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PROMOTING, REGULATING, AND ENFORCING HUMAN RIGHTS THROUGH INTERNATIONAL INVESTMENT LAW AND ISDS

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ABSTRACT

This Article suggests a reconciliation of the underlying goals embedded in international investment protection and international human rights protection. This is achieved by enhancing the fundamental elements of international investment law ("IIL") and arbitration while simultaneously elaborating on the ipso facto role of international human rights protection in international investment agreements ("IIAs"). Embracing this rebalancing and integration of supposedly separate regimes may allow the effective enforcement of a multifaceted, yet systemically coherent, transnational rule of law through the mechanism of investor-state dispute settlement ("ISDS"). Further, this is in line with the current shift from "investment promotion and protection" to "investment regulation" that is taking place in IIL.

This Article will illustrate the intrinsic potential of international investment law in furthering international human rights in a globalized world and highlight why ISDS and arbitration, in particular, are fully capable as institutions to enforce these multifaceted rules when international legal regimes interact in a seemingly fragmented international legal order. Indeed, the ideals in liberal capitalism and liberal democracy, as manifested partly in ensuring and protecting individual rights and liberties in a strong rule of law, should remain the most cherished features of a liberal world order.

This Article focuses on the human right to water, and corollary on foreign investments made in water services and sanitation. While the topic is rather limited, it encapsulates the overall debate on the interaction between international human rights and IIL. It is argued that the human right to water actually underscores the dire need for foreign direct investment, and therefore mandates a thorough analysis vis-á-vis the objectives and purpose underpinning IIL and ISDS. Thus, individuals should assess the recent debates on fragmentation and regime interaction, especially at the crosshairs of IIL and international human rights, through the lens of striking a balance between half-cooked ideals and unintended consequences.

ISDS is the transnational venue for dispute resolution that can properly adjudicate matters at the crossroad between international economic law and other, sometimes conflicting, regimes of public international law, such as human rights and environmental law. Arbitrators exercising systemic interpretation and integration will

be equipped to enforce an all-encompassing global rule of law. This is what a twenty-first century citizenry expects.

I. INTRODUCTION

Sufficient quality and quantity of water is essential for decent living conditions.[1] Access to water is a human right, and therefore investments in water services[2] are vital.[3] In this light, the enforcement of obligations in IIAs should be understood in dialogue with other substantive legal regimes, such as international human rights.[4]

However, notwithstanding the abundant need, many states are falling short on their commitment to secure its citizenry with frequent access to water services.[5] The United Nations Sustainable

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1. XU QIAN, WATER SERVICES DISPUTES IN INTERNATIONAL ARBITRATION: RECONSIDERING THE NEXUS OF INVESTMENT PROTECTION, ENVIRONMENT, AND HUMAN RIGHTS 23 (2020) ("Access to water requires two fundamental elements to be met: water quality and water quantity.").

2. In this paper, a reference to "water services" include investments in the area of supply (frequent access to water); distribution (providing for uninterrupted supply of clean water); sewage (e.g., collecting wastewater and remove impurities); sanitation (providing clean water); and management. In fact, these investments in water services may prove more important than investments in sectors such as oil and gas, construction, pharma, etc.

3. International financial institutions have supported such notion by making lending readily available for these important transborder projects and investments. *See e.g. Water*, WORLD BANK, https://www.worldbank.org/en/topic/water [https://perma.cc/BH6E-AXKW] (last visited Sept. 10, 2021) (focusing on water supply, sanitation, and water resources management). In addition, Wall Street just recently started trading water futures as a commodity. *See* E360 Digest, *Wall Street Begins Trading Water Futures as a Commodity*, YALE ENV'T 360 (Dec. 8, 2020) https://e360.yale.edu/digest/wall-street-begins-trading-water-futures-as-a-commodity [https://perma.cc/LG2L-DC7V].

4. William W. Burke-White, *Inter-Relationships Between the Investment Law and Other International Legal Regimes*, E15INITIATIVE (Oct. 2015), http://e15initiative.org/publications/inter-relationships-between-the-investment-law-and-other-international-legal-regimes/[https://perma.cc/APQ7-2E3R]; *see also* Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration* in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, & Francesco Francioni eds., 2009) (explaining that investment arbitration has grown into the most effective means of resolving investor-state disputes, and that therefore international investment law is not being challenged with interactions with other, non-investment, obligations.).

5. *Goal 6: Clean Water and Sanitation*, UNITED NATIONS SUSTAINABLE DEV. GOALS, https://www.un.org/sustainabledevelopment/water-and-sanitation/ [ttps://perma.cc/PY8Z-6VBY] (last visited Sept. 10, 2021) (reporting that "3 in 10 people lack access to safely managed drinking water services and 6 in 10 people lack access to

Development Goals (SDG) and the *de facto* human right to water both seek to facilitate access to water.[6] Some countries have taken a proactive approach by determining in their domestic laws that the right to water is a fundamental right.[7] To remedy water-related shortcomings while obeying international human rights law and meeting the SDG, many states will have to liberalize their markets and work strenuously to attract, promote, and protect foreign direct investment (FDI) in water services.[8]

While the right to water is an individual right, the investments in water services ensure that these rights can meaningfully exist. That said, in ensuring the development to water services, states should (i) make sure to screen investors with necessary due diligence in advance of making an investment in order to mitigate

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safely managed sanitation facilities"; "At least 892 million people continue to practice open defecation"; "2.4 billion people lack access to basic sanitation services, such as toilets or latrines.").

6. *See, e.g.,* International Covenant on Economic, Social and Cultural Rights art. 11-12 Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3; G.A. Res. 64/292, ¶ 1 (July 28, 2010) (recognizing the *de facto* human right to water). Org. for Econ. Coop. and Dev. [OECD], *OECD Guidelines for Multinational Enterprises,* at 31-34 (2011) https://www.oecd.org/daf/inv/mne/48004323.pdf; United Nations Conf. on Trade and Dev. [UNCTAD], *Investment Policy Framework for Sustainable Development,* UNCTAD/DIAE/PCB/2015/5 (2015); Owen McIntyre, *Emergence of the Human Right to Water in an Era of Globalization and Its Ramifications for International Investment Law*, *in* GLOBALIZATION, INTERNATIONAL LAW, AND HUMAN RIGHTS (Jeffrey F. Addicott et al. eds., 2012). Qian also states:

> General Comment 15 of the United Nations Committee on Economic, Social and Cultural Rights ("CESCR") interprets the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR") as confirming the right to water in international law. This Comment provides guidelines for the interpretation of the right to water, framing it within two articles, Article 11, the right to an adequate standard of living, and Article 12, the right to the highest attainable standard of health. *See* QIAN, *supra* note 1, at 7.

7. *See* S. AFR. CONST., 1996, § 27. The Constitution of South Africa refers to the following:

> 1. Everyone has the right to have access to -
> a. health care services, including reproductive health care;
> b. sufficient food and water; and
> c. social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
> 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. *Id.*

8. "Water services" is used as a catchphrase for water-related investments; for example, in supply, sewage, sanitation, and management.

potential disputes; (ii) impose necessary obligations on investors' performance; and (iii) then continuously work with the investors to ensure that the performance is of sufficient quality and that its citizens have frequent access to quality water.[9] Conversely, states should not create legitimate expectations by, for example, (iv) making promises that they cannot keep, (v) interfering with investments by administrative misconduct, or (vi) legislating and then re-legislating without the proper aforethought necessary.[10] Put simply, while states should be allowed to regulate, and, in particular, for health and public welfare in general, they should not act in an arbitrary manner because, for example, the investment did not turn out the way they wanted.

Finally, while navigating FDI in water services and the interaction between IIL and international human rights, we should not forget that the legal systems in most democracies are underpinned by liberal democratic and capitalist values. As a result, sovereign states have elevated individual freedoms and, conversely, substituted their dominance,[11] in order to enforce and

9. *See, e.g.,* Amy K. Miller, *Blue Rush: Is an International Privatization Agreement a Viable Solution for Developing Countries in the Face of an Impeding World Water Crisis?* 16 INDIANA INT'L & COMPAR. L. REV 217, 228 (2005); Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy Over Privatization* 31 BERKELEY J. OF INT'L L. 89, 143 (2013); and Violeta Petrova, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water,* 31 BROOK. J. OF INT'L L. 577, 600 (2006).

10. Christoph Schreuer, *Investment Protection: Original Purpose and Features*, *in* THE FUTURE OF INVESTMENT TREATY ARBITRATION IN THE EU: INTRA-EU BITS, THE ENERGY CHARTER TREATY, AND THE MULTILATERAL INVESTMENT 1, 5 (Crina Baltag & Ana Stanic eds., 2020). Schreur states:

> In reality, this seeming unfairness is designed to offset an imbalance that exists against the investor. Most countries, developing or developed, try to attract investments. They woo prospective foreign investors with promises and favours. However, once the investment is in place, the balance of power and interests changes fundamentally. The investor is subject to the host State's regulatory framework and to some extent to the whims of its bureaucracy."). *Id.*

Notwithstanding this, it is also the case that international investment law differs significantly from human rights. We believe that international investment law belongs more to international economic law, and hence helps elaborate on liberal democratic values, while international human rights law belongs more to values embedded in liberal democracy. While this is true, the two are not mutually exclusive, but rather mutually reinforcing.

11. Absolute Sovereignty as manifested in, for example, absolute police powers.

protect individual rights.[12] As we enforce international economic law, we should not forget to enforce non-economic liberal values, such as international human rights, labor rights, and international environmental law.[13]

Section II discusses the human right to water and sustainable development in ISDS. Section III examines fragmentation and regime interaction, in particular it proposes a solution through systemic interpretation and integration. Section IV analyzes ISDS's role at the crosshairs of IIL and human rights law. This underscores a necessary discussion on legitimacy concerns with respect to ISDS, and the authors engage in reform proposals to meet the expectations and demands of all stakeholders.

II. THE HUMAN RIGHT TO WATER AND ISDS: SUSTAINABLE DEVELOPMENT

Inflow of private capital in the form of foreign direct investment (FDI) is both fundamental for economic growth and integral in an increasingly interdependent and interconnected world.[14] In other words, "[t]he inflow of capital is essential for the

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12. *See e.g.* QIAN, *supra* note 1, at 99 ("Both human rights law and international investment law protect individual rights by constraining the power of host states."). *See also* Reiner & Schreuer, *supra* note 4, at 94. Reiner and Schrerur state:

> In some respects, human rights law and investment law are very similar. Ben Hamida observes that certain substantive norms such as the prohibition of discrimination and the protection of property may be common to both investment and human rights law. Moreover, both are fundamental to the process of the emancipation of the individual from the state since they both provide for proceedings between an individual and a state. *Id.*

13. *See, e.g.,* G.A. Res. A/RES/70/1, ¶ 9 (Sept. 25, 2015) ("We envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all.").

14. FDI was slow before and after the world wars until the 1990s where an outburst of FDI was seen and following that IIAs came about. Naturally these came to include ISDS clauses. *See* KENNETH VANDEVELDE, BILATERAL INVESTMENT TREATIES. HISTORY, POLICY, AND INTERPRETATION 19 (2010). FDI constitutes 38% of global GDP. S*ee* CORP. COUNS. INT'L ARB. GRP., INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) REFORM 1 (Dec. 18, 2019) (referring to United Nations Conf. on Trade and Dev., *World Investment Report 2019*, at 1, UNCTAD/WIR/2019, (2019); Schreuer, supra note 10, at 5. Schreuer writes:

> In reality, this seeming unfairness is designed to offset an imbalance that exists against the investor. Most countries, developing or developed, try to attract investments. They woo prospective foreign investors with promises and favours. However, once the investment is in place, the balance of power and interests changes fundamentally. The investor is subject to the host State's regulatory framework and to some extent to the whims of its bureaucracy. *Id.*

growth of the economy, the provision of infrastructure, and continued economic development in the receiving country."[15] Intangibles are equally important in investments, such as know-how and technology.[16]

If one proceeds from the assumption that FDI is important for economic development, one needs to ask: How can states best attract, promote, and protect FDI?[17] The answer lies *inter alia* in treaty regulation and enforcement.[18] Schreuer rightly notes that "[t]he original purpose of treaties providing for the protection of foreign investments was and still is to promote economic development in the host countries."[19] Furthermore, he notes, that "[t]he dominant idea of investment protection is to promote foreign investment through the creation of a stable investment climate."[20] This original purpose of economic development represents the fundamental underpinning of both IIL and ISDS.[21]

See also id., at 1 ("Many other investment treaties also refer to development as their primary goal. Most bilateral investment treaties (BITs), in their preamble, refer to the aim of economic development."). For this reason, IIAs where elaborated, e.g. the ICSID Convention. *See, e.g., Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157, 157 (Feb. 2020) 18 (Austl.) ("By providing [for ICSID arbitration], the Centre aims to improve the international investment climate and stimulate a larger flow of private international investment."); *Kingdom of Spain v. Infrastructure Services Luxembourg S.á.r.l.* [2021] FCAFC 1122 (25 June 2021) 1 (Austl.) (stating that the ICSID Convention is an important international convention underpinning and supporting the flow of investment capital around the world).

