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und Internationalen Wirtschaftsordnung 61

Scheu | Hofmann | Schill | Tams (Eds.)

Investment Protection, Human Rights, and International Arbitration in Extraordinary Times

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Professor Dr. Stefan Kadelbach, Universität Frankfurt a. M.
Professor Dr. Rainer Klump, Universität Frankfurt a. M.

Volume 61

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Preface

On 6 and 7 March 2020, the Wilhelm Merton Centre for European Integration and International Economic Order organized, in cooperation with the Glasgow Centre for International Law and Security of the University of Glasgow, the Amsterdam Centre for International Law of the University of Amsterdam, and the International Investment Law Centre of the University of Cologne, the 11th Frankfurt Investment Law Workshop, devoted to legal issues connected with 'Investment Protection, Human Rights and International Arbitration'.

The decision to re-visit the interplay between investment protection, international arbitration and human rights which had been explored at the 2nd Frankfurt Investment Law Workshop in 2011 (see the contributions in Hofmann/Tams (Eds.), International Investment Law and Its Others, Nomos Baden-Baden 2012) was based on the assessment that recent developments justified to re-consider some crucial questions: How can treaty makers and arbitral tribunals ensure that investment law concepts are not only in conformity with, but also promote human rights? Do relevant specificities exist in the field of investments in land, food and water? Does investment protection take account of international labour rights? Is investment arbitration meeting the procedural standards that are necessary for being considered as a legitimate mechanism for the settlement of international disputes in which individual rights and public interests are at stake? And finally, is responding to all these demands legally feasible for the current system of international investment protection or are substantial reforms required?

Anne van Aaken opened the workshop with a keynote address asking whether the inter-relationship between investment protection, human rights and international arbitration constitutes an example of cross-fertilization or of regime-collision. The actual workshop addressed the (potential) role of human rights in the drafting of international investment agreements and shed human rights perspectives on substantive investment protection standards and on international investment arbitration. Based on the intensive discussion following the various presentations, some of the papers were substantially further developed and are now published in the present volume.

In addition thereto, a number of contributions were specifically solicited in order to take account of developments such as the conclusion of the

EU-China Investment Agreement, to address specific issues such as international investment law and the rights of indigenous peoples or to add a Latin-American perspective on business and human rights arbitration as well as African perspectives on investment law and human rights.

The workshop was held on 6 and 7 March 2020, probably one of the very last academic events which took place in physical presence before the COVID-19 pandemic brought public and consequently also academic life as previously known to quite an abrupt lock-down. Since then, we all live in extraordinary times. Obviously, the most fundamental impact of the pandemic on investment law and human rights called for the inclusion of studies specifically addressing this novel issue.

As in previous years, the directors of the Wilhelm Merton Centre wish to express their sincere gratitude to Professor Dr. *Stephan Schill* of the University of Amsterdam and Professor Dr. *Christian Tams* of the University of Glasgow for their strong input and support throughout the project. Specific thanks, however, are due to Professor Dr. *Julian Scheu* of the University of Cologne: His initiative and enthusiasm were instrumental for the success of the project. Furthermore, the organisers wish to thank *Alexander Heger*, Dr. *Orhan Bayrak* and *Moritz Malkmus* for their valuable assistance before, during and after the workshop. Finally, the editors of this volume wish to thank all the contributors for their papers and *Jana Jochem*, *Veronika Fuhrmann*, *Lisa Schöttmer* and *Pia Zurborg* for their excellent editorial skills and support during the editing process.

Frankfurt am Main, 20 July 2022
Rainer Hofmann Stefan Kadelbach Rainer Klump

Contents

Abbreviations

ACHR	American Convention on Human Rights
AEC	African Economic Community
AfCFTA	African Continental Free Trade Area
AFSIL	African Society of International Law
AJICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
AMRII	African Multidimensional Regional Integration Index
ARS	Argentine Peso
ARSIWA	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Text adopted by the International Law Commission at its fifty-third session in 2001
Art(t).	Article(s)
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
AU	African Union
BAFA	Federal Office for Economic Affairs and Export Control
BHR	business and human rights
BHR Working Group	Working Group on International Arbitration of Business and Human Rights
BHRA	Hague Rules on Business and Human Rights Arbitration
BIT	Bilateral Investment Treaty
BOL	Brill Open Law
BTC	Baku-Tbilisi-Ceyhan oil pipeline project
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement

CAI	Comprehensive Agreement on Investment
CAO	Compliance Advisor/Ombudsman
CAP	Common African Position
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific States
CCHR	Cambodia Centre for Human Rights
CCIA	COMESA Common Investment Area
CCSI	Columbia Center on Sustainable Investment
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEESP	Commission on Environmental, Economic and Social Policy
CERD	Committee on the Elimination of Racial Discrimination
CETA	Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States
cf.	confer
CFS-RAI	CFS Principles for Responsible Investment in Agriculture and Food Systems
CHRLR	Columbia Human Rights Law Review
CJEU	Court of Justice of the European Union
CODEGAM	García Moreno Development Council (Consejo de Desarrollo de García Moreno)
COMAI	Conference of African Ministers in charge of Integration
COMESEA	Common Market for Eastern and Southern Africa
COVID-19	Coronavirus Disease of 2019
CPC	Central Product Classification
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRC	Convention on the Rights of the Child
CSKFTA	China-South Korea Free Trade Agreement
CSR	Corporate social responsibility

CTSD	CETA's Committee on Trade and Sustainable Development
DAG	Domestic Advisory Groups
DNA	deoxyribonucleic acid
Doc.	Document
e.g.	*exempli gratia*
EAC	East African Community
EACJ	East African Court of Justice
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of Western African States
ECOWIC	ECOWAS Common Investment Code
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
ed(s).	editor(s)
edn.	edition
EFILA	European Federation for Investment Law and Arbitration
EFTA	European Free Trade Association
EJIL	European Journal of International Law
ELC	economic land concessions
EP	European Parliament
EPA	Economic Partnership Agreement
EPRS	European Parliamentary Research Service
EPZ	Export Processing Zone
ESIA	Environmental and Social Impact Assessment
et al.	*et alia*
et seq(q).	*et sequentes/ et sequentia*
etc.	*et cetera*
EU	European Union
FAO	UN Food and Agriculture Organization
FDI	Foreign direct investment
FET	Fair and Equitable Treatment

fn.	footnote
FPIC	free, prior, and informed consent
FPS	Full Protection and Security
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HAGL	Hoang Anh Gia Lai (Vietnamese Football Club)
Hague Rules	Hague Rules on Business and Human Rights Arbitration (BHRA)
HCR	United Nations Human Rights Council
HED	Economic and Trade Dialogue
i.e.	*id est*
IACtHR	Inter American Court of Human Rights
ibid.	*ibidem*
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLO	International and Comparative Law Quaterly
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICNEA	Industrial Classification for National Economic Activities
ICSID	International Centre for Settlement of Investment Disputes
ICT	information and communication technology

