Faith Betrayed: International Investment Law and Human Rights

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A. Introduction

Foreign direct investment (FDI) is back, albeit unevenly and in different ways than before. While not at its pre-crisis zenith, global FDI flows picked up in 2011 and were projected to break the $1.5 trillion barrier later that year,1 buoyed by favourable interest rates and slowly recovering commodity prices. But the mood remains cautious. Just as the woes of the recent turmoil seemed increasingly distant, fears of a double-dip recession due to lacking growth spread. The coordination of economic policy on a larger scale remains fractious; volatile equity indices attest to the hard questions posed by issues such as currency integration and bank recapitalisation. Domestically, most states continue to show an unabated interest in attracting and regulating foreign investment. But while knee-jerk protectionism in the wake of the crisis appears not to have manifested, state measures are gradually becoming more and more restrictive.2 Concerns besides – but potentially affected by – the fortification of investments are increasingly felt, all the more since developing and transition economies now account for the majority of global FDI flows. This paper deals with one such particular concern: the international protection of human rights. It has three main parts. First, I will situate international investment and human rights law in their broader context. In a second step, I want to dig up a few bones of contention. What then follows is an outline and assessment of strategies for dealing with the interaction between these two normative projects.

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2 Ibid. x, 94.
B. The Project of a Perfect Society

I. Humanitarian Internationalism

For at least the last half-century, one of the central narratives of international law has been that the individual is increasingly displacing abstract entities, typically states and international organisations, as the system’s pivot. What was once mostly considered a transactional inter-state affair has sprouted novel and ambitious projects of substantive global regulation or governance, spanning a diverse range of well-intended ‘humanitarian’, ‘liberal’ or ‘transatlantic’ ventures. They draw upon the vocabulary and ethic of benevolence, sympathy and social reform: human wellbeing as a basic good rather than an instrumental good for the glory of nations. In other words, it is no longer the links between habitats that are focal, but the conditions within these habitats – **Lebenswelten** – themselves. It is a theme that fits well with the prevailing self-image of international law as a force of moderation and civilisation.

This is the dominant perspective at the beginning of the third millennium. Policy-making and statecraft both within and beyond the state are measured against it and have to make efforts to conform. Not that different designs and shades of opinion are not tolerated, quite the opposite, but they should respect that basic canon, ‘perfectly joined together in the same mind and in the same judgment’. Like all societies, modern international society has developed a theory of itself, broadly humanitarian, together with a vocabulary for condemnation and censure, for which international law is a common vent. The latest systemic and formalised emanation is likely to be international criminal law, but the most prominent variant to date are indubitably human rights. These projects are not just mystical notions. They consist of people working in support of – often in pursuit of – an idea such as clean seas, trade liberalisation, investment protection or human dignity. Through their disciples they claim supreme and inerrant authority, rule and guidance over a subject matter, teach doctrine, seek the power of jurisdiction as well

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5 As put by Paul: *King James Bible*, 1 Corinthians 1:10.

as the enforcement of necessary laws, while claiming independence from local control. These traits prompt the ecclesiastical metaphors used in this paper.

Of course there is considerable overlap and fluidity between different projects, both ideologically and personally; nor are these in themselves not inestimably nuanced. Most well-meaning internationalists would likely support property protection and human rights, the environment etc. It might seem archaic to cling to separable notions in modern times where plurality has become a popular buzzword for describing complex phenomena. But the fact that things are complex does not mean that they are free from conflict. Indeed, one can assume that the more interests that are being considered, the more likely it will be that difficult choices have to be made.

All these normative proposals, including investment law, have to make a justificatory effort to fit in, which is not necessarily an empirical or logical demonstration, but an effort to garner approval on reasoned rather than idiosyncratic grounds. The academic reconstruction of these efforts of recognition through acceptance is often conducted under the heading ‘fragmentation’ of international law, a laden term that implies that something that belongs together is splintered. That perspective, the view from above, tends to emphasise (hypothetical) perfect systemic unity, rather than competing normative projects. Yet viewed from the ground, the matter is far less academic, but a testing point; failure is costly and brings a risk of ultimately being shunned by the mainstream. This paper traces the efforts of international investment law to assert its place within the prevailing attitude of humanitarian internationalism as well as the opposition it faces in so doing.

II. Schism?

Propelled into the limelight by its successes, the investment regime is currently on the back foot. Various failings are alleged; they will be analysed below. At a more general level, investment law and arbitration are accused of embracing schism. The classic rebuttal involves invoking scenes of a shared history of investment and human rights protection. This will be assessed now.

1. Historical Development

Treatments of international investment law, and in particular bilateral investment treaties (BITs), tend to begin with a nod to diplomatic protection.\(^8\) It is a first pass at rapprochement and roughly goes as follows.

Ever since states assumed the sovereign monopoly to regulate their internal affairs, individuals were subject to the judicial and executive jurisdiction of the state on whose territory they happen to be. Their ill-treatment – say, unlawful imprisonment or expropriation – would accordingly be dealt with by the competent authorities of that state. Provided of course, and this is indeed a rather big caveat, the state is in fact willing to administer some form of justice, which is not always the case, particularly if it is itself involved. The situation is particularly acute with respect to foreigners.\(^9\) They are traditionally vulnerable to maltreatment, including (but of course not limited to) business risks of a non-commercial nature, e.g. nationalisation and other regulatory measures interfering with their expectation and reliance interests.\(^10\) And, in an increasingly globalised world, in which opportunities for foreign investment often exceed the prospects of home state investment,\(^11\) it is not unlikely that the injured individual in question will indeed be an alien, i.e. a national of a state other than the host state.

The traditional remedy for aggrieved foreigners, be they investors or otherwise, would be to petition their home state to take up their case on their behalf. This solution, known as diplomatic protection or espousal, however suffers from various drawbacks and has hence only played a comparatively marginal role.\(^12\) It subjects individuals to the goodwill of their governments and the vagaries of international relations, putting control of proceedings out of their hand. Moreover, it does not resolve the question whether the host state’s action was actually unlawful, a question of substantive law. It hence lacks iterability, which is a cardinal ingredient of a predictable and stable environment. Diplomatic protection instead imposes a residual and paternalistic obligation on states to regard the


\(^9\) Theoretically, nationals can avail themselves of the political process and seek more fundamental forms of redress or adjustment. That this is often rather optimistic needs little explanation. But before the rise of the territoriality principle foreigners were technically outlaws, with law being personal, as in Roman law.

\(^10\) See R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford Univ. Press, Oxford 2008) 3-7 (asserting that ‘once […] negotiations are concluded and the investor’s resources are sunk into the project, the dynamics of influence and power tend to shift in favor of the host state’).


citizens of other states as the bearers of rights, so that aliens ought not to be treated worse than nationals, or perhaps even better.\textsuperscript{13} It does not itself afford any rights other than compelling the local state to fulfil those of the foreign national. It also smacks of fractious gunboat diplomacy rather than the rule of law.

New solutions were hence called for. Since the domestic law of the host state is potentially suspicious, the obvious candidate for rules governing the treatment of individuals (and their property) was international law. In what is by now a familiar tale, an intricate network of international treaties emerged as the principal source of norms.\textsuperscript{14} BITs are the most numerous among these instruments, currently numbering over 2,800.\textsuperscript{15} They continue the treaty protection for investors developed in the context of Friendship, Commerce, and Navigation (FCN) treaties.\textsuperscript{16} As treaties between states they fall squarely within Art. 38 (1) (a) of the Statute of the International Court of Justice as a primary source of public international law.\textsuperscript{17} Over 300 other international investment agreements (IIAs) are in existence, for instance in dedicated chapters of trade agreements such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty (ECT), thus pushing the combined number of IIAs to over 3,100 a decade into the new millennium.

Apart from substantive rights, modern IIAs afford investors another crucial benefit. As is well known, they grant private investors direct access to international arbitration with the treaty partner’s government as an alternative to settling an investment dispute in the host state’s domestic courts. This differs from the state-state process of areas such as trade law. Investor-state arbitration can avoid many of the (actual or imagined) pitfalls of the traditional international law rule concerning the exhaustion of local remedies and lends the investment agreement practical functionality and real heft. Usually, the host state has offered its consent to arbitration in the BIT, which can later be perfected through acceptance by an aggrieved investor. Arbitral awards rendered are final and binding. By and large, these dispute resolutions mechanisms have reassured investors and have contributed greatly to the effectiveness of contemporary international investment law.\textsuperscript{18} IIAs and their enforcement mechanisms are nowadays widely considered

\textsuperscript{13} See EM Borchard, 'The Diplomatic Protection of Citizens Abroad' (1913) 7 American Journal of International Law 497, 516-518.
\textsuperscript{14} Customary international law standards on the protection of foreign investment were marred by incessant disagreement.
\textsuperscript{15} See UNCTAD (n. 1) 100. Some variance must be allowed to account for developments since publication of the report.
\textsuperscript{17} ICJ Statute, 26 June 1945, 1 UNTS XVI.
to be a fundamental cornerstone of a less volatile environment for foreign investors.\textsuperscript{19} This is corroborated by the fact that the recent financial and economic crisis has not dented the popularity of this model: over 60 BITs and other IIAs were concluded in 2010.\textsuperscript{20}

The traditional narrative of the genesis of investment protection is perhaps too eager for its own good. The human rights project is effectuated by rather different means. To begin with, diplomatic protection is not part of its founding myth.\textsuperscript{21} That belongs to the heroic reaction to the horrors of World War II and the big bang of 1948, even if rights can be traced back to medieval natural law doctrine and the emancipation of concepts such as \textit{ius} and \textit{dominium}.\textsuperscript{22} Human rights law is heavily suffused with natural law sensitivities, although it purports in the Grotian tradition to be based on logical rather than theistic necessity.\textsuperscript{23} It is the purest form of humanitarian internationalism. There are far fewer treaty instruments, some of which tend to be considered ‘softer’ as concerns their legal status, albeit more ambitious in scope. These are usually multilateral and in the hands of international organisations such as the UN, the International Labour Organisation (ILO) and the Council of Europe or specifically established bodies. Leaving material content aside for a moment, the main differences relate to the exhaustion of local remedies and diversity of nationality principles. In general, the law relating to the protection of human rights requires only the former, investment law only the latter. Human rights are by definition not limited by na-


\textsuperscript{20} UNCTAD (n. 1) 100.

\textsuperscript{21} Evidently, that technique does not assist maltreated host state nationals.

\textsuperscript{22} There was certainly no such concept in traditional Aristotelian ethics. See R Tuck, \textit{Natural Rights Theories: Their Origin and Development} (Cambridge Univ. Press, Cambridge 1979) chs. 1, 3.

