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Selected Recent Developments in IIA Arbitration and Human Rights

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1. Introduction

The relationship between foreign investment law and international human rights law has attracted a growing amount of interest over time.[1] There is an increasing research interest in questions of whether, to which extent and how States' human rights obligations may come into play in IIA arbitrations. States may regulate the market (and foreign investments) in furtherance of human rights obligations,[2] perhaps triggering, in turn, potential breaches of their IIA obligations towards foreign investors. Alternatively,

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1 Luke Eric Peterson and Kevin Gray, "International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration", Working Paper prepared for the Swiss Ministry for Foreign Affairs, April 2003, http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf; Moshe Hirsch, "Interactions between investment and non-investment obligations in international investment law", 2006 Paper for the International Law Association's Committee on the International Law on Foreign Investment, available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947430; Lahra Liberti, "Investissements et droit de l'homme", pp. 791–852 in P. Kahn and T. Waelde, eds., *New Aspects of International Investment Law*, Hague Academy of International Law, 2007, available also at http://www.oecd.org/dataoecd/43/39/40306263.pdf; Anne van Aaken, "Fragmentation of International Law: The Case of International Investment Protection", Vol. VVII, pp 91-130, Finnish Yearbook of International Law, 2008, available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1097529; Howard Mann, International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, International Institute for Sustainable Development, 2008; Luke Eric Peterson, "Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor–State Arbitration, International Centre for Human Rights and Democratic Development, 2009, Volume 3 of *Investing in Human Rights* series, http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf (hereinafter: Peterson, 2009).

2 When states ratify human rights treaties, they take on legally binding obligations with regard to human rights. While each treaty expresses these obligations differently, it is becoming increasingly common to express them under three headings – the obligation to respect the rights in the treaty, the obligation to protect the rights in the treaty, and the obligation to fulfill the right in the treaty. International human rights treaties cover civil and political rights (e.g. freedom of expression or the right to a fair trial) as well as economic, social and cultural rights (e.g. the right to be free from hunger).

certain activities of foreign investors may be accused of harming the human rights situation in a host country, raising questions as to whether such conduct should disqualify (or limit) foreign investors from laying claim to IIA protections and whether the business enterprise in question should be held directly liable for alleged breaches of human rights.[3]

In practice, however, human rights issues have been relatively slow to arise in the IIA arbitration context. Indeed, IIAs themselves are generally silent with respect to human rights matters, and do not expressly reference human rights-related obligations of States, much less seek to introduce any new human rights duties or obligations for governments or investors.[4] For their part, governments have rarely articulated clear views as to the relationship between IIAs and human rights. In recent years, however, specialized agencies of the United Nations, as well as the Organisation for Economic Cooperation and Development (OECD), have slowly begun to explore the interface and relationship between human rights and IIA obligations.[5]

These inquiries are taking place against a wider backdrop of work discussing the relationship between international investment law and "other" areas of international law,[6] with some pointing to the need to consider cross-cutting issues such as the need to mitigate the IIA system's lack of coordination with other fields of international law, [7] such as the application of international human rights, or also international social and environmental law. More broadly, the interaction between IIAs and other public policy objectives has been exemplified in earlier investor–State dispute settlement (ISDS) cases that have touched upon environmental or health-related issues.[8]

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[3] United Nations, "Respect, Protect and Remedy: A Framework for Business and Human Rights", Report of the Special-Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Council, 2008 (A/HRC/8/5).

[4] Although the occasional IIA may reference human rights considerations, the large majority of investment treaties appear not to touch upon this subject. Some notable exceptions include the European Free Trade Area–Singapore Free Trade Agreement and a recent Canada–Colombia Free Trade Agreement, both of which reference the Universal Declaration of Human Rights in the agreements' preamble.

[5] See the work of the United Nations High Commissioner for Human Rights (High Commissioner for Human Rights, Liberalization of Trade in Services and Human Rights, 25 June 2002, http://www.reports-and-materials.org/Trade-Human-Rights-Commission.htm; High Commissioner for Human Rights, Report on Human Rights, Trade, and Investment, July 2, 2003, E/CN.4/Sub.2/2003/9 (http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.9.En?Opendocument) and more recently the work of the United Nations Special Representative on Business and Human Rights, as well as the work of the OECD Investment Committee. See also "The Relevance of Non-Investment Treaty Obligations in the Adjudication of Investment Disputes", OECD Secretariat Scoping Paper (prepared by Lahra Liberti), March 6, 2009, DAP/INV/WP(2009)1.

[6] See Peterson (2009): 22 for discussion of earlier investment arbitrations which have discussed other international law norms (for e.g. United Nations Economic, Scientific and Cultural Organization (UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage).

