self-maintaining, respectively. “Unity” here is defined as the absence of fragmentation. Please keep in mind that entire conferences of the most eminent scholars have been devoted to this topic on numerous occasions,²⁰³ so the goal cannot be to resolve this debate in a relatively short article such as the one here. Rather, this Study’s goal is far more humble in sketching out the competing sides to the debate and some of the history of the ILC’s work on fragmentation. The Article then strives to look at how international arbitration interacts with human rights law in a way that avoids noticeable conflicts.

Three disclaimers are appropriate for this Part. First, the limited number of cases where arbitral tribunals rely on human rights jurisprudence does not allow one to conclude definitely that these fields are inextricably linked or even that human rights courts rely on international arbitral decisions.²⁰⁴ Second, the narrow scope of this Article and the qualitative methodology limit its ability to conclude whether all specialized bodies of international law are intermingling or have sufficiently common rules to constitute a coherent legal

Law: Postmodern Anxieties, 15 LEIDEN J. INT’L L. 553, 560-61 (2002) [hereinafter Koskenniemi & Leino] (providing a definition of “self-contained” that emphasizes a legal regime’s “operation outside general international law” and de-emphasizes compartmentalization of legal regimes, though they seem to contradict themselves when they later talk of “fully self-contained regimes” being less of a threat than semi-autonomous regimes).

203. See generally 31 N.Y.U. J. INT’L L. & POL. 679-933 (1999); 25 MICH. J. INT’L L. 845-1375 (2004); UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12; DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW (L.A.N.M. Barnhoorn & K.C. Wellens eds., 1995).

204. That said, it must be noted that some human rights courts have shown a willingness to rely on other bodies of law in reaching their decisions. The European Court of Human Rights has said on numerous occasions that it cannot interpret and apply the European Convention on Human Rights in a vacuum. See Consolidated Report, *supra* note 200, at 85-87 (quoting *McElhinney v. Ireland*, App. No. 31253/96, 2001-XI Eur. Ct. H.R. 37, para. 36; *Bankovi v. Belgium et al.*, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 335, para. 57) (discussing the application of general international law by special regimes, though such declarations might be relevant when discussing how special regimes can apply norms from other special regimes). See also H  l  ne Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for ‘Regulatory Expropriations’ of the Property of Foreign Investors*, 11 N.Y.U. ENV’T L. L.J. 148, 160-63 (2002) (asserting that the European Court of Human Rights has had a role in the promotion of general principles of international law); Beate Rudolf, *Unity and Diversity of International Law in the Settlement of International Disputes*, in UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12, at 390 (discussing how different international judicial bodies refer to each other); Monika Heymann, *Unity and Diversity with Regard to International Treaty Law*, in UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12, at 236 (stating that “treaty bodies refer to conventions relating to other subject matters while interpreting a treaty”).

system.²⁰⁵ Finally, this Article puts aside the debate over whether human rights are universal or more regional (which conceivably could relate to the issue of international law's unity),²⁰⁶ because this Article is more interested in the interaction of different bodies of law and not the consistency of any one body throughout the world in different cultures.²⁰⁷ The possibility exists that the field of human rights is an extra-special type of specialized regime that impacts all aspects of international law, and should not be seen as just another specialized body of law that other specialized bodies *might* use to reinterpret their own rules in its light, but is one that *requires* other specialized bodies to be reinterpreted in its light.²⁰⁸ If that is the case, then the interaction between human rights and international arbitration might not be applicable to the interaction between other specialized bodies of international law, thus further limiting the types of generalizations that can be drawn in the broader unification-versus-fragmentation debate. The existence of such an influential specialized body of international law itself, however, is more likely prime evidence of international law's unity, supporting the general thesis of this Article.

A. The ILC's Study on the Fragmentation of International Law

1. *Underlying Negativity.* There are myriad angles from which one can look at the unification-versus-fragmentation debate, each

205. See, e.g., H.L.A. HART, *CONCEPT OF LAW* 113 (1961). Such issues are reserved for future research.

206. See generally NOWAK, *supra* note 13, at 1-72; Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997); Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT'L L. REV. 391 (2001).

207. See also Int'l Law Comm'n, 57th Session, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 19, 22, U.N. Doc. A/CN.4/L.676 (July 29, 2005) [hereinafter ILC 57th Session Report] (deciding not to discuss cultural relativism and other divisions within human rights). By avoiding the universality versus cultural relativism debate that seems to permeate international human rights law, it is hoped that there is less confusion between different sub-fields of international law over what is meant by the unity of international law. See Andreas Zimmermann, *Introductory Remarks*, in *UNITY AND DIVERSITY IN INTERNATIONAL LAW*, *supra* note 12, at 25 (complaining that human rights specialists and non-specialists seemed to be speaking past each other at a recent conference on account of different terms of reference).

208. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872-73 (1990); Consolidated Report, *supra* note 200, ¶ 117 ("But most forms of international behaviour also have some bearing on 'human rights'..."); Consolidated Report, *supra* note 200, ¶ 133 n.164 (citing, *inter alia*, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 529-30 (6th ed. 2006) (questioning the speciality of human rights law)).

based on a perceived difficulty that arises from fragmentation. Since its establishment in 2002, the Study Group on the Fragmentation of International Law (Study Group) has been of the opinion that fragmentation is increasing due to various factors including the conflicts that arise from the increasing number of international tribunals, the lack of secondary rules in determining when to apply exceptions to the general rules, and the increasing collision of different specialized bodies of international law.²⁰⁹ In particular, the Study Group identified human rights law as one specialized body of international law that butts up against other bodies of international law.²¹⁰

Though, at times, the Study Group itself has alluded to the belief that international law is unified,²¹¹ it now seems to assume that international law is inherently fragmented.²¹² The study on fragmentation initially was subtitled “Risks of the Fragmentation of

209. See, e.g., Int’l Law Comm’n, 54th Session, *Report of the Study Group on Fragmentation of International Law*, U.N. Doc. A/CN.4/L.628 (Aug. 1, 2002) [hereinafter ILC 54th Session Report]; Int’l Law Comm’n, 55th Session, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 9, U.N. Doc. A/CN.4/L.644 (July 18, 2003) [hereinafter ILC 55th Session Report]. In later reports, these points are interspersed throughout the analysis, and are not summarized as neatly as in the preceding source. See generally Int’l Law Comm’n, 56th Session, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.663/Rev.1 (July 28, 2004) [hereinafter ILC 56th Session Report]; ILC 57th Session Report, *supra* note 207; ILC 58th Session Report, *supra* note 200.

210. ILC 55th Session Report, *supra* note 209, ¶ 6; ILC 56th Session Report, *supra* note 209, ¶¶ 21, 6. For example, The Chairman of the Study Group, Koskenniemi sees this third source of fragmentation—conflicts between specialized bodies of law—as involving the pitting of certain rationalities against one another, with each rationality pointing to a separate authority to determine the outcome of conflicts. Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT’L L.J. 61, 8283 (2005) [hereinafter Koskenniemi, *Legislation*].

211. See Int’l Law Comm’n, *Report of the International Law Commission on the work of its fifty-second session*, Annex, at 144, U.N. Doc. A/55/10 (2000) [hereinafter ILC Report] (“Since the fragmentation of international law could endanger such stability as well as the consistency of international law and its comprehensive nature. . .”).

212. It is interesting to note the negative approach of the ILC Study Group to this general debate. This approach stands in stark contrast to the ILC’s earlier work, for as Crawford notes, “the Commission has characteristically dealt in ‘universals,’ in the sense of norms affecting all states, or at least all relevant states having regard to the terms and object of the norm in question (all coastal states, all host states, etc.).” JAMES CRAWFORD, *INTERNATIONAL LAW AS AN OPEN SYSTEM* 583-84 (2002). Indeed, ILC Statute Article 18(1) even talks of the Commission’s task to “survey the whole field of international law,” thus possibly indicating a presumption that the field of international law can be considered as somewhat unified. See Statute of the International Law Commission, G.A. Res. 174(II), art. 18(1), U.N. GAOR, 2d Sess., U.N. Doc. A/519 (1947).