\textsuperscript{23} Cf H Grotius, \textit{De jure belli ac pacis} (reprint of E.J. Brill (1939) edn Scientia, Aalen 1993 (1625)) 36 (Lib. 1 Cap. 1 § 1 x 5) (claiming that even God could not make that two times two did not equal four or that what was inherently evil should not be evil, thereby incurring the ire of his Protestant contemporaries such as Pufendorf).
tionality. The scope of investor protection conversely extends only to investors of the other treaty party. Moreover, customary international law has seen a renaissance in human rights law as a means to fill in blanks, although not necessarily to everyone’s satisfaction. Supervision and compliance of this normative project is often achieved through persuasion and pressures relating to reputational (rather than financial) costs. NGOs and Special Rapporteurs play an important role in the monitoring process. Litigation is an important mechanic in certain regional contexts – chiefly in Europe and the Americas –, but widespread ad hoc arbitration is not a part of the toolbox.

Turning to the reasons for this discrepancy, public choice and game theorists would simply argue that the split is ultimately based on what states consider in their best interest; indeed, it is hard to shake the impression that the different approaches revolve around human rights treaties still frequently being considered a net cost to signatories, whereas investment treaties are seen as a net benefit.

Some observers however hint at different normative dimensions. In such accounts, the human rights project strikes back, playing hard to get and declining to surrender pride of place: human rights law has always been firmly wed to public law ideals and committed to enabling individual freedom and self-determination, whereas investment law displays noticeable streaks of a minimalistic private law ethos. An individual’s relationship with the superimposed authority is always marked by compulsion, but investments and their terms are thought to be voluntary, at least at the outset. Although subordination remains an important facet, reciprocity and promise-keeping are central normative vantage points. This explains the importance habitually attached to prior negotiations and representations made by states. Such a quid pro quo mentality is not as such antagonistic to international law, given its orthodox emphasis on sovereign equality, but it does shift the focus from a purely vertical to a more horizontal relationship, at

24 See only Universal Declaration of Human Rights (1948) (recognising in its Preamble the ‘inherent dignity’ and ‘the equal and inalienable rights of all members of the human family’).
28 For an ‘internal’ perspective see K-H Böckstiegel, An Arbitrator’s Perspective on BITs and their Relation to Other International Law Obligations, 24(2) ICSID Review (2009) 495, 507.
29 Think only of umbrella clauses or the protection of legitimate expectations.
least during the early stages before the investor has committed himself. Fundamentally, investment promotion and protection is thought to prefer transactional to fraternal relationships, which lie at the core of humanitarian internationalism. The particularistic emphasis contained in a myriad of tailor-made bilateral arrangements of not inconsiderable variance differs markedly from the universalist aspirations of human rights law that finds expression in multilateral agreements and *erga omnes* norms. Investment treaties and the rights springing from them are in the end classified as (contractual) bargains, whereas human rights instruments resemble sweeping ‘legislative’ expressions of fundamental values, sometimes even of *jus cogens* status.

This difference is translated into technicity and ostensible dislike for policy informing the former and creed and ‘bending of the black letter rules’ permeating the latter. One notable success of the de-politicization strategy is the Iran-US Claims Tribunal in The Hague. But the most obvious upshot is of course the largely confidential *inter partes* model of dispute settlement preferred by the investment regime, which emulates international commercial arbitration. Human rights law mechanisms, on the other hand, tend to be public and normally wear their hearts on their sleeves, e.g. in published expert reports or open court proceedings before the European Court of Human Rights (ECtHR) or the Inter-American Court of Human Rights (IACtHR). While the Universal Declaration of Human Rights was adopted with a standing ovation in a UN General Assembly meeting, the system of investment protection was largely sired by professionals behind closed doors as an alternative to abandoned multilateralism. Not only despite, but *because of* their vast numbers, individual investment treaties avoid the critical gaze of the public eye.

These again are caricaturesque observations. Instead of being of purebred private pedigree, investment law has always had a curious hybrid flavour, being a melange of specific treaty protection, trade law, public international law principles and international commercial arbitration. As will be examined further below, non-investment concerns are increasingly featuring in investment law and arbitration, and there are certainly (academic) voices even among those who do not impugn the current investment regime system as a whole that are urging a more ambitious paradigm. But the jab reinforces the predominant humanitarian narrative. The sentiments are further stoked by the fact that most contemporary

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30 See e.g. JW Salacuse, *The Law of Investment Treaties* (Oxford Univ. Press, Oxford 2010) 285-287 (conceiving expropriation protection as a means to ‘preserve the original bargain that the investor has made with the host country’).

investors are juridical persons possessing financial and political leverage easily dwarfing that of ordinary individuals and in some cases even rivalling that of public entities. True, as one commentator has pointed out, all states possess the inherent power to regulate within their jurisdiction, putting even the largest investors at risk.\(^3^2\) Nor should one forget that there are many medium-sized companies doing business abroad. But the combination of the fact that most modern investors can punch harder than the average individual and the opinion that what is at stake is at the end of the day profit rather than principle – in short, the perceived difference between those who do good and those who do well – has undeniably driven a wedge between the two projects.

The only hope lies in hopping on the humanitarian bandwagon. A common retort is to submit that both investment law and human rights redress power imbalances, chiefly the impotence of the individual vis-à-vis the might of the state.\(^3^3\) And are not the provisions of human rights conventions that protect property irresistible evidence of a common heritage and course?\(^3^4\)

There is indeed a connection, but it is rather mundane. Both lay claim to the regulatory space of states in pursuit of a more perfect society and neither is particularly aware of its costs and side effects. Granted, it is easy to forget that individual rights, assuming for a moment investors actually have rights under IIAs rather than just the states, are also important for – and perhaps ultimately indivisible from – group rights.\(^3^5\) But human rights are conceived by the faithful in revolutionary and transformative terms; a quantum leap. They claim to be a memorial to the moral imagination of present and future generations. Even if the remedy is ineffective and judicialisation insufficiently leveraged, human rights are \textit{per se} worthwhile. They wholeheartedly embrace the vocabulary of justice.\(^3^6\) It would on the other hand be rather credulous to portray investment law as a specialised form of human rights protection. It is first and foremost about busi-

\(^{32}\) Lowe (n. 12) 203.
\(^{36}\) The Universal Declaration speaks of nothing less than ‘freedom, justice and peace in the world’.
ness, not charity.\textsuperscript{37} Of course FDI can have a positive impact on personal welfare in the host state. But that is not the point here. IIAs are nowhere near as ambitious. They are conservative, not radical or emancipatory. True, many contain promotion or encouragement obligations. These might add more weight to constraints on state conduct; they are however certainly not understood to impose a specific economic policy on states.\textsuperscript{38} IIAs seek to lock in a \textit{status quo}, generally eschewing all too grandiloquent language of peace and justice. That is of course a normative endeavour in its own right – perhaps most evident in the common grant of ‘fair and equitable treatment’ –, but with a different flavour and purpose. The following section bears this out by considering common treaty provisions.

2. The Role of Human Rights Protection in Existing IIAs

a) Express Reference to Human Rights

BITs and other IIAs could of course directly embrace human rights either by imposing obligations on investors or by referring to state duties. In practice very few, if any, investment agreements mention human rights.\textsuperscript{39} For instance, among the mass users of IIAs, no explicit reference is found in the Model BITs of Germany (2008), France (2006), China (2003), India (2003), the United Kingdom (2005), or the United States (2004).\textsuperscript{40} The multilateral investment agreement for the Common Market for Eastern and Southern Africa (COMESA), adopted in 2007, lists minimum human rights standards relating to investment as a potential

\textsuperscript{37} Cf HJ Abs, \textit{Die rechtliche Problematik privater Auslandsinvestitionen} (C.F. Müller 1968) 7-8 (on the predominantly economic rationale).


future agenda item for a meeting of ministers.\textsuperscript{41} In a similar vein, the EU-Russia Partnership and Cooperation Agreement, which among other things envisages the establishment of a framework for the promotion of investment between the parties, loosely provides that the treaty parties ‘endeavour to cooperate on matters pertaining to the observance of the principles of democracy and human rights’ by way of regular political dialogue.\textsuperscript{42} But that is about it. This dearth of express references goes hand-in-hand with the one-sided design of BITs that does not address investor obligations. They are first and foremost commercial instruments.

A twist was attempted by the draft 2007 Norwegian Model BIT, which contained preambular language reaffirming the treaty parties’ ‘commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights,’\textsuperscript{43} Comparable, if slightly less elaborate, wording is contained in the preamble of the 2002 Free Trade Agreement between the European Free Trade Association (EFTA) and Singapore. Preambular wording however does not amount to substantive provisions. Rather, it is an indication of the treaties’ objects and purposes and hence an aid to interpretation.\textsuperscript{44} It cannot by itself compel the parties.

b) Related Provisions

Turning to related provisions, certain issues such as labour standards, anti-corruption and the economic empowerment of historically disadvantaged groups are occasionally mentioned in BITs.\textsuperscript{45} This is again sometimes done by preambular language. Most post-millennial Finnish BITs for instance posit that ‘the development of economic and business ties can promote respect for internationally recognised labour rights’ and that the objectives of the BITs ‘can be achieved without relaxing health, safety and environmental measures of general application’.\textsuperscript{46}

\textsuperscript{41} Art. 7 (2) (d) (iii).
\textsuperscript{42} Art. 6.
\textsuperscript{44} VCLT Art. 31(2). \textit{Cf Asylum (Colombia/Peru)} 1950 ICJ Reports 266, 282; \textit{Rights of Nationals of the United States in Morocco} 1952 ICJ Reports 176, 196.
\textsuperscript{45} OECD (n. 39) 143 (Table 3.1); L Liberti, 'Investissement et Droits de l'Homme' in P Kahn and W Ben Hamida (eds), \textit{Les Aspects Nouveaux du Droit des Investissements Internationaux} (Nijhoff, 2007) 791-852.
\textsuperscript{46} See e.g. the Finland-Guatemala BIT (2005), Preamble.
Besides the preamble, similar wording can occasionally be found in actual treaty provisions. The most prominent examples are the BITs concluded by the United States or Canada following NAFTA. Under the US Model BIT (2004) treaty parties thus acknowledge that it is ‘inappropriate’ to encourage investment by weakening or reducing the protections afforded in domestic environmental or labour laws. In light of this, ‘each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.’ The Canadian Model BIT (2004) contains a parallel provision in Art. 11 concerning domestic health, safety and environmental measures.