[7] Report of the first session of the UNCTAD Multi-year Expert Meeting on Investment for Development, TD/B/C.II/MEM.3/3, 18 March 2009.

[8] For an early analysis of ISDS cases dealing with environmental and other public policy considerations, see "Private Rights, Public Problems – A Guide to NAFTA's Controversial Chapter on Investor Rights", IISD, WWF, 2001, Winnipeg, Manitoba; Nathalie Bernasconi-Osterwalder, "International Investment Rules and Water: Learning from the NAFTA Experience", in Edith Brown Weiss, et al. "Fresh Water and International Economic Law", Oxford University Press, Oxford, 2005, pp 263–288.

Despite the absence of human rights provisions in IIAs, human rights issues occasionally arise in IIA arbitrations. For example, foreign investors and/or arbitrators have sometimes referred to human rights law for interpretive guidance in determining the substantive protections owed to foreign investors.

In a 2002 arbitration ruling under the North American Free Trade Agreement (NAFTA), a Canadian real estate development company, Mondev International Ltd., complained that the disposition of a contract dispute by the United States courts had breached key NAFTA provisions. In the course of examining this claim, the arbitral tribunal acknowledged the potential relevance of certain rulings of the European Court of Human Rights (ECHR) with respect to the statutory immunities of certain state agencies before their own courts. This form of immunity could arguably interfere with the human right to a court hearing.[9] The tribunal conceded that these decisions of the ECHR – while emanating from a different legal order – might provide some guidance by way of analogy:

> "These decisions concern the 'right to a court', an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not concerned, as article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA's guarantee of 'treatment in accordance with international law, including fair and equitable treatment and full protection and security'."[10]

In recent years, there have been a small number of other instances where human rights considerations have arisen in IIA arbitration awards.[11] Indeed, human rights issues may arise at an accelerated rate in the future. In particular, the increasing transparency surrounding IIA arbitrations, and the concomitant willingness of arbitrators to entertain legal arguments from outside actors (for e.g. *amicus curiae* briefs) may give rise to an increasing number of interventions by non-parties seeking to inject human rights evidence or legal argumentation into certain IIA disputes.

Several trends seen in recent years are highlighted below. First, in some expropriation cases, arbitrators have referred to the case law and practice of the ECHR, and offered views as to the applicability of certain ECHR concepts and approaches to the IIA sphere. In this vein, arbitrators have considered the relevance of property rights protections under human rights law when reviewing claims of expropriation under investment treaties. Second, in some disputes arising out of the Argentine financial crisis, Argentina has made express reference to the threat posed to its constitutional order, human rights and

[9] Article 6(1) of the European Convention on Human Rights provides, in part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial and tribunal established by law."

[10] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, at paragraph 144.

[11] In the following, some portions of this IIA-Monitor reviewing specific ISDS dispute settlement cases draw upon Peterson (2009).

liberties. Under this scenario, arbitrators are asked to consider the human rights of individuals who are not party to the arbitration. As is explained below, arbitrators have taken sharply different views when confronted with this generalized human rights defence. Third, and finally, there have been a series of developments related to misdeeds or acts of illegality by foreign investors. While not bearing directly on human rights, these developments offer some suggestion as to how tribunals might handle situations where certain grave human rights breaches have been perpetrated by a foreign investor. The examples discussed also raise key questions related to *jus cogens* human rights obligations.

2. Investment tribunals debate the relevance of rulings by the European Court of Human Rights

Certain human rights conventions provide protection for property, and can give rise to international claims for breach of property rights.[12] On occasion, this particular jurisprudence is discussed in IIA arbitrations arising out of claims for expropriation. For example, in the *Ronald Lauder v. Czech Republic* arbitration, the arbitral tribunal's 2001 award observed that indirect expropriation was not defined in the Czech Republic–United States bilateral investment treaty (BIT).[13] Accordingly, the arbitrators looked to various secondary studies, as well as the jurisprudence of the ECHR for guidance as to how indirect or "de facto" expropriations are defined. In common with most investment treaties, the relevant IIA makes no reference to the ECHR jurisprudence, and the arbitrators offered no explanation as to how and to what extent other forms of jurisprudence should be studied or examined by investment treaty arbitrators.

In a number of more recent instances, arbitrators have resorted to the jurisprudence of human rights courts and tribunals in the course of interpreting the expropriation provisions of investment treaties. For example, in the *Azurix v. Argentina* arbitration, an International Centre for the Settlement of Investment Disputes (ICSID) tribunal ruled in 2006 that it would turn to rulings of the ECHR for "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation".[14] Azurix complained that it had suffered an expropriation of its investment in a water and sewage service concession in the province of Buenos Aires. In reviewing Azurix's expropriation claim, the tribunal deemed useful an approach by the ECHR which examined the proportionality of measures to the public interests being pursued. The tribunal did not offer any theoretical explanation for the transposition of such a concept to the BIT context – a question upon which the treaty itself is silent.