International Law,”²¹³ though some ILC members did not like the reference to “risks” because of its negative connotation. The name was, therefore, changed to “Fragmentation of International Law: Difficulties Arising from the Diversification of International Law.” Though its focus was on the negative *and* positive implications from fragmentation,²¹⁴ the word “fragmentation” itself is still quite negative.²¹⁵ Despite the name change, this Study Group has assumed, in a post modernist manner, that fragmentation is an inherent characteristic of the international legal system.²¹⁶ Indeed, although the Study Group’s consolidated report implies that the “rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques” are positive developments arising from international law’s fragmentation, in the very next paragraph the Study Group asserts that its rationale for studying fragmentation is to look at the problems that fragmentation causes with the coherence to international law.²¹⁷ The Study Group thus emphasizes its negative approach to the topic.²¹⁸

The possibility that there are unifying forces within international law does not appear to feature in any portion of the study. This could be explained in part by the scope of the study, as reflected in its subtitle “*Difficulties Arising from the Diversification of International Law*,” which essentially delimits the study to those areas where there are problems with fragmentation, and the unification of international law, wherever that might occur, would not be seen as a problem. Still, some mention of the possibility of unification would have been expected, thus demonstrating their cup-half-empty mentality, so to speak. Some positive results of fragmentation that the ILC Study Group could have mentioned were its promotion of the reliance on third-party dispute settlement and further development of

213. Gerhard Hafner, *Risks Ensuing from Fragmentation of International Law*, in ILC Report, *supra* note 211, at 143, 143.

214. See, e.g., ILC 54th Session Report, *supra* note 209, ¶ 9; ILC 55th Session Report, *supra* note 209, ¶ 12; ILC 56th Session Report, *supra* note 209, ¶ 6; ILC 58th Session Report, *supra* note 200, ¶ 9.

215. See Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT’L L. 845, 846-47 (2004) [hereinafter Simma, *Positive*]; Gowlland-Debbas, *supra* note 12, at 285.

216. See DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 44, 49, 59 (1989) (talking about how fragmentation is a basic assumption of postmodernism).

217. Consolidated Report, *supra* note 200, at 14; ILC 58th Session Report, *supra* note 200, ¶ 9.

218. *But see* ILC 54th Session Report, *supra* note 209, ¶ 7 (leaving out this latter paragraph on the rationale for its study).

international law from the increased diversity of opinions and specialization of decision-makers.²¹⁹

Moreover, there are several unifying factors that the ILC failed to mention. There is a certain degree of cross-fertilization between different international tribunals and a sharing of ideas between their judges on many of the key doctrines of international law.²²⁰ One example from the arbitration world comes from the NAFTA Chapter 11 framework, where there are numerous factors that lead to convergence of opinions, including cross-fertilization between NAFTA tribunals from the availability of past decisions by Chapter 11 tribunals, even though the panels of arbitrators and the lawyers representing the parties come from different backgrounds.²²¹ Burke-White lists numerous other factors that act as unifying forces for international law, including the existence of general international law that virtually all international courts and tribunals take into consideration, an inter-judicial dialogue on multiple levels, quasi-

219. See Gerhard Hafner, *Pros and Cons Ensuing From Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 850-51, 859 (2004) (seeing fragmentation as a good development in that states could become more inclined to abide by international legal norms that are more of a regional nature, are perceived as being more in line with their interests, or are more tailored to a particular scenario); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 970 (2004) (emphasizing how more courts are being faced with a greater number of cases that deal with international law, making the international legal system more active and important than ever); Donald L. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases*, 43 HARV. INT'L L.J. 541, 541-42 (2002) (asserting that "the cohesion of international law is not yet generally regarded as significantly impaired by the proliferation of decisional bodies"); Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 704 (1999) [hereinafter Charney, *Impact*] (discussing how the greater number of decisions based on international law, the stronger the international legal system becomes); Jonathan L. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 73-74 (1996) (discussing the impact from the establishment of the Tribunal for the Law of the Sea, but coming to more general conclusions as well); Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 809, 809 (1999); Dietmar Prager, *The Proliferation of International Judicial Organs, in PROLIFERATION OF INTERNATIONAL ORGANIZATIONS* 279 (Niels M. Blokker ed., 2001) (asserting and explaining that the proliferation of international tribunals has more benefits than disadvantages).

220. See Jonathan Charney, *Is International Law Threatened by Multiple Tribunals?*, 271 RECUEIL DES COURS 101, 130 (1998); Charney, *Impact*, *supra* note 219, at 705.

221. Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1408-12 (2003).

harmonization of procedures and traditions between international courts and tribunals, and the emergence of hybrid tribunals.²²²

2. *Self-Contained Regimes: Interrelated Wholes?* The ILC makes considerable reference to self-contained regimes, which along with *lex specialis* (or specialized law) also involves this debate between fragmentation and unification.²²³ The reader is reminded of the definition of fragmentation by Koskenniemi in the introduction to Part III above, which involved a discussion of self-contained regimes.²²⁴ Simma and Pulkowski walk the reader through the evolution of opinions on fragmentation of recent ILC Special Rapporteurs on State Responsibility.²²⁵ Riphagen advocates the idea that self-contained regimes are distinct subsystems with primary and secondary rules being closely linked. Arangio-Ruiz asserts that the concept was dubious and that specialized regimes could not be separated from general international law. Crawford, then, essentially agrees with Arangio-Ruiz but avoids express use of the notion of self-contained regimes in favor of the phrase “*lex specialis*” to conclude that there is a residual body of law that can be automatically applied if states have not contracted out of it. Such a long-standing dialogue over the concept suggests its complexity.

The notion of a self-contained regime comes from the Permanent Court of International Justice's *S.S. Wimbledon* case and was further developed by the International Court of Justice in its *Tehran Hostages* decision, though there in the context of secondary norms.²²⁶ Interestingly, some commentators think that the doctrine of self-contained regimes should not even exist. Pierre-Marie Dupuy asserts that the doctrine of “self-contained regimes” is entirely misleading in that the ILC mistakenly introduced the notion based on a mistaken interpretation of the ICJ's decision in the *Tehran Hostage Case*.²²⁷ Others acknowledge the existence of the concept in international law,

222. See Burke-White, *supra* note 219, at 970-77.

223. Consolidated Report, *supra* note 200, ¶¶ 46-222.

224. See text accompanying *supra* note 203.

225. See Bruno Simma and Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 493-94, 502 (2006).

226. See *id.* at 491 (quoting *S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1, at 23-24; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 38-40 (May 24)); Consolidated Report, *supra* note 200, ¶ 123.

227. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 797 (1999) (citing, *inter alia*, various reports from special rapporteurs).

though they believe that there cannot be truly self-contained bodies of international law.²²⁸ This is because the existence of a legal order requires at least a tenuous relationship between subunits of that order, or else that subunit would become a separate order in its own right.²²⁹ ILC Special Rapporteurs on State Responsibility similarly have been careful to avoid saying that self-contained regimes are entirely autonomous.²³⁰ In fact, Arangio-Ruiz and Crawford seem to emphasize the openness of the international system.²³¹ The Study Group insists that there are no fully autonomous regimes,²³² though its broad definition of “self-contained regime” confuses the matter considerably: “interrelated wholes of primary and secondary rules, sometimes also referred to as ‘systems’ or ‘subsystems’ of rules that cover some particular problem differently from the way it would be covered under general law.”²³³ The phrase “interrelated wholes” contains a fundamental paradox at the heart of the debate here, because if wholes are interrelated, they can actually be seen as a single, larger whole. Critics could try to argue over the definition of “whole” here to say that there is no actual paradox, but the plain meaning suffices to show the simplicity of this term: “Containing all components; complete; not divided or disjoined; in one unit.”²³⁴

Despite this paradox, there are a smaller number of commentators who insist on the existence of autonomous, self-contained regimes, and see this autonomy as inevitably leading to the

228. See James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 880 (2002) (asserting that there are no truly self-contained bodies of law, which this Author agrees with); Bruno Simma, *Self-contained Regimes*, 16 NETH. Y.B. INT'L L. 111, 136 (1985) (admitting that “one has to recognize sooner or later that, beyond a certain point, insistence upon further ‘self-containment’ of specific legal consequences can only have a negative effect on the effectiveness of the primary rules concerned”); Marcelo Kohen, Comment, *Treaty Law: There is No Need for Special Regimes*, in UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12, at 241.

229. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 926 (1999).

230. Consolidated Report, *supra* note 200, ¶¶ 138-52 (citing, *inter alia*, Willem Riphagen, Introduction, 1 Y.B. INT'L L. COMM. 202 (1982); Willem Riphagen, Third Report on State Responsibility, 2 Y.B. INT'L L. COMM. 30 (1982); Gaetano Arangio-Ruiz, Third Report on State Responsibility, 2 Y.B. INT'L L. COMM. 25 (1991)).

231. See generally CRAWFORD, *supra* note 212, at 17-38; Consolidated Report, *supra* note 200, ¶¶ 149-50.

232. See ILC 56th Session Report, *supra* note 209, ¶ 23; Consolidated Report, *supra* note 200, ¶¶ 172, 492.

233. Consolidated Report, *supra* note 200, ¶ 128.

234. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004).

fragmentation of international law.²³⁵ This Article dismisses this radical notion of self-contained regimes, since it is inconceivable for any social system to be made up of entirely autonomous subsystems. All such systems are interlinked to some extent, even if only when it comes to interpretation.²³⁶ This Article also disagrees with calling these regimes “wholes” (whether qualified or unqualified) because this word is too often seen as synonymous with “closed” or “complete,” as is indicated in the plain meaning of the word.²³⁷

B. Fragmentation and Legal Pluralism

At first glance, it would appear that the literature on legal pluralism would be applicable to the unification-versus-fragmentation debate. Burke-White asserts that the unifying forces mentioned in Part III(A)(1) lead to a type of international legal pluralism, which he sees as falling short of a unified body of international law though it still goes against the notion of the inevitable fragmentation of international law.²³⁸ In particular, he posits that the current international legal system is “neither fully fragmented nor completely unitary” on account of these competing factors, but is more pluralist in nature in that it accepts “a range of different and equally legitimate normative choices by national governments and international institutions and tribunals, but it does so within the context of a universal system.”²³⁹ This is a somewhat unusual understanding of legal pluralism, since legal pluralism traditionally involves the presence of multiple legal orders operating at once without mention of an overarching, universal system that is operating in the background of these legal orders. As explained in the following paragraphs, legal pluralism is not particularly helpful in resolving, or

235. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1013-17, 1045 (2004).

236. Simma & Pulkowski, *supra* note 225, at 492; Simma, *Positive*, *supra* note 215, at 847 (acknowledging that “the various fragments will never be totally ‘self-contained’”); ILC 58th Session Report, *supra* note 2090, ¶ 14(1) (stating, *inter alia*, “There are meaningful relationships between [the different sets of norms within international law]”).

237. *See* text accompanying *supra* note 234. After reading Part III(B) & (C) below, critics might allege that this Part sets up a straw man to knock it down, since it would appear that only Fischer-Lescano and Teubner expressly classify self-contained regimes as closed. However, the more subtle classifications of many of the others contain an element of *divided* completeness (for lack of a better term) and that division destroys true completeness all the same.

238. *See* Burke-White, *supra* note 219, at 977-78.

239. *Id.*

even conceptualizing, the issues surrounding the unification-versus-fragmentation debate.

According to the body of literature on legal pluralism discussed below, it would seem somewhat easy to confuse legal pluralism with legal centralism, which Griffiths defines as the notion that “law is an exclusive, systematic and unified hierarchical ordering of normative propositions,” and which he places in a position opposite that of legal pluralism.²⁴⁰ Griffiths surprisingly goes so far as to say that “[t]he ideology of legal centralism has not only frustrated the development of general theory, it has also been the major hindrance to accurate observation” and that “[l]egal centralism is a myth, an ideal, a claim, an illusion,”²⁴¹ thus showing the extent of his disdain for the ideology. Putting aside the question of whether Burke-White’s statements actually fit under legal centralism, his very acknowledgement of the context being “a universal system” implies that he accepts international law’s unity (the key word there being “universal,” not necessarily “system”), with the “*recognition* of a range of different normative choices” simply adding a wrinkle of nuance to that universality.

With regard to defining legal pluralism, one must distinguish it from the plurality of law, which is the notion that different mechanisms apply to different situations all in one society.²⁴² Hooker provides perhaps the simplest definition of legal pluralism: “The term ‘legal pluralism’ refers to the situation in which two or more laws interact.”²⁴³ Vanderlinden’s definition—“the existence, within a given society, of different legal systems applicable to identical situations”—would seem to add that legal pluralism is the applicability of different mechanisms to the same situation,²⁴⁴ which would seem to be more along the lines of the plurality of law. Noticeably absent from both

240. See John Griffiths, *What is Legal Pluralism?*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1-3 (1986); Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate About Legal Pluralism*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 21, 23 (1998) (asserting that his “readings of these writers [on legal pluralism] coincide with those of Griffiths . . .”).

241. Griffiths, *supra* note 240, at 4.

242. Woodman, *supra* note 240, at 25.

243. M. BARRY HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 6 (1975). See also Woodman, *supra* note 240, at 26.

244. See Jacques Vanderlinden, *Le Pluralisme Juridique: Essai de Synthèse*, in LE PLURALISME JURIDIQUE 19, 19 (John Gilissen ed., 1971) (“L’existence, au sein d’une société déterminée, de mécanismes juridiques différents s’appliquant à situations identiques.”). See also Woodman, *supra* note 240, at 24.

definitions is any allusion to there being a unified or fragmented system at play. In his seminal article *What is Legal Pluralism?*, Griffiths defines legal pluralism as follows:

Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. "Legal pluralism" refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping "semi-autonomous social fields," which it may be added, is in practice a dynamic condition.²⁴⁵

In short, although the concept of legal pluralism is a stimulating, and perhaps even fashionable, topic in exploring the nature of law,²⁴⁶ it does not seem to fit directly into the unification-versus-fragmentation debate on the international level where there is no institutional hierarchy or global government that imposes its decisions on the competing bodies of law as the state has the power to do within the domestic context.²⁴⁷ Although not the most powerful arguments on their own, the Study Group's cursory dismissal in a footnote of legal pluralism's relevance to its analysis of fragmentation on account of legal pluralism's focus on the "coexistence of indigenous and Western law in old colonial territories as well as the emergence of types of private law in domestic societies,"²⁴⁸ as well as the scant reference to legal pluralism in the literature on fragmentation, support this conclusion.

Assuming, *arguendo*, that legal pluralism is applicable to this debate, it would seem to support the unity of international law and not its fragmentation. As Franz von Benda-Beckmann asserts, it would be incorrect to conclude, though such a conclusion often is made, that "legal pluralism would imply the existence of distinct

245. See, e.g., Griffiths, *supra* note 240, at 38. Please note that Griffiths' reference to "semi-autonomous" was to social fields, not to bodies of law, and the reference to "normative heterogeneity" does not mean that he sees specialized regimes as entirely independent. Moreover, Griffiths makes the point about the irrelevance of legal pluralism to the debate at hand when he states in his conclusion, "Legal pluralism is an attribute of a social field and not of 'law' or of a 'legal system,'" thus rendering irrelevant any of his comments that might seem to support fragmentation. *Id.*; see also Sally F. Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973). Interestingly, Roberts praises Griffiths for moving the literature away from legal centralism. See Simon Roberts, *Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 95, 96 (1998).

