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**RED RIDING HOOD - IS INVESTOR-
STATE ARBITRATION THE BIG BAD
WOLF?**

*Dr. Petra Butler**

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I. INTRODUCTION

When Benjamin Franklin pondered¹ “*When will mankind be convinced and agree to settle their difficulties by arbitration?*” he probably did not expect that after over 300 years of successful arbitration history² the world is still not convinced. The storm of protest from all quarters of society and all corners of the world in regard to the new investment arbitration chapters in the Trans Pacific Partnership Agreement³ and the Transatlantic Trade and Investment Partnership⁴ suggest the opposite - a deep mistrust in at least one field of arbitration: international investment arbitration.⁵ An illustrative example is the editorial of Wellington’s Dominion Post⁶:

¹ DAVE FARNHAM, SNIPPETS OF BENJAMIN FRANKLIN (2014).

² For an overview of arbitration history (even predating 300 years), see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION §1.01 (Kluwer, Alphen aan den Rijn, 2nd ed., 2014).

³ *Text of the Trans-Pacific Partnership*, NEW ZEALAND FOREIGN AFFAIRS & TRADE, <https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership> (last visited Apr. 2, 2016).

⁴ *Documents and events*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#_documents (last visited Apr. 2 2016).

⁵ Leon E. Trakman, *Investment Dispute Resolution under the Transpacific Partnership Agreement: Prelude to a Slippery Slope?* (2013); Leon E. Trakman *Investor-State Arbitration: Evaluating Australia’s Evolving Position* (2011); Jess Hill, *TPP clauses that let Australia be sued are weapons of legal destruction, says lawyers*, THE GUARDIAN (Nov. 9, 2015), <http://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer> (last accessed 4 May 2016); George Monbiot, *This transatlantic trade deal is a full-frontal assault on democracy*, THE GUARDIAN (Nov. 4, 2013), <http://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy>; *The arbitration game; Investor-state dispute settlement*, THE ECONOMIST, Oct. 11, 2014; Martin Khor, *The Trans-Pacific Partnership Agreement (TPPA): When Foreign Investors Sue the State*, GLOBAL RESEARCH (Sept. 1, 2013), <http://www.globalresearch.ca/the-trans-pacific-partnership-agreement-tppa-when-foreign-investors-sue-the-state/5357500>; Daniel Kalderimis, *Investor/state arbitration, the TPP and New Zealand*, CHAPMAN TRIPP (July 28, 2015), http://leanz.org.nz/uploads/presentations/Kalderimis_LEANZ%20Presentation_280715.pdf; Bianca Mueller, *The Devil in the TPPA – Investor State Dispute Settlement*, SCOOP (Mar. 22, 2015), <http://www.scoop.co.nz/stories/HL1503/S00196/the-devil-in-the-tppa-investor-state-dispute-settlement.htm> (last accessed 4 May 2016);

But the non-trade aspects of the deal are the most worrying. The worst is the mechanism allowing foreign companies to sue New Zealand in controversial offshore tribunals. This raises serious problems of sovereignty and fairness.

These tribunals are not courts as we understand them. They are courts dedicated to the interests of investors, rather than countries. Appeals are very limited. Conflicts of interest among those on the tribunals are not rigorously controlled. Judgments are not required to be consistent.

Responsibility for the public's mistrust in investor-state arbitration lies partly with human rights lawyers' and activists' ["human rights lobby"] claims of lack of transparency, investor bias and the disregard of citizens' human rights.⁷ The human rights lobby has painted the investors as the big bad wolves. The state and its citizens are red riding hood and the arbitral tribunals, as the Brothers Grimm, are re-writing the happy end. The international arbitration profession, on the other hand, has shied away from a thorough engagement with human rights and seems to have a severe case of "Berührungsangst".⁸

Julien Chaisse, *The shifting tectonics of international investment law - structure and dynamics of rules and arbitration on foreign investment in the Asia-Pacific region*, 47 GEO. WASH. INT'L L. REV. 563 (2015).

⁶ EDITORIAL: *It's too soon to celebrate the singing of this "free trade" deal*, DOMINION POST, ed., Jan. 15, 2016.

⁷ UN experts voice concern over adverse impact of free trade and investment agreements on human rights, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (June 2, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031>; Andrew Geddis, *Of TPP's, ISDS's and the Constitution*, PUNDIT (Oct. 5, 2015), <http://pundit.co.nz/content/of-tpps-isds-and-the-constitution>; *Open Letter, TPP LEGAL*, <https://tpplegal.wordpress.com/open-letter/> (last accessed 4 May 2016).

⁸ Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573, 576 (2011); see also Ciaran Cross & Christian Schliemann-Radbruch, *When Investment Arbitration curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations*, 6 L. & DEV. REV. 67, 87 (2013) (et seq. which show that arbitral tribunals have not taken the opportunity to clarify the role of human rights in investment arbitration); see also

The widespread absence of a discussion of investors' rights by the human rights lobby and the general lack of willingness by the international arbitration community to engage with human rights issues is concerning. It is concerning because, in particular for developing countries, sustainable economic development requires both: foreign direct investment and the protection of human rights.⁹

The aim of this think piece is to provide a basis to fill the gaps in both discussions by firstly describing the international human rights framework and in particular discussing whether and which human rights are available to investors and a state's citizens. The paper will then examine how a human rights analysis is relevant in an investment arbitration and why there is no need for the investment arbitration community to have "Berührungängste". By doing so the paper proposes a framework that will allow for the consistent inclusion of the International Bill of Human Rights ("IBR") and customary international human rights as a benchmark in investor-state dispute settlement. A consistent human rights benchmark is important since investor state dispute settlement can take place in competing jurisdictions, such as national courts, investment arbitration, regional human rights courts, or the International Court of Justice. There is therefore a need for promoting consistent human rights benchmarking among diverse national, regional and worldwide courts, and alternative dispute settlement proceedings.

The paper is also a contribution against the fragmentation of international law.¹⁰ It is the thesis of this paper that the IBR and customary international human rights provide the international constitutional framework in which any investment treaty is situated and in which international arbitral tribunals have to operate. To

Yannik Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox*, 37 N.C. J. INT'L L. & COM. REG. 1107, 1116 (2011). However, as an exception to the rule discussion of art 14 International Covenant on Civil and Political Rights, see *Hersham Talaat v. Indonesia*, UNCITRAL (Dec. 14, 2015).

⁹ See Megan Wells Scheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT'L L. & POL'Y 483, 483 (2011).

¹⁰ See Ursula Kriebaum & Christoph Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, http://www.univie.ac.at/intlaw/wordpress/pdf/88_concept_property.pdf.

illustrate the difference, the proposed framework will make to the discussion of investors' rights versus citizens' rights, the new framework will be applied to a case scenario. It is noteworthy to stress that the investment treaty perspective on human rights significance is not the main focus of this paper,¹¹ albeit some reference will be made.¹²

II. HUMAN RIGHTS FRAMEWORK

Human rights and fundamental freedoms are the birthrights of all human beings; their protection and promotion is the first responsibility of Governments.¹³

There are several human rights frameworks which could be used to determine the citizens' and the investor's rights: particular domestic human rights frameworks, regional frameworks in some parts of the world, and the international human rights framework. The international human rights framework encompasses the IBR containing the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic Social and Cultural Rights ("ICESCR").¹⁴ As Stephen Gardbaum convincingly argues, the IBR has to be seen as part of the international constitutional order.¹⁵ It

¹¹ See for very detailed discussion from the investment law perspective Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573 (2011); Yannik Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox*, N.C. J. INT'L L. & COM. REG. 1107 (2011); Vivian Kube & Ernst-Ulrich Petersmann, *Human rights law in international investment arbitration*, EUI Working Papers (Law 2016/02).

¹² See below II.D.

¹³ Vienna Declaration, sec. 1.

¹⁴ *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*, OHCHR, <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

¹⁵ Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749 (2008); see also Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006); see also, Andreas Paulus, *The International Legal System as a Constitution* in JEFFREY DUNOFF & JOEL TRACHTMAN, RULING THE

specifies the limits on how governments treat people within their jurisdictions. It enshrines and clarifies the distinct normative basis for the protection of fundamental rights as rights of human beings rather than as rights of citizens. That means international human rights do not make a difference between nationals and foreigners. The human rights obligations contained in the ICCPR and ICESCR have *erga omnes* effect to the extent that they have acquired customary international law status.¹⁶ That means that those rights enshrined in the IBR are applicable whether or not states are member states to the IBR or its parts.¹⁷ As a result, the IBR is applicable in every country around the world as part of the international constitutional order,¹⁸ laying down a global human rights standard¹⁹ for every

WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW & GLOBAL GOVERNMENT 69 (CUP, Cambridge, 2009).

¹⁶ JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 642 (8th ed., 2012); Pierre-Marie Dupuy, *L'unité de l'ordre juridique international* in *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL*, vol. 297, 382-85 (2002); Erika de Wet, *The International Constitutional Order*, 55 *INT'L & COMP. L.Q.* 51, 61 (2006); for IESCR, see U.N. Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. No. E/C.12/2001/10, para 16 (May 2001). Ernst Ulrich Petersmann states: "Human rights have thus become part also of the *general principles of law recognized by civilized nations* (Article 38 of the Statute of the International Court of Justice)" in *Time for Integrating Human Rights into the Law of Worldwide Organizations Lessons from European Integration Law for Global Integration Law*, NYU INSTITUTES ON THE PARK, <http://jeanmonnetprogram.org/archive/papers/01/012301-05.html>.

¹⁷ Based on the global recognition of those rights as the essence of what somehow natural right to every human being belongs just by being born as one, those rights cannot leave out any single individual, regardless of their nationality. See *Horst Dreier*, in: Dreier (Hrsg.), *GG*, Bd. 1, 2. Aufl., 2004, Vorb. Rdn. 25, Gerhard Herdegen in Maunz/Dürig, *Grundgesetz-Kommentar*, 78. EL September 2016, Art. 1 Abs. 2, marginal no. 31, 32, Herbert Bethge in Maunz/Schmidt-Bleibtreu/Klein/Bethge, *Bundesverfassungsgerichtsgesetz*, 49. EL Juli 2016, BVerfGG Rn. 90, marginal no. 65.

¹⁸ Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 *THE EUR. J. OF INT'L L.* 749, 768 (2008) ("international human rights law also functions to enshrine and clarify the distinct normative basis for the protection of fundamental rights as rights of human beings rather than as rights of citizens").