Summing up, plain reference to human rights provisions in BITs is virtually unknown. Associated areas are increasingly mentioned in several more recent investment agreements or templates, yet always with state regulation rather than investor obligations in mind. Overall, available savings are considerably more limited that in trade law, for instance. The mere absence of such references need not however suggest any encroachment between the two projects. Something more is required, which will be discussed next.

**C. Bones of Contention**

Investment regulation is a particularly dynamic example of the blurring of national and international law, general and specific norms, and public and private spheres. There is little serious doubt that it has a broad impact on a wide range of actors and situations. Modern investment law and arbitration has gained much attention due to the perception of large-scale foreign investment cutting across other essential interests such as human rights, labour standards or environmental law. More than just being a project operating differently, it is not infrequently cast as an at times negative or detrimental project. These are not the

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47 Arts. 12 and 13.
48 Cf Reiner and Schreuer (n. 40) 83 (‘peripheral at best’); Mann (n. 39) 9, 11, 15.
contentions of the NIEO proponents of yore, but of a concerned global public, often developed nations, of well-intended, mainstream, liberal internationalists.\(^{52}\)

But the preceding paragraph is inaccurate if it conveys the impression that two perfectly symmetrical regimes collide like a cat crashing into a mirror. The discourse is not one conducted under conditions of total parity. It is framed from the perspective of disloyalty to the human rights project. Three interactions are conceivable: (i) an investment violates human rights; (ii) a state infringes an IIA by regulating with a view to human rights; and (iii) the rights of the investor are conceived in human rights terms. The first variant involves the liability of multinational corporations and is not normally conceived in terms of clashing regimes. It is a specialised inquiry conducted entirely within the parameters of human rights. The second possibility is the red thread of most theoretical discussions concerning these two fields of law.\(^{53}\) The plot is clear: human rights are under attack by investment law. The actors are typecast. Here, human dignity. There, if not capitalism run rampant or colonialist adhesion, then at least slightly grimy second-order normativity. The third interaction is the odd man out. It is closer to practical experience, but viewed with suspicion by the human rights community, seen as an attempt to subvert their project. Faced with the bad news, the investment disciples, after denial and anger, seek to bargain their way out, desperately trying to fit within the human rights framework. This is most notably done by invoking shared origins and convergence as in the right to property or through compatibility techniques such as \textit{lex specialis}. Estranged siblings, perhaps, but siblings nonetheless. Some of those techniques will feature below; the historical point has already been addressed. But nobody expecting to be taken seriously would demand the inverse, that human rights obligations ought to fit into the Procrustean bed of the investment regime. Assured of her project’s pre-eminence, the human rights professional graciously extends an olive branch and joins the ‘anti-fragmentation’ or ‘harmonisation’ debate. Even human rights avoid absolutism: most can be qualified, none are to be invoked in bad faith. In a masterful double twist, the abjuration of reconciliation attempts as


\(^{53}\) See e.g. Simma, ibid. 10 (stating that investment law ‘cannot adequately respond’ to human rights challenges).

crude ‘misappropriation’ is the most evolved form of this hegemonic strategy. All of this is a testament to the commanding vocabulary of human rights, which belies its perennially compromising existence. But this is not the place to discuss the structure and shortcomings of such humanitarianism in general, i.e. the large question whether there is still an emancipatory sting left rather than just feel-good varnish that is part of the problem; rather, I wish to draw attention to the ritualised dance that takes place under the now worn rubric of ‘fragmentation’.

I. Denial

Driven by their own take on well-meaning humanitarianism, some insist that there is in fact no tension or conflict to speak of. ‘What is all the fuss about?’ they exclaim in exasperation or surprise. Are we not also the good guys, trying to make things better, little by little? Are the externalities of investment protection not negligible compared to what is being achieved? This line of defence is particularly popular with in-the-know professionals, whose instinctive reaction to utterances of other concerns besides their immediate field of specialisation is often a not-so-surreptitious glance at their personal communication device, perhaps coupled with rolling eyes. Such denial comes in two flavours, a weak one and a strong one.

1. Weak Scepticism

The weak version tends to selectively exploit facts. It points to data such as the overall rather favourable win-loss ratio of states in investment arbitrations or the dearth of cases in which human rights points were successfully pleaded. Surely, *ex negativo*, the conflicts alluded to in this larger debate are ‘hypothetical’ and the unease voiced by critical commentators premised on stubbornly ‘counterfactual’ reasoning?

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56 For one such discussion see D Kennedy, *The Dark Sides of Virtue* (Princeton Univ. Press, Princeton 2004).

Such arguments based on burden of proof are sometimes valid, particularly in legal proceedings. Little surprise then that they come naturally to professionals: ‘if it doesn’t fit, you must acquit’. But they can be taken too far. Where the premises themselves are in doubt or more than one rationality is in play, as in most scientific or political arguments, *ex negativo* points quickly acquire an aftertaste of sophistry. It is hard to see exactly why the bare fact of whether or not an issue has already been properly arbitrated or otherwise publicly come to a head should be the authoritative criterion for determining whether a specific concern is real or a principled objection is valid. For one, this shortage might itself be part of the problem. What is more, not only the actual but also the potential financial and political cost of investor-state arbitration or the threat thereof might suffice to cause a chilling effect on national regulation.58 The host states’ freedom to regulate becomes a proxy for human rights in this context.59 Of course, this in turn has to be taken with a considerable pinch of salt, since host states cannot be assumed to be paragons of virtue themselves. But this ‘regulatory space’ is a common model for a more encompassing analysis.

Yet that should not imply that this debate is entirely abstract. One does not need a particularly fertile imagination to come up with conflicts; in fact, the inability to do so is more likely to result from an ignorance of human rights law. This will be fleshed out shortly.60

The paucity of reported cases to date involving clear invocations of human rights is attributable to certain factors.61 Investors are often adequately protected by the BITs themselves, which impose no obligations on them. Host states cannot request such arbitration independently since this is also a preserve of investors. As will be elaborated below, limiting concepts such as jurisdiction and applicable law can provide further obstacles. Furthermore, it is unclear to what extent a non-state party would even be subject to human rights obligations. Human rights are hence most likely to appear as defences justifying state measures impacting foreign investment. Then again, states might be complicit in a human rights violation or fear setting an inconvenient precedent through their commitment to such arguments. *Amicus curiae* briefs, i.e. submissions by non-disputing


60 See C. II. and IV. below.

61 See Reiner and Schreuer (n. 40) 88-94.
parties with a strong interest in the outcome of a case, are however increasingly accepted. Be that as it may, the fact that there are only an exceedingly small number of reported cases in which BIT claims and human rights arguments have been openly addressed is in itself cause for concern, given the many conflicts realistically imaginable.

But did BIT tribunals not even expose some of the nefarious doings of dictatorial regimes worldwide, the sceptic responds? Little suggests that investment protection cannot also have positive spillover effects concerning the human rights situation in host states. Yet it is difficult to draw generalisable conclusions from such propositions or to seek a precise answer as to when the omelette was worth the broken eggs. What is of interest here is that this strategically echoes the expected brand of humanitarianism. And even assuming that this is true, it would still seem worthwhile to shine the spotlight on those areas of the investment law system where there is room for improvement.

2. Strong Scepticism

The strong variant of denial is premised on a legalistic argument that requires an almost metaphysical suspension of disbelief: There is no conflict since the state can pay compensation. This is as blunt as it is bizarre. It evidently does not make the plain fact that the host state may well be forced to choose between two ills – violating an obligation relating to foreign investment or violating a human rights obligation – disappear into thin air. A first objection is that arguing about law is not exhausted by arguing with legal sources but, ultimately, always a mixture of quarrelling both about normativity and its concrete application. But forget that for a moment. The suggestion is that investor rights in the form of state duties are little more than price tags; states can mess with investors as much as they like, be it benignly or not, provided they fulfil the requisite conditions. Chiefly, they must pay accordingly. That argument is feeble for at least three further reasons. First, only the wording of expropriation clauses supports such an understanding of compensation being part and parcel of primary investment obliga-

62 See Nelson (n. 34) 47.
63 See e.g. H Kelsen, *Reine Rechtslehre* (Franz Deuticke, Leipzig & Wien 1934) 20-38 (on law as both ideology and social technique); D Kennedy, 'Theses about International Legal Discourse' (1980) 23 German Yearbook of International Law 353, 362-365 (on the basic tension and movement in legal discussions between abstract ideal and concrete application); V Heiskanen, *International Legal Topics* (Lakimiesliiton Kustannus, Helsinki 1992) 82-83 (on how international legal practice shies away both from directly normative and plainly concrete decisions).
tions. Other core provisions, such as most-favoured-nation treatment (MFN) and fair and equitable treatment (FET), are not expressed in a way that suggests that recompense is anything more than a secondary obligation, remedy or consequence. Second, this understanding rides roughshod over the purpose and normative dimension of investment protection. Investors are not primarily interested in compensation. They want to be left alone, i.e. performance. Last but not least, the whole ‘efficient breach’ theory with its eccentric take on duties is notorious for leading to repugnant or absurd results when pursued too aggressively.

What then are the alternatives for strong scepticism? There is the blame game: the host state should not have entered into potentially inconsistent obligations. Perhaps, but imprudence does not avoid the uncomfortable reality of being caught between a rock and a hard place, quite to the contrary. Nor is denial based on the deliberate decision of the state to privilege human rights in the particular instance convincing, unless one is also taken by the argument that handing over one’s wallet in a robbery is a matter of free choice. *Pacta sunt servanda* or the morality of promise-keeping are also of little assistance, as they would – all other things being equal – also apply to many rival obligations. The upshot is that most sceptics embrace the weaker notion of denial based on empirical scarcity that has been examined above. In what follows I will proceed from the assumption that there is a conflict, since this is the pattern mainstream discourse chooses and just in case the denialists are wrong.

II. Conflicting Legal Obligations

A perennial stumbling block regarding a fruitful debate over supposedly clashing regimes stems from differing perceptions of what it means for there to be ‘collision’ or ‘conflict’. Assumptions that there is no conflict because of lacking dispute resolution experience or technico-legal impossibility have just been dealt with. At the other extreme, it might be possible to speak of a conflict as soon as purposes or intentions of different normative projects are somehow not identical or their consequences at odds. An undertaking of such ambition requires data collection, extensive macro-economic modelling, and large-scale socio-political theorising. It directly addresses social engineering and is hence characteristically the preserve of policymakers and activists. The *via media* is that of potentially

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64 See e.g. German Model BIT (2008) Art. 4 (‘Compensation in case of expropriation’). Out of the glut of writing on the conditions for expropriation see only Newcombe and Paradell (n. 38) 369, 377-396.