IFC	International Finance Corporation
IGWG	Intergovernmental Working Group
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
ILR	Indian Law Reports
IMF	International Monetary Fund
IOLR	International Organizations Law Review
ISDS	investor-State dispute settlement
JEFTA	Japan-EU Free Trade Agreement
KORUS	US-Korea Free Trade Agreement
LCIA	London Court of International Arbitration
LDC	Least Developed Countries
lit.	*littera*
LL.M.	Master of Laws
LLP	Limited Liability Partnership
M. Sc.	Master of Science
MAFF	Cambodian Ministry of Agriculture, Forestry and Fisheries
MEA	Multilateral Environmental Agreements
MEP	Member of the European Parliament
MERCOSUR	Mercado Común Del Sur (Southern Common Market)
MFN	most-favoured-nation
MIC	Multilateral Investment Court
MIGA	Multilateral Investment Guarantee Agency
MLC	Maritime Labour Convention
MNE Declaration	Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
MP	Member of Parliament

MPIL	Max Planck Institute for International Law
NAFTA	North American Free Trade Agreement
NAP	National action plan
NCP	National Contact Point
NDC	Nationally Determined Contribution
NGO	Non-governmental organization
NIEO	new international economic order
No.	Number
NT	National Treatment
OAU	Organization of African Unity (now called African Union)
OECD	Organization for Economic Cooperation and Development
OECD Guidelines	OECD Guidelines on Multinational Enterprises
ÖFSE	Austrian Foundation for Development Research
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of Islam Cooperation
p(p).	page(s)
PAIC	Pan-African Investment Code
para(s).	paragraph(s)
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PELJ	Potchefstroom Electronic Law Journal
PIA	South Africa's new Protection of Investment Act
Pmbl.	Preamble
PRAI	Principles for Responsible Agricultural Investment
PTA	Preferential Trade Area
PTPA	Peru-United States Trade Promotion Agreement
RECs	Regional Economic Communities
SADC	Southern African Development Community

SADC FIP	Southern African Development Community Finance and Investment Protocol
SADCC	Southern African Development Coordination Conference
SCC	Stockholm Chamber of Commerce
SDGs	United Nations Sustainable Development Goals
SIA	Sustainability Impact Assessment
SME	small and mid-size enterprise/small and medium enterprise
TDM	Transnational Dispute Management
TEU	Treaty on European Union
TFUE	Treaty on the Functioning of the European Union
TRIMS Agreement	WTO Agreement on Trade and Investment Measures
TRIPS Agreement	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
TSD	trade and sustainable development
TTIP	Transatlantic Trade and Investment Partnership
U.S.	United States
UCL	University College London
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECA	United Nations Economic Commission for Africa
UNFCCC	UN Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGP	United Nations Guiding Principles on Business and Human Rights
UN-Habitat	UN Human Settlements Programme

UNHRC	United Nations Human Rights Council
UNYB	Max Planck Yearbook of United Nations Law
USA	United States of America
USD	United States Dollar
USMCA	United States-Mexico-Canada Agreement
v.	*versus*
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
VVGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WTO	World Trade Organization

Introduction: Investment Protection, Human Rights, and International Arbitration in Extraordinary Times

Julian Scheu, Rainer Hofmann, Stephan W. Schill and Christian J. Tams[*]

I. An Uneasy Relationship

To say that international investment law is not applied in clinical isolation, has become a truism. No one seriously claims it is. And how could it? Dominated by inter-State treaties, international investment law forms part of the international legal order. It is applied in that context, and regularly interacts with other rules and regimes of international law.[1] While the interactions between international investment law and other branches of international law are manifold, investment law's relationship with human rights law deserves special attention, not least because of the importance of human rights.[2] This relationship is at the heart of the present volume.

The relationship is uneasy, and has not been a happy one, at least of recent. Concerns about clashes and tensions between investment law and human rights (some real, some perceived) have prompted much debate, both within academia and beyond.[3] These concerns relate not only to

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1 See James Crawford, 'Keynote Address: International Protection of Foreign Direct Investments: Between Clinical Isolation and Systematic Integration', in Rainer Hofmann and Christian J. Tams (eds.), *International Investment Law. From Clinical Isolation to Systemic Integration?* (2011), at 17-28.

2 For more on this, see Rainer Hofmann and Christian J. Tams, 'International Investment Law and Its Others: Mapping the Ground', in Rainer Hofmann and Christian J. Tams (eds.), *International Investment Law and Its Others* (2012), at 9.

3 For early academic inquiries, see e.g. Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009); Bruno Simma and Theodor Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology', in Christina Binder et al. (eds.), *International Investment Law for the 21st Century:*

the interaction between two substantive regimes of international law, viz. international investment law, on the one hand, and international human rights law, on the other; they arise acutely in investor-State disputes brought before arbitral tribunals.[4] Unsurprisingly, therefore, investment arbitration as the dominant mechanism for settling investor-State disputes has come under much scrutiny. One of the core questions asked, in this context, has been whether arbitrators would be able and willing to integrate human rights considerations in their decision-making? Since invest-

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Essays in Honour of Christoph Schreuer (2009), at 678-707; Marc Jacob, *International Investment Agreements and Human Rights, INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development* (2010); Annika Wythes, 'Investor–State Arbitrations: Can the "Fair and Equitable Treatment" Clause Consider International Human Rights Obligations?', 23 *Leiden Journal of International Law* (2010), at 241-256; Jorge Daniel Taillant and Jonathan Bonnitcha, 'International Investment Law and Human Rights', in Marie-Claire Cordonnier Segger, Markus W. Gehring and Andrew Newcombe (eds.), *Sustainable Development in World Investment Law* (2011), at 53-80; Susan Karamanian, 'The Place of Human Rights in Investor-State Arbitration', 17 *Lewis & Clark Law Review* (2013), at 423-447; Attila Tanzi, 'Recent Trends in International Investment Arbitration and the Protection of Human Rights in the Public Services Sector', in Nerina Boschiero et al. (eds.), *Source International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (2013), at 587-598. More recent inquiries include: Yannick Radi (ed.), *Research Handbook on Human Rights and Investment* (2018); Sheng Zhang, 'Human Rights and International Investment Agreements: How to Bridge the Gap?', 7 *Chinese Journal of Comparative Law* (2019), at 457-483; Farouk El-Hosseny and Patrick Devine, 'Contributory Fault under International Law: A Gateway for Human Rights in ISDS?', 35 *ICSID Review – Foreign Investment Law Journal* (2020), at 105-129; Eric De Brabandere und Larissa van den Herik, 'Non-State Actors and Human Rights Obligations Perspectives from International Investment Law and Arbitration', in Niels M. Blokker, Daniëlla Dam-de Jong and Vid Prislan (eds.), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development - Liber Amicorum Nico Schrijver* (2021), at 37-61; Moshe Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law', 34 *Leiden Journal of International Law* (2021), at 127-154; Crina Baltag and Ylli Dautaj, 'Promoting, Regulating, and Enforcing Human Rights through International Investment Law and ISDS', 45 *Fordham International Law Journal* (2021), at 1-50; Andreas Kulick, 'Corporate Human Rights?', 32 *European Journal of International Law* (2021), at 537-570; Kabir A.N. Duggal and Nicholas J. Diamond, 'Human Rights and Investor–State Dispute Settlement Reform: Fitting a Square Peg into a Round Hole?', 12 *Journal of International Dispute Settlement* (2021), at 291-321.