¹⁹ Compare with Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 *THE EUR. J. OF INT'L L.* 749, 768 (2008); see also Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 *THE EUR. J. OF INT'L L.* 585 (2010).

human being notwithstanding whether they are a citizen or foreigner. The IBR provides the baseline global human rights protection.²⁰ Whether, or in which circumstances, (additional) human rights enshrined in regional and/or domestic human rights standards have to be taken into account in investor state dispute resolution, is not within the scope of this paper.

How investment tribunals have to have regard to the IBR will be discussed under II.C.2. In the following the paper will outline the rights of the state's citizens and that of the investor under the IBR.

A. The Rights of the State Citizens

The human rights lobby is claiming in particular the following rights as being jeopardized by investor state relationships and the resulting disputes: the right to health²¹, the right to water²², the right

²⁰ As Ernst-Ulrich Petersmann points out “Dictatorial governments can no longer freely ‘contract out’ of their human rights obligations by withdrawing from UN human rights covenants or ILO conventions” in *Time for Integrating Human Rights into the Law of Worldwide Organizations Lessons from European Integration Law for Global Integration Law*, THE JEAN MONNET CENTER FOR INT’L AND REG. ECON. L. AND JUST., <http://jeanmonnetprogram.org/archive/papers/01/012301-05.html> (last visited Apr. 3, 2016) (That must be true not only for dictatorial governments but generally in regard to the inability of states to contract out of “human rights”).

²¹ The IECSR Committee has interpreted the “right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.” The right to health encompasses the control over one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation; the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health, including, for example, access (non-discriminatory, economic, physical, information) to functioning public health and health-care facilities [ICESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and

to a sustainable or healthy environment²³, the right of indigenous peoples to their ancestral lands²⁴, and the right to development²⁵ of

Cultural Rights, on Aug. 11, 2000 (Contained in Doc. E/C.12/2000/4), paras 8, 11, 1). In regard to a comprehensive treatment of the right to health, see JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* (2012) and VALENTINA VADI, *PUBLIC HEALTH IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* (2012).

²² The right to water encompasses, inter alia, sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. States need to take steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions. General Comment No. 15: *The Right to Water (Arts. 11 and 12 of the Covenant)*, Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on Jan. 20, 2003 (Contained in Doc. E/C.12/2002/11, paras. 2, 8). With regard to a comprehensive treatment of the right to health, see EIBE RIEDEL & PETER ROTHEN, *THE HUMAN RIGHT TO WATER* (Berliner Wissenschafts-Verlag, 2006).

²³ The right encompasses the right to a non-polluted environment, which does not endanger health, life and development. The right also comprises the obligation of the state and the community of states to repair any damage done by pollution. Gheorghe Durac, *Granting the Right to a Quality Environment -A Premise of Sustainable Development*, 9 PESD 153, 154 (2015); John Lee, *Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. OF ENVTL. L. 283. (2000). For an overview of the protection of the environment in regional and domestic human rights instruments, see Alan Boyle, *Human Rights and the Environment: A Reassessment*, UNEP, <http://www.unep.org/environmental-governance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf> (last visited Apr. 12, 2016).

²⁴ UN Indigenous Peoples Declaration, Art 1(1): “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” The central right is the right to the enjoyment of ancestral lands. Mihail Krephchev, *The Problem of Accommodating Indigenous Land Rights in International Investment Law*, 6 J. OF INT’L INVESTMENT L., 42; see generally JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (OUP, 1996).

²⁵ Declaration on the Right to Development (1986), Art 1(1): “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” The Declaration in its 10 articles requires states to guarantee rights in a manner applicable to globalisation, ie it compels states to cooperate with each other to the best of their abilities and resources to achieve development throughout the world: see for a general discussion DANIEL AGUIRRE, *THE HUMAN RIGHT TO DEVELOPMENT IN A GLOBALISED WORLD* (2008); Stephen Marks, Beate Rudolf, Koen De Feyter, & Nicolaas Schrijver, *The role of international law in U.N.*, OFFICE OF THE HUMAN

the citizens in the particular country.²⁶ Those citizens' rights, the human rights claims, are given no weight by investment tribunals. Tribunals were only concerned with the rights of investors.

The right to health and the right to water are enshrined in the IBR.²⁷ Thus, human beings have a right to health and to water notwithstanding the country they live in. The right to a sustainable or healthy environment and the right to development did not find their way explicitly into the IBR. Today, both rights are afforded at least near close to customary international law status.²⁸ The right of indigenous peoples to their ancestral lands is protected by the UN Declaration on the Rights of Indigenous Peoples. The Declaration is

RIGHTS COMMISSIONER, REALIZING THE RIGHT TO DEVELOPMENT: ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT 445, 454 (U.N. Publication, 2013).

²⁶ In regard to general criticism, see *Investor State Dispute Settlement- The Arbitration Game*, THE ECONOMIST, Oct. 11, 2014, <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>; Claire Provost and Matt Kennard, *The obscure legal system that allows corporations to sue countries*, THE GUARDIAN, June 10, 2015, <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>; *Still not loving ISDS: 10 reasons to oppose investors' super-rights in EU trade deals*, CORPORATE EUROPE OBSERVATORY, July 14, 2014, <http://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade>.

²⁷ ISECR Art 12, Art 11 (1); in addition, the U.N. General Assembly recognised the right to water and sanitation as a human right specifically in U.N.G.A. Res. 64/292, 64th Session A/RES/64/292 (July 28, 2010).

²⁸ For the right to a sustainable environment see John Lee, *The Right to a Healthy Environment*, 25 COLUM. J. ENVTL. L. 283, 338 (2000); see Susan Glazebrook, *Human Rights and the Environment*, VUWLR: HUMAN RIGHTS IN THE PACIFIC 293 (2009); Prue Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L. ENVTL. L. REV. 309 (1997); For the right to development see Isabella Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT'L. L. REV. 1425, 1436 (2000). It also should be noted that due to human rights law establishes a responsibility on part of the state toward those under its jurisdiction, and not solely an obligation between states, the Restatement has drawn a subtle distinction between the manner in which customary human rights law is established from that which creates customary international law in general. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 (1987), reporter's note 2.

not binding law. The formulation of the rights therein, however, reflects emergent customary international law.²⁹

It is the nature of human rights law to create obligations on the part of the state towards those under its jurisdiction. The IBR clearly stipulates states' obligations, for example, Article 2 (1) of the ICESCR reads:

[T]o 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.

Article 2(1) of ICESCR compels the community of states to work towards attaining the best standard of health possible for its citizens. It also requires every state to make every effort to provide for sufficient clean water. Of particular interest are the states' obligations in regard to the right to development. The right to development encapsulates a resonance of the core principles of all human rights including, primarily, equity, non-discrimination, active and meaningful participation, accountability and transparency.³⁰ For the right to be effective, another core part of the right to development is that states have a duty by themselves, and in

²⁹ Mihail Krephchev, *The Problem of Accommodating Indigenous Land Rights in International Investment Law*, 6 J. INT'L. INVESTMENT L. 42, 52 et seq. (2015); see also James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST.ORG (Oct. 3, 2007), <http://www.jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>; In regard to the general application under the American Convention on Human Rights see, *Norms and Jurisprudence of the Inter-American Human Rights System-Indigenous And Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <http://cidh.org/countryrep/Indigenous-Lands09/Chap.V-VI.htm> (last visited Apr. 16, 2016).

³⁰ See the reports of the Working Group on the Right to Development on its: Fifth Session, U.N. Doc. E/CN.4/2004/23, para. 43(a); Sixth session, U.N. Doc. E/CN.4/2005/25, para. 42; Seventh Session E/CN.4/2006/26, paras. 31, 40, 46, 67(g).

conjunction with the community of states, to accomplish the utmost possible within their available resources to attain the highest level of development in their respective states, but also globally.³¹ The same is true for the right to a sustainable and healthy environment.³²

Even though there is no unified global understanding of whether and how an individual can assert the right to health, water, a healthy environment, and a right to development (which are categorized as second and third generation rights³³), there is no doubt that in regard to those rights it is the state's and the community of states' obligation to constantly work towards the highest fulfillment and execution of those rights for its citizens and the global citizenry.

The right of indigenous peoples to their ancestral land is different to the other rights discussed as it is first and foremost a negative right. It obligates the states which are the home of indigenous peoples to provide them with the protection not to be deprived of their land.³⁴ It does not compel the particular state to

³¹ Ibrahim Salama, *The right to development at 25: renewal and achievement of its potential*, in U.N., OFFICE OF THE HUMAN RIGHTS COMMISSIONER, REALIZING THE RIGHT TO DEVELOPMENT: ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT 485, 486 (2013).

³² John Lee, *The Right to a Healthy Environment*, 25 COLUM. J. ENVTL. L. 283, 338 (2000); *see also* Draft Declaration on Human Rights and the Environment, U.N. Doc. E/CN.4/Sub.2/1994/9, Annex I (1994), art. 22 ("All States shall respect and ensure the right to a secure, healthy and ecologically sound environment. Accordingly, they shall adopt the administrative, legislative and other measures necessary to effectively implement the rights in this Declaration").

³³ *See* PAUL O'CONNELL, VINDICATION SOCIO-ECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES (2012); HELENA ALVIAR GARCIA, KARL KLARE, & LUCY WILLIAMS, SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES (2015).

³⁴ *Compare* *Kaliña y Lokono v. Surinam*, Inter-Am. Ct. H.R. (Nov. 25, 2015), http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_esp.pdf (last visited May 10, 2016) (The ACtHR found that Suriname had violated Art 3 ACHR by failing to recognize the collective legal personality asserted by the indigenous and tribal people in this case. It further noted that the lack of demarcation, delimitation, and failure to award legal title of the territory of Kaliña and Lokono violated the villagers' collective right to property recognized under Art 21 ACHR), *The Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No 148, paras. 169-200 (July 1, 2006) (The Court concluded that the State violated Article 21 (right to property) to the

progressively attain their ancestral land nor does the right require states to work as the community of states to attain those rights.