65 Is there an entitlement to indecent exposure under S. 66 of the UK’s Sexual Offences Act 2003 that can be ‘purchased’ for 2 years imprisonment?
inconsistent legal obligations, which typically informs the fragmentation debate amongst lawyers, often academically-inclined ones. It leads to the techniques sketched later. What then are the conflicting norms?

In a broad sense and as such rather unremarkably, the laws of international investment and human rights, like much of public international law, are designed to limit certain types of state action. Sometimes, however, such state action is based on rival obligations. Competing regimes are by no means a novel phenomenon, but the issue rears its head rather prominently in the investment law context, given its effectiveness, the extent of modern investor protection and the frequently very deeply intertwined involvement of international investors in matters of great public interest.

In the context of human rights, social and economic rights are likely candidates. The right to water stands out. Even if this might not yet be considered customary international law, states that are a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 owe a duty to ensure sufficient, safe, accessible and affordable drinking water. The right to water is not mentioned expressly in the ICESCR, but has been said to flow from provisions on living conditions and health. It also features in other legal instruments. Political recognition has been forthcoming lately, as evinced by a resolution of the UN General Assembly. What is further of interest in an investment setting is that the UN Human Rights Council reaffirmed in a resolution that the delegation of the delivery of safe drinking water or sanitation services to a third party does not exempt a state from its human rights obligations and that states should ensure that non-state service providers fulfil certain obligations. It is

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66 See D. below.


70 UN GA Res, The human right to water and sanitation, A/RES/64/292, 3 August 2010 (122 in favour, none against, 41 abstentions).

71 UN HRC Res, Human rights and access to safe drinking water and sanitation, A/HRC/RES/15/9, 6 October 2010.
important to note that the modern international human rights regime does not concern itself solely with findings of illegality or actual treaty breaches. It is far more demanding. Parties to the ICESCR for instance must progressively realise these obligations under the ‘respect, protect, fulfil’ mantra. Even if it is at times hard to pin down, this is ‘real’ normativity.

It is not difficult to come up with situations in which the right to water might come into play, for example based on the scenario that the host state is prohibited from interfering with rates or management in the utilities sector. Familiar cases like Biwater Gauff, Aguas del Tunari, Vivendi, Suez, or Abitibi Bowater would each only require a twist or two to fit the mould. Nor is the right to water the only sticking point. Within the ICESCR alone the following provisions could also be a basis for action that an investor considers illegal: the right to safe and healthy working conditions (Art. 7(b)), the right to fair wages and equal remuneration (Art. 7(a)(i)), the right to form trade unions and strike (Art. 8(1)), the right to social security (Art. 9), the right to an adequate standard of living (Art. 11). Various methods exist for blocking out and including such rival contentions. Since beating is usually attempted before joining an antagonist, I will examine these in that order.

III. The Difficulty of Making Human Rights Points in IIA Arbitrations

1. Jurisdiction

Rules of jurisdiction are in essence constitutional rules of a tribunal. They establish the power to decide. International investment tribunals are constituted on a case-by-case basis by consent of the parties. The agreement to arbitrate contained in a BIT or elsewhere thus defines the ambit of a tribunal’s jurisdiction. The German Model BIT (2008) for instance provides in Art. 10 that ‘disputes concerning investment’ shall, failing amicable settlement, be submitted to arbitration at the request of the investor. Coupled with additional limits on jurisdiction contained in the arbitration rules chosen and the widespread absence of human rights provisions in investment agreements, the practical effect of the tradi-

72 To give a different example of the multi-dimensional nature of human rights, the modern UN framework for managing business and human rights rests on at least three pillars, as echoed by UN HRC Res, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/RES/8/7, 18 June 2008: the state duty to protect against human rights abuses through policies, regulation and adjudication; corporate responsibility to respect human rights and avoid infringements; and access to effective remedies for victims.
tional consent principle and the restrictive wording used is to deny tribunals the competence to deal with free-standing affirmative human rights claims. But the door is not shut completely. Conversely, contingent human rights contentions that – depending on the precise formulation of the dispute resolution clause – concern or relate to the investment, such as violations of the investor’s human rights or defences of a host state based on human rights norms, are within the jurisdiction of the tribunal. Analogously, in the Maffezini arbitration the tribunal took into account arguments based on European and Spanish environmental law in deciding whether an environmental impact assessment had impermissibly infringed the claimant’s rights, evidently satisfied that this was a controversy relating to the investment.

2. Choice of Law

Having established or denied jurisdiction over certain human rights matters, the next question becomes which points are part of the law applicable to the substance of an investment dispute. The simplest way would again be to include human rights provisions in BITs. Failing that, human rights norms could enter the legal bloodstream of BIT arbitrations though choice of law provisions, such as Art. 40 of the Canadian Model BIT (2004), which provides that tribunals shall decide ‘in accordance with this agreement and applicable rules of international law’. NAFTA and the ECT anticipate the application of international law alone. To the extent that they are part of international law, human rights could thus be taken into account. Where there is no express choice of law clause in the BIT, such as in the German Model BIT (2008), for instance, the selected procedural rules might contain provisions to that extent. Art. 42(1) of the ICSID rules states that, besides the law of the contracting state party to the dispute, ‘such rules of international law as may be applicable’ shall govern the dispute. The UNCITRAL rules, which are experiencing a renaissance, are however less predisposed to international law and simply hold that the conflict of law rules consis-

75 Maffezini v Kingdom of Spain, ICSID Case No. ARB/97/7, Final Award, 13 November 2000, paras. 65-71
dered applicable by the tribunal shall determine the governing rules. In spite of that, it would still technically always be possible, if unlikely, for the parties to mutually agree for international human rights law to be applicable in a specific dispute.

3. Arbitral Practice

Given the above, it might not come as a huge surprise that human rights arguments have to date not fared particularly well in the practice of investment tribunals.\(^{76}\) Two crucial points emerge in this respect. First, tribunals have employed various techniques in order to deny the appropriateness or relevance of human rights arguments in general, such as lack of jurisdiction (see e.g. *Biloune*\(^{77}\), *Eurotunnel*\(^{78}\)), or that the matter had not been fully argued or developed (see e.g. *Azurix*\(^{79}\), *Siemens*\(^{80}\)), which in turn suggests that the argument was considered to veer somewhere between irrelevance and bad faith. Another route is to insist that legitimately acquired rights could in any event be accommodated or renegotiated, regardless of any external exigencies (see e.g. *Sempra*\(^{81}\)). The most that can usually be hoped for is for human rights instruments to provide ‘guidance by analogy’, as the tribunal in *Mondev* was prepared to accept.\(^{82}\)

But the second important observation is that, with the main exception of the Argentine cases, which have their own considerable problems, the more favourable takes on human rights arguments are all situations in which the investors pleaded human rights points, for instance by stressing the public-private power imbalance (see e.g. *International Thunderbird Gaming*\(^{83}\), *Tecmed*\(^{84}\)). Another use

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76 See Hirsch (n. 27) 106.
78 *Channel Tunnel Group v Governments of the UK and France*, PCA, Partial Award, 30 January 2007, paras. 148, 151.
79 *Azurix Corp v Argentine Republic*, Award, 14 July 2006, ICSID Case No. ARB/01/12, para. 261.
80 *Siemens AG v Argentine Republic*, Award, 6 February 2007, ICSID Case No. ARB/02/8, para. 79.
81 *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 para. 332.

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sees human rights jurisprudence being employed to determine when measures are expropriatory and give rise to compensation (see e.g. *Azurix*). While one might interpret this as a silver lining on the horizon signalling harmony between these normative projects, it is hard to suppress a sly wink and feelings of instrumentalisation instead of genuine respect. But such is the nature of the game in times of humanitarian internationalism. A prime specimen showcasing conflicting normative projects in light of the dominant discourse is the *Grand River Enterprises Six Nations* case, a NAFTA arbitration that demonstrates both the appropriation of human rights language by the claimant investor and the failure to import outside obligations. In short, human rights arguments featuring in investment disputes are perhaps a growing trend, but their treatment is lukewarm, uneven, and tactical.

IV. IIA Provisions Potentially Affected by Human Rights

Switching perspectives, state regulation that affects foreign investments negatively, usually by way of a future change of law or administrative action, is susceptible to challenge under certain IIA provisions. This might also be the case when such regulation is motivated by human rights concerns or obligations. An aggrieved investor could base his claim on several typical clauses, which shall be surveyed in the following.

1. Expropriation

While IIAs and BITs do not as such attempt to outlaw the ultimately too deeply-ingrained practice of expropriation, the direct or indirect taking of property must generally be non-discriminatory, for a public purpose, according to due process, and accompanied by prompt, adequate and effective compensation, often to be assessed at ‘fair market value’. Such clauses can make it prohibitively expensive for states to regulate for human rights reasons in areas such as labour rights, land use, and public health and safety where this would – deliberately or inadver-

84 *Técnicas Medioambientales Tecmed SA v Mexico (Tecmed)*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, para. 122.

85 *Azurix Corp v Argentine Republic*, Award, 14 July 2006, ICSID ARB/01/12, paras. 311-312.

86 *Grand River Enterprises Six Nations Ltd v USA*, NAFTA Ch.11 Tribunal, Award, 12 January 2011.
tently, given that state intention alone is not meaningful – cause a sufficiently severe economic impact on foreign investments.\textsuperscript{87}

For example, in \textit{Biwater Gauff}, Tanzania was \textit{inter alia} held to have violated the expropriation clause of the UK-Tanzania BIT (1994).\textsuperscript{88} A British-German consortium had been awarded a bid to upgrade and run water and sanitation infrastructure in Dar es Salaam, which the World Bank had previously described as ‘precarious’ at the time. The consortium however underestimated the difficulty of the project due to poor planning and sought to renegotiate the contract after it had run into management and implementation difficulties. Tanzania declined and ultimately sought to take things into its own hands by occupying the water facilities and usurping management control. While no compensation was awarded in the end on account of causation issues (the consortium had sued Tanzania for around $20 million, but the tribunal considered the loss inevitable), the arbitrators held Tanzania liable for breaching the BIT. Similarly, several disputes have arisen from South American state measures affecting the privatization of water supplies, e.g. by fixing water pricing, arguably pitting investor rights against the increasingly recognized right to water.\textsuperscript{89}

Even more acutely, in the now infamous \textit{Piero Foresti} case, European investors challenged South African legislation that seeks to improve participation and ownership of historically disadvantaged South Africans in the mining sector.\textsuperscript{90} The claimants alleged among other things that the Mineral and Petroleum Resources and Development Act of 2002 violated the expropriation provisions of the Italy-South Africa BIT and the Benelux-South Africa BIT by effectively having expropriated their existing mineral rights by turning them into ‘new order rights’, which the investors claimed were less valuable.\textsuperscript{91} Following legal wrangling, the claimants were willing to agree to discontinuance with an award dismissing their €266 million claims with \textit{res judicata} effect in August 2010.

\begin{itemize}
\item \textsuperscript{87} See Waincymer (n. 58) 309.
\item \textsuperscript{88} \textit{Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania}, ICSID Case No. ARB 05/22, Award, 24 July 2008.
\item \textsuperscript{90} \textit{Piero Foresti, Laura de Carli and others v Republic of South Africa}, ICSID Case No. ARB(AF)/07/1.
\end{itemize}
Tensions of this sort are often greatest with respect to indirect expropriation, i.e. expropriation beyond formal takings of property. The law is rather flexible and heavily reliant on case-by-case decisions, with the battle lines drawn between those who claim the grander purpose of a state measure plays a crucial role in deciding on its lawfulness and those denying this.