4 Consequently, the impact of human rights considerations on arbitral decision-making has always been an important part of the debate; see eg Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', 60.3 *International and Comparative Law Quarterly* (2011), at 573-596.

ment treaties traditionally hardly ever mention human rights expressly,[5] the result is by no means obvious, and to a large extent depends on the predispositions and leanings of the arbitrators called upon to resolve the disputes in question.[6] Among many of them, a certain reluctance to engage with human rights arguments remains prevalent, as reflected in the succinct comment of the *Rompetrol* tribunal on Romania's reliance on case-law of the European Court of Human Rights:

> the jurisprudence of the European Court of Human Rights, interesting and illuminating as it has been, is beside the point when it comes to the issues under the Netherlands-Romania BIT which form the subject of the dispute before the Tribunal.[7]

Statements such as this have prompted a significant amount of literature assessing the relationship between international investment law and human rights as uneasy.[8]

II. Regime Interaction at the Macro-Level: Conceptual Difference and Complementarity

Much of the literature on the relationship between investment treaties and human rights has focused on what might be called the macro-level, that is, it has offered perspectives that look at and conceptualise the relationship between international investment treaties and human rights treaties as interactions between two regimes of international law. In this macro

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5 See, however, for new developments in this regard: Barnali Choudhury, *Human Rights Provisions in International Investment Treaties and Investor-State Contracts*, Chapter 3 in this volume.

6 See for an empirical analysis supporting this conclusion: Silvia Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration', 31 *Leiden Journal of International Law* (2018), at 33-58.

7 ICSID, *Rompetrol v. Romania*, Award, 6 May 2013, ICSID ARB/06/3, at para. 172. See also the *von Pezold* tribunal's rejection of an amicus submission that highlighted rights of indigenous communities: noting that the scope of the arbitration was limited to 'allegedly unlawful measures taken by the Respondent against the Claimants and their investments', the tribunal considered 'a submission on the putative rights of the indigenous communities as "indigenous peoples" under international human rights law' to fall outside of the scope of the dispute: ICSID, *Bernhard von Pezold and others v. Republic of Zimbabwe*, Procedural Order No. 2, 26 June 2012, ICSID Case No. ARB/10/15, at para. 64.

8 See the references *supra* note 3.

perspective, the relationship is often characterised by conceptual difference and conflict. Both aspects have been analysed in some detail elsewhere,[9] but deserve to be sketched out briefly, as they provide the backdrop to the present volume.

The conceptual differences between the two regimes reflect different ideational foundations. Human rights are rooted in the dignity of human beings and are of an inalienable nature.[10] Inalienable, however, does not mean 'absolute': human rights are subject to limitations and the scope of protection is nuanced and varied.[11] But it does mean that human rights inhere in every human being: international law recognizes these inherent rights.[12] Investor rights, by contrast, follow a functional logic. They are granted to create trust in the host State economy. The aim of committing to guarantees such as fair and equitable treatment is therefore not to value the dignity of investors, but to influence investment decisions in favour of the host State economy by adding an international layer of legal protection to the existing domestic framework. Reflecting this, international investment law defines rights of foreign investors, not of investors *tout court*. These conceptual differences, in turn, have led to putting the analytical focus on situations where international investment law and human rights result in competing and conflicting obligations.

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9 See, among others, Julian Scheu, 'Trust Building, Balancing, and Sanctioning: Three Pillars of Systematic Approach to Human Rights in International Investment Law and Arbitration', 48.2 *Georgetown Journal of International Law* (2017), at 449-504 (encouraging to look beyond conflict and difference).

10 Accordingly, the UN Universal Declaration of Human Rights (1948) refers in its Preamble to the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'.

11 For instance, the degree of protection granted to legal persons differs significantly. While corporate human rights are recognized under the European Convention on Human Rights, other international treaty regimes, such as the International Covenant on Civil and Political Rights, take a much stricter approach. See for a discussion on the recognition of corporate human rights: Kulick, *supra* note 3, at 537-569.

12 See with respect to the birth process of a new human right from its 'discovery' until it attains 'full recognition' as part of public international law: Kerstin von der Decken and Nikolaus Koch, 'Recognition of New Human Rights: Phases, Techniques and the Approach of "Differentiated Traditionalism"', in Andreas von Arnauld, Kerstin von der Decken and Mart Susi (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020), at 7-20.

Notwithstanding these different foundations, the two regimes in many ways complement each other.[13] Both investment law and human rights protect private actors against sovereign abuses of power, and for that purpose formulate standards grounded in international law, which are beyond the State's immediate control. While investors enjoy a more limited set of rights, those that are protected clearly overlap with human rights guarantees: a governmental interference, to take the most obvious example, with private property may be a human rights matter as much as it may be an investment law concern. Where the property owner qualifies as an investor, he/she is likely to enjoy the simultaneous (if not necessarily congruent) protection of international investment law and human rights law.[14]

'Conceptual difference' and 'complementarity' describe the substantive relationship between international investment law and international human rights law. They do not indicate how concrete interactions could be addressed. As far as resolving the relationship between investment law and human rights in practice is concerned, macro perspectives have placed great weight on an interpretative device aimed at producing synergies, viz. the so-called 'principle of systemic integration',[15] which is derived from

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13 For more on this, see e.g. Stephan W. Schill, 'The OECD Guidelines for Multinational Enterprises and International Investment Agreements: Converging Universes', in Nicola Bonucci and Catherine Kessedjan (eds.), *40 Years of the OECD Guidelines for Multinational Enterprises* (2018), at 63-78; Scheu, *supra* note 9, at 452 *et seq*. Coming to the same conclusion from an empirical perspective: Steininger, *supra* note 6, at 55.