In summary, the human rights at play on the side of citizens are the right to health, water, a healthy environment, and the right to development. It is generally recognized that in regard to those rights, states have the obligation to safeguard their citizens against human rights abuses, including those of (transnational) corporations.³⁵ In particular, they are commissioned to work as part of the community of states towards the highest possible attainment of the fulfillment of those rights. The right of indigenous peoples to their ancestral lands has been conceptualized as a negative right, thought of as rooted in the right to property. Its justiciability is unquestioned.³⁶

B. The Right of the Investor

1. *Legal Persons as Human Rights Bearers*

Human rights are generally conceptualized as a safeguard for the individual against the state. If the investor is an individual there is no doubt human rights will extend to the investor.³⁷ However, the

detriment of the fifty-nine victims because its agents collaborated with the paramilitary group to destroy the victims' homes and steal their livestock, unlawfully depriving them of their property.)

³⁵ Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc A/HRC/4/035, para. 19 (Feb. 19, 2007) (prepared by John Ruggie): “..the state duty to protect against non state abuses is part of the international human rights regime’s very foundation. The duty requires states to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.”

³⁶ *E.g.*, *Kaliña y Lokono v. Surinami*, *supra* note 34; *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146, para. 113(a) (Mar. 29, 2006); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 125, para 157(c) (June 17, 2005).

³⁷ *See, e.g.*, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 170 (Nov. 21, 2007), http://www.corteidh.or.cr/docs/casos/articulos/seriec_170_ing.pdf (last visited

extension of human rights protections to legal persons is less clear. The IBR does not afford legal persons³⁸ protection.³⁹ The exclusion of legal persons from the scope of the IBR, however, does not necessarily follow from the IBR's purpose.⁴⁰ It does correspond to the preamble though, which asserts that human rights derive from the inherent dignity of the human person, and with the intention of its drafters.⁴¹

Looking more regionally, the Inter American Convention of Human Rights ("ACHR") does not offer rights protection to legal persons either.⁴² On the other hand, the European Convention on Human Rights ("ECHR")⁴³ and the African Charter on Human and Peoples Rights ("ACHPR")⁴⁴ have extended rights protection, at least in part, to legal persons.⁴⁵

May 10, 2016) (The individual investors were imprisoned and their property seized due to being suspected of drug trafficking.).

³⁸ The term "legal person" is used for the purposes of this paper in a rather broad sense, as including all natural entities.

³⁹ U.N. Human Rights Committee, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 9 (Mar. 29, 2004).

⁴⁰ Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L.L. 17, 24-25 (1999).

⁴¹ Universal Declaration of Human Rights preamble reads "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, . . ."; see also Human Rights Council, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, U.N. Doc. A/HRC/4/035, para. 37 (Feb. 19, 2007).

⁴² ACHR, Art. 61(1); ACHR, Art. 1(2); *Cantos v. Argentina*, Preliminary Objections, Inter-Am. Ct. H.R., para. 22 et seq. (Sept. 7, 2001); *Perozo v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., paras. 74, 399 (Jan. 28, 2009).

⁴³ ECHR, Art 34; see, e.g., *Société Colas Est v. France*, Eur. Ct. H.R. App. No. 37971/97, para. 41 (Apr. 16, 2002) (right to privacy in Art 8 ECHR).

⁴⁴ Art. 19 v. The State of Eritrea, Decision on the Merits, Afr. Comm'n. on Human and Peoples Rights 275/ 2003 (May 2007); Civil Liberties Organization v. Nigeria, Decision on the Merits, Afr. Comm'n. on Human and Peoples' Rights 101/93, para 37 (1995).

⁴⁵ For a full discussion on the protection of legal persons under international and regional human rights instruments albeit in regard to their criminal liability, see Piet Hein Van Kempen, *The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice?*, in

There is recognition that legal persons, in particular transnational or multinational companies, should be the bearer of (international) human rights.⁴⁶ That recognition is anchored in the fact that two regional human rights instruments afford human rights protection to legal persons and that human rights duties of transnational corporations have developed through soft-law mechanisms, such as the UN Guiding Principles on Human Rights and Business⁴⁷ and the OECD Guidelines for Multinational Enterprises.⁴⁸ Those soft law instruments contain express provisions on the human rights responsibilities of transnational corporations.⁴⁹ However, efforts are under way to convert those soft law instruments into legally enforceable standards. In 2014 the Human Rights Council with Resolution 26/9 established a working group which is tasked to develop an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises in regard to human rights.⁵⁰ The Resolution clearly identifies the responsibility of transnational corporations and businesses to respect human rights.⁵¹ The European Union has directed that its member states implement the UN Guiding Principles through national action

CORPORATE CRIMINAL LIABILITY: EMERGENCE, CONVERGENCE, AND RISK, 9, 355 (Mark Pieth & Radha Ivory, 2011).

⁴⁶ See Peter Oliver, *Companies and their Fundamental Rights: A Comparative Perspective*, 64 INT'L & COMP. L.Q. 661 (2015); see also Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17 (1999).

⁴⁷ *Guiding Principles On Business And Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Apr. 12, 2016)

⁴⁸ *OECD Guidelines for Multinational Enterprises*, OECD, <http://mneguidelines.oecd.org/text/> (last visited Apr. 12, 2016).

⁴⁹ Guiding Principles on Business and Human Rights, Principle 17; OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context, Part I, Chap IV Human Rights, No 5 (May 25, 2011).

⁵⁰ Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014), <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx> (last accessed April 17, 2016).

⁵¹ *Id.*

plans and has incorporated the Principles in its external policy.⁵² The (growing) responsibility of transnational companies in regard to the implementation of human rights must go hand in hand with their right of being protected by human rights. In other words, the human rights lobby cannot have their cake and eat it, too.⁵³

2. *A legal person's human rights*

(i) *General introduction*

It is nearly trite to state that not every human right is applicable to legal persons. The IBR rights that could be applicable to legal persons are, *inter alia*, freedom of expression⁵⁴, freedom from discrimination⁵⁵, the right to freedom of movement, access to justice⁵⁶, fair trial rights⁵⁷, or the right not to be searched

⁵² European Commission, *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play*, SWD, 144 final (July 14, 2015).

⁵³ See H.R.C. Res. 26/9, *supra* note 50 (acknowledging the double role of transnational corporations and other business as having “the capacity to foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights”).

⁵⁴ *The Sunday Times v. United Kingdom*, Eur. Ct. H.R. App. No. 6538/74 (1979); *Krone Verlag GmbH & Co. KG v. Austria* (no. 3), Eur. Ct. H.R. App. No. 39069/97 (2003); *Matter of the “Golobvision” Television Station, Provisional Measure Regarding Venezuela*, Inter-Am. Ct. H.R. (Nov. 21, 2007).

⁵⁵ *Church of Scientology Moscow v. Russia*, Eur. Ct. H.R. App. No. 18147/02 (Apr. 5, 2007); *Moscow Branch of the Salvation Army v. Russia*, Eur. Ct. H.R. App. No. 72881/01 (Oct. 5, 2006); *also compare Alexkor Ltd. and Another v. The Richtersveld Community and Others*, S. Afr. S.C. (2003).

⁵⁶ Access to justice encompasses the notion of denial of justice. Denial of justice has been recognised as *jus cogens* independent from being a right contained, as an aspect of access to justice, in the IBR. *See Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. Ecuador*, UNCITRAL, Interim Award, at 2-3 (Dec. 1, 2008).

⁵⁷ *British-American Tobacco Company v. the Netherlands*, Eur. Ct. H.R. App. No. 19589/91 (Nov. 20, 1995); *Central Mediterranean Development Corporation Ltd. v. Malta* (no. 2), Eur. Ct. H.R. App. No. 18544/08 (Nov. 22, 2011); *Mevopal SA v. Argentina*, Inter-Am. Comm’n H.R., Report No. 39/99 (Mar. 11, 1999).

unreasonably.⁵⁸ The probably most important right for any investor is, however, the right to property.⁵⁹ The right to property is only protected in the UDHR⁶⁰; it is not directly protected in the ICCPR or ICESR.⁶¹ Until recently, it was general opinion that a right to property could only arise under national law.⁶² However, sweeping economic and political changes in recent decades have laid the foundation for recognizing a global right to property. The ideological opposition against property rights has disappeared with China, Russia, and other socialist states having transitioned to market economies which are premised on private property. In addition, the globalization of trade has enhanced international support for protecting property rights. Furthermore, the increasing recognition of (property) rights of indigenous people has also aided a change in

⁵⁸ See Peter Oliver, *Companies and their Fundamental Rights: A Comparative Perspective*, 64 INT'L & COMP. L.Q. 661 (2015), for an in-depth comparative discussion.

⁵⁹ “And while one could argue that human rights treaties are fundamentally different from investment treaties with regard to their purpose of the protection of individuals compared to the promotion of friendly economic relations between two states, it should not be forgotten that a fundamental investor right under investment treaties is the right to property, which is itself a human right, recognized in most international human rights conventions.” HELGE ELISABETH ZEITLER, in STEPHAN W. SCHILL (ed.), INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 199 *et seq.*

⁶⁰ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, Art. 17 (1948) (“(1) [e]veryone has the right to own property alone as well as in association with others” and “(2) no one shall be arbitrarily deprived of his property”).

⁶¹ Eibe Riedel in THEORIE DER MENSCHENRECHTSSTANDARDS 39 (Dunker & Humbolt, Berlin, 1986) concludes that the travaux préparatoires indicate that the non-inclusion of property rights in both Covenants originates in the antagonistic ideological views of the Western and Eastern blocs, as well as those of the North and South. *See also* John Sparkling, *The Global Right to Property*, 52 COLUM. J. TRANSNAT'L L. 464, 469 (2014); Jacob Mchangama, *The Right to Property in Global Human Rights Law*, Cato Policy Report (Washington, June/July 2011), <http://www.cato.org/policy-report/mayjune-2011/right-property-global-human-rights-law> (last accessed Apr. 18, 2016) (article maintains a certain political angle).

⁶² Sparkling, *supra* note 61, at 464; *see also* Luis Valencia Rodriguez, *The Right of Everyone to Own Property Alone as Well as in Association with Others*, 90 U.N. Comm'n on H.R., UN Doc E/CN.4/1994/19 (Nov. 25, 1993).

finding that property is a customary human right.⁶³ The three regional human rights treaties (the ECHR, the ACHPR, and the ACHR) all protect property.⁶⁴ National constitutions and national laws overwhelmingly protect the right to property.⁶⁵ Importantly, even though the right to property was not included in the ICCPR or the ICESCR the omission did not equate with the states' denial of the right to property. As the Annotation to the Draft International Covenant on Human Rights clearly declares, "no one questioned the right of the individual to own property".⁶⁶ A close reading of the travaux préparatoires aids the conclusion that since the ideological obstacles in regard to property ownership have been "overcome", a redrafted 2016 IBR would include the right to property; it would not only exist as a principle in the UDHR.⁶⁷ Therefore, as Golay and Cismas conclude:⁶⁸

⁶³ In regard to the European Union countries, see: Case C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi & Al Barakaat International Foundation v. European Commission*, 2008 E.C.R. I-06351, at 355.