246. Roberts, *supra* note 245, at 96, 101.

247. This is the case even though some scholars seem to base their definition of legal pluralism on presuppositions of legal centralism, though Griffiths persuasively shows why this is inappropriate. See Griffiths, *supra* note 240, at 9-14.

248. Consolidated Report, *supra* note 200, ¶ 8 n.13.

unconnected legal systems and/or neglect power differences between them.”²⁴⁹ The concurrent operation of different bodies of law within one domestic legal order—for example, the distinct bodies of law relating to common law marriage and legal marriage—do not make the one, overarching legal system any less unified.²⁵⁰ On the contrary, as Roberts explains when discussing the conceptualization of the plural scene, “Normative orders, including that presented by the national legal system, are best seen as partially discrete, but nevertheless overlapping and interpenetrating social fields, within which meaning is communicated on a two-way, interactive basis.”²⁵¹ Thus, although the specialized bodies of law have their own identifying characteristics, it would be inappropriate to characterize them as autonomous or the system in which they exist as fragmented—fragmentation again being defined as the breaking down of general international law into autonomous self-contained regimes, with the autopoietic nature self-contained regimes causing the most problems. Related words such as “semi-autonomous”, however, lack this idea of autopoiesis, and imply residual unity. Moore writes about the *semi*-autonomous nature of such social fields as being able to “generate rules and customs and symbols internally, but . . . is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded.”²⁵² This would seem to be the most fitting description for the relationship between human rights jurisprudence and international investment arbitration, though theorists such as Teubner who see specialized bodies of law as fully autonomous will disagree with this description, instead asserting that these closed systems merely are responding to their environment. However, the arbitration cases that expressly rely on human rights jurisprudence, as discussed in Part I above, show that the norms of one specialized body of law have crossed over the border into another, demonstrating a level of interchange that supports the notion of unity.

249. Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37, 46 (2002).

250. *See id.* at 63 (distinguishing between system-internal pluralism and pluralism of systems).

251. Roberts, *supra* note 245, at 101.

252. SALLY F. MOORE, *LAW AS PROCESS* 55 (1978); *see also* Roberts, *supra* note 245, at 101.

C. The Two Competing Camps

Many scholars have weighed in on whether they see the international legal system as more unified or fragmented. Without going into the idiosyncrasies of each scholar's views, the mainstream view would appear to be that international law is unified and that that unification is worth preserving.²⁵³ Moreover, some ILC statements and several speeches of ICJ Presidents to the General Assembly reflect this view,²⁵⁴ as well as Crawford's version of the Draft Articles on State Responsibility,²⁵⁵ which came out two years before the Study

253. See, e.g., Simma, *Positive*, *supra* note 215, at 845-46; Charney, *Impact*, *supra* note 219, at 707-08; Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 280 (2006) (asserting that international tribunals need to act as the "guardians of unity in international law" in the face of increasing fragmentation); Pierre-Marie Dupuy, *L'Unité de l'Ordre Juridique International: Cours Général de Droit International Public*, 297 RECUEIL DES COURS 9 (2002); Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT'L L. 929 (2004); Dupuy, *supra* note 227, at 792; Rainer Hofmann, *Introductory Remarks*, in UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12, at 21-22 ("Among these challenges [to international law in maintaining international peace], I should like to mention one of the risks resulting from the very fast development of international law, namely the risk of becoming too diverse, of losing its unity and, thereby, its quality as truly international law."); Karel Wellens, *Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends*, in DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW 3, 4, 26 (L.A.N.M. Barnhoorn & K.C. Wellens eds., 1995).

254. See Koskeniemi & Leino, *supra* note 202, at 553-55 (quoting, *inter alia*, Stephen M. Schwebel, Address to the Plenary Session of the General Assembly of the United Nations, Oct. 26, 1999 ("[I]n order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the *unity* of international law.") and Gilbert Guillaume, Address to the Plenary Session of the General Assembly of the United Nations, Oct. 30, 2001 ("The proliferation of international courts may jeopardize the *unity* of international law and, as a consequence, its role in inter-State relations.")); Rao, *supra* note 253, at 938-39.

255. Daniel Bodansky & John R. Crook, *The ILC's State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT'L L. 773, 781 (2002); James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 436-37 (1999) (commenting that the revision of the Draft Articles after their First Reading would involve "bringing into account the more recent case law of the International Court . . . relevant cases of the various tribunals (especially the Iran-United States Claims Tribunal and ICSID tribunals; more recently, WTO panels and the Appellate Body) together with the jurisprudence of the human rights courts and committees, and integrating them within the classical structure of the Draft Articles"). In fact, Crawford asserts that "the Commission has characteristically dealt in 'universals,' in the sense of norms affecting all states, or at least all relevant states having regard to the terms and object of the norm in question (all coastal states, all host states, etc.)." CRAWFORD, *supra* note 212, at 583-84. However, this statement was made well before the work of the ILC's Study Group on Fragmentation began.

Group became active. As Birnie and Boyle point out in the international environmental law context, the ICJ seems to prefer an integrated approach to international law over a fragmented approach, where multiple bodies of international law are taken into consideration in resolving the case before it.²⁵⁶ Indeed, this can be seen in the *Gabcikovo-Nagymaros Project* case where environmental law was taken into account in deciding an essentially investment dispute,²⁵⁷ in the Nuclear Weapons advisory opinion where the ICJ combined environmental law issues with use-of-force issues,²⁵⁸ and in the Wall advisory opinion where the ICJ said that human rights law applied at the same time as international humanitarian law in the Occupied Palestinian Territory.²⁵⁹ Although these are clear examples of international law's developing unity in the past decade, it is possible to see the ICJ was responding to the arguments placed before it. Thus, though the fact that it deals with multiple bodies of law within the same section of a decision does not necessarily mean that it is inclined towards an integrated approach to international law, it still might very well have such an inclination. Further, given the cases mentioned in Part I, the same inclination towards an integrated approach to international law might also be a characteristic of international investment arbitral tribunals, despite lawyers' arguments in an arbitral proceeding focusing the tribunal's decision.²⁶⁰ Some critics might argue that such assertions in favor of international law's unity are merely a reaction to postmodernism,

256. See P.W. BERNIE & A.E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 80 (2d ed. 2002).

257. *Gabcikovo-Nagymaros (Hung. v. Slov.)*, 1997 I.C.J. 7, 67-68, 77-78 (Sept. 25); BERNIE & BOYLE, *supra* note 256, at 80 n.13.

258. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 241-44 (July 8); BERNIE & BOYLE, *supra* note 256, at 80 n.13.

259. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 131, 171-81 (July 9). Moreover, the U.N. Human Rights Council recently determined that the Universal Periodic Review of states is to be done with the both human rights and international humanitarian law acting as the standards. U.N. Human Rts. Council, Intersessional open-ended intergovernmental Working Group to develop the modalities of the universal periodic review mechanism established pursuant to Human Rights Council decision 1/103, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, at 2, UN Doc. A/HRC/5/14 (June 6, 2007). Please note that the ICJ in the Nuclear Weapons advisory opinion made clear that the *lex specialis* (or international humanitarian law) would be used to determine what "arbitrary deprivation of life" means, and not human rights law. See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 240 (July 8); Consolidated Report, *supra* note 200, at ¶¶ 96, 103-04.