15. CORP. COUNS. INT'L ARB. GRP., *supra* note 14, at 1.

16. Schreuer, *supra* note 10 at 3. Schreuer writes:

> A problem with the econometrics of investment treaties is that the economists who undertake these studies do not always measure the right thing. . . . The definitions of investment in BITs give a vivid illustration of the range of protected assets that may contribute to the development of host States, including intangibles like know-how and technology. *Id.*

17. *See, e.g.,* Crina Baltag, *Reforming the ISDS System: In Search of a Balanced Approach?,* 12CONTEMP. ASIA ARB. J. 279, 300 (2019) ("The origin of international investment law rests on the focus on the 'promotion' and 'protection' of foreign investments.").

18. There are of course many factors but legal security, e.g. a predictable and non-discriminatory regulatory environment; a stable macroeconomic environment, including access to engaging in international trade; infrastructure and human capital; and tax benefits. *See, e.g.,* ORG. FOR ECON. COOP. AND DEV., CHECKLIST FOR FOREIGN DIRECT INVESTMENT INCENTIVE POLICIES (2003).

19. Schreuer, *supra* note 10, at 1.

20. *Id.*

21. *See, e.g.,* Energy Charter Treaty, pmbl., Apr. 16, 1998, 2080 U.N.T.S. 100 (amended Jan. 15, 2016) https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf [https://perma.cc/2X9B-FMQG]("broader energy cooperation among signatories is

The new generation of model bilateral investment treaties ("BITs") share this primordial purpose of "[r]eaffirming the importance of encouraging investment promotion."[22]

Conclusively, economic development is key for most sectors and for meeting States' overall policy objectives and specific undertakings. However, "[t]he real problems in international investment are, that for the major part, the huge flows of investment do not go where they are needed most."[23] Perhaps, some reform is necessary in this light. Such reform should focus on promoting a rule of law that takes into account non-economic interests in development. Thus, investment regulation becomes the key default mechanism that promotes, attracts, and protects FDI in an organized manner. The new generation of model BITs affirms these goals.[24]

This Article discusses states' objectives and undertakings in order to both attract, promote, and protect foreign investments, but also to align with the SDG 6 on clean water and sanitation.[25] In this intersection between economic development and sensitive areas of investment, Schill noted that the principle of sustainable development requires an understanding of investment law not as an obstacle to development but also as a tool for host States to achieve their overall economic development objectives.[26]

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essential for economic progress and more generally for social development and a better-quality life."); *see* Amco v. Indonesia, Decision on Jurisdiction, ICSID Case No. ARB/81/1¶ 23 (Sept. 25, 1983) ("[T]he [ICSID] Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries."). *See also* Schreuer, *supra* note 10, at 2 ("Many other investment treaties also refer to development as their primary goal. Most bilateral investment treaties (BITs), in their preamble, refer to the aim of economic development.").

22. *Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model*, GOV'T CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng [https://perma.cc/M67E-J7X9](last visited Sept. 5, 2021).

23. Schreuer, *supra* note 10, at 4.

24. *Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model*, *supra* note 22 ("Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic co-operation between them, and to the promotion of sustainable development.")

25. *See* G.A. Res. 64/292, *supra* note 6.

26. STEPHAN W. SCHILL, E15INITIATIVE REFORMING INVESTOR-STATE DISPUTE SETTLEMENT (ISDS): CONCEPTUAL FRAMEWORK AND OPTIONS FOR THE WAY FORWARD, 5 (2015).

FDI improves lives and societies by promoting and enabling economic development. Moreover, protecting FDI through IIL and ISDS helps "export the virtues of capitalism and to maintain the unity and develop prosperity of the free world alliance."[27] Economic development nowadays includes sustainable development, and therefore such projects can be attracted while being protected.

The global community is mostly united on the mission of achieving development "in its three dimensions – economic, social and environmental."[28] United Nations Conference on Trade and Development ("UNCTAD") approaches the three dimensions in a balanced and integrated manner.[29] This notion could, we argue, help rebalance ISDS by integrating a nondimensional view of development when interpreting IIL.

Lately, several initiatives have come to reflect a widespread consensus that IIAs should include provisions that reflect the current understanding and relevance of sustainable development.[30] For example, we assert, that protection of human rights should be carefully considered in the context of IIL. Thus, IIAs are being increasingly amended to reflect new developments, such as the inclusion of sustainable development objectives.[31] As

27. *See* THOMAS E. CARBONNEAU, CARBONNEAU ON ARBITRATION : COLLECTED ESSAYS 7-8 (2011); RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 24 (2012) ("[E]conomic literature has emphasized that openness of an economic system to foreign competition is among the factors that contribute to economic growth and to good governance in general. Thus, investment law embodies and represents the nature and the effects of economic globalization, with the potential advantage of economic efficiency and of a higher standard coupled with a reduced legal power of the national authorities to regulate such areas that have an impact upon foreign investment").

28. G.A. Res. 70/1, 2030 Agenda for Sustainable Development, at 3 (Sept. 25, 2015) ("We are committed to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner.").

29. *Id.*

30. *See, e.g.,* Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383, 384-85 (2015) ("The emergence of environment-related disputes reflects shifting societal perceptions about the importance of sustainable development.").

31. *See, e.g., Model Text for the Indian Bilateral Investment Treaty*, UNITED NATIONS CONF. ON TRADE AND DEV., pmbl, (Dec. 28, 2015), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download [https://perma.cc/MF8X-YE7Q] ("Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the

explained in the Introduction to the 2005 IISD Model International Agreement on Investment for Sustainable Development:

> [T]he model for IIAs developed 50 years ago no longer meets the needs of the global economy in the 21st century. . . . We believe the time is ripe to propose a new model for IIAs, a new direction that is consistent with the goals and requirements of sustainable development and the global economy of the 21st century.[32]

For example, the proposed provisions on sustainable development to be included in the modernized Energy Charter Treaty ("ECT"), which defines the context and objectives of sustainable development, focuses on the right to regulate and the levels of environmental and labor protection, climate change and transparency etc.[33]

A major initiative *vis-á-vis* the inclusion of sustainable development objectives into IIAs has been the UNCTAD's Investment Policy Framework for Sustainable Development.[34] As such, the UNCTAD Framework refers to the following: (1) incorporating concrete commitments to promote and facilitate investment for sustainable development, as most agreements include hortatory language on encouraging investment in preambles or non-binding provisions on investment promotion;[35] (2) balancing State commitments with investor obligations and promoting responsible investment, as most IIAs do not specify investor obligations or responsibilities;[36] (3) ensuring an appropriate balance between protection commitments and

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development of economic cooperation between them and to the promotion of sustainable development.") [hereinafter Indian Model BIT].

32. HOWARD MANN, ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT, NEGOTIATORS' HANDBOOK X (2nd ed., 2005).

33. *See* Energy Charter Secretariat [ECS], *Report of the Modernisation Group on Progress Made in Fulfilling the Negotiations Mandate*, at 46-53, ECS Doc. CC 699 (Nov. 25, 2020), https://www.euractiv.com/wp-content/uploads/sites/2/2020/12/ECT-report-on-progress-made_FS.pdf [https://perma.cc/VMC2-BWDY] (proposed provisions on sustainable development).

34. UNCTAD, *Investment Policy Framework for Sustainable Development, supra* note 6.

35. *Id.* at 77.

36. *Id.* at 77-78. An example is the "unclean hands doctrine," as a defense stemming from an investor obligation. *See* Burke-White, *supra* note 4, at 3. ("Clean hands defences would allow a state to invoke the investor's lack of clean hands, even with respect to other substantive legal regimes, as a defence or jurisdictional bar to an investor's claim under investment law rules.").

regulatory space for development, as the protection of foreign investments cannot be absolute and fundamentally limit governments' regulatory freedom.[37]

A. Investment in Water Services

Because international stakeholders need to attract FDI in the water services sector and protect the human right of access to water, institutions should consider "the problems of scales and jurisdictions between the public and private, and how to meet a social need and profitability requirement in a market economy."[38] There are plenty of international instruments recognizing a *de facto* universal right to water.[39] Thus, IIA drafting and in particular interpretation could be informed also by these international instruments recognizing a *de facto* universal right to water through systemic interpretation. Put simply, investment tribunals "are required to interpret and subsequently integrate other public interests."[40]

Some scholars have argued that the right to water should even be treated as "constituting *jus cogens* in general international law and must inform investment treaty-making and interpretation."[41]

37. *Investment Policy Framework for Sustainable Development, supra* note 6, at 78. The unclean hands doctrine essentially says that, unless the investor is complying with international law (broadly), he cannot seek protection under the same regime (in the narrow sense). Thus, there can be no rights without obligations.

38. QIAN, *supra* note 1, at 21. This interaction between private and public interests, manifested in different legal regimes due to fragmentation of public international law, will eventually be adjudicated by arbitrators. Not only taking account of IIL, but also *inter alia* international human rights law, international environmental protection, and domestic laws.

39. *See supra* note 6 and accompanying text. G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, at 52 (Dec. 12, 1974); G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986);); Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874; United Nations Framework Convention on Climate Change, Mar. 21, 1992, 1771 U.N.T.S. 107; G.A. Res. 64/292, The Human Right to Water and Sanitation (July 28, 2010); Urbaser S.A. v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 1205 (Dec. 8, 2016) ("It is not disputed that the human right to water and sanitation is recognized today as part of human rights and that this right has as its corresponding obligation the duty of States to provide all persons living under their jurisdiction with safe and clean drinking….").

40. QIAN, *supra* note 1, at 96 .

41. Dominic N. Dagbanja, *The Conflict of Legal Norms and Interests in International Investment Law: Towards the Constitutional-General International Law Imperatives Theory* 6 TRANSNAT'L LEGAL THEORY 518, 547 (2015).

This argument rests on the constitutionalist principle, i.e. the role and standing of international human rights in legal civilization. For example, some have noted that because international human rights treaties and international environmental treaties promote the protection of human rights and the environment, much as does the constitution, these types of treaties should be treated as superior to investment treaties.[42]

At the end of the day, the obligation to put in place mechanisms to implement international agreements and to meet, for example, the SDGs, is the responsibility of the state and not of the investor. Thus, we argue, that the obligations stemming from the SDGs and the *de facto* human right to water should be accounted for already before attracting and promoting investments in the water services sector; for example, when negotiating and concluding concession contracts. The role and standing of international human rights may perhaps be higher in the hierarchy of default rules (e.g. as regulating investments in customary international law) as Dagbanja seems to allude.[43] It is true that human rights have "constitutional standing" and that investor protection does not.[44] The story is different, we argue, when states have explicitly agreed to promote and protect investments through IIAs, and hence elaborated a robust IIL. This explicit regime is then by design sanctioned through ISDS, which makes the end result a powerful one.

Finally, any insinuation on a hierarchy of laws, where IIL should be treated as inferior to another legal regime should be dismissed in its entirety.[45] However, any path forward that does not integrate conflicting legal regimes through systemic interpretation risks de-legitimizing ISDS, and therefore may slowly lead to the dismantle or total transformation of one of the greatest legal institutions that adjudicatory civilization has ever seen.[46]

42. *Id.* at 554; QIAN, *supra* note 1 ,at 116.

43. Dagbanja, supra note 41.

44. *Id.*

45. *See* QIAN, *supra* note 1, at 203 **(**"The *jus cogens* nature and deference principle establish a hierarchical value system regarding what weight should be given in the reconciling process.**")**.

46. Moreover, from a purely practical point of view, it is not possible to fit the water services regime into a regime of static rules without sufficient account taken for external factors that may or may not justify state measures that interferes with the investment. *See, e.g.,* ANA M. DAZA-CLARK, INTERNATIONAL INVESTMENT LAW AND WATER RESOURCES

States have begun to privatize the water services sector in order to promote and attract investments.[47] Most investments in water services are based on high-risk concession contracts.[48] Thus, the investor is relying on the legal framework and stability of the state.[49] Nowadays, approximately ten percent of global consumers receive their water from private companies.[50]

B. Investment Disputes and Water

In the context of investment disputes related to water services, the case law reflects the inherent tension between IIL and any relevant international legal systems involved with applicable water services regulation.[51] It is argued that international human rights law seems to collide with international investment protection when it comes to the privatization of infrastructure and notably water services and that the measures taken by host states, such as repudiation of lease contracts, failure to improve facilities, negative propaganda, or lowering of water prices have been challenged by investors before arbitral tribunals.[52]

Evidently, ISDS disputes regarding water services investments concern mostly the competing rights between the states' "right to regulate" and the investors right to investment

MANAGEMENT: AN APPRAISAL OF INDIRECT EXPROPRIATION 65-66 (2017) ("It would therefore be unreasonable to expect that a highly variable and unpredictable resource, such as water, should remain subject to static rules, hindering adaption and resilience in times of scarcity and climate variability.").