⁶⁴ Eur. Ct. H.R. Optional Protocol No. 1, art 1; African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 21; American Convention on Human Rights, 1114 U.N.T.S. 123, art 21. That means that 2/3 of all nations are parties to regional human rights treaties that contain the right to property.

⁶⁵ In regard to extensive discussions on the protection of the right to property under national constitutions, see: THEO VAN BANNING, *THE HUMAN RIGHT TO PROPERTY* 139-46 (Intersentia, Antwerpen, 2002). See also TOM ALLAN, *THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS* 36-82 (CUP, Cambridge, 2000); Luis Valencia Rodríguez, *The right of everyone to own property alone as well as in association with others*, U.N. Doc. E/CN.4/1994/19, at 64 et seq. (Nov. 25, 1993); Christophe Golay/Ioana Cismas, *The Right to Property from a Human Rights Perspective*, International Center for Human Rights and Democratic Development, at 2.3 (legal opinion, 2010), <http://www.geneva-academy.ch/docs/publications/ESCR/humanright-en.pdf> (last accessed Apr. 18, 2016).

⁶⁶ See U.N. Docs. E/CN.4/SR.230-232; E/CN.4/SR.302, 303; E/CN.4/SR.413-418, para. 197, available at http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf (last accessed Apr. 14, 2016). See also the concern expressed in U.N. Doc. E/CN.4/SR.413-418, para. 198 ("To omit [the right to property] might create the impression that it was not a fundamental human right").

⁶⁷ U.N. Docs. E/CN.4/SR.230-232; E/CN.4/SR.302, 303; E/CN.4/SR.413-418, para. 197-212, available at

The review of provisions of international instruments, regional treaties and national constitutions reveal the universal recognition of the human right to property. It appears that generalized and consistent State practice and *opinio juris* reflect the customary nature of the first paragraph of Article 17 of the UDHR ‘everyone has the right to own property alone as well as in association with others’.”

(ii) *The ambit of the right to property*

An important question is what the right to property entails. Any attempt to discuss the ambit of the right to property in a comprehensive manner would go well beyond the scope of this article.⁶⁹ The following sets out the basic features of the ambit of the right to property.

The UN General Assembly has stated that the right to property extends to both “[p]ersonal property, including the residence of one’s self and family”⁷⁰ and “[e]conomically productive property, including property associated with agriculture, commerce

http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf (last accessed Apr. 14, 2016).

⁶⁸ Christophe Golay/Ioana Cismas, *The Right to Property from a Human Rights Perspective*, International Centre for Human Rights and Democratic Development, at 2.4 (legal opinion, 2010) <http://www.geneva-academy.ch/docs/publications/ESCR/humanright-en.pdf> (last accessed Apr. 18, 2016); see also Sparkling, *supra* note 61, who extensively and detailed discusses the right to property as a right recognized as international law. Denying the jus cogens quality of the right to property, Joern Axel Kaemmerer, *Der Schutz des Eigentums im Voelkerrecht*, (Apr. 20, 2016) (denying the jus cogens quality of the right to property), https://www.uni-trier.de/fileadmin/fb5/inst/IRP/Bitburger_Gespraech_e_Einzeldokumente/BitburgerGespr_2004_I_Kaemmerer_151_175_geschuetzt.pdf.

⁶⁹ See, e.g., URSULA KRIEBAUM, *EIGENTUMSSCHUTZ IM VOELKERRECHT* (Duncker & Humboldt, Berlin, 2008); THEO VAN BANNING, *THE HUMAN RIGHT TO PROPERTY* (Intersentia, Antwerpen, 2002); RUDOLF DOLZER, *EIGENTUM, ENTEIGNUNG UND ENTSCHÄDIGUNG IM GELTENDEN VÖLKERRECHT* (Springer, Heidelberg, 1985); Adolph A. Berle, *Property, Production and Revolution*, 6 COLUM. L. REV. 1, 1-20 (1965); *generally*, FRIEDRICH CARL V. SAVIGNY, *DAS RECHT DES BESITZES* (Heyer, Gießen, 1803).

⁷⁰ U.N. Doc. A/RES/45/98, para. 3 (Dec. 14 1990).

and industry”⁷¹ In the absence of the right to property being stipulated by the ICCPR, the Human Rights Committee has not dealt with the right directly.⁷² The Inter American Court of Human Rights and the European Court of Human Rights, on the other hand, have filled the relative void under the respective Covenants.⁷³ According to their jurisprudence, the right to property encompasses a wide range of economic interests like movable and immovable property; tangible and intangible interests, such as shares, an arbitration award and intellectual property;⁷⁴ pension rights⁷⁵; a business operation⁷⁶; a customer base⁷⁷; vested, asset like, rights⁷⁸; a license or concession⁷⁹; and the right to exercise a profession⁸⁰

⁷¹ *Id.*

⁷² The Human Rights Committee dealt with the right to property in the negative. *E.g.*, Kéténguéré Ackla v. Togo, Communication No. 505/1992, U.N. Doc. CCPR/C/51/D/505/1992, 1996, para. 6.3 (“the Committee noted that, irrespective of the fact that the confiscation took place prior to the date of entry into force of the Optional Protocol for Togo, the right to property was not protected by the Covenant. Accordingly, the Committee decided that this claim was inadmissible *ratione materiae*, under article 3 of the Optional Protocol”).

⁷³ In regard to an overview of the jurisprudence of the European Court of Human Rights, *see*: Helene Ruiz Fabri, *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. ENVIR. L. J. 148 (2012); in regard to the jurisprudence of the Inter-American Court of Human Rights: LAURENCE BURGORGUE-LARSEN & AMAYA UBEDA DE TORRES, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (OUP, Oxford, 2011).

⁷⁴ *Lithgow v. United Kingdom*, 1986 ECHR 8 (1986); *Ivcher Bronstein Case*, Inter-Am. Ct. H.R. (ser. C) No. 74 (Feb. 6, 2001), available at <http://www1.umt.edu/humanrts/iachr/C/74-ing.html>; *Palamara-Iribarne v. Chile*, Merits, Reparations, and Costs, (ser. C) No. 135, para. 96 (Nov. 22, 2005); *Salvador Chiriboga v. Ecuador*, Preliminary Objections and Merits, (ser. C) No. 179 (May 6, 2008).

⁷⁵ *Azinas v. Cyprus*, Eur. Ct. H.R. App. No. 56679/00 (Apr. 28, 2004); *Torres Benvenuto et al v. Peru (Five Pensioners Case)*, Inter-Am. Ct. H.R. (ser. C) No. 98 (Feb. 28, 2003); *Acevedo Buendía et al (Discharged and Retired Employees of the Office of the Comptroller) v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 198, para. 80–91 (July 1, 2009).

⁷⁶ *Van Marle v. Netherlands*, Eur. Ct. H.R. App. No. 8543/79; 8674/79; 8675/79; 8685/79 (June 26, 1986)

⁷⁷ *Latridis v. Greece*, Eur. Ct. H.R. App. No. 31107/96, ECHR 1999-II 75 (Mar. 25, 1999).

⁷⁸ *Holy Monasteries v. Greece*, Eur. Ct. H.R., 20 EHHR 1 (1995).

Importantly the ECHR has extended the concept of protected property to rights arising from contracts and other types of claims⁸¹, including, for example, claims to restitution under national law⁸². Furthermore, the Court has held that a legitimate expectation of a property right is protected under Article 1(1) Optional Protocol to the ECHR. In *Slivenko v Latvia* the Court stated:⁸³

[p]ossessions” can be “existing possessions” or assets, including claims by virtue of which the applicant can argue that he or she has at least a “legitimate expectation” of acquiring effective enjoyment of a property right.

The Inter-American Court of Human Rights has summarized the right to property as⁸⁴

⁷⁹ *Tre Traktörer AB Garamond v. Sweden*, Eur. Ct. H.R., A159, para. 53 (1989); *Fredin v. Sweden*, Eur. Ct. H.R., 13 EHRR 784 (Feb. 18, 2991).

⁸⁰ *Gospodinova v. Bulgaria*, Eur. Comm’n H.R. App. No. 37912/97 (Apr. 16, 1998) (decision on admissibility); *Jantner v. Slovakia*, Eur. Ct. H.R. App. No. 39050/97, para. 34 (Mar. 4, 2003); *Kopecký v. Slovakia*, Eur. Ct. H.R. App. No. 44912/98 (GC) 2004-IX, para. 35 (2004); *von Maltzan et al v. Germany*, Eur. Ct. H.R. App. No. 71916/01, 71917/01, 10260/02, para. 74 (Mar. 2 2005) (decision on admissibility).

⁸¹ *Compare, e.g., Pressos Compania Naviera SA v. Belgium*, Eur. Ct. H.R. 21 EHHR 301 (1995) (tort claim); *Monica Carss-Frisk, A guide to the implementation of Article 1 of the Protocol No. 1 to the European Convention on Human Rights*, Human Rights Handbooks, No. 4, para. 29 et seq. (Strasbourg, 2001).

⁸² *Compare, e.g., Kirilova and Others v. Bulgaria*, Eur. Ct. H.R. App. No. 42908/98 et al: (June 9, 2005) (final, Sept. 9 2005), and (June 14, 2007) (final, Sept. 14, 2007).

⁸³ *Slivenko and Others v. Latvia*, Eur. Ct. H.R. App. No. 48321/99, (GC) ECHR 2002-II, para. 121 (2002); *see also, Vander Mussele v. Belgium*, Eur. Ct. H.R. App. No. 8919/80 (ser. A) 70, para. 48 (1983); *Pine Valley Developments Ltd. v. Ireland*, Eur. Ct. H.R. App. No. 12742/87 (ser. A) 222 (1991).

⁸⁴ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 144; *see also, Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (June 17, 2005); *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Mar. 29, 2006); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all moveables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.