260. Coe, *supra* note 221, at 1407.

with its assumption of fragmentation of the international legal order.²⁶¹ However, one must not forget that the very study of the *process* of fragmentation presupposes that the original was a whole or was at least more unified than it is now.²⁶²

Still, there are a considerable number of commentators who think fragmentation is inevitable. In one of the first publications to discuss the fragmentation of international law, though without using the word “fragmentation” more than once, Weil seems to be of the opinion that fragmentation is inevitable.²⁶³ The Study Group itself concludes that “normative conflict[s] [are] endemic to international law” on account of the lack of hierarchy within the international law-making process,²⁶⁴ but this ignores the spontaneous reconciling, and even borrowing, of norms between specialized regimes, which the reference to *autonomous* self-contained regimes within the definition of fragmentation would seem to not allow. Koskenniemi and Leino describe the conflicts between the normative systems of international law as “pathological,” thus seeming to assume that international law is bound to a fragmented existence.²⁶⁵ More recently, Koskenniemi asserted that “[t]he international context, perhaps like ‘modernity’ *tout court*, was always ‘fragmented.’”²⁶⁶ This was the same point that the Study Group asserted at the beginning and at the end of its work,²⁶⁷ which is not surprising given that Koskenniemi was the Study Group’s Chairman. Yet again, Koskenniemi’s view of the international system seems inherently pessimistic when he asserts, “Alongside general law, today we have human rights law, international trade law, international criminal law, international environmental law and so on, with the general law breaking into particular principles and institutions with conflicting procedures and preferences[; t]here is no end to the fragmentation of the international world into such instrumental rationalities.”²⁶⁸ Quite a

261. See Koskenniemi & Leino, *supra* note 202, at 553.

262. Simma, *Positive*, *supra* note 215, at 847; Rao, *supra* note 253, at 930.

263. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413 (1983).

264. See Consolidated Report, *supra* note 200, ¶ 486.

265. Koskenniemi & Leino, *supra* note 202, at 560, 576. “Pathological” is seen as meaning habitual, compulsive or inevitable in this context. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004).

266. Koskenniemi, *Mindset*, *supra* note 202, at 22.

267. Consolidated Report, *supra* note 200, ¶ 16; ILC 54th Session Report, *supra* note 209, ¶ 6.

268. Koskenniemi, *Legislation*, *supra* note 210, at 81.

few other commentators are fatalistic over international law's fragmentation,²⁶⁹ while others implicitly assume international law's fragmentation.²⁷⁰ Burca and Gerstenberg assert that the international law discourse sees the "sharp ethnic, cultural, ideological, constitutional, and economic diversity" as leading to "an *irreversible* loss of law's unity" by its fragmentation into "parallel 'regimes.'"²⁷¹ Hafner might be interpreted as saying that fragmentation is unavoidable,²⁷² in part because he says that the "international legal system cannot avoid normative conflicts . . . because it lacks clear legal guidance for the resolution of conflicts of norms."²⁷³ However, in the very next sentence Hafner asserts, "This situation threatens the unity of the international legal system," which implies a belief that unity will continue if these conflicts do not break it apart.²⁷⁴ Fischer-Lescano and Teubner are fatalistic in their analysis of fragmentation, claiming that international law is doomed to a fragmented existence because it is made of autonomous, self-contained regimes²⁷⁵ and because global society itself is unavoidably fragmented,²⁷⁶ though they fall short of adequately explaining why it is so unavoidable. Indeed, Fischer-Lescano and Teubner seem to prematurely foreclose the very possibility that investment arbitral tribunals will rely on other bodies of law when they assert the following:

In contrast to the courts of developed Nation-States that guarantee legal unity, globally dispersed courts, tribunals, arbitration panels and alternative dispute resolution bodies are so closely coupled, both in terms of organization and self-perception, with their own specialized regimes in the legal periphery that they *necessarily* contribute to a global legal fragmentation.²⁷⁷

269. Kalypso Nicolaidis & Joyce L. Tong, *Conclusion: Diversity or Cacophony? The Continuing Debate Over New Sources of International Law*, 25 MICH. J. INT'L L. 1349, 1372 (2004).

270. Monica Pinto, *Fragmentation or Unification Among International Institutions: Human Rights Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 833, 841 (1999) ("The reasonable goal of unification of the international legal system necessarily involves the international protection of human rights.").

271. Grainne de Burca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 HARV. INT'L L.J. 243, 245-46 (2006) (emphasis added).

272. Annika Tahvanainen, Commentary, *Comment to Professor Hafner*, 25 MICH. J. INT'L L. 865, 865 (2004).

273. Hafner, *supra* note 219, at 854.

274. *Id.*

275. See Fischer-Lescano & Teubner, *supra* note 235, at 1013-17, 1045.

276. See *id.* at 1004, 1017.

277. *Id.* at 1014 (emphasis added).

That said, they make the normative argument that “arbitration instances must move beyond concrete contractual terms in order to take environmental consequences and human rights complications into account as part of a specific *ius non dispositivum* . . .”²⁷⁸ which, as this Article demonstrates, already is taking place to some extent. Instead of unity of international law, they assert that the best that can be hoped for is a “weak compatibility between the fragments” if conflicts law can create a network logic.²⁷⁹ However, it is again not exactly clear why they think that this compatibility cannot constitute a degree of unification of international law. On the contrary, they seem to assume that these bodies of law are absolutely self-contained, thus making it impossible for them to be unified and reconciled to any degree on certain instances. However, the whole point of the conflict-of-laws rules comprising private international law (at least within the common law system) is to make compatible otherwise incompatible bodies of law. Regardless, one must not forget that Fischer-Lescano and Teubner’s views on fragmentation are not in the mainstream.²⁸⁰

In sum, the opinions contained in the preceding paragraph ignore the instances where particular bodies of law overlap without conflicting, as with the cases mentioned in Part I above. These cases suggest that there ultimately might be an end to the fragmentation of the international legal order after all, assuming there was a beginning.

Ultimately, both sides of this debate have strong arguments for seeing international law either as unified or fragmented. This remainder of this Section critically reviews some of those arguments.²⁸¹

The arguments from the unification (or ‘universalists’) camp range from the simple to the complex. On the former end of the spectrum, Abi-Saab blames critical legal scholars such as Kennedy for

278. *Id.* at 1038.

279. *Id.* at 1045.

280. See Simma, *Positive*, *supra* note 215, at 847.

281. One cross-cutting issue to keep in mind is the pivotal role of the end of the Cold War in this debate. This focus on the Cold War having transformed the system might reflect liberal democratic thinking on the fragmentation problem where democratization of states can be seen as naturally leading to a greater desire to settle disputes peacefully, though an entirely different theory that emphasizes the gradual evolution of the international system outside of the events surrounding the end of the Cold War is equally as plausible an explanation for the fragmentation phenomenon. See, e.g., Rao, *supra* note 253, at 930, 958-60 (asserting that the purpose of this article is to show that the fragmentation of international law is “a sign of the growing maturity of international law”).

creating somewhat artificial divisions in an otherwise unified body of law.²⁸² On the other end is Pauwelyn, who argues that the fragmentation of international law, which results from the system's roots in state consent, made it possible for the international community (or parts thereof) to cooperate during the Cold War on *trade-* and *economic-*related issues through such institutions as the World Bank and IMF for the specific reason that they were able to avoid much of the *political* struggle that was characteristic of this period.²⁸³ However, once the Cold War ended, the former communist states joined those economic-oriented organizations and broke down the neat divide that had developed between both spheres, with political- and economic-related issues quickly coming linked.²⁸⁴ Such linkage, which also has been helped along by zealous NGOs, has removed much of the meaning of the distinction between public international law and international economic law at the global level.²⁸⁵

The commentators within the fragmentation (or particularists') camp can be loosely categorized into four groups.²⁸⁶ The first group sees the increasing specialization of society and law as a fundamental cause of fragmentation, arguing that specialization since the end of the Cold War has so entrenched the idea of the fragmentation of international law into the collective psyche that fragmentation is assumed to be inherent in the contemporary system.²⁸⁷ The ILC Study Group would fall into this category, as it sees technically specialized cooperation networks creating their own rules because general international law does not adequately take into account the

282. See Abi-Saab, *supra* note 229, at 919-20.

283. See Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903, 903 (2004). Interestingly, such institutions were even required to avoid political issues in their operations, according to their articles of agreement. See *id.*

284. See *id.*

285. See *id.* When speaking of this divide on the international level, it is somewhat irrelevant that individual states may have broken down this divide within their domestic jurisdictions much earlier than the end of the Cold War. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-40 (1985) (determining that an antitrust dispute, which fell within the realm of public interest, was nonetheless subject to arbitration under the Federal Arbitration Act).