On the one hand, expropriation clauses are not seen as watertight investment insurance. Some arbitral decisions almost seem to have ruled out expropriation completely in the context of non-discriminatory regulatory action in an attempt to reign in excessive risk-isolation of foreign investors. It is thus occasionally said that no liability (and hence no duty to compensate) attaches to economic injury that is a consequence of *bona fide* regulation within accepted limits, i.e. whenever a state is exercising its sovereign powers for the general welfare within the framework of its inherent police powers.\(^{92}\) Similarly, in *Methanex* an arbitral tribunal granted state regulatory powers more breathing space in holding that while regulation affecting investment still had to be non-discriminatory, for a public purpose, and enacted in accordance with due process, it would not be deemed expropriatory and compensable ‘unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.’\(^{93}\)

But that remains highly controversial. Even if one accepts ample room for police powers, what exactly falls within this permissible and non-compensable regulatory power of states remains rather unclear. An emerging consensus would seem to tentatively include non-excessive *bona fide* taxation, forfeiture for crime, public health, public safety, and perhaps the protection of cultural property.\(^{94}\) Environmental regulation however remains hotly contested. As to human rights, it would appear that the more elementary the need is that is being addressed, the more likely it will be considered acceptable.

In fact, many arbitral decisions do not view such public purpose exceptions favourably. After all, under customary international law, state intent is traditio-

\(^{92}\) *Sedco, Inc v Iran*, 9 Iran-US Claims Tribunals Reports 248, para. 275; *Técnicas Medioambientales Tecmed SA v Mexico (Tecmed)*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, (2004) 43 ILM 133, para. 119; *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 255.

\(^{93}\) *Methanex Corporation v United States (Methanex)*, ICSID Case No ARB/98/3, Pt IV, ch. D, para. 7.

nally irrelevant in the expropriation context. According to this orthodox view, it is solely (or, more recently, primarily) the effect of the impugned state measure on the investor’s property rights that matters, not its purpose. State obligations to pay can be triggered ‘no matter how laudable and beneficial to society as a whole’ regulatory measures may be. In *Metalclad*, the tribunal declined to consider the intent or motivation of an ecological decree barring the use of a site as a landfill and gave an extremely broad definition of expropriation, encompassing any incidental interference with the use of property which deprives the user in whole or in significant part not only of the use but also of the reasonably-to-be-expected economic benefit of said property.

Gradually, a middle way seems to be emerging between the two positions sketched above, with neither view gaining unqualified acceptance. This is another example of the grand humanitarian melange. One tribunal branded a straightforward public purpose exception ‘insufficient’ by itself. A more recent NAFTA decision however displayed sensitivity to the wider context in which investment takes place and took care to highlight its public dimension. Generally speaking, a more balanced, and hence also somewhat nebulous concept of expropriation is evolving, which among other things takes into account the impact of regulation, its purpose, legitimate investor expectations, the degree and intensity of interference, the importance of the interests at stake, and even-handedness in the application of state measures.

In summary, there remains ample uncertainty in the law of expropriation. While the purpose of regulation is increasingly being factored into arbitral decisions, human rights are by no means established as a definite trump card yet. But there no denying that its pressures are being increasingly felt.

96 *Compañía del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153, para. 192 (but note that this was a case of direct expropriation for conservation purposes). *Cf Tecmed* para. 121 and *Compañía de Aguas de Aconquija SA and Vivendi Universal v Argentina*, ICSID Case No ARB/97/3-20, Award, 20 August 2007.
97 *Metalclad Corporation v United Mexican States*, NAFTA Ch.11 Tribunal, 30 August 2000, 40 ILM 36 (2001), paras. 103, 111.
98 *Azurix Corp v Argentine Republic*, Award, 14 July 2006, ICSID ARB/01/12, para. 310.
99 See *Glamis Gold, Ltd v United States of America (Glamis)*, NAFTA Ch.11 Tribunal, Award, 8 June 2009, paras. 5-8.
2. Fair and Equitable Treatment

FET provisions are the Silly Putty® of investment law. Extremely flexible and context-specific, they make across the board assessment difficult. The open-textured nature of these clauses affords arbitrators a large margin of discretion—veritable material to pursue a particular brand of normativity.\footnote{See Mondev International Ltd v United States of America, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, para. 112.} Nevertheless, despite its fluidity the standard is said to have a technical legal meaning of its own and is not to be equated with deciding \textit{ex aequo et bono}. It is a matter of some contention whether conventional clauses go beyond the customary standard. Issues litigated under the FET heading have, for example, revolved around basic vigilance and protection, transparency, legitimate expectations, procedural propriety, good faith, and abuses of authority.\footnote{See TJ Grierson-Weiler and IA Laird, ‘Standards of Treatment’ in P Muchlinski, F Ortino and C Schreuer (eds), \textit{The Oxford Handbook of International Investment Law} (Oxford University Press, Oxford 2008) 272-290.} The piecemeal nature of international investment arbitration is particularly glaring in the FET context, where some tribunals seem to demand that an investor is to know beforehand all rules and regulations that will govern its investments, whereas other tribunals appear to place more weight on the state’s right to exercise its sovereign regulatory powers, noting that ‘any businessman or investor knows that laws will evolve over time. What is protected however is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power.’\footnote{For the former see e.g. MTD Chile, SA v Republic of Chile (MTD Chile), ICSID Case No. ARB/01/7, Award, 25 May 2004, section 4. For the latter see Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332.}

An FET clause could cross human rights whenever administrative, legislative, or judicial activity by the host state that is motivated by human rights norms fails to observe the minimum standard, hence sparking an investment claim. Given the vast extent of modern governmental regulation and the breadth of the FET standard, such conflicts could arise in many spheres, including but not limited to labour rights, indigenous rights, public health and safety, sustainable development and the right to water.\footnote{Cf Knoll-Tudor (n. 74) 339 (listing various arbitral decisions).} FET protection is by no means only engaged in extreme situations involving ‘mistreatment of aliens in South American jails, or the failures in the investigation of crimes against the person’.\footnote{C McLachlan, L Shore and M Weiniger, \textit{International Investment Arbitration: Substantive Principles} (Oxford Univ. Press, Oxford 2007) 202.} For example, in the \textit{Piero Foresti} arbitration referred to above, the claimants could conceivably
have alleged that the new legislation requiring quarry operators to hire historically disadvantaged South Africans violated FET provisions.

In this context it has been suggested in the literature that it would be unacceptable for competing human rights obligations to preclude a finding of a violation of an FET clause. Rather, human rights should according to that understanding simply factor into the calculation of compensation to be paid by the host state. Little to no guidance is to be derived from the IIAs themselves and no consistent arbitral jurisprudence has developed on this point. Arguably, the reference to equitable treatment introduces a high degree of elasticity in order to accommodate conflicting interests. But against this it might be said that BIT obligations are not reciprocal. All told, the vast catch-all nature of such clauses, evinced by the many different contexts in which FET has successfully been invoked, makes them an attractive option for investor claims and thus a potential fetter on the regulatory autonomy of states.

3. Non-Discriminatory Treatment

By design, relative standards guarantee comparable treatment. They do not provide for a specific degree of protection but rather simply ensure that foreign investors are not treated less favourably than domestic investors (national treatment: NT) and not discriminated against vis-à-vis foreign investors from third countries (MFN treatment). Under the latter, it is occasionally possible to secure substantive and perhaps even procedural advantages contained in other investment agreements signed by the host state. Some BITs also include an additional non-discrimination provision.

Despite sounding deceptively simple, these standards raise many questions. They too are important venues for competing normative visions. For instance, in reaching a finding on discrimination in the investment context, it first has to be established who the appropriate comparator is. In the Occidental case, Ecuador was held to have breached an NT clause because the claimant oil company was denied the VAT refunds domestic seafood and flower producers were recei-

106 See Knoll-Tudor (n. 74) 340-343.
109 See e.g. MTD Chile and Siemens v Argentine Republic, ICSID Case No. ARB/02/8.
110 Cf McLachlan, Shore and Weiniger (n. 105) 263.
While other tribunals have taken a narrower view as to what is comparable, the broad *Occidental* approach – holding that all companies were ultimately exporters and hence comparable – could serve to challenge specific state regulation aimed at furthering particular progressive causes by supporting different sectors or groups of society. This might still be the case even according to a more relaxed understanding if the investors in question operated within the same economic sector.

The second step is then to determine how the subjects for comparison have actually been treated. If treatment has differed, it thirdly has to be decided whether the impugned governmental action can be justified, i.e. has a reasonable connection to a rational policy of the host state. Factors variably involved in this last stage of the exercise are the language of the impugned regulatory measure, the effect on the investor (which can be direct or indirect), and the intent of the host state.\textsuperscript{112}

Once again the issue of public purpose justifications of state regulation looms large, and once again clear and uniform jurisprudence has yet to emerge to potentially inform policymakers on this point. The ‘proper balance’ between investor protection and the state’s right to regulate remains elusive with respect to these clauses.\textsuperscript{113} Until clearer normative benchmarks have been established, it is conceivable that the discrimination provisions can readily curtail host state measures seeking to effectively implement various human rights-related policies. As one commentator put it, the potential impact on human rights ‘is not difficult to perceive’.\textsuperscript{114}

Turning to justifications, external reasons for divergent treatment of foreign investors were for instance rejected in the *SD Myers* arbitration. The tribunal appears to have second-guessed the defendant state’s motivation and ruled on the evidence that the host state possessed discriminatory protectionist intent.\textsuperscript{115} This can be contrasted with other tribunal decisions focusing chiefly on the effect of regulation on the investor and placing little importance on the motivation of the state.\textsuperscript{116} Initiatives seeking to promote equal opportunities or diversity might hence be caught between the hammer of discriminatory intent and anvil of affecting the investor. And finally, it has been argued by NGOs that it would be

\textsuperscript{111} *Occidental Exploration and Production Co v Ecuador (Occidental)*, LCIA Case No UN2467, Award, 1 July 2007.  
\textsuperscript{113} Cf Grierson-Weiler and Laird (n. 102) 298.  
\textsuperscript{114} Ortino (n. 112) 344, 365.  
\textsuperscript{115} *SD Myers* para. 162.  
\textsuperscript{116} See e.g. *Occidental* para. 177.
difficult under MFN clauses to successfully pursue divestment strategies (e.g. as in the 1980s regarding apartheid South Africa), since it would be impermissible to impose restrictions on a specific group of investors only.  