14 In fact, it is this situation of complementarity in which investment tribunals have most regularly taken human rights law into account. Examples include cases such as ICSID, *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, where the tribunal interpreted the investment treaty by relying on the jurisprudence of the European Court of Human Rights (ECtHR). See for a discussion on the question whether investment protection could be understood as part of human rights law: Nicolas Klein, 'Human Rights and International Investment Law: Investment Protection as Human Right?', 4.1 *Goettingen Journal of International Law* (2012), at 199-215.

15 See Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54.2 *International and Comparative Law Quartely* (2005), at 279-320; International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc. A/CN.4/L.682, 13 April 2006, at paras. 37-43; Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law', 68.3 *International and Comparative Law Quarterly* (2019), at 575 *et seq.*; Julian Scheu, *Systematische Berücksichtigung von Menschenrechten in Investitionsschiedsverfahren* (2017), at 225 *et seq.*; Johannes H. Fahner and Matthew Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring

Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). According to this provision, actors called upon to interpret provisions of a treaty can take into account, together with the treaty's more immediate context, 'any relevant rules of international law applicable in the relations between the parties'. For investment treaties, this encompasses human rights treaties, and vice versa.

III. The Limits of Macro Perspectives

Macro perspectives that view the relationship between international investment treaties and human rights treaties as an interaction between two regimes remain sketchy and somewhat bland. No doubt they mark useful starting points for the analysis -- but little more, as they lack both nuance and prescriptive force. To begin with the latter aspect, while the themes of conceptual difference and complementarity offer plausible angles, they hardly control outcomes. What does complementarity mean in concrete cases -- other than a general encouragement to pursue convergent solutions? Does the conceptual difference mandate divergent approaches? Macro perspectives do not tell us, and do little more than to provide some general guidance for inquiry.

Macro perspectives also do not offer the means effectively to control the process: 'systemic integration' is no doubt a useful 'tool' to 'manage tensions' between regimes, but it does not prescribe how that tool is to be used, or in fact whether it is to be used at all. In this respect, treaty interpreters have to determine the 'cash value'[16] of human rights in the process of interpreting investment treaties – just as they are required to identify whether human rights law comes within the scope of the 'relevant rules' referred to in Article 31(3)(c) VCLT?[17] The VCLT, in other words, does not tell us any more than any macro perspective on the role of human rights in international investment law. Perhaps unsurprisingly, notwithstanding a decade of fervent argument – by scholars, arbitrators,

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the Limits of Systemic Integration', 68.3 *International and Comparative Law Quarterly* (2019), at 741-759.

16 See Fuad Zarbiyev, 'The "Cash Value" of the Rules of Treaty Interpretation', 32 *Leiden Journal of International Law* (2019), at 33-45.

17 As noted by the International Law Commission, in the 'single combined' process of treaty interpretation, '[a]ll the various elements ... would be thrown into the crucible, and their interaction would give the legally relevant interpretation': see Yearbook ILC 1966, vol. II, at 219-220.

and occasionally tribunals – in favour of integrating human rights into investment arbitration, the *Rompetrol* tribunal's statement that arguments about human rights were 'interesting' but 'beside the point' when it comes to deciding upon investor claims, remains quite common.

Macro perspectives suffer from a second, and more fundamental, limitation: they fail to appreciate quite how diverse the interactions between investment law and human rights law are. Seen properly, this is not one relationship, but a series of relationship*s* (in the plural). The role of international human rights in the interpretation of international investment treaties has dominated the debate; and it is a crucial question. But while crucial, this question is also quite peculiar: peculiar because it looks at the relationship from one particular angle (namely whether human rights have a place in the interpretation of investment treaties), considers a particular moment (namely the interpretation of such treaties in a dispute settlement process), and focuses on a particular type of actors (treaty interpreters, notably tribunals). And it purports to identify one solution in describing a relationship between both sets of norms as if international investment law and international human rights law were two monolithic blocks whose relationship with each other fits neatly into generalizable conceptualizations.

IV. From Macro to Micro: Interfaces between Investment Protection and Human Rights

The contributions to the present volume seek to overcome the limitations inherent in the macro perspectives sketched out in the previous sections. They move from 'macro' to 'micro', in the hope of offering a more nuanced account of the relationships (still in the plural) between investment protection and human rights. Rather than searching for one overarching perspective on, or even rule for, the interaction of two regimes, the aim is to identify interfaces, that is, 'points where the actors, norms and procedures belonging to respective legal orders interact with one another.'[18] The idea of interfaces breaks up the idea of regimes (human rights and

18 Machiko Kanetake, 'The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions', 9 *International Organizations Law Review* (2012), at 267, 268; Machiko Kanetake, 'The Interfaces between the National and International Rule of Law: A Framework Paper', in Machiko Kanetake and André Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference* (2016), at 11.

investment protection) interacting as monoliths, to the benefit of viewing interactions as multi-layered, heterogeneous, and context-dependent. Underlying this is the assumption that the relationship will vary, depending on which layer and which feature of the respective regimes interact, and in what context.

Five such interfaces are the focus of the subsequent contributions, and structure the present volume. These do not follow any cogent logic or sequence, nor attempt to paint a complete picture of the complex relationship between human rights and international investment protection. Rather, they all have in common that they are of relatively recent origin, reflect the diversity of 'contact points' between human rights and investment protection, and in a way unravel the idea of being able to look at the relationship between human rights and investment law in a monolithic fashion.

Contributions to this book engage, in five parts, with the following sets of issues:

(i) Part 1: Business and human rights arbitration as a novel arbitral mechanism for enforcing human rights against multinational companies and foreign investors;
(ii) Part 2: Inclusion of explicit human rights norms in international investment agreements;
(iii) Part 3: Human-rights-specific and investment-project-specific analyses;
(iv) Part 4: Regional instruments and approaches, focusing on recent investment practice of African States;
(v) Part 5: Differentiating in respect of how investment protection and human rights relate to each other in 'extraordinary times', or times of crisis, rather than during the regular state of affairs.

The above is no more than a selection of 'interfaces'. Many more interfaces exist, and many more nuances could be considered. Still, the contributions to this volume show that the relationship between international investment law and human rights law is complicated and complex and illustrate the need for a nuanced understanding that moves beyond the broad brushstrokes.