47. JORGE E. VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 179 (2012); QIAN, *supra* note 1, at 21.

48. *See, e.g., Water and Sanitation Concession/BOT/DBFO*, WORLD BANK (Dec. 2, 2020). https://ppp.worldbank.org/public-private-partnership/sector/water-sanitation/concessions-and-bots [https://perma.cc/AN7H-F6LS].

49. QIAN, *supra* note 1, at 4.

50. *Id.* at 17-22.

51. *Id.* at 7. This paper has not touched upon the debates on the creation of a "global water governance" or a "global administrative law" on this and similar issues. *See e.g.* Joseph Dellapenna & Joyeeta Gupta, *Toward Global Law on Water,* 14 GLOB. GOVERNANCE 437 (2008).

52. Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 INT'L J. OF CONST. L. 671, 677 (2017) (referencing Biwater Gauff (Tanzania) Ltd. (Claimant) v. United Republic of Tanzania (Respondent), Award, ICSID, Case No. ARB/05/22, Award, ¶ 380 (July 24, 2008) (amici submission, summarized by the Tribunal).

protection.[53] In a sense, concerns about state sovereignty are on the rise; in particular the perception that investment tribunals have failed to strike a proper balance between investors' economic interests and the host states' regulatory power to take into account and further their noneconomic interests.[54]

In the water services arbitration cases, water tariffs are the main source of tension, such was when water tariffs are frozen in order to accommodate an alleged necessity (e.g. a financial crisis and a citizen's inability to stand the bill).[55] It is in this type of scenario where states defend their actions with arguments that potentially fall outside the realm of IIL *stricto senso*. For example, in some water disputes,[56] host states have decided to freeze water tariffs in a supposed response to a financial crisis by, for example, encouraging consumers not to pay their water bill. Such and similar measures have culminated in ISDS procedures in which host states have frequently invoked the *de facto* human right to water as a defense.[57] States have alleged that it was indeed within their police powers and "regulatory space" to take measures aimed *inter alia* at protecting and promoting the right to water.

The ICJ has "clarified that individual treaties are not to be interpreted in isolation but rather in the context of evolving

53. *See, e.g.,* James H Carter, *The Culture of Arbitration and the Defense of Arbitral Legitimacy*, *in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 97–105 (David D. Caron, et al. eds., 2016); Stephan W Schill, *Conceptions of Legitimacy of International Arbitration*, PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 106–124 (David D. Caron, et al. eds., 2016); SCHILL, *supra* note 26, at 1; Charles N. Brower & Sadie Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement*, 55 HARV. INT'L L. J. 45 (2014); Chester Brown & Kate Miles, *Introduction: Evolution in Investment Treaty Law and Arbitration*, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 3, 3-4 (Chester Brown & Kate Miles eds., 2011).

54. QIAN, *supra* note 1, at 9.

55. Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award (June 21, 2011); Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, (May 16, 2006); Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, (Oct 21, 2005).

56. *Aguas del Tunari, S.A.*, ICSID Case No. ARB/02/3.

57. *See* QIAN, *supra* note 1, at 17-22. *See also* Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (Nov. 21, 2000); Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability (June 30, 2010); Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26**,** Award, (Dec. 8, 2016).

international law."[58] In the *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ reasoned that "the Treaty is not static, and is open to adapt to emerging norms of international law."[59] It may be the time now that arbitrators in the ISDS system accommodate the same dynamic interpretation of IIAs. Arbitrators already have at their disposal methods of interpretation and certain mechanisms necessary to adjudicate at the crosshairs of IIL and environmental obligations. In fact, forward-thinking and pro-active arbitral tribunals have already steered the development in a pragmatic and progressive direction.[60] Conclusively, through most IIAs, the sources of international law that regulates the investments in the water services sector transcends IIL and instead can be found in customary international law, general principles of law, sometimes soft law, and other instruments of international law.

With this brief prelude, it is, therefore, appropriate at this point to take a look at the relevant ISDS cases involving water service related disputes. Of course, there is a multitude of cases in which the underlying dispute relates, in one form or another, to water services. For example, in *Methanex v. United States,*[61] the claim under the UNCITRAL Arbitration Rules was filed pursuant to NAFTA by Methanex Corporation and arose out of the order of the governor of California to ban the gas additive MTBE from gasoline by the end of 2002.[62] However, the ban itself was directly related, among others, to the quality of groundwater and drinking water.[63] The dispute in *Biwater v. Tanzania* related to the World Bank

58. Laurence Boisson de Chazournes, *Environmental and Investment Arbitration: Yin and Yang?,* 10 ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL 371, 376 (2017); *see* Legality of the Threat or Use of Nuclear Weapons (United Nations), 1996 I.C.J. 226 (July 8, 1996), https://www.icj-cij.org/en/case/95 [https://perma.cc/H4JW-LUEZ].

59. *Case Concerning the Gabcíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, ¶ 112 (Sept. 25).

60. *See, e.g.,* Indian Model BIT, *supra* note 31; *Model Text for the Kingdom of the Netherlands Bilateral Investment Treaty*, UNITED NATIONS CONF. ON TRADE AND DEV. (Mar. 22, 2019) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download [https://perma.cc/5GRJ-LNWR] [hereinafter Dutch Model BIT].

61. Methanex Corp. v. United States, 44 I.L,M. 1345 (United Nations Comm'n on Int'l Trade L. 2005).

62. *Id.* at ¶ 1.

63. *See id.* at ¶ 15 ("[W]hile MTBE has provided California with clean air benefits, because of leaking underground fuel storage tanks MTBE poses an environmental threat to groundwater and drinking water . . . ").

funded program of repairs and upgrades to, and the expansion of, the Dar es Salaam Water and Sewerage Infrastructure.[64] In *Pacific Rim v. El Salvador*,[65] the dispute related to the refusal of El Salvador to grant investors a gold-mining permit, to which El Salvador opposed that the issuance of such permit would have serious environmental impacts, including water pollution.[66] In most of these cases, as mentioned, the focus was on balancing investors' rights against public interests. Below, the paper will discuss those cases in which the tribunals had to touch upon the issue of interaction between IIL and public international law sources, as well as relying on the systemic integration to address these concerns.

Suez v. Argentina[67] and *AWG v. Argentina*[68] involved a water concession in Buenos Aires, and the 2002 economic crisis in Argentina triggered the dispute.[69] The Claimants set up an Argentine company, Aguas Argentinas S.A. (AASA), which, in 1993, entered into a concession agreement for a period of thirty years with the Argentine government for water distribution and waste water treatment for Buenos Aires and certain surrounding municipalities. Following the Argentine crisis and the devaluation of the Argentine peso, the government refused to revise the fees and tariffs charged by AASA. Following this, AASA failed to meet the revenue necessary for its financial obligations and the investments in the water distribution and waste management systems. In 2006, the Argentine government terminated the concession and AASA became subject to insolvency proceedings soon afterward. The *Suez* and *AWG* cases are relevant because the arbitral tribunal had to consider the normative conflict between the human right to water and the investment regime.[70] Argentina

64. *Biwater Gauff*, ICSID Case No. ARB/05/22 at ¶ *8 et seq*, ¶ 34.

65. Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Award (Oct. 14, 2016).

66. *Id.* ¶ 7.15.

67. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivdendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award (April 9, 2015).

68. *Id.* (referencing AWG Group Ltd. v. The Argentine Republic, an UNCITRAL case administered by ICSID., which had the same composition of the arbitral tribunal and the two proceedings run in parallel. However, the tribunal rendered a single award).

69. *Id.*

70. Suez, Sociedad General de Aguas de Barcelona, S.A,. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability (July 30, 2010).

and the *amici curiae* in the proceedings[71] submitted that "Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations."[72] However, the tribunal found no basis for such a conclusion in the BITs and international law. The tribunal held that

> Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations. Viewing each treaty as a whole, the Tribunal does not find that any of them excluded the defense of necessity.[73]

Such a conclusion supports the proposition that any such potential conflict, as submitted by Argentina in the *Suez* and *AWG* cases can be resolved by adopting the systemic integration approach.[74]

In *Urbaser v. Argentina,* the investor held shares in a local Argentinian company which was awarded a concession contract for providing water and sewage services.[75] After the Argentine crisis and the devaluation of the Argentine peso, which triggered the revaluation of tariffs and the review of the concession terms, the concession was terminated in 2006. Through its counterclaim, Argentina tried to hold the investor liable for failing to provide adequate water and sewage services, that is for failing to expand the water and sewage network and for inadequate investment, and, as such, to obtain an award finding the investor to have violated the human right to water under international law. The tribunal considered that it had jurisdiction to entertain a counterclaim, because the arbitration clause was framed in such a

71. Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB 03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission (Feb. 12, 2007).

72. *Suez*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 262

73. *Id.*

74. *See also* VIÑUALES, *supra* note 47, at 180.

75. *Urbaser S.A.,* ICSID Case No. ARB/07/26 ¶ 34.

way as to allow a counterclaim arising out of the concession agreement.[76] Moreover, the tribunal held, there was a link between the claim and the counterclaim, as the latter was also based on the investment, or rather on the lack of sufficient investment.[77] On the merits, the tribunal found that the applicable law clause concerned not only the Argentina-Spain BIT provisions,[78] but envisioned other sources of (international) law, such as general principles.[79] This meant that claims concerning the breach of obligations stemming from such sources could be entertained by the tribunal. The tribunal went on to analyze the possibility of an individual investor to be bound by obligations under public international law and found that modern international law did not prevent this.[80] However, in the counterclaim raised by the State, it was found that the human right to water and sewage services, as part of international law—on which the respondent relied against the investor—did not have a corresponding obligation on individual companies since it was the State that was bound by the obligation and not the investor's company.[81] For the purpose of this paper, it is nevertheless important to highlight that the tribunal in *Urbaser* has devoted good space in addressing the interaction between the relevant IIA and other sources of law, in particular focusing on the interaction between the investment regime. The tribunal began by highlighting that the tribunal must first look at the relevant provisions in the BIT and, in particular, at the one concerning the applicable law and referring to "general principles of international law."[82] In order to be pertinent "where appropriate," these

76. *Id.* ¶ 61 (Article X(3) of the Spain-Argentina BIT provides that: *The dispute may be submitted to an international arbitral tribunal in any of the following circumstances: (a) At the request of either party to the dispute, when no decision has been reached on the substance 18 months after the judicial proceeding provided for in paragraph 2 of this article began or When such a decision has been reached, but the dispute between the parties persists; (b) When both parties to the dispute have so agreed.*), 1144 (wording of the BIT), 1146-7 (investors' consent to arbitration did not and could not exclude counterclaims).

77. *Id.* ¶ 1151.

78. *Id.* ¶ 1187.

79. *Id.* ¶ 1188-91 (Art. X(5) of the Spain-Argentina BIT provides that *"[t]he arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.)*

80. *Id.* ¶ 1193-99.

81. *Id.* ¶ 1206-8, 1212.