Situated directly at the perceived public-private fault lines, umbrella clauses have come under heavy fire in recent arbitral decisions for potentially allowing a flood of lawsuits before international tribunals perhaps best litigated elsewhere and providing a vastly wider scope of host state liability than provided for in the BITs themselves. This critical view has in turn been sharply attacked by other tribunals and commentators, making confident predictions difficult. There is some force in the contention that the original anxiety which gave rise to such clauses, i.e. the trepidation about private investors dealing with states, and hence the across the board double-layered risk-insulation of investors, is perhaps not indispensable. NAFTA and the US Model BIT (2004) point that way and no longer contain umbrella clauses. But they are still found in many other IIAs.

Rounding off the arsenal, it is not unlikely that the prohibition of performance requirements on investors found in many BITs could prevent certain ‘progressive’ state measures seeking to foster sustainable local development through the involvement of foreign investment. Due to space constraints this point cannot be dealt with here in full, but the South African natural resources measures seeking to better integrate historically disadvantaged parts of the population once again spring to mind.

V. Systemic Concerns

What investment law can muster in imperious treaty terms, the human rights project repays in systemic issues, which will now be sketched.

118 See e.g. SGS v Pakistan, Decision on Jurisdiction, 6 August 2003, 42 ILM (2003) 1290.
120 See Mann (n. 39) 36-37.
1. One-Sidedness

A popular source of agitation is that the investment regime is one-sided in at least two respects. For one, the BIT technique is bilateral only with respect to state responsibilities. But even here it is not difficult to see that the legal provisions of BITs will be of greater use to capital-exporting states than to those importing capital. The tables are turning with the emergence of new global players, but an inbuilt bias remains. Moreover, investors are privileged by design by only being afforded rights without being subject to obligations under these treaties, which has led one commentator to sardonically refer to a specific investment protection system as ‘a human rights treaty for a special interest group’. In a similar vein and barring a few limited exceptions and counterproposals, most investment treaties are silent as to the rights of non-investors. The question hence becomes to what extent counterweights to this imbalance already exist and how these can be leveraged.

2. Participation Deficit

Another perennial concern is the fact that, despite the ultimately far-reaching impact of major international investments (e.g. power plants, water and sewage infrastructure, landfills, mining pits etc.), the BITs providing the basic legal framework for such large-scale projects have traditionally been negotiated and concluded outside the public sphere. This acute participation deficit of concerned sectors of society and NGOs is of course not uncommon when it comes to international treaties and regulation in general. One curt answer to this is that the citizens’ consent can be indirectly derived from their respective governments’ participation in the treaty-making process. This places a large degree of faith in national governments’ ambitions to promote and protect human rights, which some states will quite conceivably subordinate to economic development or other goals. Another reply furtively questions the wisdom of even having the public participate in all aspects of what is essentially a highly specialised technocratic exercise. I will – probably unfairly – call this the ‘Eurocrat’ view of law. While an in-depth discussion of this point is not called for here, it is evident that public awareness and participation, and therefore ultimately public values such as human rights, democracy and legitimacy, have traditionally been sidelined in

121 See Bachand and Rousseau (n. 58) 16.
123 Cf Fry (n. 57) 104.
erecting the fundamental tenets of the current investment regime.\textsuperscript{124} But that is the case with almost all elite-led projects of humanitarian internationalism. This is all the more likely given that it is hard to deny that international adjudication, including of course ICSID and other arbitration, effectively shapes the specificities of international (investment) law through ever-burgeoning jurisprudence.\textsuperscript{125} Moreover, this objection is given a special twist in times of certain (Latin American) countries withdrawing from parts of the investment regime, regardless of the merits of these individual cases. Recent initiatives in Norway, the US, and South Africa, however, slowly seem to be breaking the mould by circulating draft investment agreements in an attempt to at least solicit input from a wider range of society.

3. Expertise Imbalance

The complex BIT networks and international arbitration in general leave much room for interpretation; an entire industry depends on this. In addition, their exact economic and political significance can be very difficult to gauge. What is hence also said to give rise to concern is that many countries, in particular capital-importing ones, frequently do not at first possess sufficient expertise regarding the consequences of BITs or adequate policy frameworks when negotiating and concluding investment agreements.\textsuperscript{126} Even if renegotiations and other later corrections are not impossible, such initial misalignment could produce hasty and unfavourable results that unduly privilege immediate economic gains over other concerns.

4. Downward Spiral

The ever-present, yet rarely substantiated, downward regulatory spiral is the nuclear weapon of humanitarianism, which considers itself an upward spiral. The more unencumbered protection an IIA offers, the more likely it is to attract foreign money; repeat \textit{ad infinitum}. It is closely related to the ‘prisoner’s dilemma’ argument. A capital-importing country will gain a competitive advantage over

\textsuperscript{125} See e.g. the special issue on international adjudication in 12(5) \textit{German Law Journal} (2011).
other states in a similar situation if it grants more generous concessions through its BIT programme. Of course nobody quite knows what drives states to do what they do. Moreover, the attractiveness of a host state for foreign investment will in the end depend on a myriad of other legal and non-legal circumstances, but there is a degree of persistence to the view that, from a regulatory perspective, BITs involve such a dilemma: states might be better off as concerns policy freedom and human empowerment if they collectively rejected restrictions of their regulatory capacity in the form of IIAs, but they are individually tempted to conclude investment agreements to not lose their competitive edge.\(^{127}\) The attractiveness of this argument obviously lies in the fact that states are absolved of much of the blame. But even if there is no real compulsion and states simply considered it desirable to conclude such agreements, the downward spiral kicks in.

VI. Concerns Regarding Dispute Settlement Procedures

Investment claims are regularly vindicated through international dispute settlement. Viewed from the humanitarian perspective, the investor-state arbitration mechanism itself is likewise capable of improved adjustment.\(^{128}\) Areas of heightened concern are outlined in this section.

1. Transparency

Probably the most common criticism of investment disputes relates to the confidentiality of proceedings, which limits attempts to fully monitor, assess, and ultimately accept not only the arbitral process but also the operation of international investment law in general.\(^{129}\) While there are a few noteworthy exceptions such as Art. 38 of the Canadian Model BIT (2004) and Art. 10 of the US Model BIT (2004), investment agreements do not normally contain provisions on the transparency of disputes. This then falls to the individual procedural rules under which the arbitrations take place. International arbitration is traditionally con-


ducted behind closed doors. The popular UNCITRAL rules provide that awards are not to be published without the parties’ consent. Indeed, the existence of UNICITRAL arbitrations is often not even widely known. The ICC rules do not expressly address transparency. Equally, very little information on SCC arbitrations is in the public domain. Of the procedures commonly chosen, only ICSID lists pending and concluded cases in its publicly inspectable docket, which also mentions basic details of registered arbitrations including subject matter, party names, date of registration, composition of the tribunal, and the procedural stages. But at times scant, if any, information is available on the arguments made, the minutes, and other records of the proceedings. What is more, the parties may still agree to keep the actual award confidential. Barring such agreement, a party may release the award to the public. While ICSID is increasingly moving towards greater transparency and a majority of awards are now published either by the parties elsewhere or directly through ICSID, systematic and comprehensive publication remains elusive. Consequently, even some ICSID awards are inaccessible. In line with the old adage about justice being seen to be done, this is inherently suspicious.

2. Uncertainty and Lack of Review

Investment disputes are arbitrated in a variety of fora under diverse procedural rules. Even within the same institutional and procedural framework, individual panels will always be constituted *ad hoc* for the specific case. Coupled with the lack of equalising elements such as a reflected approach to precedent or an appellate process that could reconcile different jurisprudential strands this poses a potential source of irregularities and legal uncertainty, no matter how much occasional tribunals may be concerned to impose a modicum of coherence on the case law. This is not only considered problematic in terms of predictability, knowledge imbalances and state planning, but in all likelihood also contributes to the many popular anxieties surrounding investment arbitration, in particular when observers do not share the business community’s general preference for


132 See Dolzer and Schreuer (n. 10) 37.
finality over correctness. After all, as one commentator has noted, unlike in pure commercial arbitration, there is never just money at stake in investment arbitration; often, the public policy of an elected (foreign) government is directly at stake. One wonders whether that is really any different in human rights judicial review.

So much for common sticking points between the two normative projects. What follows are those internal strategies that are considered capable of aligning investment protection and human rights law, i.e. subsuming and merging one into the other. The openness of investment protection to human rights law may not be perceived as favourable as with respect to other areas, such as environmental law, but there are certainly sufficient entry points that can be utilised by lawyers using familiar techniques. Since they do not attempt to fundamentally change the ground rules, I refer to them here as management techniques.

D. (Internal) Management Techniques

Given the limitations outlined above and the fact that most BITs do not contain substantive human rights provisions, the question arises if human rights could otherwise be relevant to investment arbitration. The question is of general importance and the techniques and answers sketched here can be relevant to all ‘outside’ legal obligations, not just to human rights. Much of this is debated by academic lawyers, who by and large tend to care more for overall systemic coherence and completeness than practitioners, who in turn prefer to focus on the functional logic of their particular niche, intent to get very specific results. It has already been noted that the commonly used catchphrase, ‘fragmentation’, implies a defect. This is more than just a semantic point. It imposes an argumentative burden on those advocating a particularistic solution, again reinforcing the dominant narrative.


135 Cf Hirsch (n. 27) 106; J Viñuales, Foreign Investment and the Environment in International Law: An Ambiguous Relationship 80 BYIL (2009) 244.
I. Side-stepping Collisions

An explicit conflict clause in an investment treaty would make matters considerably easier for lawyers. Alas, these are no clear instances in the context of human rights. A possible example of such express instruction might be Art. 16 of the US Model BIT (2004), which affords primacy to outside international legal obligations entitling an investor to treatment that is more favourable than that accorded by the BIT.\textsuperscript{136} Other conflict clauses avoid laying down plain hierarchies, e.g. Arts. 12 and 13 of the US Model BIT, according to which the treaty parties ‘shall strive to ensure’ that they do not derogate from domestic environmental and labour laws. More oblique still are clauses amounting to little more than a restatement of general rules of interpretation. The reason for the relative weakness and unpopularity of express conflict clauses is patent: political preferences and objectives differ. In the absence of clear conflict clauses contained in the agreements, other principles are invoked in an attempt to get around the discrepancies.