However, in borrowing the ECHR's proportionality test, the tribunal in *Azurix v. Argentina* expressly noted that it was following the approach of an earlier ICSID tribunal in an arbitration under the Mexico–Spain BIT. In the *Tecmed v. Mexico* case, the Spanish

[12] See most notably, the European Convention on Human Rights and the American Convention on Human Rights.
[13] *Ronald Lauder v. Czech Republic*, Final Award of September 3, 2001, at paragraphs 200–202.
[14] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of July 14, 2006, at paragraphs 311–312.

investor alleged that its investment in a hazardous waste treatment facility had been expropriated by Mexico. The tribunal's analysis of this expropriation claim cited a number of rulings of the European and Inter-American Courts of Human Rights.[15] Moreover, the *Tecmed–Mexico* arbitrators offered some legal explanation for their recourse to human rights law decisions: a provision in the relevant BIT which instructs arbitrators to resolve disputes according to the provisions of the treaty and by applying international law provisions. The tribunal construed this latter phrase to denote the sources of international law set forth in article 38 of the Statute of the International Court of Justice.[16] With this by way of explanation, the tribunal cited several human rights rulings which it deemed to bear upon the interpretation of an "indirect de facto" expropriation in the *Tecmed* case, including ones which assessed the proportionality between a government's aims and the burden borne by an affected investor.[17]

Meanwhile, in another investment arbitration, *Fireman's Fund v. Mexico*, a United States investor accused Mexico of having expropriated its investments in a Mexican financial institution. In its 2006 award, the arbitral tribunal indicated that it would examine *other* arbitral awards – not because they were binding precedents – but because they might be persuasive in helping to illuminate the meaning of expropriation under customary international law.[18] In the course of so doing, they acknowledged the proportionality analysis used in the earlier *Tecmed* case. In a footnote, the arbitrators observed that proportionality is used by the European Court of Human Rights, but added, without elaboration, that "it may be questioned whether it is a viable source of interpreting article 1110 of the NAFTA."

In the *ADC v. Hungary* ICSID arbitration, ECHR jurisprudence has been relied upon by arbitrators as part of the expropriation analysis. The claimants, a pair of Cyprus-incorporated entities accused Hungary of having expropriated their investments in a project to build an airport terminal at Budapest Airport. The investors were contracted to build the terminal, and to collect fees from various businesses operating out of the terminal (including passenger user fees, retail and duty-free outlet fees, and aircraft parking fees). After finding that the claimants had suffered an expropriation, the arbitrators turned to ECHR expropriation cases for guidance in quantifying the compensation owed to the foreign investors.

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[15] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (Case No. ARB(AF)/00/2), Award of May 29, 2003, at paragraphs 116–122.

[16] Ibid., at paragraph 116.

[17] Ibid, at paragraph 122; Ursula Kriebaum has pointed out that the use of proportionality analysis by tribunals in the *Tecmed* and *Azurix* cases differs from the way that this concept is used by the European Court of Human Rights. Whereas the ECHR uses proportionality in cases of established expropriations in order to determine the compensation owing, arbitrators in *Tecmed* and *Azurix* used proportionality tests to answer the threshold question of whether an expropriation had, in fact, occurred. See Privatizing Human Rights: The Interface between International Investment Protection and Human Rights, in August Reinisch and Ursula Kriebaum (eds.), The Law of International Relations – *Liber Amicorum* Hanspeter Heuhold, Utrecht: Eleven International Publishing , 2007, pp. 165–189.

[18] *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award of July 17, 2006, paragraphs 171–173.

In the *ADC v. Hungary* case, the arbitrators decided that they would value an expropriated property on the date of the arbitral award, rather than on the date when the expropriation occurred. In reaching this decision, the arbitrators stressed that the expropriation was *unlawful*, and that the relevant standard of compensation prescribed in customary international law is the *Chorzow Factory* standard which seeks to wipe out all the consequences of the illegal act and "re-establish the situation which would, in all probability, have existed if that act had not been committed". The tribunal observed that the value of the investment in question had increased in value since the time of the expropriation, and in order to wipe out all consequences of the act, it would be appropriate to value the compensation at the (later) date of the arbitral award. Notably, the tribunal found "support" for this approach in decisions of other international courts and tribunals, including the Iran–United States Claims Tribunal and the ECHR.[19]