82. *Id.* ¶ 1188.

additional legal bases must be connected or referred to by the BIT, which represents the ground of the decision in all cases. To this end, the tribunal in *Urbaser* unequivocally held that

> As far as recourse to the "general principles of international law" is concerned, such reference would be meaningless if the position would be retained that the BIT is to be construed as an isolated set of rules of international law for the sole purpose of protecting investments through rights exclusively granted to investors. Such a view, which Claimants favor, is not correct for more than one reason.[83]

The tribunal also took into consideration the provisions of the applicable BIT providing that where a matter is governed by the BIT and also by another international agreement, the parties to the BIT and the agreement and their investors shall be subject to whichever terms are more favorable."[84] In tribunal's view, such provision is evidence that "the BIT does not represent, in the view of the Contracting Parties and its clear text, a set of rules defined in isolation without consideration given to rules of international law external to its own rules."[85] Further, the tribunal explained that the provisions of Article X(5) of the applicable BIT "instructs the Tribunal to make its decision on the basis of the BIT and, where appropriate, by reference to one of the two bases other than the host State's domestic law, which are the main sources of international law, i.e. "other treaties in forth between the Parties" and "general principles of international law." The tribunal concluded that it "is thus Article X(5) [of the BIT] itself that states the evidence that the BIT is not framed in isolation, but placed in the overall system of international law."[86]

In *SAUR v. Argentina*,[87] the dispute resembles the other cases against Argentina involving water concessions. SAUR's claims arise out of the alleged failure of the government of the Mendoza province to adjust the service tariff in the light of the impact of the Argentine crisis. This, in turn, had a direct effect on SAUR's capacity to make the necessary investments, and hence to maintain the

83. *Id.* ¶ 1189.
84. *Id.* ¶ 1192 (referencing Article VII(1) of the BIT).
85. *Id.* ¶ 1192.
86. *Id.* ¶ 1201.
87. SAUR International SA v. Republic of Argentina, ICSID Case No. ARB/04/4, Award (May 22, 2014).

quality and quantity of sewage and drinking water. Ultimately, SAUR's local company entered liquidation. The tribunal addressed Argentina's position on the human rights defense and concluded that human rights and the right to water, in particular, are to be taken into consideration by the tribunal as they are part of the general principles of international law.[88] Further, the tribunal held that it does have the task to counterbalance the fundamental right to water and the right of the investor to benefit from the protection offered by the BIT.[89]

Azurix v. Argentina[90] was the dispute arising out of the concession contract obtained by ABA, an indirect subsidiary of Azurix, for the distribution of potable water and the treatment of sewage in the Buenos Aires province. The province failed to fulfill its contractual obligation to invest in infrastructure, which led to an algae contamination of the water reservoirs. Argentina raised issues of conflict between the applicable BIT and human rights treaties protecting consumers' rights and the fact that any such conflict must be resolved in favor of human rights.[91] The tribunal, however, considered that the argument had not been sufficiently argued, and failed to understand the incompatibility between BIT and human rights in this specific case.[92]

III. FRAGMENTATION AND REGIME INTERACTION: SYSTEMIC INTERPRETATION AND INTEGRATION

Having surveyed the relevant investment arbitration case law dealing with water services, it has become apparent that one has to address the reality that "international investment regime faces fragmentation risks found in general international law".[93]

88. SAUR International SA v. Republic of Argentina ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 330 (June 6, 2012) (highlighting that the right to water is a fundamental public service incorporated into Argentine law, and this right was weighed heavily by the tribunal in its decision).

89. *Id.* ¶ 331-32 (noting that the tribunal balanced the interests of the public right to water with the competing interests of the investor).

90. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (July 14, 2006).

91. *Id.* ¶ 254.

92. *Id.* ¶ 261.

93. QIAN, *supra* note 1, at 70. On fragmentation of international law, *see generally* Report of the Study Group of the International Law Commission (ILC), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (Apr. 13, 2006), *as corrected* UN Doc.

Moreover, the investment regime interacts and conflicts with other public international law regimes.[94] In spite of this organic interaction, there is little collaboration – as advocated earlier in this paper – between different adjudication fora in public international law. This is further accelerated by the fact that most IIAs "contain[s] different levels of protection, and one identical term can be subject to different interpretations by different tribunals."[95]

The regime interaction between IIL and human rights is another example of the so-called fragmentation of international law coming to light.[96] This fragmentation appears as "normative fragmentation,"[97] as well as "institutional fragmentation" given

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A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (finalized by Martti Koskenniemi)[hereinafter ILC]. For a commentary on the "pros and cons" of fragmentation, see Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. OF INT'L L. 849 (2004). *See also* Peters, *supra* note 52, at 673 ("The diagnosis of fragmentation refers to the dynamic growth of new and specialized subfields of international law after 1989, to the rise of new actors beside states (international organizations, non-governmental organizations (NGOs), and business), and to new types of international norms outside the acknowledged sources."); Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law,* STAN L. REV. 595, 596 (2007) ("In recent years there has been a growing debate in international legal circles about the importance of what is termed 'fragmentation': the increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries.").

94. IIL also conflicts and interacts with political and legal commitments in the domestic legal systems. *See* QIAN, *supra* note 1, at 90. In this paper, we deal with horizontal interaction; that is, IIL interacting with other regimes of public international law, as opposed to vertical interaction (interaction between IIL and domestic commitments). *See also* Burke-White, *supra* note 4 ("International investment law coexists with a wide range of other substantive regimes of international law, including human rights law, humanitarian law, environmental law, intellectual property law, and various regional legal orders. The interactions between investment law and these other regimes have come to be seen as increasingly problematic, with stakeholders questioning the legitimacy of international investment law and even the purposes of the international legal order more generally.").

95. QIAN, *supra* note 1, at 70**.** *See also* Stephan W. Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*, 2 TRADE, L. AND DEV. 63 (2010).

96. For a general research on the topic of regime interaction *per se*, see MARGARET A. YOUNG, REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION (2012). For a specific research on the topic of human rights in IIL and arbitration/ISDS, see HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann eds., 2009). *See also* Hafner, *supra* note 93, at 849 ("The system of international law has become increasingly fragmented, particularly since the end of the Cold War.").

97. The interaction among norms and principles from different legal regimes, e.g. IIL and international human rights. *See, e.g.,* Peters, *supra* note 52.

that "[t]here is no unified body of norms that apply to water and sanitation services regulation."[98] Regime interaction in water regulation will undoubtedly raise questions concerning the role of human rights protection in international investment protection.[99] Moreover, regime interaction can present itself *vis-á-vis* domestic commitments (vertically), as well as with respect to international regimes (horizontally).[100] This paper deals almost exclusively with horizontal regime interaction, particularly between IIL and international human rights.

Thus, the starting point of this analysis must be a general outline on fragmentation, regime interaction, and how to merge public international law regimes accordingly.[101] First, states have created specialized regimes out of need and necessity.[102] Second, several specialized regimes interact and conflict. Finally, states must harmonize the specialized regimes in order to establish a proper transnational or global rule of law.[103] The ILC Report on the Fragmentation of International Law states:

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98. QIAN, *supra* note 1, at 65-114. Some speak also of "institutional" fragmentation and "ideational" fragmentation. *See iIbid.,* at 675 (describing the former as different treaties, organizations, courts, etc., and the latter as different objectives and values).

99. QIAN, *supra* note 1, at 55.

100. *Id.* at 90.

101. For an explanation to the causes of fragmentation, see, for example Peters, *supra* note 52, at 674 (describing three causes of fragmentation; that is, the decentralized structure of international law; that different areas are handled by different departments and authorities; and finally as a response to "globalization"). For an explanation on fragmentation as a problem or opportunity, see *id.* at 678-82.

102. This underscores the benefits of fragmentation, i.e. as "an adequate reaction to modernity and modern complexity in life". Moreover, it presents several opportunities, such as competition between regimes, protection against centralization of powers, etc. *See id.* at 680-81.

103. Hafner, *supra* note 93. at 849-50 (outlining various factors that are responsible for the increased fragmentation, e.g. the proliferation of international regulations; increasing political fragmentation; regionalization; specialization of international regulations; and emancipation of individuals from States). A transnational or global rule of law takes account of all kinds of rules and legal regimes under international law. Thus, a reference to transnational or global rule of law naturally includes the systemic interpretation and integration. A transnational or global rule of law cannot be read in isolation. Such would demolish the constitutionalist principle and undercut values embedded in liberal democracy and liberal capitalism. Moreover, such rule of law can only function where "judicial dialogue" can flourish, i.e. where law-appliers and enforcement bodies are integrated, too. *See, e.g., id.* at 695 ("Importantly, the 'global community of courts' would need to encompass not only international courts and tribunals but also domestic ones applying international and foreign law in order to bring about a 'global' jurisprudence.").

> The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[104]

Despite the fact that there are more than 3,000 IIAs, the majority fails to provide guidance as to how issues of human rights should be addressed in the context of investment promotion and protection.[105] As has been noted, the current network of over 3,000 varied [IIAs], with references to various types of investor-state dispute resolution institutions, leading to over 900 investment arbitration cases, have come to give a flavour of the fragmented nature of IIL and ISDS.[106]

As a result of this fragmentation, arbitral tribunals faced with this interaction have traditionally been reluctant to open the ISDS floor shop to these non-economic, non-investment law-related matters, at least to the fullest extent. The problem is further exacerbated given that BITs are generally limited in their scope, often narrowly defined to attract, promote, and primarily protect investments.

In this context, when arbitrators are tasked with ascertaining the existence of the rule of law before enforcing it, it is perhaps not easy to discern whether and when a thick rule of law should be considered in the contemporary IIL and ISDS regimes.[107] As such, arbitrators should respect formal legality, substantive justice, as well as fundamental rights.

Perhaps the better way to harmonize legal regimes is through systemic interpretation and consolidation (as far as possible).[108] In

104. ILC, *supra* note 93, ¶ 8.

105. *See* Jörg Kammerhofer, *The Theory of Norm Conflict Solutions in International Investment Law, in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 83-98 (Marie-Claire Cordonier Segger, Markus W. Gehring et al. eds., 2011).

106. Baltag, *supra* note 17, at 281.

107. *See* Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, 25 EUR J. INT'L L. 1147, 1147-1168 (2014).

108. See *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (Dec. 30, 2015). Here, the Ad Hoc Committee, while referring to the ILC Report on the Fragmentation of International Law

systemic interpretation, and subsequently integration,[109] we include the concept of "judicial dialogue", i.e. the concept that adjudicators inform each other despite sitting in different venues.[110] This technique allows for the interpretation of international rules holistically by taking into account all kinds of rules of international law, including treaty law, customary rules, general principles, and even soft law.[111] Systemic interpretation is embedded in Article 31(3)(c) VCLT as "[m]ay be taken to express what may be called the principle of 'systemic integration' the process surveyed all along this report whereby international obligations are interpreted by reference to their normative environment ('system')."[112] It is perhaps the case that Article 31 of the VCLT not only "allows" systemic interpretation, but it "mandates" "treaty interpreters to take into account [all] kinds of 'rules of international law.'"[113] This leads to systemic integration, which implies a global common good into the algorithm of international law application and interpretation. The ILC wrote that:

> [L]aw is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a *general, public interest*. Without the principle of "systemic integration" it would be impossible to give expression to and to keep alive, any *sense of the common good of humankind*, not reducible to the good of any particular institution or "regime."[114]

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and the principle of systemic integration, confirms that relying on instruments from the field of human rights is a "legitimate method of treaty interpretation."*Id.* ¶ 92.

109. Systemic interpretation and systemic integration will be used interchangeably and refer to the same notion. Systemic interpretation leads to systemic integration. Thus, in the intersection between IIL and another legal regime, the use of systemic interpretation helps integrate the two and a coherent, holistic transnational or global rule of law can be enforced.

110. *See* Peters, *supra* note 52, at 695 ("Importantly, the 'global community of courts' would need to encompass not only international courts and tribunals but also domestic ones applying international and foreign law in order to bring about a 'global' jurisprudence.").

111. *See id.* at 693.

112. ILC, *supra* note 93, ¶ 413. *See also* Burke-White, supra note 4, at 5 ("This provision clearly opens the door for tribunals interpreting and applying investment law to consider other rules of international law and, potentially, interpret investment law in a way that avoids conflict.").

113. Peters, *supra* note 52, at 693.

114. ILC, *supra* note 93, ¶ 480.

If a proper interpretation is employed, fragmentation can enhance both legitimacy and effectiveness of international law.[115] Systemic integration would help deal with fragmentation by bringing interacting legal regimes in line, i.e. reconciling or integrating with one another. ISDS is best equipped to utilize such technique and to address matters of IIL, at the intersection with other domains of public international law, such as international human rights.[116] Thus, fragmentation culminates in the issue of competing norms and institutions. In this light, regime interaction is needed to provide for a coherent transnational (or global) rule of law.[117]

As such, a removal of conceptualizing IIL and ISDS as a strict hierarchal order based on "primary rules" and "secondary rules" is

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115. Peters, *supra* note 52, at 682.