Part 1: Business and Human Rights Arbitration

The contributions in Part 1 of the book focus on a relatively novel interface of foreign investment and human rights: the emerging field of business and human rights arbitration. This field is given shape by the publi-

cation of the *Hague Rules on Business and Human Rights* (Hague Rules),[19] which provide a procedural framework for using the tools of international arbitration to enforce human rights against multinational companies.[20]

Anne van Aaken explains the functioning of these Rules in closing, together with international soft law guidelines on corporate social responsibility (CSR), such as the OECD Guidelines for Multinational Enterprises, domestic human rights legislation, such as the German Supply Chain Act (*Lieferkettengesetz*), and private regulation through supply chain contracts, the gap for allowing victims to hold multinational corporations accountable for human rights violations.[21] Indeed, practical examples, such as the Bangladesh Accord concluded by actors in the garment industry after the Rana Plaza incident, illustrate that the use of an arbitration mechanism is possible to settle business and human rights disputes.

Juan Ignacio Massun and *Gustavo Becker* add a Latin American perspective on the application of the Hague Rules.[22] They describe the ideas behind the creation of this specific set of arbitration rules and recall Latin American experiences with investment treaty tribunals, which have addressed, or rather failed to address, human rights issues in the past.[23] The authors recall that the Hague Rules reflect a shifting paradigm with respect to CSR. Multinational corporations are no longer considered as entirely private entities that are only subject to State-made regulation. Instead,

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19 Hague Rules on Business and Human Rights Arbitration (2019), available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (last visited on 20 July 2022).

20 For an introduction to the Hague Rules, see Ursula Kriebaum, 'The Hague Rules on Business and Human Rights Arbitration', 114 *Proceedings of the ASIL Annual Meeting* (2020), at 149-155; Ulla Gläßer and Claudia Kück, 'The Hague Rules on Business and Human Rights Arbitration – A Balancing Act', *SchiedsVZ* (2020), at 124-133.

21 Anne van Aaken, *Investment Protection, Human Rights, and International Arbitration: Cross-Fertilization or Regime-Collision?*, Chapter 1 in this volume.

22 Juan Ignacio Massun and Gustavo Becker, *Business and Human Rights Arbitration: A Latin American Perspective on the Application of the Hague Rules*, Chapter 2 in this volume.

23 In doing so, the chapter focuses on the following investment arbitrations: ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Award, 8 December 2016, ICSID Case No. ARB/07/26; PCA, *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, Award, 30 August 2018, PCA Case No. 2013-15; PCA, *Copper Mesa Mining Corporation (Canada) v. The Republic of Ecuador*, Award, 15 March 2016, PCA Case No. 2012-02.

they show that investors must assume a proactive role in independently addressing and redressing adverse human rights impacts of their business activities. The Hague Rules are supposed to serve as a procedural tool that corporations might use to implement a meaningful CSR strategy.

Part 2: Human Rights in International Investment Agreements

Another, still relatively recent interface for increased interaction between foreign investment and human rights are human rights provisions appearing in international investment instruments. *Barnali Choudhury* analyzes such provisions in both international investment treaties and investor-State contracts.[24] While recalling that entrusting investment tribunals with addressing human rights issues raises important issues of legitimacy, *Choudhury* sets out different categories of clauses that integrate human rights considerations into investment instruments. She distinguishes between provisions that generally reference the host State's right to regulate or the need to respect international human rights, and merely make clear that investment law is not a closed system, and more specific clauses that impose concrete human rights obligations on foreign investors. Despite different degrees of efficiency of such clauses, they are all based on the assumption that investors are best placed to minimize the human rights impacts of their respective activities and therefore have to adopt a more proactive role.

Filip Balcerzak then addresses the impact treaty drafting has on the competence of investment tribunals to address human rights claims.[25] Based on three model situations,[26] he describes the practical differences of standard, narrow, and wide jurisdictional clauses in cases where human rights are invoked by investors or host States.[27] His analysis shows that the

24 *Supra* note 5.

25 Filip Balcerzak, *Jurisdiction and Admissibility in Investment Treaty Arbitration – A Human Rights Perspective*, Chapter 4 in this volume.

26 The first two situations correspond to a normative conflict. In the first model situation, the investor is considered to be an innocent bystander, whereas the second model situation is based on the assumption that the investor's conduct has adversely affected human rights. The third model situation relates to the fact that investors may profit from complementary protection by both legal regimes.

27 A 'standard jurisdictional clause' provides a State's consent to arbitrate disputes about the substantive provisions of an investment treaty. A 'narrow jurisdictional clause' limits the scope of jurisdiction to one (or a few) standard(s) of the treaty. In contrast, a 'wide jurisdictional clause' expresses the State's consent to arbitrate

drafting of jurisdictional clauses is of great importance. Subject to the approach taken by contracting States in the drafting process, the jurisdiction of investment tribunals is in principle sufficiently broad to hear and rule on human rights arguments presented by either of the parties to a dispute. Especially when operating on the basis of a wide jurisdictional clause, separate claims based on customary international law and/or international human rights treaties may be part of the subject-matter of the proceedings. This shows that there is real potential for investment tribunals to proactively shape the interaction between investment law and human rights.

Bringing foreign investment and human rights closer together in international investment agreements is a challenge in treaty negotiations and depends on the parties' relative negotiation power and priorities. *Peter-Tobias Stoll* and *Malte Gutt* analyse that challenge in taking a closer look at the agreement in principle on the Comprehensive Agreement on Investment between the European Union (EU) and China.[28] Canvassing the rules in the agreement, *Stoll* and *Gutt* note the agreement's departure from classical investment protection. The agreement includes, amongst others, a chapter on sustainable development and makes reference to human rights. However, since the draft agreement lacks a more general and encompassing human rights clause, *Stoll* and *Gutt* wonder whether the project will find enough political support to see the light of day. Recent developments in EU-China relations seem to reflect that scepticism.

Part 3: Specific Conflicts between Investment Law and Human Rights

The contributions in Part 3 zoom in on particular human rights, and particular investment projects, asking how investment protection and particular human rights interact. *Edward Guntrip* opens this Part with a case study of a rubber plantation in the Cambodian province Ratanakiri as a concrete, project-specific example for better understanding adverse human rights impacts of foreign investments.[29] His analysis illustrates

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'all disputes concerning investments' or 'any legal dispute concerning an investment'.

28 Peter-Tobias Stoll and Malte Gutt, *The EU-China Investment Agreement – Investment Liberalization, Sustainable Development, and Human Rights*, Chapter 5 in this volume.

29 Edward Guntrip, *Domestic Human Rights Frameworks as a Means to Regulate Investments in Land, Food, and Water: A Case Study of Cambodia*, Chapter 6 in this volume.

the significance of domestic human rights frameworks in the regulation of investments in land, food, and water. Using the United Nations Guiding Principles on Business and Human Rights (UNGPs) as a framework, *Guntrip* explains why there is no simple solution for bringing foreign investment and human rights into harmony.