286. The terms "particularism" and "fragmentation" are used interchangeably. Please note that the use of the term "particularism" is not meant to be derogatory in any way.

287. See Charlotte Ku, *The ASIL and the International Law Network*, AM. SOC'Y INT'L L. NEWSL. (ASIL, Washington, D.C.), June 1995 (noting the link between specialization and fragmentation).

needs of that specialized community.²⁸⁸ According to the Study Group, this is the essence of the problems surrounding fragmentation, along with their conclusion that these special regimes “have no clear relationship to each other.”²⁸⁹ It is this type of assertion that Part II of the Article refutes. The Study Group concludes that what is needed is state legislation to fix this problem and not a technical answer from the legal community.²⁹⁰ However, as this Article suggests, arbitral tribunals are able to incorporate to a certain degree different specialized regimes in an ad hoc fashion without such legislation or institutional hierarchies.

The second group sees the increasing number of actors within the international realm as a fundamental cause of fragmentation. Petersmann would fall into this group, since he sees the “ever-expanding scope of international economic law” after the end of the Cold War as a major cause of conflict within international law.²⁹¹ Stark seems to think that because there are different actors operating within the realm of international law all with a different view of what the law should be that the law is inherently fragmented.²⁹² Koskenniemi and Leino see the end of the Cold War as a key point in time in that talk of making international law a complete system became possible again after the Cold War, though they assert that it was liberalism and globalization that frustrated all moves to making it such a system in that, after the Cold War, there was “a kaleidoscopic reality in which competing actors struggled to create competing normative systems often expressly to escape from the strictures of diplomatic law— though perhaps more often in blissful ignorance about it.”²⁹³

The third group includes commentators, such as Hafner, who see the international legal system as being more fragmented since the end of the Cold War due to a variety of different factors, including the proliferation of international regulations, greater political fragmentation, regionalization of international law, individuals becoming subjects of international law separate from that of states,

288. See Consolidated Report, *supra* note 200, ¶ 482.

289. *Id.* ¶ 483.

290. See *id.* ¶ 484.

291. Petersmann, *supra* note 253, at 280.

292. See Barbara Stark, Afterword, “Violations of Human Dignity” and Postmodern International Law, 27 YALE J. INT’L L. 315, 345 (2002).

293. Koskenniemi & Leino, *supra* note 202, at 559.

and the specialization of international regulations.²⁹⁴ The fourth group sees globalization and the loss of some local control as a fundamental cause of fragmentation. Schachter seems to view a form of fragmentation as a response to globalization as people try to preserve their identity from the “remote anonymous forces [that seem to] control their lives.”²⁹⁵ It is interesting to note how scholars can take these same observations about the international system and come to the opposite conclusion. For example, Jackson claims that globalization raises the strong need for uniformity of rules that will govern all of the players in the market.²⁹⁶ Crawford adopts this same thinking, but goes a step further, saying that globalization has “accentuated the trend towards relative uniformity in recent years,”²⁹⁷ not merely that globalization calls for greater uniformity.²⁹⁸ Likewise, Leubuscher sees globalization as leading to the “conflation of public and private needs” and the interconnection between individuals, corporations and the state.²⁹⁹ This contradiction raises the question of whether it is possible that two opposing interpretations of key facts surrounding globalization and the end of the Cold War can be right.

This question can be rephrased as whether international law accurately can be characterized as both united and fragmented at the same time. The legal theorist Vanderlinden seems tormented by his struggles over defining the nature of the international legal system, claiming that the idea of a pluralistic legal system is impossible

294. See Hafner, *supra* note 219, at 849-50.

295. Oscar Schachter, *The Decline of the Nation-State and Its Implications for International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 17 (1997).

296. See John H. Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization*, 31 N.Y.U. J. INT'L L. & POL. 823, 824 (1999).

297. CRAWFORD, *supra* note 212, at 576 (Crawford nonetheless recognizes the “significant divergences of policy, interest and approach amongst states and groups of states”).

298. Unlike some commentators, this Article uses unity and uniformity synonymously, even though it might be possible to distinguish the two. See Anja Seibert-Fohr, *Unity and Diversity in the Formation and Relevance of Customary International Law*, in UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12, at 278.

299. See Susan Leubuscher, *The Privatisation of Law: International Investment Agreements as Acts of Pretended Legislation*, 3 TRANSNAT'L DISPUTES MGMT. No. 2, at 1-2 (2006). See also The Secretary-General, *Preliminary Report of the Secretary-General, Globalization and its Impact on the Full Enjoyment of All Human Rights*, at 2, 9, U.N. Doc. A/55/342 (Aug. 31, 2000) (seeing globalization as linking peoples lives and different aspects of society together, though identifying that some parts of society do not benefit from these changes). Christian Tomuschat, *International Law as the Constitution of Mankind*, in INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION 37 (United Nations ed., 1997) (asserting that the international community increasingly adopts the notion of shared fundamental values).

because such is “either self-contradictory or redundant,”³⁰⁰ presumably on account of the competing factors of unity and fragmentation.³⁰¹ Other commentators appear somewhat less genuine as they grapple with this issue, instead seeming to hedge their bets. As Hersch Lauterpacht asserted, “The disunity of the modern world is a fact; but so, in a truer sense, is its unity.”³⁰² Schermers and Blokker conclude in their book *International Institutional Law: Unity within Diversity* that “international organizations vary greatly” though they have “much in common.”³⁰³ With regard to reservations, Bröhmer talks paradoxically of how “reservations are an instrument to gain more unity by accepting some degree of diversity.”³⁰⁴ More generally, Gowlland-Debbas labels as “paradoxical[ly]” her point that “the greater the degree of specialization, the more self-contained the regimes, the greater is the trend towards permeability between different fields of law”³⁰⁵ Crawford talks of “the ideal of universality” in international law “only be[ing] achieved on the basis of some allowance for disagreement on particulars,” which he himself sees as “paradoxical, a spurious sort of ‘unity in diversity.’”³⁰⁶ Nonetheless, Crawford concludes that such paradoxical “unity in diversity” is “the necessary product of an attempt to conceive of and to organise a global society of states in the persistent absence of any central authority.”³⁰⁷ One cannot help but wonder if the use of such paradoxes is a way for commentators to avoid the difficult question of whether the international legal system is better characterized as unified than fragmented, or vice versa.

Still other commentators see the debate as somewhat of a social construct. Oeter talks of the unity of international law as being a social construct that the international community “will try to achieve

300. Jacques Vanderlinden, *Return to Legal Pluralism: Twenty Years Later*, 28 J. LEGAL PLURALISM & UNOFFICIAL L. 149, 152-54 (1989).

301. *Id.*

302. HERSCH LAUTERPACHT, 2 INTERNATIONAL LAW 26 (1975).

303. HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 15 (4th rev. ed. 2003); *see also id.*, at 1205-09; CRAWFORD, *supra* note 212, at 576.