What is not protected is the right or guarantee to acquire property in the future.⁸⁵

It is undisputed that the right to property protects the right's bearer from the direct expropriation of their property.⁸⁶ Right's bearers are also protected from a de facto deprivation of property.⁸⁷ As the ECHR observed:⁸⁸

In the absence of formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of . . . Since the Convention is intended to guarantee rights that are "practical and effective" . . . it has to be ascertained whether th[e] situation amount[s] to a de facto expropriation....

(iii) Summary

In the present day, not only individual investors but also corporations have to be afforded human rights. The inclusion of (transnational) legal persons in the protection sphere of international human rights has to be the consequence of requiring corporations to

⁸⁵ Marckx v. Belgium, Eur. Ct. H.R. App. No. 6833/74 (1979); X v. the Federal Republic of Germany, Eur. Ct. H.R. App. No. 8410/78 (1979).

⁸⁶ Ursula Kriebaum & Christoph Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 748 (Zurich, 2007), *available at* http://www.univie.ac.at/intlaw/wordpress/pdf/88_concept_property.pdf (last accessed Apr. 18, 2016) (p. 5 of the linked publication)

⁸⁷ Sporrang and Lönnroth v. Sweden, Eur. Ct. H.R. App. No. 7152/75 (1982); Monica Carss-Frisk, *supra* note 81, para. 67 et seq.

⁸⁸ Sporrang and Lönnroth v. Sweden, *supra* note 87, para. 63.

be protectors of human rights. The most important right for an investor, the right to property, has attained customary international law status. At this point in time the ambit of the right has to be ascertained through the analysis of (especially) the European Court of Human Rights and the Inter American Court of Human Rights jurisprudence. Such an analysis reveals that the right to property extensively protects the economic interests of corporations in regard to direct, and importantly also de facto expropriation, and the curtailment of the use and enjoyment of their property.⁸⁹ The right to property protects the physical assets of a corporation but also its intangible assets. Importantly, the right to property also protects the business operation including legitimate expectations.

3. Conclusion

Both citizens as well as investors are afforded rights under international human rights law. However, at this point in time the state's citizens' enjoyment of human rights is on more solid foundations than those of legal persons in general and investors in particular. Citizens' rights most likely to be at stake in an investor-state dispute are so called second and third generation rights. Those rights are enshrined in the ICESCR or rights which have attained customary international law status. Even though generally their justiciability is not without doubt, it is generally accepted that those rights demand a constant progressive realization from states.⁹⁰ For most investors, their human rights protection will depend on the acknowledgment that they can, as legal persons, be bearers of international human rights, in particular the IBR. Since (transnational) corporations are relied upon for the progressive realization of human rights, those obligations must come with the right to be a human rights bearer. A number of rights which have

⁸⁹ See European Court of Human Rights, *Factsheet: Companies-Victims or Culprits* (July 2013); Ursula Kriebaum & Christoph Schreuer, *supra* note 86 (discussing the differences between investment law and human rights law in regard to the issues arising in the limitation of the investor's economic interest. However, the different treatment does not necessitate a different outcome in regard to protection).

⁹⁰ See above II.A. in regard to the concept of the states' duty to progressive realization.

been or could be the focus of human rights violations by the state are ICCPR rights which are unquestionably justiciable. The right to property, which is undoubtedly the most important right to be upheld for the investor, has come into its own and has achieved at least near customary international law status. Therefore, international human rights law does afford investors protection in regard to the investment they have made.

No human rights bearer, however, holds their rights absolutely. Article 29(2) of the UDHR generally acknowledges that, in the exercise of

rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Some rights in the IBR have specific limitations.⁹¹ Whether specific limitations apply to the right to property is at this point in time not generally recognized since the right to property has just emerged on the international plane. Guidance can again be sought from the ECHR and the ACHR. Article 1 of the Optional Protocol No 1 to the ECHR⁹² grants the state the possibility to limit the individual's right to property due to public interest. The ACHR also allows the limitation of the right to property due to public interest.

⁹¹ The right to freedom of expression (art. 19(2), ICCPR), for example, can be limited when it is necessary for the country's national security (art. 19(3)(b)).

⁹² Optional Protocol No 1, Art. 1 reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." See *Yukos v. Russia*, Judgement, Eur. Ct. H.R. App. No. 14902/04, para. 554 (Sept. 20, 2011), in regard to the general interpretation of Art. 1.

The ACHR only allows a limitation to the right to property for just compensation.⁹³

The citizen's rights in question are rights that require a progressive realization by the state.⁹⁴ To justify preventing the realization of one right at the expense of another right, the realization must be reasonable.⁹⁵ It is beyond the scope of this article to discuss the limitations on the right to property and the citizen's rights at any length. For the purpose of this article it is important to state that neither the investor's rights nor those of the citizens are absolute. Human rights law has developed internal limitation mechanisms to take account of the fact that the individual's enjoyment of rights take place within the community of other rights holders.

In addition to internally accepted limitations on a right, the commonly used analytical framework to balance the rights of human

⁹³ ACHR, Art. 21(2) : "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." In *Salvador Chiriboga v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 179 (May 6, 2008), the city had expropriated applicant's land for use as a public park but failed to pay any compensation. The Court held that the public interest or social utility standard was satisfied since the park provided a recreational and ecological protected area for the benefit of city residents. However, the Court found a violation of the right to property due to the city's failure to comply with expropriation procedures required under domestic law (*i.e.*, failure to pay compensation). The Court also observed that a restriction on the right to property must be proportionate to the legitimate interest that justifies it, which requires a fair balance between the interests of the public and owner. The ECtHR also generally requires compensation for a limitation of the right to property. *James et al v. United Kingdom*, Eur. Ct. H.R. App. No. 8793/79 (ser. A) No. 98, para. 54 (Feb. 21, 1986) ("[T]he taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes"); *Lithgow and Others v. the United Kingdom*, Eur. Ct. H.R. App. No. 9006/80 et al., para. 120 (July 8, 1986) ("[T]he taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances").

⁹⁴ See above II.B.2.(i).

⁹⁵ The principle of reasonableness as an inherent limit of socio-economic rights has been best developed by the South African Constitutional Court, *see Khosa v. Minister of Social Development*, 2004 (6) SA 505 (CC) (Mar. 4, 2004); *see also*, Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitation Clause*, 20 S. AFR. J. OF HUM. RTS. 448 (2004).

rights holders to allow for the fullest human rights fulfillment is proportionality. Proportionality has been received *inter alia* into the constitutional doctrine of courts in continental Europe⁹⁶, the United Kingdom⁹⁷, Canada⁹⁸, New Zealand⁹⁹, Israel¹⁰⁰, South Africa¹⁰¹, and the United States¹⁰², as well as the jurisprudence of treaty-based legal systems such as the European Convention on Human Rights¹⁰³, the American Convention on Human Rights,¹⁰⁴ the European Court of Justice,¹⁰⁵ and the ICCPR^{106/107}. The core proportionality analysis requires the following inquiries to be made:

- a) Is there a legitimate aim in regard to the measure in question?
- b) Is the measure suitable to achieve the aim?

⁹⁶ *E.g.*, Bundesverfassungsgericht 1 BvR 2378/98 (Mar. 3, 2004) (police surveillance powers in regard to living space).

⁹⁷ *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26; *Huang v. Secretary of State for the Home Department* [2007] UKHL 11; *Kashmiri v. Secretary of State for the Home Department* [2007] UKHL 11.

⁹⁸ *R v. Oakes* [1986] 1 S.C.R. 103 (Can.).

⁹⁹ *R v. Hansen* [2007] N.Z.S.C. 7, para. 102 (N.Z.).

¹⁰⁰ *CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village* 49(4) PD 221, 353 (1995) (Isr.).

¹⁰¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (S. Afr.).

¹⁰² In regard to the United States, see Iddo Porat, *Mapping the American Debate over Balancing* in GRANT HUSCROFT/BRADLEY MILLER/GREGOIRE WEBBER, *PROPORTIONALITY AND THE RULE OF LAW* 397 (CUP, Cambridge, 2016).

¹⁰³ *Handyside v. United Kingdom*, Eur. Ct. H.R., [1976] ECHR 5 (Dec. 7, 1976); *Soering v. United Kingdom*, Eur. Ct. H.R., 11 EHRR 439 (1989); Helene Ruiz Fabri, *Approach taken by the European Court of Human Rights to the Assessment of Compensation for Regulatory Expropriations of the Property of Foreign Investors* (2002) 11 N.Y.U. ENVTL. L.J. 148, 163 (2002).

¹⁰⁴ Compare IACHR, Art. 27(1) and discussion in YUTAKA ARAI-TAKASHI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 186 (intersentia, Antwerp, 2001).

¹⁰⁵ *E.g.*, *Sky Österreich*, E.C.J. (GC) C-283/11, para. 50 et seq. (Jan. 22, 2013).

¹⁰⁶ U.N. Human Rights Committee, General Comment No. 31, para. 6 (Mar. 29, 2004).

¹⁰⁷ For an in depth discussion on the framework of proportionality in different jurisdictions, see GRANT HUSCROFT, BRADLEY MILLER and GREGOIRE WEBBER, *PROPORTIONALITY AND THE RULE OF LAW* (CUP, Cambridge, 2016).

- c) Is the measure necessary to achieve the aim?
- d) Is the measure the least rights infringing means to achieve the aim?
- e) Considering the competing interests of the different rights bearers at hand is the measure proportional?

The human rights framework demands a balancing of the investor's rights with the rights of the citizens, i.e. the state's right to make public policy decisions to safeguard its citizens' rights. The human rights framework internally limits a state's measure in regard to the realization of the rights in question, like the right to health or water. The proportionality paradigm gives the balancing a tested structure. It is therefore curious that a review of arbitral awards reveals that arbitral tribunals have turned a blind eye to the human rights of the state's citizens, as an extensive study by Jason Fry determined.¹⁰⁸ The argument generally advanced is that the arbitral tribunal gets its power by virtue of the parties set out in an investment treaty between the host state and the investor's state. And as long as the investment treaty does not stipulate an authority for the investment tribunal to have regard to the citizens' human rights, tribunals do not have the authority to do so.¹⁰⁹ That has resulted in, as Bruno Simma put it:¹¹⁰

a problem of aiming at two moving targets: for the foreign investor, how to accurately estimate the political risks of the investment before, or at the time of, its establishment in the host State so as to enable the investor to price the contract cost correctly according to its projected returns on investment; and for the host State, how to determine the optimal degree of police powers and regulatory authority to be retained during the life of the investment, needed to perform its international human rights obligations.