Christina Binder follows with a chapter that analyses a specific set of human rights provisions, namely the rights of indigenous peoples.[30] The rights and interests of these groups are often neglected in the context of large investment projects when, as is too often the case, the groups' interests are subordinated by the host State to the interests of the host State's population at large. Even though challenges remain, *Binder* identifies positive signs of increasingly constructive interaction between investment protection and the rights of indigenous peoples. These include evolving treaty language acknowledging human rights of indigenous peoples, increased participation in investment arbitration of *amicus curiae* addressing these specific rights, and the consideration of new approaches in damage calculation, for example by taking into account the investor's contributory fault.

Henner Gött's chapter focuses on another specific set of rights—international labour rights—and their interaction with international investment law. He does not address just another category of human rights, but adds that human rights at times come with the involvement of specific institutions. In the context of international labour rights, this is the International Labour Organization (ILO).[31] Its labour standards, such as the freedom of association, the right to collective bargaining, or the elimination of all forms of forced or compulsory labour, are therefore more than a body of substantive norms that must be reconciled with investment law. Considering labour-related investment disputes,[32] *Gött* argues that investment arbitration has the potential of undermining the tripartite dialogue between governments, workers, and employers which is established by the ILO conventions, and which is essential to the organization's model of labour governance. Pointing to Art. 5 VCLT, he raises the question whether ILO con-

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30 Christina Binder, *Investment Protection and Human Rights: Tensions and Perspectives with a Special Focus on the Rights of Indigenous Peoples*, Chapter 7 in this volume.

31 Henner Gött, *ILO Labour Standards in International Investment Law*, Chapter 8 in this volume.

32 This includes cases such as UNCITRAL, *Centerra Gold Inc. and Kumtor Gold Company v. The Kyrgyz Republic*, PCA Case No. 2007-01/AA278; UNCITRAL, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*; ICSID, *Piero Foresti, Laura de Carli & Others v. South Africa*, ICSID Case No. ARB(AF)/07/01; ICSID, *Veolia Propreté v. Egypt*, ICSID Case No. ARB/12/15.

ventions could take precedence over BITs in the event of conflict. *Gött* also suggests options for the ILO and its member States to consult on investment-related matters. Against this background, he concludes that future contributions from the ILO system have the potential to strengthen investment law's social dimension.

Part 4: African Perspectives on International Investment Law and Human Rights

Part 4 seeks to overcome the often European or 'global Northern' focus of the debate, by showing how specific regional approaches or perspectives, namely those engaging with Africa, can be fruitful for elucidating interfaces between foreign investment and human rights. Indeed, Africa is among the regions of the world where societies are particularly exposed to the 'dark side' of foreign investment,[33] from times of colonial rule until today. At the same time, after having been considered traditionally as 'rule takers', African States are increasingly developing into 'rule makers' in respect of the relationship between foreign investment and human rights.[34] Both aspects make African perspectives on investment and human rights particularly interesting and relevant.

Anna Hankings-Evans explores human rights and development-based approaches to international investment law in Africa.[35] In her chapter, she describes how African countries are increasingly engaged in establishing new investment law instruments that take inspiration from human

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33 The 'dark side' describes detrimental effects of foreign investments, especially with regard to the human rights of the host State's population. Investments in farmlands are a typical and controversial example. See generally Olivier De Schutter, 'How Not to Think of Land-Grabbing: Three Critiques of Large-Scale Investments in Farmland', 38 *The Journal of Peasant Studies* (2011), at 249-279. See e.g. with regard to Africa: Ruth Hall, 'Land Grabbing in Southern Africa: The Many Faces of the Investor Rush', 38.128 *Review of African Political Economy* (2011), at 193-214; Franklyn Lisk, 'Land Grabbing' or Harnessing of Development Potential in Agriculture? East Asia's Land-Based Investments in Africa', 26 *The Pacific Review* (2013), at 563-587.

34 See Makane Moïse Mbengue and Stefanie Schacherer, 'The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime', 18.3 *Journal of World Investment & Trade* (2017), at 414-448.

35 Anna Hankings-Evans, *Africa's Human Rights and Development-based Approaches to International Investment Law*, Chapter 9 in this volume.

rights considerations. Although continent-wide initiatives, such as the Pan-African Investment Code (PAIC)[36] or the Investment Protocol of the African Continental Free Trade Area (AfCFTA),[37] do exist, she challenges the assumption of one single 'African voice' and sheds light on diverging approaches to investment protection in the domestic context, as examples from Ethiopia, South Africa, and Tanzania demonstrate.

Tomasz Milej, in turn, explores the defining markers of what is often referred to as the 'Africanisation' of international investment law.[38] They reflect the deficits of the current system and relate to the insufficient recognition of the host State's right to regulate, the interpretation of treaty standards by arbitral tribunals, and the lack of African agency in the process of making and applying rules of investment protection. While these three pillars are considered to be interlinked, *Milej* concludes that establishing African ownership is most needed to remedy existing power imbalances and legitimacy deficits. In this context, he suggests the introduction of investor obligations and the exclusive jurisdiction of Africa-based dispute settlement bodies, such the ECOWAS Court of Justice, as an alternative to investment treaty arbitration.[39]

Part 5: International Investment Law and Human Rights in the Era of COVID-19

The final set of contributions to the present volume zooms in on the importance of context for studying interactions between investment law and human rights. They deal with how that relationship looks like in a moment of crisis, namely in light of the current COVID-19 pandemic, which poses challenges to investment protection and human rights and

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36 Pan-African Investment Code (PAIC) (2016), available at https://au.int/en/documents/20161231/pan-african-investment-code-paic (last visited on 20 July 2022).

37 Investment Protocol of the African Continental Free Trade Area (AfCFTA) (2018), available at https://afcfta.au.int/en/documents/2018-03-21/agreement-establishing-african-continental-free-trade-area-afcfta (last visited on 20 July 2022).

38 Tomasz Milej, *Reclaiming African Agency: The Right to Regulate, Investor-State Dispute Settlement, and the 'Africanisation' of International Investment Law*, Chapter 10 in this volume.

39 The ECOWAS Court of Justice is an organ of the Economic Community of West African States (ECOWAS), a regional integration community of 15 member states in Western Africa. See also Matthew Happold and Relja Radović, 'The ECOWAS Court of Justice as an Investment Tribunal', 19.1 *Journal of World Investment & Trade* (2018), at 95-117.

requires the relationship to be concretized in 'extraordinary times', or times of crisis, rather than as part of the normal state of affairs.