304. Jürgen Bröhmer, Comment, *in* UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12, at 253.

305. Gowlland-Debbas, *supra* note 12, at 285. Interestingly, Gowlland-Debbas switches the order “diversity within unity,” apparently to emphasize the unity of the system. *Id.*

306. CRAWFORD, *supra* note 212, at 594.

307. *Id.*

while never putting it into reality completely.”³⁰⁸ The ILC Study Group has asserted that “‘fragmentation’ and ‘coherence’” of the international legal system is all “in the eye of the beholder,”³⁰⁹ thus implying that the international legal system is neither objectively fragmented nor unified. Regardless of whether it is a social construct, the important question is whether it has any value in explaining the dynamics of the international legal order.

This Article does not dismiss the possibility that the ultimate conclusion in the unity-versus-fragmentation debate will be that both unity and disunity can coexist. Yet, it would be unwise to dismiss the possibility that either unity or disunity better characterizes the international system, just as one ought not to have dismissed in ancient times the theory that the world was round merely because there were many competing theories at that time. From a practical perspective, there is no way to definitively determine in such a limited study whether the international legal system is unified, fragmented or both. From a theoretical perspective, however, it is difficult to see international law as anything other than a complete system at this point in time. International legal norms must be thought of in relation to other norms—such as domestic legal norms and cultural norms—thus connecting norms together in one large network.³¹⁰ Moreover, it is difficult to see the debate in anything but a binary fashion—either the universal system is unified or it is not. Indeed, “unity” and “diversity” are opposites.³¹¹ While opposites do not necessarily imply *tertium non datur* (or that there is no third possibility), in this case there is no third possibility because the very definition of “unity” involves the absence of diversity, which would constitute a truly mutually exclusive arrangement.³¹² In other words, once a part becomes separated from the system, then it becomes a system unto itself. When the issue becomes one of degree of connection, as is the case here despite the extreme opinions of

308. Stefan Oeter, Comment, *Unity and Diversity of International Law in the Settlement of International Disputes*, in UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12, at 419.

309. Consolidated Report, *supra* note 200, ¶ 20.

310. François Ewald, *The Law of Law*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 36, 36 (Gunther Teubner ed., 1988). *See also* Gowlland-Debbas, *supra* note 12, at 286.

311. Rudolf, *supra* note 204, at 390-91.

312. *See* Dictionary.com Unabridged (v. 1.1), <http://dictionary.reference.com/browse/unity> (last visited Aug. 2, 2007).

Fischer-Lescano and Teubner,³¹³ then the existence of a connection would appear to be taken as a given.³¹⁴ This would be so regardless of whether the whole could be better organized or more of a coherent system, since even a loosely connected system of parts is still a systemic whole.³¹⁵ A dog has four legs, all of which have a similar but somewhat different structure, though they all make up part of one dog. Surely “fragmented” does not seem like a fitting description for a typical dog. The same is true with the various bodies of law that make up international law, with there being sufficient unity throughout the parts for it to be a workable system. With this in mind, the following Section explains why the universalists’ views on international law are more persuasive than those of the particularists.

D. International Law’s Unity

Despite the best efforts of particularists in arguing in favor of international law’s fragmentation, this Article agrees more with the universalists for three reasons. The first reason deals with the general flexibility that decision-makers have in reaching their decisions. As Stark points out, international law tends to be fragmented on account of its lack of a centralized law-giver or decision-making.³¹⁶ However, this lack of centralization does not necessarily mean that different subject-matter areas have to conflict one with another or that decision-makers within each specialized body of law cannot *sua sponte* deal with conflicts as they arise. Just as the ICJ is not bound by precedent under ICJ Statute Article 59, it can, indeed, consider all judicial decisions, among other sources provided under ICJ Statute Article 38.³¹⁷ Likewise, there is nothing stopping any international court or tribunal from borrowing from the decisions of other fora in reaching their own decisions, though there is the likely caveat that such external decisions cannot be incompatible with the most relevant law for that court or tribunal. Indeed, tribunals of limited jurisdiction

313. See *supra* text accompanying notes 275-79.

314. Similarly, an assertion that “there are few true universals in international law” implies that there are at least some universals. CRAWFORD, *supra* note 212, at 588.

315. Please note that this likely is a controversial point. As Woodman has asserted, legal pluralism is a “non-taxonomic conception, a continuous variable,” so it is impossible to distinguish between unitary and plural legal situations. Woodman, *supra* note 240, at 54. That said, Woodman is not saying that systems of law do not exist, as von Benda-Beckmann characterizes him as saying. See von Benda-Beckmann, *supra* note 249, at 63.

316. See Stark, *supra* note 292, at 337-38.

317. See Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute] (entered into force Oct. 24, 1945).

(which includes most international tribunals) are not limited in the scope of the applicable law that they can use in interpreting and applying the relevant treaties they are limited to interpreting and applying.³¹⁸ As Crawford has noted in the human rights context, “international human rights courts and tribunals have to apply international human rights standards to situations in which national law is intimately engaged,” and in the investment arbitration context, “the applicable law [in a BIT arbitration] is some combination of international and applicable national law.”³¹⁹ As Heck asserts, “while [the judge] must decide the individual case before him, he does so by applying the entire legal order.”³²⁰ Within the context of the self-contained-regimes debate, Koskenniemi has concluded that “international practice has never treated specialized rule-systems as independent from the rest of the law[; y]ou could not just take one bit and leave the rest aside: *il n’y pas de hors-droit*.”³²¹ The same arguably can be said for arbitrators and the rules that they apply. Indeed, as Bucher and Tschanz point out, arbitrators do not operate simply under the agreement before them or in a legal vacuum.³²² How can anyone say that such a porous system as international law is truly fragmented? Such flexibility means that there are no formalized barriers between specialized bodies of law.

The second reason for why the universalists’ view is more persuasive deals with the inherent unity of the international legal system despite the trend towards specialization. Society in the past few decades has become so sophisticated that “specialization” seems to be the motto. 20th century international law largely has given up the theoretical emphasis that existed prior to the First World War in favor of a more pragmatic approach to international law and on what functions for practitioners in real situations.³²³ The pragmatic approach to international law seems to rely on the fragmentation of

318. See Consolidated Report, *supra* note 200, ¶¶ 44-45; Antonio R. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties*, 16 ICSID REV.—FOREIGN INVESTMENT L.J. 20, 21 (2001).

319. CRAWFORD, *supra* note 212, at 23-24.

320. Simma & Pulkowski, *supra* note 225, at 498 (quoting P. HECK, BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ 107 (1932)).

321. Koskenniemi, *Mindset*, *supra* note 202, at 19 (the English translation being “there is nothing that is outside of law”).

322. See ANDREAS BUCHER & PIERRE-YVES TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND 102-03 (1988).

323. See David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 100-02, 112-13, 116, 120-21 (1997).

state sovereignty and the rejection of formalism.³²⁴ As law (and even international law) becomes more of a trade and as these practitioners become more specialized, international law becomes more compartmentalized and the bodies of rules and paradigms that each type of practitioner uses evolves along its distinct path. Still, despite this relative compartmentalization of practice, the semblance of the largely forgotten parent—a unified system of international law in the 19th century—can be seen in virtually all areas. As Kennedy posits, international lawyers at the end of the 19th century “would sharpen the analogy between international public law and the private law of contract and property, and would increasingly think of a single, universal, international legal fabric ordering relations among civilized and uncivilized states.”³²⁵ More emphasis on the theory of international law might help resuscitate these entirely relevant and valid notions of unity that underlie the current legal system. Nonetheless, one must not forget that even contemporary sources acknowledge that all legal systems have common elements, such as *pacta sunt servanda*, good faith, fair hearings, and *nemo iudex in re sua*, which is reflected in the basic idea that general principles of law are a source of international law under ICJ Statute Article 38.³²⁶ This is so despite the countless differences between such systems, thus underlining the fundamental unity of international law.³²⁷ On a related point, even if specialized regimes of international law can be self-contained, they seem to be embedded within general international law.³²⁸ Indeed, diverse specialized courts still rely on that same general international law in addition to more specialized bodies of law in settling the disputes brought before them,³²⁹ and at the same time, these specialized bodies of law in turn become a part

324. *See id.* at 112.