A cardinal way for achieving ‘regime integration’ is interpretation and supplementary analogy. International courts and tribunals have developed various ‘fall back’ techniques when dealing with arguments not covered by the treaties in question.\textsuperscript{137} This is the strong suit of the lawyer, his very own eminent domain of imposing meaning.

For one, human rights law can be used to ‘concretise’ the meaning of IIA terms. BIT provisions are notoriously vague. One need only recall the invariable demand for ‘fair and equitable treatment’ of the investor. But being creatures of international law themselves, BITs can be interpreted on the basis of predominant interpretation principles.\textsuperscript{138} Besides ordinary meaning, context, object and purpose, subsequent practice, and other habitual methods of interpretation, ‘external rules of law’ are often looked at in order to give meaning to a particular treaty term. It is sometimes even claimed that the parties would have appreciated that the content of a legal term would change accordingly over time as the law

\textsuperscript{136} See also Art. 11 UK Model BIT (2005).


\textsuperscript{138} Cf AAPL v Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990, 32 ILM (2001) 580, 594, para. 39. Moreover, ‘the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated [...]’ (para. 21).
evolves. Human rights jurisprudence thus can and has in the past been ad-
duced to ‘clarify’ the meaning of both substantive and procedural BIT terms.\textsuperscript{140} For example, as has already been alluded to above, in the Tecmed arbitration, the panel referred to case law of the ECtHR to spell out various aspects of legitimate regulatory takings in the public interest. Again, this is more likely to work if both normative projects benefit of the face of it, i.e. when investors’ rights are aug-
mented via human rights concepts, such as when legitimate expectations are played as a trump against domestic regulation or when states have to defray their own legal costs even if they prevail.\textsuperscript{141} Clear and tight drafting can certainly seek to shut the door, but this has its costs; nobody wants to be a pariah in the age of humanita-rian internationalism.

There are more tools in the lawyer’s toolkit. One could attempt to invoke hu-
man rights obligations in the context of a presumption of compliance with inter-
national human rights law. The idea behind this vaunted principle is that the 
treaty parties would surely not have intended that their agreement offend existing 
rules of international law.\textsuperscript{142} Unless specifically stated otherwise, the normative 
import of a BIT will according to this management technique not be taken to 
have tacitly dispensed with the elemental human rights protection of (customary) 
international law. Such a take on BITs for instance permits defining the limits of 
what an acceptable exercise of police powers by the host state is in the context of 
an alleged expropriation. It would be a reckless investor indeed who sought to 
argue that an IIA deliberately prohibits governmental regulation fulfilling pe-
remptory norms (\emph{jus cogens} obligations) or even ‘ordinary’ human rights. Even 
if the measures in question do not cross into the realm of the non-derogable, the 
burden would at the very least shift to the investor to claim that the parties in-
tended to cut across such sensitive issues of international law in this particular 
instance.

And finally, there is always Art. 31 (3) (c) of the Vienna Convention on the 
Law of Treaties of 1969 (VCLT). According to this provision, ‘any relevant 
rules of international law applicable in the relations between the parties’ should 
be taken into account together with the particular context in interpreting a

\textsuperscript{139} See Kasikili/Sedudu Island (Botswana v Nigeria), Judgment (Declaration of Judge Hig-
\textsuperscript{140} See Fry (n. 57) 82-99.
\textsuperscript{141} For a paradigm example of this strategy see International Thunderbird Gaming Corp v 
United Mexican States, NAFTA Ch.11 Tribunal, 26 January 2006, Separate Opinion of 
Thomas W. Wälde, paras.26, 141.
\textsuperscript{142} See Territorial Jurisdiction of the International Commission of the River Oder, Judg-
ment, 10 September 1929, PCIJ, Series A, No. 23 (1929) 20; Electronica Sicula SpA 
treaty. This provision did not at first receive much attention. But it has been (re-)discovered as a normative basis for ‘de-fragmentation’. Care is taken not to portray Art. 31 (3) (c) as a ‘master key’ to open the floodgates and wash away all limits of jurisdiction and applicable law and effectively rewrite the parties’ obligations; after all, the lawyer is expected to work within the system. Nonetheless, that provision licences the idea that at least erga omnes obligations, i.e. universal obligations owed to the community of states as a whole, are such relevant rules applicable between the parties and should hence be taken into account in interpreting BITs. If certain human rights obligations could be classified as erga omnes (to which no claim is made here) or otherwise as relevant and applicable, they could very well be brought to bear on a dispute.

II. Resolving Collisions through Conflict Rules

Through the interpretive techniques outlined above the participants seek to argue away disputes in which investment law and human rights law collide. Successful interpretation yields the result that they were ‘apparent’ rather than ‘real’ conflicts, a kind of false alarm. Most lawyerly efforts are likely to be poured into that activity. But there is also heavier weaponry. The threshold that however has to be crossed is that of clashing legal obligations; policy objectives are not enough. It is the typical gambit of lawyers that sacrifices relevance for authority. Assuming investment and human rights obligations truly are both relevant and at loggerheads, what then?

The tricks of the trade to ‘resolve’ such situations are well known. Many are contained in the VCLT, which is considered codified customary law in this respect. It is a veritable treasure trove of dusty Latin terms. In essence, the answer turns upon whether or not one finds ‘self-contained’ regimes. It is a binary calculus in which the negative result leads to human rights prevailing and vice versa. The snag is that the mere existence of tools does not compel or guide their use, no matter what the conceptual drawing board has yielded. Little surprise that

146 Cf Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 154.
legal practice has not exactly produced a deluge of case law on the use of the VCLT in these situations. But at least in theory it should work.

Hierarchy is the first such tiebreaker. A normative pecking order with non-derogable norms à la Art.53 VCLT would give clear instructions which obligation should trump in a particular circumstance by voiding the offending treaty. Such *jus cogens* however is the royal flush of international law and rarely if ever encountered in this context; the prohibition of torture and slavery spring to mind, but these are extreme situations. Nevertheless, it is clear that conflicting provisions contained in investment treaties could not contravene superior rules. They would, for example, have to yield to fundamental rights that are protected through Art.103 of the UN Charter.\(^{148}\) If however invalidity also does not resolve the situation and the conflicting non-investment obligation is also a primary source of international law (i.e. found in a treaty or customary international law), various other tiebreakers can be employed.

For instance, it is almost trite to note that, like every other treaty, BITs are an attempt to create specific legal relations between parties and that these might attempt to contract out of general international law other than *jus cogens*.\(^{149}\) In other words, it is possible to argue that BITs are *lex specialis* and *lex posterior*.\(^{150}\) Arts. 30 and 59 of the VCLT for instance regulate the relationship between successive treaties. But requirements relating to the identity of the subject matter and the parties, as well as potentially unwelcome consequences resulting from interference with multilateral treaty regimes essentially foreclose a simple imposition of BITs as *lex posterior*.\(^{151}\) Moreover, the observation that BITs constitute *lex specialis* between pairs of states dealing with investment promotion and protection is not necessarily tantamount to arguing that they reject all other potentially relevant norms of international law.\(^{152}\) Indeed, BITs are silent on most matters of international law. At a more rarefied theoretical level, it is doubted whether special treaty-based regimes (i.e. BITs) could even have legal effect without reference to another system of law that could provide them with such validity (i.e. public international law).\(^{153}\) In short, there is little leeway or appetite to allow for non-dominant normative projects.

\(^{148}\) Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

\(^{149}\) See VCLT Arts. 53 and 64.


\(^{152}\) See Simma and Kill, 'Harmonizing Investment Protection and Human Rights: First Steps Towards a Methodology' (n. 59) 705.

Summing up the argument so far, the effective invocation of human rights law in investment arbitrations is far from guaranteed on account of several inimical devices, but management techniques exist through which one can suggest that it should play a decisive role. The core claim is that BITs are not created in a legal vacuum but in a system of public international law. Yet while the techniques themselves are often unfolded in ample detail, their appropriate use is hardly ever discussed.

E. (External) Transformation Techniques

I. Political Reimagination

The techniques outlined above are flexible and open-ended means of massaging meaning into legal sources, working within the system. Nearing the end of the paper, I proceed from the twin observations that all good lawyers can square circles but that, faced with difficult real world problems, it is usually not possible to have one’s cake and eat it. That is not a flaw of legal dispute; it is in its blueprint. This section therefore sketches ways to purposefully formulate the relationship between the law on investment and human rights. After deciding which normative project is to be preferred in a specific situation, this can then be put into action. It does however require an express commitment one way or another, which is itself worthwhile. While it may be belittled as fantasy governance, this seems preferable both to the cognitivist apologia and false necessity of household legal defragmentation and to surrendering to resentment. ¹⁵⁴

1. Modifying IIAs

It almost goes without saying that this will inevitably be up to the political intentions of the involved parties. They might of course consider the present situation desirable. Nevertheless, it seems that capital-exporting countries are increasingly waking up to the reality that they too might have their policy spaces constrained


by IIAs. The first Vattenfall saga that unfolded in Germany is illustrative of this development.

Most obviously, completely new BITs could be negotiated and concluded. This takes time. BITs generally remain in force for a duration of ten years or more, see e.g. Art. 13(2) of the German Model BIT (2008). At the end of that period, they normally continue indefinitely until denounced by one of the parties and a subsequent notice period has passed (often 12 months). But even following successful termination prior investments continue to enjoy the protection of the BIT provisions for a fairly long time (e.g. 20 years from the date of termination under the German Model BIT). Amending existing BITs, while technically possible, is also not without complications. Generally speaking, investors are entitled to rely on the treaty provisions as long as the treaty remains in force. It is however of course much easier to amend a bilateral treaty than one involving many state parties. A third method would be for the parties to leave the text of an existing investment agreement intact and issue binding interpretations of certain provisions, as was the case when the three NAFTA parties issued a statement limiting the ambit of FET under NAFTA. The US Model Bit (2004) even explicitly provides for this possibility in Art. 30.


Based on the points identified above and irrespective of the precise treaty technique chosen, several potential revisions of investment treaty terms could tilt the balance as desired. It is important to note that most of the following changes could, even individually, have an immense impact on the investment climate so that they should simply be seen as a non-exhaustive selection of tools at the drafters’ disposal.