116. *See, e.g., id.* at 701. This can be partly remedied by IIL and ISDS taking account of a broader role of law by accommodating regime interaction through systemic interpretation. However, there are still controversies on whether the arbitral system is indeed the best suited venue. *See* Reiner & Schreuer, *supra* note 4, at 96 (discussing the controversy of international arbitration being the proper venue for dealing with breaches of human rights, the authors acknowledged lack of transparency and legitimacy as inevitable reproaches). Other conflicting legal regimes include environmental law and EU law. *See, e.g.,* CRINA BALTAG & YLLI DAUTAJ, INVESTORS, STATES, AND ARBITRATORS IN THE CROSSHAIRS OF INTERNATIONAL INVESTMENT LAW AND ENVIRONMENTAL PROTECTION (2020); Baltag & Stanic, *supra* note 10. When the authors refer to "best equipped" or "better equipped," such statement may sound colloquial. Such assertion rests on a firmly entrenched analysis of which judicial institutions (domestic and international) or branch (administrative, executive, or judicial bodies) that has the best claim to decision-making of international investment law matters that implicate human rights mattes; that is, which institution or alternatively branch of government that has "best" competency and legitimacy to render legitimate and appropriate decisions in a transnational setting. Thus, the expression is not chosen lightly. Moreover, the authors believe that being "best equipped" includes being able to utilize systemic integration in order to account for regime interaction. The exact level of deference between arbitrators and other institutions that claim authority is a separate matter to be engaged with by the arbitrators. For a thorough study on which actor has the "best claim" to authority, see generally ESMÉ SHIRLOW, JUDGING AT THE INTERFACE:DEFERENCE TO STATE DECISION-MAKING AUTHORITY IN INTERNATIONAL ADJUDICATION (2021). For the purposes of this paper, a detailed account of why ISDS is better equipped than, for example, national courts or other international bodies is outside the scope of the research. Finally, reference to "best" or "better" equipped does not mean that a state should have no discretion in her sovereign sphere. Such right to regulate, margin of appreciation, balancing, or whatever it may be, would be a manifestation of deference between the arbitrator and a national institution or branch. What level of deference should be given in a given dispute differs and is a matter that ISDS arbitrators confront every day.

117. *See* Peters, *supra* note 52, at 679 ("Fragmentation also engenders losses of legal certainty which is in turn an element of the [global] rule of law.").

preferred. The conflict resolution technique of determining the law in a "normative hierarchy" has no place in determining the applicable law. It has rightly been noted that "[t]he disintegration of the legal order jeopardizes the credibility, reliability, and, consequently, the authority of international law."[118] The specialization of international law should not mean that a coherent rule of law cannot be enforced where regimes are interacting. Furthermore, the same should be true where two "special regimes" (i.e. *lex specialis* in their own right) interact, such as IIL and international human rights.[119] In this light, IIL should not be interpreted in isolation, nor as a *lex specialis* that takes precedent over all other international legal regimes. Applying IIL in isolation and as *lex specialis* offer international arbitrators an "easy way out," but not one that is sustainable in the long run for building the practice of adjudication through ISDS and building a transnational rule of law through application, interpretation, and dissemination of IIL.

> The "degree of regime interaction depends on the dialogue among the subfields of international law to approach the emerging norms" and that such "related to the participants' capacity to cope with the development of international law as a whole"; for example, the right to water.[120]

As mentioned and as retained by arbitral tribunal,[121] arbitrators should not view IIL in isolation, but should integrate conflicting legal regimes through systemic interpretation.[122] When working with plural rights and obligation, "systemic integration can make them parts of some coherent and meaningful whole."[123] Moreover, it has been noted that the systemic interpretation method can be used to incorporate recent developments in

118. Hafner, *supra* note 93, at 856.

119. The interpretation of conflicting regimes through identifying a "*lex specialis*" or "*lex posterior*" has been described as a "*horizontal*" technique. *See* Peters, *supra* note 52, at 682.

120. QIAN, *supra* note 1, at 49. *See also* Ernst-Ulrich Petersmann, *International Rule of Law and Constitutional Justice in International Investment Law and Arbitration*, 16 IND. J. GLOB. LEGAL STUD. 513, 526 (2009).

121. *See Suez*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 262.

122. *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention* 54 INT'L & COMPAR. L. Q. 280 (2005).

123. QIAN, *supra* note 1, at 136.

international law and can unify instead of fragment international law.[124]

IV. ISDS AT THE CROSSHAIRS OF INTERNATIONAL INVESTMENT LAW AND HUMAN RIGHTS

When international law is fragmented, one should aim at finding the optimal "collaboration" between the fragmented areas. Fragmentation in international law is "exacerbated by the lack of exchange of information between and among dispute settlement bodies."[125] ISDS is the best equipped venue for the redress of grievances stemming from IIL, which may from case to case interact with other public international law regimes, such as international human rights or international environmental law.[126]

As such, "[i]n discussing a (re)balancing of [IIL] and ISDS system in the context of the current reform, distinction must be made between substance, i.e. [IIL], and procedure, ISDS, in particular, arbitration."[127] This is because (a) "the interaction of substantive norms takes place through two related mechanisms," and (b) the mechanism of interpretation, i.e. turning on "how the tribunal interprets the applicable law in the light of other coexisting substantive norms."[128] Moreover, there is a distinction between holistic and overreaching reform, and moderate reform. ISDS arbitrators will have to balance the state's sovereignty in regulating for public purpose (i.e. a non-economic interest), on the one hand, with the obligation to protect foreign investments pursuant to voluntary undertakings and often additional promises, on the other.[129] Therefore, arbitrators must enforce rights and obligations stemming from the regime of IIL, while also enforcing rights and obligations stemming from other international legal regimes, such as international human rights.[130]

124. *Id.* at 79.
125. Hafner, *supra* note 93, at 858.
126. *See supra* note 116, and accompanying text.
127. Baltag, *supra* note 17, at 292.
128. Burke-White, *supra* note 4, at 2.
129. The usage of "balance" or "rebalance" could be substituted for "symmetry" or "recalibration". The essence remains the same, i.e. that economic and non-economic interests should both have due account and consideration.
130. *See, e.g.,* Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?* 60 INT'L & COMPAR. L. Q. 592 (2011).

Thus, the procedure and its arbitrators must adapt to this new reality, as they inevitably will be asked to adjudicate more disputes at the intersection between IIL and human rights law. This possible widening of jurisdiction, competence, and duty is at the center-stage of the current debate in the international arbitration community.[131]

The crux of the matter in the policy debate *vis-á-vis* regime interaction of (a) international investment law (IIL), and the (b) human right to water,[132] is whether liberalization and privatization either helps developing economies generating economic improvements and better living conditions, or adversely, whether such "commodification" of water will *inter alia* "jeopardize people's right to water, given that profit-driven private companies might be reluctant to serve the poor."[133]

It is evident that reform is necessary, especially in light of the current backlash on IIL and ISDS. Such reform should be aligned with constitutional values of democracy, the rule of law, and fundamental human rights (i.e. formed in light of public interest").[134] Such proposals should include *inter alia* (i) reforming IIAs (e.g. preambular language, including provisions on further regulatory autonomy for the states, inclusion of general exceptions and justification clauses, specification of substantive protection standards, etc.); (ii) reforming the arbitral procedure (e.g. widening the jurisdiction and applicable law *vis-á-vis* merits, elaborate on the role of counterclaims, the submission of *amicus curiae*, etc.); and (iii) broaden host states' defenses where IIL clash with other regimes of public international law (e.g. international human rights).

It is submitted that adopting the ISDS procedure to accommodate for regime interaction, and thus integrating, the increased fragmentation is needed.

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131. See BALTAG & DAUTAJ, *supra* note 116.

132. *See* International Covenant on Economic, Social, and Cultural Rights, *supra* note 6.

133. QIAN, *supra* note 1, at 6.

134. *See, e.g.,* Attila Tanzi, *Public Interest Concerns in International Investment Arbitration in the Water Service Sector: Problems and Prospects for an Integrated Approach*, *in* FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS (Tullio Treves et al. eds., 2014).

While ISDS is an appropriate regime to work at the interaction of IIL and other regimes of public international law, such as international human rights, these relatively recent debates on fragmentation and regime interaction, especially at the crosshairs of IIL and international human rights, must be assessed through the lens of striking a balance between half-cooked ideals and unintended consequences.[135] For example, even though outside the scope of this paper, it must be mentioned that some authors have argued that fragmentation of international law is a form of specialization by design, and therefore "a product of a calculated effort on the part of powerful states to protect their dominance and discretion by creating a system that only they have capacity to alter."[136] This kind of rationale underscores the growing tension with IIL and ISDS. Such tension spills-out in various reform proposals rooted in half-way ideals. This, in turn, will also help explain why various stakeholders (primarily some states and NGOs) are critical of the IIL and ISDS.[137]

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135. *See* Schreuer, *supra* note 10, at 3. ("[I]nvestments not enjoying international legal protection will require a risk premium. The higher profits required by the investor to justify its legal risk inevitably reduces the benefits of the foreign investment to the host State."). *See also* Charles H. Brower, *Politics, Reason, and the Trajectory of Investor-State Dispute Settlement,* 49 LOY U. CHI. L. J. 271, 295 (2017) ("Large multinational investors may not like the EU's vision, but seem unlikely to oppose it, in part because investment treaties do not rank high on their list of institutional concerns, and in part because multinational enterprises have other options in managing disputes with host states. Small- and medium-size investors might oppose the EU's proposal for an investment court, but lack the political capital to influence treaty negotiations."); *Id.* at 300 (Brower spoke *inter alia* about the establishment of a multilateral investment court and its unintended consequences for small and medium enterprises. For example, he wrote that multinational corporations involved in large investment projects can vote with their feet, i.e. they can move. "That, in turn, would transform the proposed investment court into a small claims court reserved only for small- and medium-sized investors, while the real action involving the big players and points of principle takes place elsewhere [. . .]"); Burke-White, *supra* note 4, at 10 ("While reforms are needed to ensure that investment law fully engages with other substantive fields of international law, scrapping the present investment law system or undertaking significant alterations to the substance of that system would be unnecessary overreactions to manageable challenges.").

136. Benvenisti & Downs, *supra* note 93, at 625.

137. *See* KAJ HOBÉR & JOEL DAHLQUIST, INVESTMENT TREATY ARBITRATION, PROBLEMS AND EXERCISES 12 (2018) ("Despite the success of investment arbitration, critical voices have been raised. They come mostly from some States and NGOs.").

A. Backlash on IIL and ISDS

Backlash from IIL and ISDS is focused primarily on whether ISDS in its current format is legitimate enough to properly adjudicate investment disputes. The backlash is further intensified when asking whether ISDS can appropriately be used to adjudicate investment matters that include a component of significant public interest, such as environmental issues, human rights concerns, bribery and corruption, etc. Currently, IIL and ISDS are facing questions of legitimacy which are mainly discussed in the context of the UNCITRAL Working Group III on the ISDS Reform.[138] The legitimacy debate has culminated in some overreaching forms of criticism, such as an alleged lack of transparency, that ISDS leads to a "regulatory chill,"[139] and that there exists an inherent investor-bias.[140] Thus, one way to redress the legitimacy concerns would be to expand the applicable law in IIAs and thereby streamlining enforcement of a transnational or global rule of law through ISDS. This seems to be the only sensible path forward.

According to Schill, in order to improve the perceived legitimacy deficit, the ISDS community should perhaps move away from treating legitimacy as a "monodimensional" concept rather

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138. Baltag, *supra* note 17, at 283. *See also* Peters, *supra* note 52, at 680 ("So ultimately, at the bottom of the fragmentation debate lies a concern for a loss of legitimacy of international law, a loss which will ultimately threaten that law's very existence.").

139. This theory is based on the unverified premise that ISDS leads the legislative branch to a halt in legislating for the betterment of the State in accord with public concerns. However, one should not outright refuse the notion of a supposed chill in regulation based on unverified allegations. CHRISTIAN TIETJE ET AL., THE IMPACT OF INVESTOR-STATE-DISPUTE SETTLEMENT (ISDS) IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP, 46 (2014) ("After analyzing all concluded ICSID decisions, the researchers found that 47% of disputes were associated with ministries or agencies while only 9% (14 total cases) resulted from legislative acts."). *See, e.g.,* C. Mark Baker & Cara Dowling, *Resolving Climate-related Disputes. The Role of International Arbitration*, in *FORWARD! ВПЕРЁД! FRAMÅT! ESSAYS IN HONOR OF PROF DR KAJ HOBÉR* 39 (Eric Bylander, Anna Jonsson Cornell, and Jakob Ragnwaldh eds., 2019) (stating that there is little evidence supporting the contention of a "regulatory chill," but meanwhile that such contention should not be dismissed "out of hand"). *See also* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law,* 9 CHI. J. OF INT'L L. 471, 483-489 (2009).

140. *See also* European Federation for Investment Law and Arbitration (EFILA), *A Response to the Criticism Against ISDS*, 4-42 (2015). The investor-bias allegation lacks any merit and should be dismissed entirely. *See* Int'l Ctr. for Settlement of Inv. Disp. [ICSID], *The ICSID Caseload Statistics,* at 13 (2021) https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf [https://perma.cc/G2H6-LFWC].

than a "multidimensional concept."[141] In this multidimensional representation of ISDS, the regime should take into consideration (a) party legitimacy, (b) community legitimacy; (c) national legitimacy; and (d) global legitimacy.[142] Put simply, the ISDS-reform debate must "proceed in a well-informed manner and take into account the interests of all stakeholders in a balanced way."[143]

Further, in order to take properly into account national legitimacy and global legitimacy, the IIA and ISDS must engage in a proper balance with the broader interests of host States and the protection of public interests.[144] In particular, arbitrators must entertain a balancing of IIL with, for example, human rights obligations. To remedy some of the perceived legitimacy deficit,[145] it may be considered whether this decade's arbitrators should embrace an indirect duty to serve as guardians of a transnational legal order.