¹⁰⁸ Jason Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. OF COMP. & INT'L L. 77 (2007).

¹⁰⁹ Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L.Q. 573, 582 (2011).

¹¹⁰ *Id.* at 579.

The non-use of the human rights framework by arbitral tribunals is problematic. The reason is that the right which is at the heart of investment arbitration – the right to access to justice – is the right which puts the investor, at least sometimes, in a better position than a state’s citizens. In a country with a non-functioning adjudication system¹¹¹ the investors, unlike the citizens, have through investor-state arbitration an avenue open to them that allows access to justice to independent adjudicators who are outside that non-functioning adjudication system. In this inequality lies the potential human rights violation of investor-state arbitration but also the potential for investor-state arbitration.

C. International Arbitration Approaches

Having set out the human rights framework applicable to the investor-state relationship the paper will briefly set out the currently proposed approaches of how tribunals can be compelled to take human rights into account.

1. *Current Approaches*

Broadly speaking three approaches are advanced. All approaches are centered on the investment treaty. They have as their underlying premise that human rights can only be taken into account if, and as far as, an investment tribunal is allowed to consider rules of international law. They allow any kind of human rights analysis only in so far as human rights can be placed in a particular relationship with the investment treaty concerned.¹¹² The core premise of those approaches is illustrated by the *travaux préparatoires* of Article 42(1) of the Convention on the Settlement of Investment Disputes (“ICSID Convention”) which refers to “such rules of international law as may be agreed by the parties.”¹¹³

¹¹¹ “non- functioning” for the purposes of this article is meant in the widest sense including a legal system that does grant effective justice.

¹¹² See Bruno Simma, *supra* note 109, at 581-82.

¹¹³ ICSID Report of the Executive Directors, I ICSID Rep. 31 (2006) (*emphasis added*) (cited in CHRISTOPH SCHREUER, *THE ICSID CONVENTION: A*

(i) Explicit Referencing Approach

The first approach advanced is to draft (in the future) investment treaties that clearly state that a tribunal has to take the state's human rights commitments into account.¹¹⁴ Among the rare investment treaties that do make reference to human rights already, human rights are addressed in two different ways none of which gives the tribunal an explicit mandate to incorporate a human rights analysis into its decision making process. First, certain treaty clauses, such as Article 1114(1) of the North American Free Trade Agreement (NAFTA), allow a host state under its respective regimes to enact measures aimed at protecting human rights.¹¹⁵ However, such measures are only allowed to the extent that they are consistent with the terms of the investment treaty.¹¹⁶ Second, other treaty clauses provide that the provisions of the investment treaty do not limit the regulatory power of states regarding the protection of human rights. Article 10(1) of the Canadian BIT Model provides such an example.¹¹⁷ The Comprehensive Economic and Trade

COMMENTARY 609 (CUP, Cambridge, 2001)). Pursuant to the report by the Executive Directors, the term 'international law' as used in the context of the Convention has to be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice. In light of this statement, the applicable rules of international law are those contained in treaties, customary law, and general principles of law recognized by civilized nations. Therefore, under the ICSID Convention the IBR has to be taken into account if the investment treaty makes reference to international law.

¹¹⁴ Bruno Simma, *supra* note 109, at 579.

¹¹⁵ See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., art. 1114(1), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

¹¹⁶ NAFTA, art. 1114(1) ("Nothing in this Chapter [11] shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concern") (*emphasis added*).

¹¹⁷ Model Agreement for the Promotion and Protection of Investments, art. 10(1) (2004): "Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health." Available at <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last accessed 3 April 2016); see also the Norwegian Draft Model BIT (2015), which has

Agreement (CETA) between Canada and the European Union as a recent instance includes a clause which protects human rights explicitly.¹¹⁸ Those express references to the state's ability to regulate with the aim to foster human rights are stating the obvious. As set out in the previous part of this paper states are compelled by the IBR to attain the highest standard in human rights compliance for their citizens. A reminder of that in an investment treaty is undoubtedly useful. In addition what is proposed is to clearly state in an investment treaty a tribunal's ability to weigh the state's aim to foster human rights compliance through its social and economic policy against the investor's right to its investment.

In regard to existing investment treaties two approaches have been proposed:

(ii) Dynamic Interpretation Approach

The first approach promulgates a dynamic interpretation as set out by the International Court of Justice in *Kasiliki, Sedudu Island (Botswana v Namibia)*:¹¹⁹ where treaties use known legal terms whose content the parties expected would change through time,¹²⁰ the meaning of these terms will be determined by reference to international law as it has evolved and stands at present, rather than to the state of the law at the time of the conclusion of the treaty.¹²¹

an equivalent to art. 10 in its art. 25. In addition, art. 31 reads: "The Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and to participate in the United Nations Global Compact."

¹¹⁸ Consolidated Comprehensive Economic and Trade Agreement Text, EU-Canada, Oct. 30, 2016, Annex 8-E ("... the Parties confirm their understanding that measures that are 'related to the maintenance of international peace and security' include the protection of human rights"), available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (last accessed Feb. 15, 2017).

¹¹⁹ *Kasiliki, Sedudu Island (Botswana v Namibia)*, Judgment, 1999 I.C.J. Rep. 1045.

¹²⁰ *Id.* at 2 (Declaration of Judge Rosalyn Higgins).

¹²¹ The same technic was utilized in *Ronald Lauder v. Czech Republic*, Final Award of Sept. 3, 2001, at para. 200,

The European Court of Human Rights applies this principle as a matter of routine, basing it *inter alia* on articles 31(1) and 31(2) of the Vienna Convention on the Law of Treaties.¹²²

(iii) Interpretative Presumption Approach

The other school of thought emphasizes the interpretative presumption that treaties are intended to produce effects which accord with existing rules of international law.¹²³ This presumption is used to resolve issues of interpretation relating to the broader normative content of a treaty rather than to the meaning of a specific term. This argument is based on article 31(3)(c) of the Vienna Convention on the Law of Treaties¹²⁴ which states that in the interpretation of a treaty between the parties has to take account of “[a]ny relevant rules of international law applicable in the relations between the parties.” However, as Bruno Simma points out article 31(3)(c) of the Vienna Convention can only be employed as a means of harmonization *qua* interpretation, and **not** for the purpose of modification, of an existing treaty.

2. *The Human Rights Centric Approach*

However, is the Vienna Convention on Treaties really the glue that prevents international law to disintegrate into a 1000 pieces? In domestic law the respective constitution (generally containing a human rights catalogue) is allowed comfortably to be the overarching umbrella that gives the law legitimacy and provides a framework in what the state but also its citizens can engage in and are allowed to

<http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf> (last accessed Feb. 15, 2017).

¹²² See, e.g., *SE Golder v. United Kingdom*, Eur. Ct. H.R. App. No 4451/70, Report of the Commission, CE doc. D-60-355, 25 (June 1, 1973); *also Id.*, Judgment, 29-36 (Feb. 21, 1975).

¹²³ *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, 1957 I.C.J. Rep. 142; *Corfu Channel case (U.K. v. Albania)*, Judgment, 1949 I.C.J. Rep. 104.

¹²⁴ See also Ciaran Cross & Christian Schliemann-Radbruch, *When Investment Arbitration curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations*, 6 L & DEV. REV. 67, 87 (2013).

do. On the international plane this paper argues the IBR provides this overarching umbrella. The IBR sets out the paradigm in which states but also the arbitrators and the investors have to operate in. If states would not have to adhere to the IBR (and as stated at the beginning since those rights embodied in the IBR are customary so every state has to adhere to them) then human rights protection would be illusory. The IBR has to be treated as *jus cogens* by any tribunal in investment treaties decisions. Article 53 of the Vienna Convention on the Law of Treaties provides that “a treaty is void if, at the time its conclusion, it conflicts with a peremptory norm of general international law.” The general principle that is extrapolated is that domestic as well as international law follows a hierarchy whereby treaty obligations are of no effect in the event that they conflict with a fundamental *jus cogens*.¹²⁵ The IBR contains the most globally recognized norms. International investment law itself should not be blind to human rights.¹²⁶ By signing an investment treaty states cannot relieve themselves from any human rights obligation towards their citizens. It should not matter whether the state includes human rights protection in those treaties or not. It cannot lie in the hands of the states or the investors whether human rights are applicable.¹²⁷ Regarding that international investment law constitutes a public law discipline¹²⁸, neither states nor investors can “flee into private law”¹²⁹

¹²⁵ Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* 18 (International Institute for Sustainable Development Research Paper, Apr. 2004), https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf (last accessed Feb. 15, 2017).

¹²⁶ Filip Balcerzak, *Jurisdiction of Tribunals in Investor–State Arbitration and the Issue of Human Rights*, 29 *ICSID Rev.* 216, at VI (2016), <https://academic.oup.com/icsidreview/article/29/1/216/2356645/Jurisdiction-of-Tribunals-in-Investor-State> (last accessed Feb. 15, 2017).

¹²⁷ For a different opinion, see Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 *J. OF INT’L DISP. SETTLEMENT* 277, 281 (2015), <https://academic.oup.com/jids/article/6/2/277/819997/Human-Rights-in-Investor-State-Arbitration-The> (last accessed Feb. 15, 2017), who points out in his conclusion that the highest responsibility for human rights protection bears the state while building an investment treaty, even though he recognizes the possible influence of investment arbitration tribunals regardless of investment treaties clauses at least for the human right to water.

¹²⁸ STEPHAN W. SCHILL, *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 17 et al. (2010).

when it comes to violation of basic general law principles.¹³⁰ The ability of states to contract out, even partially, of the IBR would seriously undermine human rights protection globally. As set out above under B the IBR provides not only protection for citizens but also for the investor. And also the arbitrator is part of the paradigm as Lalive so clearly pointed out:¹³¹

While he is clearly not an organ of the State, the international arbitrator is not acting in a legal vacuum and is not called upon to decide, so to speak, as if he did not belong to this world! The question may be raised here, in passing [. . .] whether the arbitrator is not, perhaps, the organ of the international community, be it the community of States or the ‘international community of businessmen’ (in which more and more States and State organs appear to be active) or both international communities.