In yet another recent arbitral award to touch upon expropriation issues, a panel of ICSID arbitrators rejected the relevance of a concept used by the ECHR. In the *Siemens v. Argentina* case, the German firm alleged that it had suffered an expropriation of an investment in an informatics services contract. For its part, Argentina cited ECHR jurisprudence for the proposition that less-than-fair-market-value compensation may be owed in cases where expropriations were undertaken for important social or economic reasons: However, in rejecting this argument, the tribunal reasoned as follows:

> "Argentina has pleaded that, when a State expropriates for social or economic reasons, fair market value does not apply because otherwise this would limit the sovereignty of a country to introduce reforms in particular of poor countries. Argentina has not developed this argument, nor justified on what basis Argentina would be considered a poor country, nor specified the reforms it sought to carry out at the time. Argentina in its allegations has relied on *Tecmed* as an example to follow in terms of considering the purpose and proportionality of the measures taken. The tribunal observes that these considerations were part of that tribunal's determination of whether an expropriation had occurred and not of its determination of compensation. *The tribunal further observes that article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the treaty"*[20] (emphasis added).

From this brief review of recent IIA awards, it is clear that human rights jurisprudence has been referred to in several disputes over alleged expropriation. As has been made clear above, arbitrators have looked to the practice of the ECHR with respect to the proportionality analysis – sometimes reaching differing conclusions as to the applicability of this concept in the IIA realm – as well as in relation to the so-called margin of

[19] *ADC Affiliate Limited and ADC and ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of October 2, 2006, at paragraph 497.

[20] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award of February 6, 2007, para 354; This award is currently subject to a revision request lodged by Argentina. See item #6 in the December 17, 2008 edition of *Investment Arbitration Reporter* at: http://www.iareporter.com/Archive/IAR-12-17-08.pdf.

appreciation which is sometimes accorded in human rights cases so as to give states some margin of discretion in determining how best to meet its international law obligations. Furthermore, as was seen in the *ADC v. Hungary* case, arbitrators have turned to the ECHR jurisprudence in an effort to reinforce a decision to quantify compensation from the date of an arbitral award, rather than the (earlier) date of the effective expropriation. Despite the somewhat frequent invocation of ECHR jurisprudence, arbitrators rarely offer a detailed theoretical explanation as to how such norms are applicable to the IIA case at hand. However, in the *Tecmed v. Mexico* case the arbitrators did expressly rely upon the applicable law clause of the *Mexico–Spain* treaty as a gateway to examine other relevant rules of international law.[21]

3. Governments raise generalized human rights defences in cases related to the financial crisis

On occasion in IIA arbitration, there have been human rights arguments raised by governments in *defence* of alleged IIA breaches. Although this appears to be an emerging trend – one which is difficult to assess given that most pleadings in IIA arbitrations remain confidential – there is some evidence that governments advert in IIA arbitration to certain human rights obligations contained in national constitutions or international treaties. IIAs give few instructions as to how such human rights are to be squared with the investment protections guaranteed to foreign investors.

Thus far, this type of argument appears to have arisen most notably in the series of IIA arbitrations that have been brought by foreign investors in the aftermath of the Argentine financial crisis.[22] In these arbitrations, Argentina appears to have raised generalized human rights arguments in defence of certain emergency measures adopted by the State. This line of argument has stressed the need to protect the human rights of citizens by ensuring basic order and/or access to those services which are instrumental to public health and welfare. On this view, measures taken in response to the financial crisis were necessary to uphold Argentina's constitutional order, as well as basic rights and liberties of the Argentine public. Arbitrators have taken widely divergent views of this human rights argument.

The first ICSID award to be rendered in a claim related to the Argentine financial crisis touched upon these issues in a brief and oblique fashion. United States-based CMS Energy Transmission convinced a tribunal of arbitrators that their investments in a gas transmission venture had been harmed by several breaches of the Argentina–United States BIT.[23] In so doing, the tribunal rejected an argument by Argentina that it acted out of a state of necessity. Furthermore, Argentina had mounted something of a generalized human rights defence: insisting that the "economic and social crisis that affected the

[21] See the discussion in Anne van Aaken, op. cit., at page 16.

[22] For an examination of cases related to the Argentine financial crisis, where governments have invoked the so-called essential security defense, see *The Protection of National Security Interests in IIAs*, UNCTAD Series on International Investment Policies for Development, UNCTAD, New York and Geneva, 2009, Sales No. E.09.II.12, forthcoming.,

[23] *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005.

country compromised basic human rights", and that an investment treaty could not prevail in the face of measures taken to remedy the effects of the crisis – and the compromised human rights.[24] However, on the facts of the case, the arbitrators denied that there was any "collision" between the investment treaty and the Argentine Constitution (and international human rights treaties to which Argentina was a party). The tribunal did not elaborate at length on this finding, but simply observed:

> "In this case, the Tribunal does not find any such collision. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties."[25]

In subsequent cases, arbitrators have differed sharply as to the weight to be accorded to this generalized human rights defence by Argentina.