That said, despite the outspread criticism and "signs of a backlash, [ISDS] remains the best available method for the protection of private investments from the acts if a foreign host State."[146] The truth is that "[a]rbitrators not only achieve efficient and effective dispute settlement but they also, through their independent and impartial application of the governing law, foster the international rule of law and an investment-friendly environment."[147] There is a virtue in truth, and therefore a necessity to objectively engage in legal scholarship to examine the actual evidence IIAs and ISDS, which "fails to reveal the threats and harms that have been posited."[148]

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141. Schill, *supra* note 53, at 117-122.

142. *Id.* at 119-22.

143. Schill, *supra* note 26, at 1.

144. *See* Baltag, *supra* note 17, at 300.

145. The delegates to the thirty-six session of the UNCITRAL Working Group III highlighted the necessary distinction between well-founded concerns, which are supported by facts and empirical research, and non-founded concerns, which are based on perceptions. *See Draft report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session*, U.N. Comm'n on Int'l Trade L., ¶ 20, U.N. Doc. A/CN.9/964 (Nov. 6, 2018), https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf [https://perma.cc/8QVS-ETJ6].

146. Sundaresh Menon, *The Transnational Protection of Private Rights, Issues, Challenges, and Possible Solutions, in* PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 35 (David D. Caron, et al. eds., 2016).

147. Brower & Schill, *supra* note 139.

148. *See generally* Brower & Blanchard, *supra* note 53.

B. Reforming Treaties: Applicable Law and Next Generation of IIAs

The central feature of investment protection is the creation of international standards for the treatment of foreign investments, as well as the creation of effective remedies for their enforcement.[149] Thus, the next generation IIAs should "seek to balance investor rights and duties, preserve the State's right to regulate in the public interest and to acknowledge the importance of not only economic but also social and environmental goals in their design."[150] Legitimate State measures, either regulatory or of other nature, must be aimed at, for example, improving access to water without unduly interfering with IIL. The drafting of new investment agreements should reflect how states incorporate other substantive areas of international law and the guidance to arbitrators who have to balance competing regimes.[151]

The rule of law at the crosshairs of IIL, human rights law, and ISDS can only be enforced if reference is made to the relevant laws and rules in the context of human rights in the applicable treaty itself.[152] References to "general international law" and "cross-references" to other treaties or regimes are instrumental to broadening the jurisdiction and power of international investment tribunals.[153] Going into the future, the IIL and ISDS community will likely continue crafting a new generation of IIAs to redress the regime-interaction conundrum.[154]

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149. *See generally* Schreuer, *supra* note 10, at 5.

150. Peter Muchlinski, *Negotiating New Generation International Investment Agreements*, *in* SHIFTING PARADIGMS IN INTERNATIONAL INVESMTMENT LAW: MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED 41 (Steffen Hindeland & Markus Krajewski eds., 2016). *See also* Burke-White, *supra* note 4, at 1 ("Moreover, a new generation of BITs is emerging that often provides far more explicit balancing between investment law and other areas of international law.").

151. *See* Burke-White, *supra* note 4 at 1.

152. *See e.g.* UNCTAD, *Investment Policy Framework for Sustainable Development, supra* note 6.

153. *See* Peters, *supra* note 52, at 689.

154. *See, e.g.,* International Energy Charter Modernisation Group, *Public Communication on the Fourth Negotiation Round of the Modernisation of the Energy Charter Treaty* (2021), https://www.energycharter.org/fileadmin/user_upload/Public_Communication_Web.pdf [https://perma.cc/6G7E-W6VD]. *See also* International Energy Charter Modernisation Group, *Public Communication on the Second Negotiation Round of the Modernisation of the Energy Charter Treaty* (2020) where sustainable development and corporate social responsibility was discussed,

The new generation of IIA's[155] often include language widening arbitrators' jurisdiction, powers, and duties through (i) widening the preambular part of the applicable IIA; (ii) drafting provisions reserving policy space for regulation, in general, or for specific matters, such national treatment standard or expropriation, in particular;[156] (iii) and the inclusion of general provisions concerning human rights protection, alone, or as part of sustainable development or corporate social responsibility (CSR).[157] The new generation of IIAs is "responding to issues of general interest, such as sustainable development," although not with the force that most expected.[158] In sum, "[d]etailed treaty provisions that allow states parties to an [IIA] to balance competing interests ex ante offer the most promising means of resolving potential conflicts between [IIL] and other areas of law."[159] If this is not available explicitly, as is most often the case, the enforcement of the rule of law in the broad sense requires the proper interpretation of IIAs in light of the rules of treaty interpretation as codified by the Vienna Convention[160] and, in particular, under Article 31(3)(c).

https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Library/Public_Communication_EN2.pdf [https://perma.cc/M5NQ-4W97].

155. *See, e.g.,* QIAN, *supra* note 1, at 102 ("Notably, there are newly concluded IIAs which explicitly refer to general exceptions which grant the tribunals greater flexibility in balancing noneconomic interests.").

156. IIAs could include broader and more emphatic exception clauses that would make it clear that States have "greater regulatory flexibility". *See id.*

157. The role and standing of CSR in IIL and ISDS is outside the scope of this paper. *See, e.g.,* Dutch Model BIT, *supra* note 60, art. 23 ("Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises."). *See also* Reiner & Schreuer, *supra* note 4, at 86 ("When considering whether and to what extent states are bound by human rights duties, it would be inconsistent to disregard obligations that might be incumbent upon the investor.").

158. Baltag, *supra* note 17, at 292.

159. Burke-White, *supra* note 4, at 5.

160. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (1980).

1. Applicable law

Many IIAs contain choice of law clauses that typically includes "treaty rules, host state law, and customary international law."[161] Under these broadly phrased IIAs, international human rights are part of the applicable law.[162]

However, the role of customary international law in ISDS, as stemming from IIAs, is heavily disputed, let alone the role and standing of general principles of international law.[163] It has been noted that "[o]ne school of thought is that application of nontreaty law can contribute to the interpretation of one specific provision [and] [t]he other is that nontreaty law can be used to determine the appropriate applicable law."[164] One could even go as far as arguing that "it is impossible for arbitrators to determine a case merely focusing on the treaty," instead arbitrators "often refer to the general principles or customary rules of international law."[165]

Nowadays, customary international law and general principles of law are generally treated as complementing IIAs.[166] Article 31(3)(c) has been instrumental in allowing treaty interpreters to refer and incorporate general and customary rules into the IIA framework. As mentioned, systemic integration, meaning that arbitrators interpret IIAs in line with other

161. Reiner & Schreuer, *supra* note 4, at 84.

162. The same is true where there is a general reference to "international law". *See, e.g.,* Energy Charter Treaty, *supra* note 21, art. 26(6) (referencing "in accordance with this Treaty and applicable rules and principles of international law"). A reference to international law should be understood as a reference to the sources of law as outlined in Article 38 of the ICJ Statute. *See* Statute of the International Court of Justice, June 26, 1945, art, 38, 33 U.N.T.S. 993.

163. Moreover, some would argue that IIAs being enforced through ISDS may help formulate customary international law. For an interesting read, *see e.g.* Bernard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law* 14 NW. J. OF INT'L L.& BUS. 327 (1994). *See also* QIAN, *supra* note 1, at 65-114("There is no consensus regarding the role of nontreaty law in investment disputes. The lack of consensus gains particular weight in water investment disputes because this type of investment is highly concerned with different areas of international law and various layers of domestic regulations.").

164. QIAN, *supra* note 1, at 65-114.

165. QIAN, *supra* note 1, at 137.

166. *See* Stephen Fietta & James Upcher, *Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?*, 29 ARB. INT'L 187 (2013). *See also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 80 (2012).

international commitments,[167] is essential for ISDS. The relationship between IIAs and general and customary rules are "symbiotic."[168]

Moreover, it is largely accepted that the right to water is part of customary international law and stems from international instruments.[169]

Finally, the applicable law in IIAs should be addressed in the light of the "constitutional principle," i.e. that IIL should be interpreted in line with non-investment values such as international human rights.[170] Only such approach can equip arbitrators with the necessary powers to enforce a transnational (or global) rule of law. Thus, the next generation IIAs should "address the interaction between [IIL] and environmental, labour, and human rights law."[171]

2. Preambular provisions

One way of facilitating public interest is to include preambular language in IIAs. Preambular provisions mentioning human rights and/or sustainable development made their way in the latest generations of IIAs in a more elaborate form. These provisions, indicative of the object and purpose of the IIA, can indeed assist arbitral tribunals in the interpretation of the terms of the agreement in accordance with Article 31(1) of the Vienna Convention. Illustratively, Austria-Tajikistan BIT provides the following:

> RECOGNISING that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards; . . .

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167. *See* DOLZER & SCHREUER, *supra* note 166, at 79.

168. McLachlan, *supra* note 122.

169. *See* Dan F. Marques, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation*, 35 HUM. RTS Q. 785 (2013). *See also* QIAN, *supra* note 1, at 44-75 ("Academic opinion on the role of nontreaty law has argued that nontreaty law, especially the human right to water, should be applicable in dealing with water-related investment claims.").

170. *See generally* Dagbanja, *supra* note 41. *See also* Schill, *supra* note 26.

171. Burke-White, *supra* note 4, at 7.

> REFERING to the international obligations and commitments concerning respect for human rights;
>
> RECOGNISING that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable;
>
> COMMITTED to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards;
>
> EXPRESSING their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries; . . .
>
> TAKING NOTE OF the principles of the UN Global Compact;
>
> ACKNOWLEDGING that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection.[172]

And the 2016 Czech Republic Model BIT provides for the following:

> Desiring to encourage enterprises operating within their territory or subject to their jurisdiction to respect

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172. Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan, Austria-Taj., (entered into force Dec. 21, 2012). To the other end, there are early IIAs that do not contain reference neither to sustainable development nor to environmental protection. For example, Japan-Turkey BIT refers in its Preamble only to the "strengthening of economic cooperation between the two countries", the creation of favorable conditions for the investments and the beneficial effect of investments on the economies of both countries. Agreement Between Japan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investment, Japan-Turk., (entered into force Mar. 12, 1993). *See also* the Preamble to The Netherlands-Argentina BIT:

> Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them, particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party,
>
> Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investments is desirable . . . . Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Argentine Republic, Arg.-Neth., pmbl. (entered into force Oct. 1, 1994).

> internationally recognized standards and principles of corporate social responsibility, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct,
>
> Conscious that the promotion and reciprocal protection of investments in terms of the present Agreement stimulates the business initiatives in this field, economic prosperity and sustainable development of both States,
>
> Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and with promotion of consumer protection and labour standards.[173]

3. Substantive Protection

Most of the IIAs acknowledge the host-states regulatory powers, also referred to as "police powers."[174] These provisions are meant to allow host States some regulatory or policy leverage in handling matters of public interest. However, this could trigger a conflict with the standards of protection envisaged by the applicable IIA and, in particular, with the expropriation. In these instances, most parties favored nation treatment standard and the fair and equitable treatment standard. As explained by UNCTAD:

> According to the doctrine of police powers, certain acts of States are not subject to compensation under the international law of expropriation. Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as . . . (c) legislation restricting the use of property, including planning, environment, safety, health and the concomitant restrictions to property rights . . . For example, if confiscation of property is effected [sic] as a sanction for a violation of domestic law by the property owner, this would not be an expropriation. The same would be the

173. *Model Text for the Czech Republic Bilateral Investment Treaty*, UNITED NATIONS CONF. ON TRADE AND DEV., (Dec. 28, 2016), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5407/download [https://perma.cc/WD2V-CANM] [hereinafter Czech Model BIT].

174. *See* Beharry & Kuritzky, *supra* note 30, at 422 (referring to the Restatement (Third) of Foreign Relations Law § 712 (Am. L. Inst.1987) the authors engage in a conversation on measures taken that are permissible and non-discriminatory. They suggest that "[c]ustomary international law establishes that certain state action is beyond compensation under the international law of expropriation because states enjoy wide latitude to regulate within the realm of their police powers").

> case if an establishment is shut down for violations of environmental or health regulations.[175]

Few IIAs refer to the police powers of States when it comes to measures taken for health, safety, and environment. This policy space can be reserved either (a) generally, (b) for the entire IIA, or (c) in the context of a specific standard of treatment, such as national treatment or expropriation.