The investor-state relationship illustrates the private-public divide on the international plane. The private-public divide, i.e. when is a state action private when public, is one of the most contested in every jurisdiction.¹³² One of the fundamental issues is that the

¹²⁹ Compare the principle in German Public Law “keine Flucht ins Privatrecht”, see Ferdinand Kirchhof, *Art. 83*, n.103, in GRUNDGESETZ-KOMMENTAR, 78 (Maunz & Dürig eds., Sept. 2016); Thorsten Kingreen, *AEUV Art. 36*, n.111, in EUV/AEUV 5 (Calliess & Ruffert eds., 2016).

¹³⁰ Compare Wolfgang Friedmann, *The Use of “General Principles” in the Development of International Law*, 57 AM. J. INT’L L. 279, 295 (Apr., 1963) (“The science of international law can no longer be content with the analogous application of private law categories. It must search the entire body of the ‘general principles of law recognized by civilized nations’ for proper analogies. With the growing importance of international legal relations between public authorities and private legal subjects, public law will be an increasingly fertile source of international law”).

¹³¹ Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, ICCA Congress Series No. 3 at 258, 302 (1986).

¹³² For an overview of the German discussion, See Ulrich Stelkens, *The Public-Private Divide: Annual Report – 2010 – Germany*, IUS PUBLICUM NETWORK REV. (Nov. 2011), http://www.ius-publicum.com/repository/uploads/23_11_2011_10_39_Stelkens.pdf (last accessed May 28, 2016), for an overview of the German discussion. For an overview of the

arbitration community seems to view the investor-state relationship from a private law lens centering its analysis of the relationship between in the investor and the state solely on the investment treaty. The investment treaty, a treaty between two or more states, does have to be the starting point of the analysis. The object of an investment treaty is to attract investment, i.e. business, something commonly associated with private law. However, only because the subject matter of the treaty is private does not mean that public law principles, i.e. human rights, do not apply to its interpretation. As the German Constitutional Court has convincingly and regularly stated: a state cannot resort to a private measure to circumvent its human rights commitments since otherwise human rights protection would be illusive.¹³³

To accept the proposed paradigm in this article would mean that human rights, as enshrined in the IBR, have to be taken into account by the arbitral tribunal whether or not there is an interpretative “hole” or “hook” in the respective investment treaty. Human rights are the structure in which the investment treaty is fixed to and which ultimately limits it. In other words, the paradigm proposed is the opposite paradigm of, what is at this stage, the general opinion where the investment treaty provides the structure in which human rights have to find a hook to be able to find hold in that structure. Thereby, while balancing the interests of the investor against the interests of the citizens, arbitrators not only harmonize two potentially conflicting regimes of international law (investment law and human rights law) but, in substance, also highlight the human dimension of investment law.¹³⁴

discussion regarding the United Kingdom, see Dawn Oliver, *common values in public and private law and the public/private divide*, in BA Rider (ed), *LAW AT THE CENTRE* 119 (Kluwer, London, 1999); see generally Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 *EUR. J. INT’L LAW* 387 (1999); LAW COMMISSION OF CANADA, *NEW PERSPECTIVES ON THE PUBLIC-PRIVATE DIVIDE* (2007).

¹³³ See BVerfGE 15, 256, 262; BVerfGE 21, 362, 369, 370; BVerfGE 115, 205, 237.

¹³⁴ Yannik Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox*, *N.C.J. INT’L L. & COM. REG.* 1107, 1114 (2011).

D. Conclusion

An analysis of the international human rights framework demonstrates that states' citizens as well as the foreign investors are human rights bearers. Human rights methodology provides for a balancing of conflicting rights' positions. The current inclusion of human rights into the decision making of arbitral tribunals occurs through an investment treaty centered interpretation. That general approach limits the tribunal's ability, if not discourages, to consider the relevant human rights of citizens and investors alike in its decision-making. Arbitrators are part of the international community and their mandate is not only determined by their appointment and the relevant investment treaty provisions but also by the international constitutional framework, i.e. the applicable human rights norms. Even if an arbitral tribunal would ignore an existing investment treaty a human rights analysis would not disregard the rights of the investor. Therefore, if a human rights analysis does not differ in its outcome significantly from the analyses of tribunals under the relevant investment treaty then it evidences that an arbitral tribunal does not have to fear the inclusion of a human rights analysis in its decision-making process. On the contrary, an inclusion of a human rights analysis will aid the decision-making process and most importantly will foster a constructive dialogue with the human rights lobby and thereby would promote the legitimacy of investment arbitration.

III. THE CASE

Investors have successfully sought relief in front of regional human rights courts¹³⁵ and domestic courts¹³⁶ for government interference with their investment. An analysis in light of the international human rights framework adds an important dimension.

¹³⁵ See, e.g., Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Inter-Am. Ct. H.R. (ser. C) no. 170 (Nov. 21, 2007), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_170_ing.pdf (last accessed May 10, 2016); Oao Neftyanaya Kompaniya Yukos v. Russia, Eur. Ct. H.R. App. No. 14902/04 (Mar. 8, 2012).

¹³⁶ See Overview in Helene Brubowski, *Internationale Investitionsschiedsverfahren und nationale Gerichte*, Jus Internationale et Europaeum 79 (Mohr Siebeck, Tübingen, 2013).

As set out earlier the international human rights framework provides the global human rights standard available to every international arbitral tribunal by virtue of being international. It provides the globally accepted minimum human rights standard.

The general way human rights cases are approached are by defining the ambit of the right that is potentially infringed and once an infringement is established to balance the limiting of that right with the rights of other rights holders since it is accepted that rights can be justifiably limited by the rights of others. In the following that methodology will be applied to *TECMED v Mexico*.¹³⁷ The tribunals approach in the judgement was also followed by other tribunals later on, for example, in *Azurix v Argentina*.¹³⁸

A. The Investment Arbitration Tribunal Decision

TECMED, a Spanish company with its two Mexican subsidiaries, brought a claim against Mexico alleging several violations of the Spain-Mexico BIT. The claim concerned TECMED's investment in a hazardous waste landfill site acquired in 1996. TECMED alleged that Mexico failed to renew a license for the site.

In the investment arbitration proceedings TECMED alleged the failure to renew the license rendered the investment completely lost, as it did not have any economic value as an ongoing business. TECMED alleged violations of the BIT, including expropriation, fair and equitable treatment and full protection and security. The tribunal found that Mexico's action in effect expropriated TECMED's investment, and that it failed to provide fair and equitable treatment. The Tribunal interestingly did balance Mexico's interest in its

¹³⁷ *TECMED v Mexico*, ICSID Case no. ARB(AF)/00/2 (May 29, 2003) (the author chose this case as one of the earlier cases where the arbitral tribunal payed regard to balancing the rights of the investor against the rights of Mexico's citizens).

¹³⁸ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of July 14, 2006, para. 311, <http://www.italaw.com/sites/default/files/case-documents/ita0061.pdf> (last accessed Feb. 15, 2017).

environment and the investor's right to property. The Tribunal stated:¹³⁹

After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures 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. Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There 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. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not. On the basis of a number of legal and practical factors, it should be also considered that the foreign

¹³⁹ *TECMED v Mexico*, *supra* note 137, at para. 122. Also recently quoted in *Philip Morris v. Uruguay*, ICSID Case no. ARB(AF)/10/7, para. 295 (July 8, 2016), where it stressed that the tribunal relied on the jurisprudence of the European Court of Human Rights, based on Article 1 of Protocol 1 of the Convention..

investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors.

B. The Human Rights Tribunal Decision

This paper will limit its human rights analysis to the right to property.

1. *Ambit of the right infringed?*

The first step in a human rights analysis is to define the ambit of the right that is potentially involved to determine whether the act or omission is protected by the right. As discussed under II.B.2.(ii), the right to property encompasses a license¹⁴⁰ as well as legitimate expectations in proprietary positions¹⁴¹. In *TECMED* the investor sustained a complete loss of the profits and income from the economic and commercial operation of the landfill as an ongoing business. The damage sustained included the impossibility of recovering the cost incurred in the acquisition of assets for the landfill, its adaptation and preparation and, more generally, the investments relating to or required for this kind of industrial activity. That included, but was not limited to, constructions relating to the landfill; lost profits and business opportunities; the impossibility of performing contracts entered into with entities producing industrial waste. Thus the government's action led to the termination of such contracts and to possible claims relating thereto. Furthermore, the government's action resulted in a loss of reputation for *TECMED*

¹⁴⁰ Compare *Tre Traktörer AB/Garamond v. Sweden*, Eur. Ct. H.R. App. No. 10873/84, para. 53 (1989); *Fredin v. Sweden*, Eur. Ct. H.R. App. No. 12033/86 (1991); *Latridis v. Greece*, Eur. Ct. H.R. App. No. 31107/96 (1999).

¹⁴¹ Compare *Slivenko v. Latvia*, Eur. Ct. H.R. App. No. 48321/99 (2003), para. 121; see also *Vander Mussele v. Belgium*, Eur. Ct. H.R. App. No. 8919/80 (ser. A), para. 48 (1983); *Pine Valley Developments Ltd. v. Ireland*, 222 Eur. Ct. H.R. App. No. 12742/87 (ser. A) (1991).

and to its subsidiaries in Mexico. The consequence was a negative impact on TECMED's capacity to expand and develop its activities in Mexico. Even though the government did not expropriate TECMED its actions rendered the property of TECMED de facto useless. In addition, TECMED's expectation in the license and the license itself are protected by the right to property. Therefore, TECMED's activities and expectations in regard to the operation of the landfill were protected by the customary right to property. TECMED's right to its property was infringed by the actions of Mexico's government. As set out above under II.B.2.(ii), the right to property can be limited if the property owner is compensated fairly for the expropriation.¹⁴² If the state compensates fairly for the expropriation the right to property is not infringed.

2. *Proportionality Analysis*

After establishing that TECMED's right to property in the landfill was infringed through the government's action the next inquiry is whether the government's action is a justified limitation on TECMED's right to property. That inquiry is particularly fact specific. Since the arbitral tribunal did not engage in a human rights analysis the government did not provide the facts to the standard needed for a proportionality analysis according to the record. The analysis is limited to the facts set out in the award.

(i) Is there a Legitimate Aim in Regard to the Measure in Question?