In a recently-decided Argentine crisis dispute – *Continental Casualty v. Argentina* – an ICSID tribunal did accept Argentina's necessity defence, and also nodded in the direction of Argentina's responsibility to safeguard basic rights and liberties.[26] United States-based Continental Casualty had sued Argentina under the Argentina–United States BIT, alleging that certain emergency measures (taken in response to the financial crisis) breached the terms of the BIT. Continental owned one of Argentina's major providers of workplace compensation insurance, and had complained that the emergency measures harmed an investment portfolio held by Continental's local subsidiary. In particular, Continental complained of restrictions on transfers out of Argentina, restrictions placed on the rescheduling of cash deposits, the "pesification" of United States dollar deposits, and the pesification and default of certain Argentine debt obligations.

In its September 2008 award, the tribunal held that the treatment of one particular class of assets did lead to a breach of the United States–Argentina BIT, but otherwise the tribunal upheld Argentina's defence of necessity.[27] Indeed, the tribunal expended considerable time in analysing the terms of article 11 of the BIT, which provides certain public order and essential security exceptions. Notably, the tribunal rejected a narrow construction advanced by the claimants, and concluded that either the essential security or the public order clause could encompass situations arising from a severe economic crisis. Of particular note, the arbitrators ruled that the former clause could be invoked prior to the total collapse of a country. In this vein, the arbitrators stressed that such exceptions would be worthless if they could be invoked only when economic conditions had deteriorated so badly that there was nothing left for governments to protect.

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[24] Ibid., at paragraph 114.
[25] Ibid., at paragraph 121.
[26] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award of 5 September 2008.
[27] The arbitrators ruled that a restructuring offer made in relation to certain Treasury Bills was a breach of the Argentina–United States BIT due to the particularly burdensome nature of this offer. See "Most breaches of US–Argentine BIT rejected in Continental Casualty case", *Investment Arbitration Reporter*, 8 September 2008, http://www.iareporter.com/Archive/IAR-09-08-08.pdf.

Of particular interest, the arbitrators ruled that the extreme social and economic crisis faced by Argentina provided sufficient justification for the government's acting proactively to protect constitutional guarantees and fundamental liberties – rather than wait until it was necessary to suspend "constitutional guarantees and fundamental liberties".[28] Furthermore, the arbitrators drew expressly on a concept used in the human rights law context when they indicated that they would accord States a "significant margin of appreciation" when it came to applying emergency measures. In urging the use of this margin, the arbitrators stressed that "a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight".[29]

In a footnote, the arbitrators further elaborated on this margin of appreciation or discretion:

> "A certain deference to such a discretion when the application of general standards in a specific factual situation is at issue, such as reasonable, necessary fair and equitable, may well be by now a general feature of international law also in respect of the protection of foreign investors under BITs."[30]

As discussed in the previous section, the arbitrators in an earlier-discussed ICSID arbitration, *Siemens v. Argentina*, had expressed the contrary view: that a "margin of appreciation" was not to be accorded under the Argentina–Germany BIT.[31]

The holdings in the *Continental* case – which applied to most but not all claims advanced by the claimant – can be contrasted with other Argentine cases, where tribunals have rejected a "necessity" defence. In the *Sempra v. Argentina* case, the arbitrators ruled in 2007 that Argentina was not entitled to a necessity defence in a claim brought by the United States investor in two gas distribution enterprises.[32] The United States investor complained of a series of emergency measures, including the compulsory "pesification" of utility tariffs (which were previously calculated in United States dollars), and the abandonment of a policy of adjusting gas tariffs in line with United States inflation indices.

Ultimately, arbitrators upheld certain treaty breaches advanced by the claimant, while rejecting certain others. Of particular note, the tribunal rejected Argentina's efforts to

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[28] Ibid., at paragraph 180. See also *LG&E Energy Corp and others v. Argentine Republic*, ICSID Case No. ARB/01/1, Decision on Liability of October 3, 2006. The *LG&E* case upheld Argentina's necessity defence, at least during the peak of the financial crisis, albeit on different reasoning than that seen in the subsequent *Continental* case. The *LG&E* decision gave weight to the social dimensions of Argentina's crisis, without expressly referring to Argentina's human rights obligations. See for example, paragraph 234 of the 3 October 2006 decision on liability, where the tribunal acknowledges the food and health crisis which followed from the economic crisis,

[29] Ibid., at paragraph 181.

[30] Ibid., at footnote 270.

[31] The context in the *Siemens* case differed insofar as the margin of appreciation was being urged in relation to a different issue. However, the tribunal was explicit in rejecting the applicability of the notion in the investment treaty arbitration context.