Article 10(3) of the Iran-Slovakia BIT is probably a step forward, as it refers to the obligation of investors and investments to apply the standards of corporate governance for the sector involved, as well as to "strive to" contribute to sustainable development of the host State:

> Investors and investments should apply national, and internationally accepted, standards of corporate governance for the sector involved, in particular for transparency and accounting practices. Investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through appropriate levels of socially responsible practices.[176]

Similarly, Canada-Mongolia BIT refers to the encouragement of investors to voluntarily incorporate standards of corporate social responsibility, including environmental standards.[177]

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175. United Nations Conf. on Ttade and Dev. [UNCTAD], *Expropriation: A Sequel*, UNCTAD/DIAE/IA/2011/7, 79 (2012).

176. Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, Iran-Slovk., art. 10(3)(entered into force Aug. 30, 2017).

177. Agreement between Canada and Mongolia for the Promotion and Protection of Investments, Can.-Mong., art. 14 (entered into force Feb. 24, 2017). *See also* Agreement for Cooperation and Promotion of Investments between the Government of the Federal Republic of Brazil and the Government of the Republic of Mozambique, Braz.-Mozam., art. 10 (signed 30 Mar. 2015, not yet in force). Annex II of the Agreement refers to various components of corporate social responsibility, including to environmental progress with a view of sustainable development. However, the language of the provisions is a soft one, of best efforts on the side of the investor. *Id.* at Ann. II. *See also* Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar, Arg.-Qatar, art. 12, (signed Nov. 6, 2016, not yet in force) (referring to corporate social responsibility under "best efforts" obligations: "lnvestors operating in the territory of the host Contracting Party should make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices.").

India revived its Model BIT in 2015 and chose to walk back specific references to human rights and consumer protection. Instead, India focused on language that is enough to be interpreted broadly. The relevant provision on investor obligations read as follows: "[Investors] shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments."[178]

The Dutch Model BIT, adopted in 2019 also refers to investor obligations. Article 7(1) provides that investors should "comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws."[179]

These treaties impose obligations on investors and clearly articulate the policy objectives of preserving the regulatory space for matters of public interest. In turn, arbitral tribunals have come to recognize and uphold these provisions and conclude that there is no breach of protection of investments where the measure is taken within the applicable law, in a non-discriminatory manner, and motivated by the duty of the host State to exercise its police powers.[180] In other words, "[w]here States must take actions against investors, which would amount to a breach of their international commitments, IIAs allow these States to rely on the obligations of investors to comply with human rights or environmental laws, as well as on the police powers of the States."[181]

Another majorly important development is the inclusion of the "clean hands defence", i.e. a "jurisdictional or admissibility bar prohibiting claims by investors whose prior behaviour was in breach of other substantive obligations of domestic or international law, including environmental, labour, or human

178. Indian Model BIT, *supra* note 31, art. 11 (Compliance with Laws).
179 Dutch Model BIT, *supra* note 60, art. 7(1).
180. *See infra,* notes and accompanying text; *see* Chemtura Corporation v. Government of Canada, Case No. PCA Case Repository 2008-01, Award, ¶ 266 (Aug. 2, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0149_0.pdf [https://perma.cc/Z99G-KVVH].
181. Baltag, *supra* note 17, at 294.

rights law."[182] This requirement has been incorporated in several "next generation IIAs".[183]

Conclusively, clauses providing for regulatory autonomy, general exceptions, or justification of certain measures "intend to carve out regulatory space for States to achieve policy goals without breaching their substantive obligations."[184] These types of clauses are particularly pertinent given the backlash on IIL and ISDS, as well as the need to merge IIL with other legal regimes of significant importance.

C. Reforming the Arbitral Procedure: Enhancing the Fundamental Elements

Having referred to the ISDS legitimacy 'crisis' and discussed fragmentation and systemic integration with reference to IIL and ISDS, we now identify how a reform of the ISDS regime should be pursued without undercutting the fundamental elements of international arbitration. Any reform proposal that undercuts the fundamental features of international arbitration would move the regime farther from its equilibrium state.[185] Thus, legitimate ISDS reform must conform, preserve, and enhance the fundamental elements of international arbitration.[186] More than procedural features, ISDS has helped de-politicize heavily political and diplomatic subject-matter issues.[187] For having brought the rule of law to all corners of the world, removing obstacles of sovereignty

182. Burke-White, *supra* note 4, at 8.

183. *See, e.g.,* Indian Model BIT, *supra* note 31; Comprehensive Trade and Economic Agreement between Canada and the European Union, Can.-E.U. (signed Oct. 30, 2016, noy yet entered into force).

184. *See* Beharry & Kuritzky, *supra* note 30, at 392.

185. *See* Schill, *supra* note 26, at 3 ("In sum, the current ISDS system conceptually suffers from a tension between its public governance functions and its set-up as a private dispute settlement mechanism that is modeled on how private-private disputes are settled in commercial arbitration. Against this background, ISDS comes as a challenge to core constitutional law values, such as the principle of democracy, the concept of the rule of law, and the protection of fundamental or human rights.").

186*. See* Charles N. Brower, et al., *So Is There Anything Really Wrong With International Arbitration As We Know It?, in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 7 (Arthur W. Rovine ed., 2012).

187. Schreuer, *supra* note 10, at 7 ("Agreeing to investment arbitration means removing a potentially dangerous dispute from the political arena and transferring it to a judicial forum that applies objective, previously agreed standards in a preformulated settlement process. Investment arbitration contributes to international stability by depoliticising disputes.").

and in instances gunboat diplomacy, ISDS should be acknowledged on that fact alone.[188]

The question is whether and how the ISDS regime can maintain its fundamental features, including remain de-politicized, and still embrace constitutional values that would enhance the regime's global legitimacy. We believe that systematically integrating the international human rights regime with IIL would be one significant step in the right direction. As a result, this will increase the legitimacy of the regime.

One important point in this reform is to encourage the systemic interpretation. Arbitral tribunals have concluded that IIAs, and BITs in particular, cannot be viewed in isolation, but rather forms part of a broader international law. Arguably, IIL, as it converges with public international law, is the expression of, or, in any case, a guarantee of the rule of law. For example, one of the first arbitral tribunals to consider human rights as fundamental right was *AAPL v. Sri Lanka,* which highlighted that BITs are not a self-contained closed legal system, but they have to be seen within a wider juridical context in which rules from other sources are integrated.[189] Similarly, in *BG Group v. Argentina*, the Tribunal held that a BIT is not a self-contained legal framework, isolated from international and domestic law.[190] In *Urbaser v. Argentina*, the Tribunal was clear in holding that BITs cannot be read in isolation,

188. Menon, *supra* note 146, at 28 ("In keeping with the post-war abhorrence of war and the use of force, states moved away from 'gunboat diplomacy' in economic relations, seeking instead multilateral international agreements for the protection of the private rights of their nationals.").

189. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, Final Award, ICSID Case No. ARB/87/3 , ¶ 21 (June 27, 1990). This was confirmed by the tribunal in *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc . v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/02/1 (Oct. 3, 2006) [hereinafter LG&E v. Argentina]. In this case, the arbitral tribunal held that the fact that there was no contractual relationship between claimant and host State constituted an additional argument favoring the application of international law:

> The fact that there is no contract between the Argentine Republic and LG&E favors in the first place, the application of international law, inasmuch as we are dealing with a genuine dispute in matters of investment which is especially subject to the provisions of the Bilateral Treaty complemented by the domestic law. *See id.,* ¶ 97-98 (citing the *AAPL v. Sri Lanka* Final Award).

190. BG Group Plc. v. The Republic of Argentina, UNCITRAL, Award, ¶ 100 (Dec. 24, 2007).

without consideration to rules of international law, external to its own rules.[191]

In dealing specifically with the provision concerning the applicable law under Article X(5) of the Argentina-Spain BIT, the Tribunal in *Urbaser v. Argentina* first explained that the one has to give due consideration to the principles of international law,[192] and then that the reference in the applicable law provision under the BIT to "general principles of international law" would be meaningless if the BIT is viewed in isolation.[193] As such, the applicable law provision in the relevant IIA should be sufficient to allow the Arbitral Tribunal to take into consideration any international rule concerning environmental matters related to the dispute.

When claims are submitted to arbitration under the ICSID option, arbitral tribunals must observe the provisions of Article 42(1) of the ICSID Convention:

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

Generally, arbitral tribunals understand that the parties to the dispute have made a choice of applicable law for the purpose of Article 42(1) of the ICSID Convention when bringing a dispute in reliance of an IIA, and this choice is reflected in the provision concerning the applicable law in the IIA, as illustrated above. Furthermore, as Article 42(1) directs to the application of "such rules of international law as may be applicable," tribunals agree that the provision speaks for the application of international law without restrictions. In *Urbaser v. Argentina*, the Tribunal concluded that the BIT's provision concerning the applicable law did not contain an exclusion of the application of 'international law' and, thus, it was "in harmony with Article 42(1) of the ICSID Convention".[194]

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191. Urbaser S.A*.,* ICSID Case No. ARB/07/26 ¶ 1192.
192. *Id.* ¶ *1188*.
193. *Id.* ¶ 1189.
194. *Id.* ¶ 1202. *See also*, THE ICSID CONVENTION: A COMMENTARY 575 (Christoph H. Schreuer, et al. eds., 2009).

There are also decisions of arbitral tribunals advising for caution in importing provisions of other treaties into IIAs. In the sphere of human rights law, the Tribunal in *Pezold v. Zimbabwe*, concluded that:

> [D]ue caution should be exercised in importing concepts from other legal regimes (in this case European human rights law) without a solid basis for doing so. Balancing competing (and non-absolute) human rights and the need to grant States a margin of appreciation when making those balancing decisions is well established in human rights law, but the Tribunal is not aware that the concept has found much support in international investment law. The Respondent has only referred the Tribunal to European human rights cases in its arguments.[195]

The investment arbitration cases show that arbitral tribunals are endorsing a broader rule of law applicable to the parties before them, either by referring to the rules of international law or turning to the wording of the applicable IIA.[196] This is in line with Article 31(3)(c) of the Vienna Convention, which provides that in interpreting treaties, parties should take into account relevant rules of international law and applicable relations between the parties.[197] Article 31(3)(c) refers to "any rules of international law," which means that the reference is to "all the sources of international law, including custom, general principles, and, where applicable, other treaties,"[198] with no hierarchy established.[199] As further explained by the ILC Report on the Fragmentation of International Law, Article 31(3)(c) of the Vienna Convention "goes beyond the truism that 'general international law' is applied generally and foresees the eventuality that another rule of conventional international law is applicable in the relations

195. Bernhard von Pezold and Others v. Republic of Zimbabwe, Award, ICSID Case No. ARB/10/15, ¶ 465 (July 28, 2015).

196. *See* Maffezini v. Spain, ICSID Case No. ARB/97/7, Award, ¶ 67 (Nov. 13, 2000) ("The Tribunal has carefully examined these contentions, since the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also increasingly so under international law.").

197. Vienna Convention, *supra* note 160, art. 31(3)(c).

198. ILC, *supra* note 93, ¶ 426.

199. Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission*, *in*, THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 113-114 (Enzo Cannizzaro ed., 2011).

between the parties."[200] In *Pope & Talbot v. Canada*, the arbitral tribunal interpreted the reference to "international law" in this provision with reference to Article 38 of the Statute of the ICJ.[201] With specific reference to environmental protection, the arbitral tribunal in *Iron Rhine Arbitration* considered to the debate surrounding the term "rules" under Article 31(3)(c) of the Vienna Convention and concluded that international law requires the integration of appropriate environmental measures in the design and implementation of economic development activities.[202] Further, the conclusion of ICJ in *Gabčikovo-Nagymaros Project Case* is of particular importance, especially by emphasizing that a treaty is not static, but open to adapt to emerging norms of international law.[203]

Article 31(3)(c) of Vienna Convention is not, as such, a mechanism for importing into a treaty other rules of international law, but a provision meant to be employed in the interpretation of the terms of a treaty.[204]

It is important, thus, to conclude that certain provisions in the applicable IIA and the rules of treaty interpretation, in particular

200. ILC, *supra* note 93, ¶ 470. There is a debate whether the rules must have a connection with the treaty that is interpreted, or not. Most of commentators agree that "[t]hese rules need have no particular relationship with the treaty other than assisting in the interpretation of its terms. Villiger, *supra* note 199, at 111. *But see* ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES. THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 178 (2007) (holding that pursuant to the Vienna convention, rules must have a demonstrated connection with the associated treaty); RosInvestCo v. Russia, SCC Case No. V079/2005, Award on Jurisdiction, ¶ 39, (Oct. 1, 2007) (holding that referencing "any relevant rules of international law applicable in the relations between the parties" must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general license to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole).

201. Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Award in Respect of Damages, ¶ 46, (May 31, 2002). *See also* Statute of the International Court of Justice, *supra* note 162, art. 38.

202. Award in the Arbitration Regarding the Iron Rhine ("IJZEREN RIJN") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, 27 R.I.A.A. 35, ¶¶ 58-59 (Perm. Ct. Arb. 2005).

203. Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. Rep. 7, ¶ 112 (Sept. 25).

204. See e.g. Stephan W. Schill & Vladislav Djanic, *Wherefore Art Thou? Towards a Public Interest-Based Justification of International Investment Law*, 33 ICSID REV. - FOREIGN INV. L. J. 29, 45 (2018) (concluding that "there is ample room for employing the principle of systemic integration as a gateway for competing public interests to guide the interpretation of otherwise vague treaty standards.").

Article 31(3)(c) of the Vienna Convention, may assist arbitral tribunals in comprehensively addressing IIL claims.

Another important issue of consideration in the ISDS reform is the possibility of respondent States to bring counterclaims. During the UNCITRAL Working Group III discussions on the concerns raised by ISDS, some States submitted in respect to counterclaims that, on one hand, "providing a mechanism for States to raise counterclaims was an important aspect of ensuring an appropriate balance between respondent States and claimant investors as well as for promoting procedural efficiency, fairness and the rule of law."[205] As also summarized in the 2019 Report of UNCITRAL, while having considered "proposals with respect to whether obligations of investors (for example, in relation to human rights, the environment as well as to corporate social responsibility) warranted further consideration,"[206] the UNCITRAL Working Group III, in discussing the reforms of ISDS, reiterated that its mandate is limited to procedural aspects of the identified concerns.[207]

Continuing on the procedural reforms suggested thus far, "[p]rocedural balance might also be attained by allowing the relevant stakeholders, and, in particular, the representatives of the society at large with an interest in the dispute, to have the opportunity to participate in the ISDS proceedings."[208] Because

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205. U.N. Comm'n on Int'l Trade Law, Rep. of Working Grp. III (Investor-State Dispute Reform) on the Work of Its Thirty-Fourth Session, U.N. Doc. A/CN.9/930/Add.1/Rev.1., at 2 (2018).

206. U.N. Comm'n on Int'l Trade Law, Rep. of Working Grp. III (Investor-State Dispute Reform) on the Work of Its Thirty-Seventh Session, U.N. Doc A/CN.9/970, at 7, ¶¶ 34-35 (2019).

> The Working Group then considered proposals with respect to whether obligations of investors (for example, in relation to human rights, the environment as well as to corporate social responsibility) warranted further consideration. It was noted that that aspect was closely related to the question of allowing counterclaims by States as well as claims by third parties against investors.
>
> In that context, the general understanding was that any work by the Working Group would not foreclose consideration of the possibility that claims might be brought against an investor where there was a legal basis for doing so.
>
> *Id.*

207. *Id*., at 6, ¶ 26. U.N. Comm'n on Int'l Trade Law, Rep. of Working Grp. III (Investor-State Dispute Reform) on the Work of Its Thirty-Fourth Session, U.N. Doc. A/CN.9/930/Add.1/Rev.1., at 2 (2018).

208. Baltag, *supra* note 17, at 298.

many ISDS matters implicate matters of public interest, increased transparency and third-party participation through *amicus curiae* have been a necessary evolution when negotiating and drafting IIAs, as well as for their procedure of and participation in ISDS. Regime interaction can only be functional through participation of all stakeholders in the procedure, as well as through inclusion and transparency.[209] The traditional approach to third-party participation in ISDS was restrictive. In *Aguas del Tunari v. Bolivia*, the Tribunal held that:

> The Tribunal appreciates that you, and the organizations and individuals with whom you work, are concerned with the resolution of this dispute. The duties of the Tribunal, however, derive from the treaties which govern this particular dispute. [. . .] The duty of a tribunal in any case that arises under that instrument will be to follow its dictates. It is no less our duty to follow the structure and requirements of the instruments that control this case.[210]

However, as much as the ethos of this statement makes sense, this approach has been reconsidered.[211] There is now a high degree of transparency in investment arbitration proceedings. This transparency in investment arbitration was exacerbated by the entry into force of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2014.[212] The increased transparency in arbitration proceedings has also paved the way for the participation of *amici curiae* in these proceedings. Tribunals have—and are exercising—the discretion to accept *amicus curiae* briefs. Transparency and third-party participation reform do indeed prove the fact that the ISDS regime considers *inter alia* the global dimension of the legitimacy debate (or alleged deficit).

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209. *See* Peters, *supra* note 52, at 699.

210. Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Letter of the Tribunal to NGO on the Petition to Participate as amici curiae, 2 (Jan. 29, 2003) https://www.italaw.com/sites/default/files/case-documents/ita0019_0.pdf [https://perma.cc/E57G-SQC8].

211. *See, e.g.,* Reiner & Schreuer, *supra* note 4, at 90 ("While invocations of human rights obligations by host states have been met with little enthusiasm, tribunals have been more willing to consider human rights missues in another context, namely that of amicus curiae submissions.").

212. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, (2014), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf [https://perma.cc/E7VX-EH4P].

Allowing public interest groups to participate in ISDS proceedings strengthens the constitutional value of democracy. In this light, one could highlight that a similar evolution is possible to remedy the concern of shielding human rights violations.

Equally important is host States' regulatory powers and their due enforcement under the applicable IIA. "[H]ost states have relied on human rights considerations defensively to justify measures with adverse effects on the investment, arguing that their treatment of an investor was in furtherance of or necessary to protect certain international human rights commitments".[213] Thus, circumstances precluding wrongfulness under international law—such as "necessity"—"may provide a means to avoid the effect of two conflicting rules of law applying simultaneously to a state's conduct."[214] This is particularly important for investments in water services because host states may justify their measures on the *de facto* or *ipso facto* human right to water. Thus, when host States seek to justify their actions, arbitrators must entertain a standard of review appropriate to balance the competing objectives and obligations stemming from IIL and IIAs, on the one hand, and international human rights stemming from other international instruments, customary law, and general principles of law. Striking that balance is hard, which is why the doctrine of proportionality is an increasingly important tool and device for arbitrators. Nonetheless, tribunals have considered that there must be an "appropriate correlation between the State's public policy objective and the measure adopted to achieve it."[215] One author has argued that proportionality is an ideal mechanism for judicial balancing within a constitutional framework, but that alternative approaches may be preferable in ISDS.[216] It has been argued that the doctrine of proportionality should be coupled with appropriate deference because such approach takes due account for regulatory autonomy and institutional competency and

213. Reiner & Schreuer, *supra* note 4, at 89.

214. Burke-White, *supra* note 4, at 4.

215. AES Summit Generation Ltd. and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No ARB/07/22, Award, ¶ 10.3.9 (September 23, 2010); ADC Affiliate Ltd. and ADC & ADMC Mmgmt. Ltd. v. the Republic of Hungary,ICSID Case No. ARB/03/16, Award of the Tribunal, ¶ 423 (Oct. 2, 2006); Prabhash Ranjan, *Police Powers, Indirect Expropriation in International Investment Law, and Article 31 (3) (c) of the VCLT: A Critique of Philip Morris v. Uruguay*, 9 ASIAN J. OF INT'L L. 98, 111-112 (2019).

216. QIAN, *supra* note 1, at 128.

expertise.[217] Finally, structuring IIAs and ISDS procedures in ways that leaves sufficient policy space for host states to regulate in the public interest would improve the democratic deficit and in turn increase the legitimacy of ISDS by aligning the regime with constitutional values.[218] Thus, some of the answers lies in the "next generation IIAs."[219]

As a final note under this heading, much in the same manner as the UNCITRAL Transparency Rules have been developed and adopted to accommodate concerns with ISDS, the Hague Rules on Business and Human Rights Arbitration (the "Hague Rules") has been adopted to reflect concerns of human rights violations in international arbitration.[220] More specifically, the Hague Rules represent another "important attempt to strike a balance between investment protection and human rights objectives related to water investments."[221] However, while embracing these additional reforms and novel aspects of arbitrating for global good, one should not disregard arbitration's role in arbitrating for peace throughout history.[222] Change is inevitable; as the saying goes, "changing it rests." However, one should not easily disregard the quiet triumph of arbitration.[223]

217. *Id.* at 159 ("This chapter provides two reasons regarding why international tribunals need to offer a measure of deference when adjudicators review national authorities' decisions. The first one is regulatory autonomy and the relative capacities of the decision-makers, who are more embedded in the local situation. The other one is the institutional competency and expertise issue, which may have practical benefits in relation to the measure in dispute.").

218. Schill, *supra* note 26, at. 4.

219. *See e.g., Dutch* Model BIT, *supra* note 60; Indian Model BIT, *supra* note 31.

220. *See* Center for Int'l Coop., *The Hague Rules on Business and Human Rights Arbitration Team*, (Dec. 12, 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [https://perma.cc/5H6P-BZ9Q]; *See also* Ylli Dautaj, *Roll Out the Red Carpet: The Hague Rules on business and Human Rights are Finally Here!*, KLUWER ARBITRATION BLOG (Dec. 26, 2019), http://arbitrationblog.kluwerarbitration.com/2019/12/26/roll-out-the-red-carpet-the-hague-rules-on-business-and-human-rights-arbitration-are-finally-here/ [https://perma.cc/EB69-DREE].

221. QIAN, *supra* note 1, at 39.

222. *See, e.g.,* ULF FRANKE, ET AL., ARBITRATING FOR PEACE: HOW ARBITRATION MADE A DIFFERENCE (2016).

223. *See* Stockholm Chamber of Commerce, *The Quit Triumph – How Arbitration Changed the World*, VIMEO, https://sccinstitute.com/about-the-scc/scc-100-years/the-quiet-triumph/ [https://perma.cc/2PBH-GW9G].

V. CONCLUSION

"When the Well's dry, we know the Worth of Water."[224]

ISDS should be treated as the proper venue for addressing and redressing investment disputes that have human rights components. Among all feasible transnational alternatives, ISDS has the greatest potential to remain de-politicized while still enforcing a multifaceted and all-encompassing transnational (or global) rule of law.

Thus, in efforts to consider the wider realm of public international law, states should actively promote investments that align with sustainable development. Such includes attracting, promoting, and subsequently protecting through IIL and ISDS investments in the water services sector, aimed directly or indirectly at generating economic value (for the investor) and meeting SDG6 and the human right to water (for the host state).

We believe that the proposals in this paper are fully in line with the object and purpose of IIL and ISDS. More than that, we are of the firmly entrenched view that our ideas would enhance the fundamental elements of international arbitration.

As we saw in the case studies, revolution does not come in a day, let alone evolution. The enforcement of human rights obligations, as fundamental rights, within water services investments has been assessed by arbitrators at the jurisdictional, as well as at the merits stage of investment arbitration proceedings. Because IIAs are rather limited in explicitly referencing international human rights provisions, it is argued that such obligations should be incorporated and addressed in the light of the rules of treaty interpretation. Arbitrators in the ISDS regime must perform differently in order to reform and then transform their perceived powers and duties, and therefore elevate their standing as pro-active transnational adjudicators.

The integration of human rights—stand-alone or as part of sustainable development—obligations within the framework of IIAs is an expression and manifestation of furthering the transnational or global rule of law. Only a systemic, holistic, and comprehensive approach to international investment disputes that implicate *inter alia* human rights issues can ensure that states

224. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (1746).

and investors are equally held accountable for their respective undertaking.[225] Thus, if endorsing a broadening of applicable law, ISDS will be able to preserve, protect, and enforce the values embedded in liberal capitalism and a liberal democratic world order.

Going forward, we must understand that there is indeed an *ipso facto* role of international human rights protection as applicable law in most, if not all, IIAs. Embracing this notion that the various fragmented regimes are not in conflict in the manner previously believed, helps arbitrators implement the enforcement of a systematically coherent and all-encompassing transnational or global rule of law.[226] Thus, new wine in old bottles should not be considered a bad thing. Quite the opposite. For example, the fact that "'new' investments in water and sanitation services are regulated by 'old' investment treaties," should instead be praised rather than frowned upon.[227] As President Biden said in a presidential debate during 2020, we can indeed chew gum and walk at the same time.

225. While re-drafting IIAs, states can *inter alia* include more robust exception clauses, counterclaim provisions, or other treaty language that is friendly to sustainable development. *See* Beharry & Kuritzky, *supra* note 30, at 411.

226. *See e.g.* Peters, *supra* note 52, at 680 ("To conclude, what is at stake in fragmentation is unity, harmony, cohesion, order, and—concomitantly—the quality of international law as a truly normative order.").

227. QIAN, *supra* note 1, at 17.