As set out under II.A. the right to health is a right protected by ICESCR which the state has to progressively realize. The Tribunal itself observed that:

the Arbitral Tribunal has to resolve any dispute submitted to it by applying international law

¹⁴² What constitutes a "fair", "just", or "reasonable" compensation is of course a matter of contention. It is beyond the scope of this article. For further reading in regard to the ECtHR: Helene Ruiz Fabri, *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. ENVTL. L.J., 148, 165 et seq. (2002).

provisions (Title VI.1 of the Appendix to the Agreement), for which purpose the Arbitral Tribunal understands that disputes are to be resolved by resorting to the sources described in Article 38 of the Statute of the International Court of Justice considered, also in the case of customary international law, not as frozen in time, but in their evolution.¹⁴³

Interestingly, the Tribunal only applied international law and customary international law in regard to its understanding of the right to property and the question whether indirect de facto expropriation amounted to expropriation. It did not discuss international law or customary international law applicable to the citizens of Mexico. Instead the tribunal found that it was not concerned with whether non-renewal of the permit was legal under domestic law. It held:¹⁴⁴

The Arbitral Tribunal will not review the grounds or motives of the Resolution in order to determine whether it could be or was legally issued. However, it must consider such matters to determine if the Agreement was violated. That the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent's domestic laws does not mean that they conform to the Agreement or to international law.

Even if the Tribunal is correct by not reviewing the legality of the non-renewal of the permit under domestic law the Tribunal in accordance with its own reliance on Article 38 of the Statute of the International Court of Justice has to take into account the international law and the international customary law applicable to the citizens of the state.

The state is obligated under Article 12 ICESCR to safeguard and to progressively realise the highest attainable standard of the health of its citizens. To protect its citizens from the health effects of

¹⁴³ *TECMED v Mexico*, *supra* note 137, at para. 116 n.133 (May 29, 2003) (*citing* *Mondev Int'l Ltd. v. United States*, ICSID Case no. ARB (AF)/99/2, para. 116 (Oct. 11, 2002)).

¹⁴⁴ *Id.* at para. 120.

hazardous waste is an obvious obligation. The denial to renew a permit for a landfill where hazardous waste is deposited due to the urbanisation of the area is a measure that is in accordance with the state's duty to safeguard its citizens' health and an aim the state is under an international obligation to realise.

(ii) Is the Measure Suitable to Achieve the Aim?

On the available facts the closure and relocation of the landfill is a suitable measure to avoid a hazard for the citizens of the close by urban centre. The municipality's motivation was stated as:¹⁴⁵ "[to] secure environmental safety in view of the rapid urban growth of Hermosillo, provide a response to the concerns that had been expressed and guarantee, in the long term, the environmental infrastructure to handle and dispose of industrial waste".

(iii) Is the Measure Necessary to Achieve the Aim?

The facts indicate that TECMED operated the landfill in accordance with all safety regulations and that the operation and even a proposed extension of the operation did not and would not threaten the public health of the citizens of the nearby town or the environment.¹⁴⁶ Therefore the non-renewal of the permit was not necessary to achieve the aim of safeguarding the citizens of Hermosillo from a public health threat and environmental disaster. However, it can be argued that a landfill that contains hazardous waste even if compliant with all safety regulations poses an inherent threat to the health of a nearby urban centre. By closing landfills containing hazardous waste close to urban centres is a preventative measure progressively realizing the right to health under Article 12 ICESCR.

¹⁴⁵ *Id.* at para. 110.

¹⁴⁶ *Id.* at para. 131.

(iv) Is the Measure the Least Rights Infringing Means to Achieve the Aim?

If the non-renewal of the license is the only measure suitable to prevent a health threat to the citizens of the nearby urban centre. It has to be borne in mind, that the need to dispose of hazardous waste is a necessary by-product of modern civilisation. Therefore, the state would potentially breach its obligations under Article 12 ICESCR by closing one landfill where hazardous waste can be disposed of without allowing for the hazardous waste to be disposed of somewhere else since it would risk the illegal dumping of hazardous waste. With that in mind the question arises whether the blanket non-renewal of the license is the least infringing measure or whether the non-renewal of the license accompanied with either compensation for the loss of the business and/or the offer of a different site to resume TECMED's business would have been a least infringing measure. According to the facts, it is worthy to note that negotiations in regard to relocating TECMED's business to a different site had taken place during and after the non-renewal of the perm it but had ultimately ceased.¹⁴⁷ The least infringing measure in regard to TECMED's property interest would have been to either offer a new site for its operation or adequately compensate them for its loss of business. As noted above, II.B.3. (especially footnote 92), the right to property has the inherit limitation that generally expropriation has to be accompanied with fair compensation to be justified. Even though the facts are silent on the issue it seems that for the state to fulfil its obligation under ICESCR and its obligation towards TECMED the least infringing measure would have been to offer an alternative site for TECMED's operation. However, it is acknowledged that the state can make choices in how to realize its obligations. Therefore, the state instead of relocating TECMED's business could have compensated TECMED for its loss of property and organised the disposal of hazardous waste differently. By not doing either the state did not use the least infringing measure to achieve its aim. The non-renewal of the permit without either fair compensation or re-location of TECMED's business is therefore disproportionate to the state's aim to safeguard the health of its citizens. It is an justified limit on TECMED's right to property.

¹⁴⁷ *Id.* at para. 112.

(v) *Considering the competing interests of the different rights bearers at hand is the measure proportional?*

Since the non-renewal of the licence is not the least infringing measure available to the state TECMED's right to property is disproportionately limited in balance with the citizens' right to health.

3. *Conclusion*

Using a human rights methodology to analyze TECMED's claim against Mexico in regard to the expropriation of its business demonstrates that a human rights analysis will take the rights of the investor into account. A human rights analysis will provide for an analytical framework that will allow a tribunal to balance the rights of the investor with that of the state's citizens. The use of a human rights framework will lead to more fully developed arguments under international law. It is significant that in TECMED the Tribunal relied on Article 38 of the Statute of the International Court of Justice in regard to the investor but not in regard to the state's citizens. Using the human rights framework in aiding its decision tribunals would combat what, commentators generally agree, that international investment law and arbitration have an adverse impact on the promotion and protection of human rights.¹⁴⁸

Having established a breach of the investor's right to property the question becomes what the appropriate remedy for a breach of the human rights violation is. The question of compensation is without doubt of utmost importance for the victims

¹⁴⁸ See Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization 2* (N.Y.U. Global Law, Working Paper No. 1, 2005).

of human rights abuses.¹⁴⁹ In regard to the violation of the right to property the ECtHR has generally held that:¹⁵⁰

the protection of the right to property ... would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicant.

The aim of this paper was to demonstrate that using a human rights framework to analyze an investor-state dispute will adequately address the rights of the investor and the state's citizens. Using a human rights methodology will aid a tribunal's analysis of the dispute and will contribute to the legitimacy of its decision. The question of a fair remedy is outside the scope of this paper.

IV. GENERAL CONCLUSION

There is no need for an arbitral tribunal in an investor-state dispute to have any "Berührungängste" in regard to human rights. International human rights do provide a methodological framework that allows for a balanced consideration of both the investor's position but also the respective state's citizens' rights which the state has to safeguard and/or progressively implement. The investor's right to property which is at the center of the contention is not an isolated

¹⁴⁹ See, e.g., DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2015); EWA BGINSKA, DAMAGES FOR VIOLATIONS OF HUMAN RIGHTS: A COMPARATIVE STUDY OF DOMESTIC LEGAL SYSTEMS (Springer, Heidelberg, 2015); JASON VARUHAS, DAMAGES AND HUMAN RIGHTS (Hart, 2016); JAGMOHAN MISHRA, HUMAN RIGHTS VIOLATION: CONTEMPORARY CONCERNS & REMEDIES (Akansha Publishing, 2011); see also G.A. Res. 60/147 (Dec. 16, 2005).

¹⁵⁰ James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A), para. 54 (1986); see also Lithgow v. United Kingdom, 102 Eur. Ct. H.R. (ser. A), para. 120 (1986); Holy Monasteries v. Greece, 301-A Eur. Ct. H.R. (ser. A), paras. 70-75 (1994); Hentrich v France, 209-A Eur. Ct. H.R. (ser. A), para. 48 (1994); Pressos Compania Naviera SA v. Belgium, A332 Eur. Ct. H.R. (ser. A), para. 38 (1995); Guillemin v. France, 1997-I Eur. Ct. H.R., paras. 52-57 (1997).

right but a right which is instrumental, in the company with other rights, in fostering socio-economic well-being¹⁵¹ Only the interplay and inclusion of all members of a society, natural and legal persons, nationals or foreigners, can society strive and attain the highest possible standard of well-being. The international human rights framework recognizes this and has tasked the state with the duty through fair and reasonable government, i.e. through balancing the rights of every member of society, to progressively achieve the highest possible standard of well-being.

An international arbitral tribunal, as part of the international community, is charged with overseeing whether the state has balanced the rights at play justifiably. In essence, there can be no doubt that the state has to be able to take any measure which enhances the human rights of its citizens or safeguards them from harm. If that measure infringes the rights of the investor the measure will be justified if the investor is compensated. In other words, the state can do anything as long as it compensates the investor. There might be situations where the measure is of such importance that in balance the property infringement of the investor does not warrant compensation.¹⁵²

For an investment tribunal to include a human rights analysis into its decision-making process will increase its legitimacy. Even though desirable, there is no need for stronger human rights clauses in investment treaties. The investment tribunals bear the responsibility to implement the law, regardless whether states and investors felt before responsible for including a human rights clause in their investment treaties. Since human rights provide the overarching framework any investment treaty, bi-lateral or multi-lateral, has to be interpreted in light of human rights and is limited by them. Accordingly, also lawyers should be aware that they enjoy the opportunity to introduce human rights considerations into the arbitral conversation¹⁵³, as already mentioned no matter for which

¹⁵¹ Luis Valencia Rodríguez, *The right of everyone to own property alone as well as in association with others*, para. 116, UN Doc. E/CN.4/1994/19 (Nov. 25, 1993).

¹⁵² As noted earlier, it is outside the scope of this paper to discuss what constitutes fair compensation.

¹⁵³ Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* 20 (International

side they argue. Then red riding hood and the wolf may have a break from playing tag and come more often together for a cup of tea on eye level.

Institute for Sustainable Development Research Paper, Apr. 2004), https://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf (last accessed Feb. 15, 2017).