[32] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007.

invoke article 11 of the Argentina–United States BIT and customary international law in an effort to plead that its emergency measures were occasioned by a state of necessity. Arbitrators offered a different assessment of the peril faced by Argentina than was seen in the *Continental Casualty* case. In common with the approach in the earlier *CMS v. Argentina* case, the *Sempra* tribunal concluded that the country's constitutional framework and basic rights or liberties were *not* in danger of collapse. This pivotal conclusion as to the endangerment of basic rights and liberties seems to have colored the tribunal's approach to the case.

Indeed, the tribunal noted that an expert for the claimant was asked whether Argentina's obligations under the American Convention on Human Rights would compel it to maintain its constitutional order during the crisis.[33] The claimant's witness responded "yes" to this query.[34] However, when the arbitrators turned their attention to the facts of the case, they were not convinced that the crisis heralded the collapse of Argentina's constitutional order:

> "This debate raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners. Yet, the real issue in the instant case is whether the constitutional order and the survival of the State were imperiled by the crisis, or instead whether the government still had many tools at its disposal to cope with the situation. The tribunal believes that the constitutional order was not on the verge of collapse, as evidenced by, among many examples, the orderly constitutional transition that carried the country through five different presidencies in a few days' time, followed by elections and the re-establishment of public order. Even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation."[35]

A third approach – distinct from the *CMS*, *Sempra* and *Continental* rulings – can be seen in a very recent award in an Argentine financial crisis arbitration. In the *National Grid v. Argentine Republic* arbitration, the arbitral award acknowledged the human rights arguments raised by Argentina, but was silent as to the persuasiveness of any such human rights reasoning.[36] National Grid initiated arbitration under the Argentina–United Kingdom BIT, alleging that a series of emergency measures had harmed the United Kingdom company's investments in the Argentine electricity sector. In its November 2008 award, the tribunal ruled that Argentina had breached certain protections contained in the Argentina–United Kingdom BIT. Arbitrators rejected an argument by Argentina that it had acted out of a state of necessity when it introduced the emergency measures in question.[37] However, arbitrators made some concession to the grave situation in which Argentina found itself at the very height of its financial crisis. Thus, the tribunal held that,

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[33] Paragraph 331.
[34] Ibid.
[35] Paragraph 332.
[36] *National Grid PLC v. Argentine Republic*, Award of 3 November 2008, available online at: http://ita.law.uvic.ca/documents/NGvArgentina.pdf.
[37] Ibid.

during the six-month peak of the crisis, the country's actions could not be construed to be in breach of the Argentina–United Kingdom BIT:

> "What would be unfair and inequitable in normal circumstances may not be so in a situation of an economic and social crisis. The investor may not be totally insulated from situations such as the ones the Argentine Republic underwent in December 2001 and the months that followed."[38]

On the face of the award, Argentina appears to have cast its emergency measures in human rights terms, in an effort to justify the measures as necessary to preserve the constitutional order and basic rights and liberties. However, in framing its own conclusions, the tribunal did not offer an opinion as to the weights and demands of these human rights obligations.

Apart from the generalized human rights defence being raised in some of the Argentine financial crisis disputes, there is also scope for particular human rights obligations to be raised in IIA arbitrations. In theory, it has been conjectured that the State's duty to promote and protect various *individual* human rights obligations could be material in IIA arbitrations where a State claims that its treatment of foreign investors was motivated by these human rights obligations. These human rights may range from civil and political rights (freedom of expression or the right to a fair trial) to economic, social and cultural rights (right to the enjoyment of just and favourable conditions of work, the right to be free from hunger or the right to water) or the prevention of slavery and genocide. A popular example in academic literature is the right to water – and its potential relationship to a series of IIA arbitrations arising out of water and sewage concessions. However, at least to date, there have been no awards which address this issue to a meaningful degree. (In the recent *Biwater v. United Republic of Tanzania* arbitration, arbitrators had conceded at an earlier stage of the proceedings that human rights considerations might be raised by the dispute.[39] However, the 2008 award noted that the United Republic of Tanzania had sidestepped the question whether its treatment of a United Kingdom foreign investor was compelled by the government's human rights legal obligations.[40] The tribunal did not explore the United Republic of Tanzania's human rights law obligations in further detail.)