Tillmann Rudolf Braun unfolds the complexity of this situation from an international law perspective.[40] In his chapter, he identifies doctrines of international law that may come into play to evaluate which State action is in the public interest. In view of potential disputes related to government measures taken in response to the COVID-19 crisis, such as lockdowns, or export and mobility restrictions, he explores concepts and patterns of interpretation that might play a decisive role in what may become a 'new frontier' of investment claims: disputes concerning the compatibility of responses to the pandemic with international investment treaties. After examining the impact of the police powers doctrine and of proportionality analysis on the interpretation of investment treaties, *Braun* turns to the defence of necessity under customary international law. He recalls that the conditions to establish necessity have so far been interpreted comparatively strictly, but also inconsistently. In view of the pandemic, he advises against looking at isolated measures, but instead suggests an overall evaluation of a State's strategy which will often include a multi-faceted package of different measures.

Based on the assumption that there is significant potential for COVID-19-related investment claims,[41] *Martin Gronemann* and *Markus Krajewski* explore options and possible responses at the disposal of host States. They take a closer look at recent proposals of a temporary suspension of investment obligations and/or investment claims for COVID-19-related measures as a potential exit-strategy for host States.[42] They conclude that the unilateral withdrawal of consent does not seem to be a viable option to mitigate the impact of investment protection on COVID-19-related measures. Instead, a human rights informed interpretation of investment protection standards, or reliance on security exceptions in investment

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40 Tillmann Rudolf Braun, *State Responsibility and Investment Protection in the Time of Pandemic*, Chapter 11 in this volume.

41 So far, COVID-19-related investment claims remain isolated incidences. However, they do exist, as the claim brought by two French airport operators against Chile relating to a concession agreement illustrates. See ICSID, *ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile*, ICSID Case No. ARB/21/40. Pointing out that African States might be particularly affected by such claims, see also Hankings-Evans, *supra* note 35, at pp. 330-331.

42 Martin Gronemann and Markus Krajewski, *International Investment Law and the COVID-19 Pandemic: Exit, Voice, or Loyalty?*, Chapter 12 in this volume.

treaties, might enable States to defend against COVID-19-related measures before investment tribunals.

V. Outlook

As is clear from these brief summaries, the contributions to this volume adopt a vast array of different approaches and view the relationship between international investment law and human rights from many different vantage points. They do not present a comprehensive analysis, and do not offer an analytically clear-cut conceptualization of the relationship, nor can they. The contributions instead attempt to embrace the relationship between international investment law and human rights law in its (sometimes confusing) complexity. No attempt is made to distil this complexity into one overarching regime-interaction rule, nor to offer one grand design. Instead, the relationship reflects how Edith Brown Weiss has described present-day international law more generally, as 'international law in a kaleidoscopic world'.[43]

Considered as a whole, all chapters both flash out tensions between the rights and interests underlying international investment law and human rights and explore pathways towards interaction. While recognizing tensions, many contributions illustrate the potential for synergies or conflict mitigation, e.g. by pointing to promising developments for increased interaction in dispute settlement (through the use of arbitration to hold investors accountable for human rights violations), treaty-making (through the appearance of human rights clauses in investment treaties), and scholarly analysis (by analysing international investment law through a human rights lens). Such avenues for interaction may not only reduce tensions between the underlying rights and interests, but open up entirely novel perspectives. Instead of limiting oneself to explaining how to apply international investment law without harming human rights, the environment, or the stability of democratic systems, it may be time to ask to which extent human rights and international investment law can be mutually supportive, that is, how international investment law can be part of managing global crises, and respecting, protecting, and promoting international hu-

43 Edith Brown Weiss, 'International Law in a Kaleidoscopic World', 1 *Asian Journal of International Law* (2011), at 21-32.

man rights, and how human rights can help sustain stable State-market relations and contribute to regulating markets effectively.

Part 1:
Business and Human Rights Arbitration

Chapter 1: Investment Protection, Human Rights, and International Arbitration: Cross-Fertilization or Regime-Collision?

Anne van Aaken[*]

I. Introduction

The (dis)connection of human rights and investment protection is considered as part of a broader problem of fragmentation of international law[1] and has been extensively discussed as such.[2] The investment law universe

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1 Anne van Aaken, 'Fragmentation of International Law: The Case of International Investment Law', *XVII Finnish Yearbook of International Law* (2008) 91; International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006.

2 Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration', in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 82; Moshe Hirsch, 'Investment Tribunals & Human Rights: Divergent Paths', in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009) 97; Barnali Choudhury, 'Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights', 46 *Alberta Law Review* (2009) 983; Eric De Brabandere, 'Human Rights Considerations in International Investment Arbitration', in Malgosia Fitzmaurice and Panos Merkouris (eds.), *The Interpretation and Application of the European Convention of Human Rights* (2013) 183; Eric De Brabandere and Larissa van den Herik, 'Non-State Actors and Human Rights Obligations: Perspectives from International Investment Law and Arbitration' (31 August 2020), in Niels Blokker, Daniëlla Dam, and Vid Prislan (eds.), *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development. Liber Amicorum Nico Schrijver* (2021), Grotius Centre Working Paper Series No 2020/089-IEL, Leiden Law School Research Paper (forthcoming), available at https://ssrn.com/abstract=3683696 (last visited on 20 July 2022); Ursula Kriebaum, 'Human Rights and International Investment Arbitration', in Thomas Schultz and Federico Ortino (eds.), *The Oxford Handbook of International Arbitration* (2020) 150;

has for a long time been seen as a self-contained eco-system. International Investment Agreements (IIAs) are typically asymmetrical: they offer substantive rights to investors, which may be enforced against host States, and do not impose obligations on investors in return (whether human-rights-related or otherwise). Given the procedurally strong protection of investors through investor-State-dispute settlement, usually without the exhaustion of local remedies and thus national courts, and investment tribunals predominantly applying IIAs as substantive law, it has been argued that human rights are neglected, although affected, in this system. In other words – the pendulum swung too far towards legally binding investor protection. In the last decade there has been 'a whirlwind of law-making'[3] in the field of business and human rights – on the international, the national, and the corporate level. International 'soft law', including non-binding standards for businesses, has expanded in recent years, including through the OECD Guidelines for Multinational Enterprises, the UN Global Compact[4] and the UN Guiding Principles on Business and Human Rights[5] ('Guiding Principles' or UNGP) in 2011. These substantive standards, however, largely omit procedural mechanisms or alternatives to the inadequacy or unavailability of litigation in national courts. Can arbitration, especially arbitration in the field of business and human rights, applying the newly launched Hague Rules on Business and Human Rights Arbitration (called BHRA or Hague Rules)[6] help to improve the imbalance? Can this procedure cross-fertilize and balance the different interests and rights at stake? Or would it provoke regime collision?

Moshe Hirsch, 'Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law' (21 August 2020), *Leiden Journal of International Law* (forthcoming), available at https://ssrn.com/abstract=3678743 (last visited on 20 July 2022).