Preambles to treaties, while not capable of creating substantive rights, are important to interpretation. Drawing on the above then and expanding the initiatives of recent Scandinavian and North American investment agreements, future BITs could in preambular language expressly reaffirm their commitment to the general system of public international law, declare that they do not intend to create an isolated legal regime, and state that they recognise other relevant norms

157 See Dolzer and Schreuer (n. 10) 23.
158 See Mann (n. 39) 24.
and values of international law such as human rights. Or do the exact opposite. It would also be worth emphasising any intention to seek an adequate balance between investment protection and the frequent necessity of positive state measures to implement those norms and values.

Turning to the substantive provisions, BITs make frequent use of definitions to lay down the fundamental scope of the investment agreement. Of particular note here is the definition of ‘investment’. One important modification to many of the formulations commonly encountered at present would be to provide that an investment for the purposes of the agreement is only one that is made in accordance with the domestic law that governs the investment (akin to what recent South African BITs are providing) or the law of the host state. Moreover, certain particularly sensitive sectors or areas of economic activity could be excluded from the scope of application of the BIT. If the reverse is desired, this should equally be made clear.

At present, many expropriation clauses spend more time stipulating details of compensation payments than clarifying the hazy fringes of (indirect) expropriation. Future BITs could build upon Annex B of the US Model BIT (2004) and NAFTA and specify when exactly non-discriminatory regulatory actions designed and applied to protect human rights and legitimate public welfare objectives do not constitute indirect expropriations. Alternatively, it could be stipulated or expressly ruled out that human rights obligations mandating infringing regulatory measures reduce any compensation award.

Explanation of what is meant by FET would go a long way towards securing legal certainty and predictability for all parties involved. A first step would be to stipulate whether this is the same as the minimum standard of treatment of customary international law or whether this is an autonomous treaty concept. Secondly, while it is of course impossible and naïve to try to spell out all forms of unfair and inequitable treatment in a tidy formulation, it might be helpful to enumerate typical categories of FET breaches, list factors that can give rise to a breach of the standard, and include factors that militate against such a finding. If so desired, FET could be scrapped altogether.

As to the relative standards of treatment, a ‘progressive’ BIT could provide for an express exception to an NT violation for limited cases of affirmative action (positive discrimination), i.e. programmes designed to promoting equality and advancing those sectors of society that have been historically disadvantaged or unfairly discriminated against. Such a clause is found in the South Africa-Tanzania BIT (2005) for instance. MFN clauses could be tweaked to tone down the implantation of procedural benefits from other BITs for tactical reasons – referred to as ‘cherry picking’ – where this was not intended or they could expressly fling the door wide open.
Further or alternatively to these modifications, parties could draft a general exception clause that seeks to preserve states’ right to regulate in vital areas, thus appreciating that a commitment to human rights frequently requires more than mere omission. A few modern BITs already include similar provisions.

With respect to choice of law clauses, explicitly ousting or including applicable principles of international human rights law would lessen dependence on second-order rules contained in procedural regimes (which are by their multilateral nature much more difficult to amend), ad hoc agreements by the parties on the governing law, or biased interpretive techniques. Similarly, the compromissory clause providing for dispute resolution could be drafted more narrowly or widened to afford tribunals the authority to also take into account non-BIT obligations in investment disputes.

3. What About Investor Obligations?

A difficult point is whether BITs should also include investor obligations or specific home state responsibilities, possibly coupled with an abrogation of their rights in cases of non-compliance. Introducing such provisions might seem tempting as a quick solution to any unwanted imbalance. However, various considerations need to be borne in mind and analysed carefully. Inevitably, this would have enormous economic ramifications, which would need to be assessed in detail beforehand. The first step is again to decide what the purpose of these agreements should be.

Assuming parties would want to cut down on investment promotion and protection, one answer would be to introduce even more legal provisions, and hence complexity, into a fairly focused, albeit already rather intricate, legal instrument. The alternative would be to enhance and strengthen the existing provisions and jurisprudence of international and domestic human rights protection and to allow them to play a meaningful role in investment law and arbitration, rather than to create duplicates thereof in investment treaties. Nonetheless, whichever is chosen, such gestures would run the risk of driving businesses into the even less transparent, accountable, and possibly less legitimate realms of private regulation and non-legal dispute settlement.

4. Reforming Dispute Settlement Procedures

Given their key role in shaping the system, various procedural aspects of BITs and commonly used arbitration rules could be reconsidered when attempting to achieve a new foundation concerning the interaction between the investment re-
gime and human rights. The options are as follows: *amicus curiae* participation could be widened in order to bring a broader perspective to the table, in particular when neither investor nor state are minded to invoke human rights points. Transparency could be improved through better public access to documents, in which commercially sensitive data could be redacted. A higher degree of consistency might be achieved through greater use of requests for binding interpretations, appellate processes, preliminary reference amulation or a multilateral investment court composed of independent judges. Short of that, arbitrators could be selected in a more neutral manner through the procedural frameworks of choice. The question whether an exhaustion of local remedies is mandatory should always be addressed. While it is certainly true that large investment arbitrations are not exactly speedy affairs and not all host state courts are incapable or unwilling to grant fair trials, it seems overly optimistic to conclude that the mills of justice grind the same the world over.

5. Multilateral Investment Agreements

Several states might set up a multilateral framework. Coherence and uniformity could be enhanced. Wildly oscillating bilateral power imbalances might arguably be restrained, thereby promoting fairness and legitimacy through wider participation. ‘Treaty shopping’ (via MFN clauses or home states of convenience) could be curtailed. All of this could result in tangible stability and predictability benefits, simplify planning for businesses and states alike, and perhaps drive down legal and regulatory costs.

Of course the idea of such a global, or at least regional, solution is not new. But it has never really come to fruition in form of a multilateral treaty focusing purely on investment. Famously, in the mid to late 1990s, the OECD member states negotiated the ill-fated Multilateral Agreement on Investment (MAI), which was abandoned following stern criticism from NGOs and sectors of civil society alleging it was too investor-friendly and promoted economic liberalisation too aggressively. When certain states such as France refused to back the MAI, the initiative was scrapped.159 In more recent discussions on the matter, it is also frequently states that are not traditional capital-exporters that lead the

critical vanguard, most commonly citing fears of impediments to state regulation.\textsuperscript{160}

Nevertheless, what was cast in doubt was chiefly the material content of individual proposals and not so much the concept of multilateralism itself. Barring Russia, the multilateral ECT is encouraging. The EU’s new competence for FDI following the Lisbon Treaty is however viewed with suspicion, but probably more so because of a fear of supranational aggrandisement and a perceived policy bias. Be that as it may, at present there appears little political appetite for another attempt at a multilateral investment treaty.

6. Comprehensive FTAs

Another possibility that is increasingly popular is the move to embed investment in a larger package of economic relations. Investment protection is then seen not simply as a privilege for a special group of people, but as one component of a state’s foreign and economic policy network on matters such as trade, industry, the mobility of persons and capital, development, and the environment. Besides the obvious point that it is easier to find a common denominator amongst the limited parties to Free Trade Agreements (FTAs), this supports a more holistic perspective and could better accommodate the concerns of countries that do not traditionally export investment by providing other concessions. NAFTA is a prototype of such a wider approach. Its multi-faceted design might help to explain why its investment chapter and consequently also certain NAFTA arbitrations do not seek to push investment protection to the maximum, a tendency individual BITs are more prone to. Another example would be the Australia-United States FTA of 2004, which, reflecting the developed domestic legal systems of both countries, does not include special provisions for investor-state dispute settlement.

7. Domestic Law

In an important but frequently forgotten way, much of the international law of investment protection has already become domestic law through national constitutional arrangements relating to the internal status of public international law. Another option would be to create specific standards of investment protection.

within domestic law and then back these up with an appropriate track record in practice, thereby quelling investor anxieties and the call for BITs in the first place and achieving a higher degree of integration of investment law and other norms. Such a strategy would however demand an adequate commitment and legal framework to be fully effective and convince the system’s current users of such a model’s feasibility. Albania, Egypt, and Venezuela have launched similar attempts, but this has not yet inspired much confidence.\textsuperscript{161}

8. Voluntary Codes

Numerous codes of conduct of varying ambition have attempted to remedy a perceived imbalance by setting out duties of corporate investors. Policy initiatives to that extent have over time been launched by the OECD, ILO, UN ECOSOC, and various UN agencies. From a legal point of view, such codes are not binding. Their practical effect on companies’ behaviour is difficult to assess. The standards themselves are not performance tools and generally lack monitoring capacities. Such codes can however raise awareness of important issues and involve investors directly. While they are unlikely to usher in an ‘age of corporate moral purity’,\textsuperscript{162} they are yet another tool, especially for interpretation.

9. Human Rights Audit

Lastly, one suggestion is to introduce joint ‘human rights audits’ undertaken by investors and host states, which would assess the latter’s treaty commitments and thus seek to define more clearly the applicable law or condition any legitimate expectations.\textsuperscript{163} Whether or not this is practically feasible or might amount to human rights lawyers effectively becoming marketing people paid to whitewash the activities of corporate actors is an open question. But there is a serious drawback: these auditors are likely to perpetuate the muddy and questionable internal management techniques. As such the proposal is typical of the dominant rapprochement narrative that is hopeful for benign humanitarian osmosis and cross-fertilisation while buttressing the pre-eminence of the human rights project.

\textsuperscript{161} Cf Dimsey (n. 119) 16.
\textsuperscript{162} Lowe (n. 12) 203.
F. Conclusion

What then of the perfect society? Bad news first: solutions cannot be found. The good news is that they can be chosen à la carte. This requires transformatory imagination and an expression of preferences. The ever-popular legal fragmentation debate obscures this point all too readily. The question is a matter of faith rather than legal science. At the end of the day, the inquiry is straightforward: would you rather create conditions that may well be less favourable for investors if this is likely to increase the basic wellbeing of certain people? Too much effort has been spent on turf wars between different normative projects, sparring bizarrely with arcane legal concepts. The real issue is deciding how much concern to afford to each sphere and to accept the costs of that decision. Indeed, perhaps the participants are too afraid to lose what they have under the current impasse. For all its ceremonial bluster and harrumphing, international law – and this can only mean those using the vocabulary of international law – shies away from such a basic inquiry. The dangers of carrying on solely with the internal management techniques as before include slipping into fanciful cognitivistic views of law, reducing complexity at the price of relevance, and perpetuating idolatry about intentions and routines. The tools become more than they are, hubris swells. Crucially, responsibility is pushed away. Deliberately or unwittingly, discourse about justice is sidelined. It need not be that way. But at its core this is a matter of predilection, not a legal puzzle.