Thus, it remains very much an open question to what degree alleged breaches of IIA obligations could be mitigated by virtue of the fact that a government was professing to act in furtherance of one or another human rights obligation. For instance, there is a still-active debate as to whether the purpose of an allegedly expropriative measure should have *any* impact upon a tribunal's assessment of the measure's compliance with the IIA.[41] Similarly, there is debate as to whether such a purpose should affect the level of

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[38] *National Grid P.L.C. v. Argentine Republic*, Award of 3 November, 2008, at paragraph 180.
[39] See *Biwater Gauff* (United Republic of Tanzania) *Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No.5, at paragraph 52.
[40] Ibid, at paragraph 434.
[41] Some commentators and governments argue that human rights measures should fall within the police powers of a government; on this view, bona fide human rights measures that impact negatively on a foreign investor would not constitute an expropriation for which compensation is owed. See, for example, the

compensation to be paid in the event that an expropriation is held to have occurred.[42] Furthermore, there is a sometimes vigorous debate *within* the human rights law field as to whether there is a hierarchy of human rights. In this vein, arbitrators may look more or less favourably on human rights defences depending upon the *particular* human rights obligation in question. For example, is the State acting to prevent imminent bodily harm to local citizens? Or is the state adapting policies to further a social and economic right such as the right to the highest attainable standard of physical and mental health? Similarly, tribunals might also take differing views depending upon the perceived range of policy options available to governments in advancing the human rights objectives in question (e.g. were there measures which might have impacted less onerously upon the foreign investor while fulfilling the human right goals in question?).

Tribunals have not yet begun to grapple with many of these challenging questions and they will find little in the way of guidance in IIAs themselves – most of which are silent as to such considerations, including what tests and methods should be used. Nevertheless, there are certain interpretive tools available to arbitrators, including provisions of the Vienna Convention on the Law of Treaties (VCLT) which have been underutilized by IIA arbitrators to date.[43] In particular, VCLT article 31 3 (c) has been cited as a possible tool for reconciling different international law norms in the areas of foreign investment and human rights.[44]

4. Questions related to *jus cogens* human rights obligations

Having reviewed issues related to the relationship between human rights and IIAs, a related question addresses the relationship between IIAs and the most fundamental rules of protection of human rights. Prohibitions against slavery, genocide and human trafficking, for example, are fundamental principles of international law, accepted by the international community and of a so-called *jus cogens* nature. It could well be that, in their defense, States claim that they act in pursuance of *jus cogens* obligations, pointing to the peremptory nature of such legal obligations and suggesting that this would justify a violation of IIAs. This may arise even where an investor is not involved in activities that trigger *jus cogens* questions.

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discussion in Peterson (2009), at page 28 where the Government of Argentina has argued that legitimate and proportionate measures in furtherance of human rights should not be deemed an expropriation.

[42] Some commentators have suggested that arbitrators may have latitude in certain contexts to mitigate the level of compensation owed in cases where a legitimate human rights interest lay behind a measure that has led to an expropriation; similarly, there is some evidence of governments making such arguments in pending arbitrations. It should be stressed that this approach has been presented as an alternative to the all-or-nothing debate about whether a measure is protected by the police powers doctrine (and, if so, not deemed to be an expropriation). For more discussion, see Ursula Kriebaum, "Regulatory takings: balancing the interests of the investor and the state", 8 *The Journal of World Investment and Trade*, 2007, pp.717–744.

[43] See Moshe Hirsch, "Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective", in Yuval Shany and Tomer Broude, eds., *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity*, Hart Publishing, 2008, at pp.323–343.

[44] See van Aaken, op. cit.

To date, there are no known investment cases where a State claims to have acted in defense of such a high-order human right. However, in a recent case dealing with a different issue, the investment tribunal expressed its view on a related issue: whether or not investors should be granted protection in case they have violated *jus cogens* type of obligations.

In Phoenix Action Ltd. v. Czech Republic, the tribunal expressed the view that protection "should not be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs".[45]

Moreover, based on recent arbitral developments, it seems likely that arbitrators would weigh carefully any peremptory human rights obligations of States, in hearing a claim for alleged breach of an IIA.[46] As seen in other cases, investor conduct – and its conformity with overarching general principles of international law – has been a material consideration at times.

In August of 2008, a ICSID tribunal ruled on an arbitration claim brought by a Cypriot-based corporation against Bulgaria.[47] The tribunal placed particular weight upon certain misrepresentations made by the claimant's owner as part of its efforts to obtain State approval for the purchase of a struggling refinery. In the view of the tribunal, the protections of the Energy Charter Treaty could not be extended to investments "that are made contrary to the law."[48] The investor's behaviour was deemed to breach principles of international law, and therefore precluded the application of the protections of the Energy Charter Treaty. The arbitrators cited several international law principles deemed applicable to the arbitration, including "international public policy", and the principle that no one should benefit from their wrongdoing.[49]

Of particular interest, the principle of "international public policy" has loomed large in other earlier ICSID arbitrations, including a contractual dispute between World Duty Free Company and the Republic of Kenya. In a 2006 ruling, an ICSID tribunal confronted clear testimony as to the relevant contract having been procured by means of a bribe.[50] After surveying the national and international law related to corruption, the tribunal concluded that "bribery is contrary to the international public policy of most, if not all, States".[51] Accordingly, the tribunal held that claims based "on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."