3 Steven Ratner, 'Introduction to the Symposium on Soft and Hard Law on Business and Human Rights', 114 *AJIL UNBOUND* (2020), at 163.

4 It was called into life by former UN General Secretary Kofi Annan and is voluntary: UN Global Compact, *About the UN Global Compact*, available at https://www.unglobalcompact.org/about (last visited on 20 July 2022).

5 OHCHR, *Guiding Principles on Business and Human Rights* (2011), available at https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf (last visited on 20 July 2022).

6 Drafting Team of the Hague Rules on Business and Human Rights Arbitration, *Hague Rules on Business and Human Rights Arbitration* (2019), available at https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf (last visited on 20 July 2022). The author was a member of the drafting team of the Hague Rules.

This chapter aims to shed light on the interaction between investment protection and human rights by embedding BHRA in the broader picture of business and human rights regulatory landscape in order to formulate its potential for cross-fertilization more precisely. In this regulatory landscape, two issues are to be distinguished: first, the substantive norms applicable to business and human rights issues and second, the procedures to give effect to those substantive norms, be they 'hard' or 'soft'.[7] Both can exist either on the national or international level and those levels may interact. Two problems are to be addressed in that context: first, how can we prevent human rights abuses by foreign investors and second, how can we remedy them? Those problems of preventive and remedial functions are clearly interconnected since remedies always also have a preventive function, but not all preventive mechanisms have a remedial function. If remedies are weak, what other mechanisms exist for prevention? How can we realistically integrate human rights in foreign investment and foreign investment law?

There are promises and pitfalls of different means of human rights protection in international business – I submit that we need an array of means for cross-fertilization. BHRA can thus not be discussed on a stand-alone basis; this procedure clearly interacts with other mechanisms and can fulfil its function only in interconnection with other legal mechanisms. But BHRA may also be (partially) able to fill gaps in human rights protection which this chapter identifies, especially concerning the remedial function. It is strong on two accounts: the remedial function as well as the preventive function whereas the existing means for rebalancing mostly have only one of those functions.

The chapter proceeds as follows. In order to understand the interaction between human rights and investment protection, it is necessary to understand the existence of both substantive norms as well as procedures which already exist and where remedial or preventive gaps can be identified. Thus, I map the field of international and national (soft) law for substantive norms and procedures (II.). I then introduce the BHRA and spell out which gaps this procedure will be able to fill (III.). The last section concludes (IV.).

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7 On the preferences and incentives for States whether to choose 'hard' or 'soft' law, see Kishanthi Parella, 'Hard and Soft Law Preferences in Business and Human Rights', 114 *AJIL UNBOUND* (2020), at 168.

II. Mapping the Field

Mapping the field of the myriad of ways in which investment protection and human rights already interact also allows to identify the gaps and weaknesses which may be filled by the BHRA procedure. I will first turn to the international level and describe the substantive norms as well as the procedures (A.), before turning to the national level and again describe substantive norms as well as the procedures (B.). Both cannot be done exhaustively due to space restraints but for the purpose of this chapter – to demonstrate gaps and the potential to fill those by the BHRA, this suffices. Both levels are respectively discussed with their potential and their weaknesses in equilibrating human rights and investment law.

A. International (Soft) Law and Procedures

1. Soft Law

A variety of international soft law exists which contains human rights norms for international business; they will be only briefly touched upon since they have been extensively analysed in the literature.[8] Most commonly known are notably the UN Guiding Principles on Business and Human Rights (UNGP) of 2011,[9] the revised OECD Guidelines on Multinational Enterprises,[10] the UN Global Compact,[11] and the Council of Europe's Committee of Ministers Recommendation on Human Rights on Business 2016.[12] On 23 February 2022, the European Commission has adopted, after open public consultation on the sustainable corporate governance ini-

8 For a selection: *supra* note 3; John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 *American Journal of International Law* (*AJIL*) (2007) 819; Barnali Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights', 67 *International and Comparative Law Quarterly* (*ICLQ*) (2018) 961; Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds.), *Tracing the Roles of Soft Law in Human Rights* (2016).

9 *Supra* note 5, Artt. 11-15.

10 See, e.g., Artt. A(2), (9)-(12) OECD, *Guidelines for Multinational Enterprises* (2011), available at http://www.oecd.org/daf/inv/mne/48004323.pdf (last visited on 20 July 2022).

11 *Principles 1-6* UN Global Compact, available at https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited on 20 July 2022).

12 Committee of Ministers of the Council of Europe Recommendation of 2 March 2016, CM/Rec(2016)3 Artt. 22-23, available at https://edoc.coe.int/en/fundamental

tiative, a proposal for a Directive on corporate sustainability due diligence that will require EU companies of a certain size to conduct mandatory human rights and environmental due diligence on their operations and global supply chains. If passed, the new law would also include provisions for corporate liability with possible sanctions imposed for non-compliance and fill gaps identified here at least for EU companies.[13]

Only the OECD Guidelines provide for a grievance mechanism and indeed 57 % of cases brought against business to national contact points are human rights cases.[14] Most of the cases are brought by NGOs[15] and there are no remedies for human rights victims, unless they are mediated by OECD contact points. The other mechanisms have no grievance procedure for victims. The UNGP provide the globally recognized and authoritative framework for the respective duties and responsibilities of governments and business enterprises to prevent and address business-related human rights impacts. Clearly, the UNGP enabled a debate and established itself as a focal point. It was and is the underlying basis for action on the international, including European and national levels, including for the Hague Rules. Access to an effective remedy is a core component, and one of the three pillars of the UNGPs. It envisages three types of mechanisms to provide access to an effective remedy in business-related human rights abuses: State-based judicial mechanisms, State-based non-judicial grievance mechanisms, and non-State-based grievance mechanisms. The focus hitherto has been on State-based mechanisms, such as National Human Rights Institutions.[16]

Notwithstanding potential behavioral effects of international soft law, the problem with it is that there is no hard enforcement and there are no

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-freedoms/7302-humanrights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html (last visited on 20 July 2022).

13 European Commission, Proposal for a Directive of the European Parliament of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, available at https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf (last visited on 20 July 2022).

14 OECD, *Cases Handled by the National Contact Points (NCP) for Responsible Business Conduct*, available at https://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf (last visited on 20 July 2022).

15 While initially only trade unions could submit complaints to the relevant NCPs, the 2000 revision of the OECD Guidelines opened up the specific instance procedure to NGOs and individuals.

16 See Human Rights Council, Thirty-eighth session: Resolution adopted by the Human Rights Council on 6 July 2018, UN Doc. A/HRC/RES/38/13, 18 July 2018, at para. 8.