325. *Id.* at 119; *see also id.* at 126 (“By century’s end, there is increasing use of a private law analogy to explain the international legal order. From diverse powers operating in overlapping spheres, a unified sovereignty emerges, analogous in competence to the individual, subject to one law.”).

326. *See* ICJ Statute, *supra* note 317, art. 38(1)(c).

327. *See* *Abi-Saab*, *supra* note 229, at 920. This also is the case even though the ICJ ostensibly never has based one of its decisions on the general principles of law. *See* Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989*, 61 BRIT. Y.B. INT’L L. 1, 110-11 (1990).

328. *See* Simma & Pulkowski, *supra* note 225, at 500. *See also* Consolidated Report, *supra* note 200, ¶¶ 435-38 (noting how the European Court of Human Rights applies general international law); Marcelo Kohén, Comment, *Treaty Law: There is No Need for Special Regimes*, in UNITY AND DIVERSITY IN INTERNATIONAL LAW, *supra* note 12, at 241.

329. *See* Pauwelyn, *supra* note 283, at 911.

of general international law, at least concerning the secondary rules of international law.³³⁰ In short, the fallback position of general international law makes it possible to circumscribe all bodies of international law into one large unit.

Third, even though there may be more competing actors in the system that try to make different normative systems, as Koskenniemi and Leino point out, this does not necessarily mean that there currently exist distinct bodies of law that are irreconcilable. On the contrary, as the analysis of Part II demonstrates, there are significant overlaps even among the most dissimilar bodies of law, where overlap occurs without one subsuming the other. This quasi-melding of different branches of international law can add considerably to the legitimacy and effectiveness of international law in that decision-makers charged with interpretation are helping to relieve perceived tensions between these branches that have existed since the end of the Cold War by considering (and perhaps even reconciling) these tensions.³³¹ Although those charged with interpreting and applying investment treaties have not traditionally been known for considering norms from other branches of international law when making their decisions,³³² this Article suggests that this might be changing. Nicolaidis and Tong see lawyers as fearing the “growing overlap and confusion of mandate between different legal regimes and, as a result, a duplication of efforts and a waste of resources.”³³³ While it is acknowledged that overlap and even potential conflict of different legal regimes may exist, these are not believed to be things that should illicit fear.³³⁴ After all, the international legal system seems to have been sufficiently robust and flexible to have weathered both hot and cold wars of the past few centuries. Moreover, international decision-makers are adequately respectful of other courts in minimizing outright conflicts, thus adding a degree of authority to

330. See Wellens, *supra* note 253, at 28 (“Special fields remain an integral part of general international law and this holds true for each of the secondary rules reviewed in this volume, with the exception being made, one has to admit, for the Community legal order.”). See also *id.* at 25-31 (discussing how common secondary rules throughout the specialized bodies of international law lend significant coherence to the system).

331. See Philippe Sands, *Searching for Balance: Concluding Remarks*, 11 N.Y.U. ENVTL. L.J. 198, 202-03 (2002).

332. See *id.*

333. Nicolaidis & Tong, *supra* note 269, at 1351.

334. The word “proliferation”—as in the proliferation of international tribunals and actors—does not help in alleviating fear, inasmuch as that term is associated with weapons of mass destruction. See *Abi-Saab*, *supra* note 229, at 925; *Rudolf*, *supra* note 203, at 389-90.

decisions that reflect some unity in the legal order.³³⁵ As the ILC Study Group noted, “In international law, there is a strong presumption against normative conflict... [which] extends to adjudication as well.”³³⁶ Therefore, commentators must be careful not to exaggerate the differences between bodies of law to the point of portraying the unity of international law as being threatened.³³⁷

This Part has attempted to apply the generalizations from the technical analysis of arbitration cases in Part I into a broader theoretical framework. Although these observations do not resolve the debate over the fragmentation of international law, they indicate that international law perhaps is more unified than some commentators would assert. Indeed, the porous nature of special regimes makes it so that decision-makers in any one regime are free to borrow norms from other special regimes in interpreting and applying their own norms. This is, at least, what has been observed in an admittedly limited number of international arbitration cases where the arbitral tribunal has borrowed from human rights jurisprudence without necessarily creating a conflict between these two special regimes. Such examples of overlap between specialized bodies of international law ought not to be overlooked.

CONCLUSION

This Article has identified some of the ways international arbitration has relied on human rights jurisprudence. Although these bodies of law are not united *per se*, the examples laid out in Part I show that there is more of a connection between them than commentators might think. Despite such positive overlaps, they still are portrayed in the literature as generally conflicting bodies of law. Changing the perception might take much energy, given how international law continues to be taught and thought of as having such discrete, disconnected subfields.³³⁸ Such a compartmentalized approach to international law causes problems, which Brownlie summarizes well:

A related problem is the tendency to fragmentation of law which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as “international human

335. See Rudolf, *supra* note 203, at 409-10.

336. Consolidated Report, *supra* note 200, ¶ 37.

337. See Rao, *supra* note 253, at 934.

338. See Philippe Sands, *Treaty, Custom and the Cross-Fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85, 88 (1998).

rights law” or “international law on development.” As a consequence the quality and coherence of international law as a whole is threatened. Thus, for example, points are made as though they are novel propositions of human rights law when in fact the point concerned had long been recognized in general international law.³³⁹

In other words, if practitioners and judges do not embrace the interconnectedness of different bodies of law and start thinking of international law from a holistic perspective, then they might be doomed to reinventing the wheel, so to speak, each time these bodies interact and create “novel” issues. The reality is that the various branches of international law increasingly overlap to the point that it raises serious doubts over whether there are truly self-contained bodies of law. Although compartmentalization generally can lend the impression of order to a field often criticized for its lack thereof,³⁴⁰ artificial compartmentalization is counterproductive in this case in that it denigrates the overarching logic of an otherwise coherent whole. Although a divide still exists in terms of the analytical tools of those bodies of law, the numerous cases mentioned above of international investment arbitrators relying on human rights jurisprudence suggest that the divide gradually is being worn away at least in this context. What this means is that counsel in arbitration cases may need to take more of a holistic approach to arguing their cases and judges a more creative, cross-sector approach to decision-making, which can be helped along by law professors and students taking a more holistic approach to the teaching and learning of international law in the future, as opposed to teaching only “‘the law’ as defined in the normative logic of their own law discourses.”³⁴¹ Such a holistic approach to international law might lead to the ultimate filling of the legal black hole that the ILC Study Group said exists in inter-regime relations.³⁴²

In conclusion, most of the commentators who say that human rights ought to be given their due consideration vis-à-vis investors’ rights rely on little, if any, actual cases to show that this is not already happening. Rather, much of their relatively normative argumentation relies on relatively unpersuasive counterfactual reasoning and

339. Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 15 (James Crawford ed., 1988) (also acknowledging that there may be tensions between the different so-called compartments of international law).

340. See Sands, *supra* note 338, at 88.

341. von Benda-Beckmann, *supra* note 249, at 40.

342. See Consolidated Report, *supra* note 200, ¶ 492(2).

hypothetical situations. The close study of actual arbitral decisions contained within this Article indicates that investment arbitration seems to be consistent with human rights, instead of undermining them. It is believed that further analysis of this topic will reveal an even greater connection between these two areas of international law. While more certainly needs to be done in the world to protect human rights and to prevent human rights violations, the answer does not seem to be to demonize international investment arbitration.