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[45] *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, April 15, 2009, at paragraph 78.
[46] See discussion in Peterson and Gray, op. cit., pp.18–20.
[47] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008.
[48] Ibid., at paragraph 139.
[49] Ibid., at paragraphs 143-144.
[50] *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award of 4 October 2006.
[51] Ibid., at paragraph 157.

To date, the principle of international public policy has been deemed to have been breached by the misrepresentations of foreign investors or their having engaged in bribery. However, it remains to be seen to what extent the same principle might apply in cases where an investor is accused of serious wrongdoing, giving rise to human rights violations. It has been noted that it might be contrary to public policy (or international public policy) for courts to enforce arbitral awards which "enforce or protect prohibited activities such as terrorism, drug trafficking, money laundering, smuggling, or genocide."[52] By the same measure, arbitrators might decline, on jurisdictional grounds, to hear disputes where the investments are predicated on certain grave forms of human rights abuse (e.g. slavery, genocide and human trafficking.) Alternatively, tribunals might assert jurisdiction over a case, but hold that investment treaties (or certain protections therein) are void or inapplicable in circumstances where they come into conflict with a peremptory (or *jus cogens*) norm.[53]

However, there have been no publicly-reported IIA cases to date which involve a clash between a *jus cogens* human rights norm and some IIA norm. For the moment, then, it remains a matter of speculation how arbitrators would respond to claims brought by investors who are themselves accused of involvement in grave human rights breaches.

5. Conclusion

There are numerous ways in which human rights issues may arise in the context of IIA arbitration. Several examples have been surveyed here, drawing upon recent IIA awards. These include the use of human rights jurisprudence for purposes of analogy, with arbitrators debating whether concepts or approaches (including proportionality of the margin of appreciation) used in human rights cases are applicable in the IIA context. Also, governments have sometimes invoked their duty to protect all human rights and liberties by acting to avert or ameliorate certain threats to public order or basic security. As has been seen, arbitrators reviewing the same factual situations have sometimes taken sharply different views as to whether the facts at issue give rise to the threat cited by the government (and used as attempted justification for the measures under scrutiny in a given IIA arbitration). Finally, there are emerging IIA cases where arbitrators have relied upon principles such as "international public policy" in order to deny IIA protections to investors that have committed certain illegal actions. It is likely that the same principles might apply to those rare future cases where governments are alleged to have breached IIA protections in the course of acting to comply with certain *jus cogens* human rights obligations (for example, by taking action against a foreign investor engaged in practices such as slavery). However, the precise import of such *jus cogens* norms – in terms of a tribunal's jurisdiction and the merits considerations – appears to be largely uncharted territory for the time being.

It is likely that arbitrators will engage further with the human rights law obligations of States, as these are being raised in a small, but significant, number of ongoing

[52] See, for example, Karl-Heinz Boekstiegel, "Public Policy as a Limit to Arbitration and its Enforcement". Paper prepared for the 11th IBA International Arbitration Day, 1 February 2008.
[53] See discussion in Moshe Hirsh, p. 326.

arbitrations.[54] For instance, a high-profile arbitration by a group of mining investors against South Africa includes certain challenges to that country's Black Economic Empowerment policies, which, could lead to debate in this (or future) cases as to the relationship of IIAs to policies that promote certain disadvantaged persons.

While arbitrators generally lack the jurisdiction to rule that a human rights law norm has been breached, they may nevertheless be called upon to examine a State's human rights law obligations – and draw their own conclusions as to what these demand in practice (and how they may interact with investment law obligations). In view of this trend, there has been some discussion as to the advantages and drawbacks of arbitrators finding themselves in this position – and whether international investment tribunals have the capacity, expertise and indeed the mandate to engage such questions.[55]

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[54] See Peterson (2009) for a discussion of several ongoing cases where human rights law obligations are being debated, including *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1; *Suez, Socieded General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17; *Anglian Water Group v. Argentine Republic, UNCITRAL arbitration proceeding; Grand River Enterprises, et. al. v. United States of America*, NAFTA/UNCITRAL arbitration proceeding; and *Glamis Gold, Ltd. v. The United States of America*, NAFTA/UNCITRAL arbitration proceeding (Decision, 17 November 2005).

[55] See van Aaken, op. cit., for more discussion on this point. Concerns about international economic tribunals engaging in the balancing of economic and other (non-economic) factors, as it arises when applying strict proportionality testing, have also been voiced with respect to World Trade Organization dispute settlement.