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## *The contested legitimacy of investment arbitration and the human rights ordeal*

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1. As attested by a growing body of literature<sup>1</sup> and an increasing number of claims before arbitrators<sup>2</sup>, the human rights<sup>3</sup> ordeal now facing investment arbitration is the result of increasing unease generated by the contemporary quasi-worldwide foreign investment regime. It is well known that this regime, which rests largely on a massive number of bilateral treaties (BITS)<sup>4</sup>, was born of

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<sup>1</sup> See for example, a series of excellent studies approaching the intersection between the investment regime and human rights through analysis of arbitration cases: Luke Eric Peterson and Kevin R. Gray, "International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration", *Research paper prepared by the International Institute for Sustainable Development (IISD) for the Swiss Department of Foreign Affairs*, April 2003; Marc Jacobs, "International Investment Agreements and Human Rights", INEF Research Paper Series Human Rights, Corporate Responsibility And Sustainable Development 03/2010; Ursula Kriebaum, *Privatizing Human Rights. The Interface between International Investment Protection and Human Rights*, A. REINISCH & U. KRIEBAUM (EDS.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, 165-189. © 2007 ELEVEN INTERNATIONAL PUBLISHING. Printed in The Netherlands.

<sup>2</sup> For an excellent overview of the cases, see *Urula Kriebaum, op cit*, p.167 et s.

<sup>3</sup> Whose version, which generation, of human rights are we talking about here? It seems sensible to follow much of the literature and to treat them them generically, as widely accepted fundamental values in comparative constitutional and international law, whether regional or universal, first (liberal individual rights) or second (social and economic rights) or even third generation (environmental rights). While it is true that such an approach assumes the liberal framework in which (at least the first generation of) such rights are designed, this does not prevent robust critique of the political economy of international investment law and the way in which its arbitration mechanism functions to support it. As Olivier de Schutter has shown in a different context, implementation of a fundamental right to food can go a long way to questioning the whole system in which these rights are inevitably embedded and might, if endorsed, carry far reaching re-distributive consequences (Olivier De Schutter & Kaitlin Y Cordes, *Accounting for Hunger. The Right to Food in the Era of Globalisation*, Hart, 2011, specially, O de Schutter, « International Trade in Agriculture and the Right to Food », 137, p.181 et s.). In the context of investment arbitration, there may be collective property rights and rights to cultural heritage, right to food and water, indigenous people's rights to self-determination, or environmental values which have the potential to open up an exclusively contractual, privatized regime.

<sup>4</sup> There are some 2300 bilateral investment treaties (BITs), of which 1700 are in force (UNCTAD, Research Note, Recent developments in international investment agreements, 30 August 2005, UNCTAD/WEB/ITE/IIT/2005/1, at 1). Many are concluded between state parties to ICSID (International Centre for the Settlement of Investment Disputes) established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which now counts over one hundred and forty member States. Similar agreements between states are found in investment chapters of regional or multilateral trade agreements such as the North American Free Trade Agreement NAFTA, whose chapter 11 allows investors to bring a case against a foreign host state if alleging expropriation without compensation, or unfair or discriminatory treatment.

a widespread distrust of customary public international law, seen as providing too volatile an environment for the foreign investment required for the purposes of development. But while development economics still posits that the inflow of capital is vital to ensure the needs of populations in terms of access to essential public infrastructures and services, the distribution of rights and obligations within the treaty regime, along with the accompanying arbitration process which upholds it, is progressively stigmatized as imbalanced to the detriment of the host state, in favor of the private foreign investor. This perception may of course have much to do with switching trends in global capital flows and the new awareness of states which were formerly the home to private investors, that under the terms of the BITs, their own regulatory powers in respect of local consumers or environment are now seriously curtailed in favor of incoming foreign capital<sup>5</sup>.

2. But it is clearly also the result of changing expectations within the international community as to the content of human rights and their role in the international legal order. The first bilateral BIT between Germany and Pakistan was negotiated in 1959, at the very beginning of the post-colonial struggle for a new distribution in the world economy<sup>6</sup>. In such a context, collective social and economic rights were all but unformulated; public awareness of environmental issues very limited; claims of newly independent developing countries states to control their natural resources as yet unarticulated; the status of indigenous peoples distinct from the sovereign state as yet equally unchartered. That BITs multiplied and prospered along identical lines even after the hotly disputed oil and gas arbitrations of the 60s, the emerging foundations of a new economic order in the 70s, the demise of the Washington consensus in the 90s, bears witness both to the extent of the influence of the World Bank's lending policy, and to the pull of the downward regulatory spiral among developing states in pursuit of private foreign capital<sup>7</sup>.

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<sup>5</sup> M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd edn 2010), emphasising the contemporary reversal under which Western states, previously exporters of capital and now the largest recipients of foreign investment, are becoming wary of the legal arguments and tools developed within 20th century investment law (see p 25, citing examples of contestation, in the context of arbitration or multilateral dispute resolution, by Canada and the United States, of facets of foreign investment regimes which they had initially crafted, particularly those which hamper the regulatory power of the host state).

<sup>6</sup> General Assembly resolution 1803 (XVII) 1962 declares "*The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.*" ... "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace." Then in 1966 permanent sovereignty over natural resources became a general principle of international law when it was included in common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.

<sup>7</sup> See Zachary Elkins, Andrew T. Guzman, and Beth Simmons. 2004. *Competing for Capital: The*

3. While the economic justification for weighting the design of bilateral investment regimes so as to restrict the regulatory powers of the host state was found in the desirability of fostering foreign direct investment through a stable environment, the robust protection provided to contract and property rights of the private investor was also generally touted as contributing significantly to the rule of law in the host state. In this respect, the investment regime was initially perceived to accommodate a human rights component, in that it was linked to the supposed impotence of the private investor vis-à-vis the unbridled power of the local sovereign. The substantive guarantees provided for incoming capital flows thus tellingly comprise a commitment on the part of the host country both to non-discrimination and fair and equitable treatment of the investor, who thereby secures a first-mover advantage in the context of the struggle for capital in which the host is inevitably engaged. A compulsory arbitration mechanism, which the foreign investor has the sole right to trigger, thereafter ensures the intangibility of the contractual acquis. Host state consent, the cornerstone of the entire regime, legitimates any perceived infringement of sovereignty, and, typically, there is no further reference to human rights. Nor is any specific procedure envisaged whereby communities or individuals whose interests are unaligned on those of the host state may be heard.

4. Contemporary critique of the international investment regime takes several forms. The most overtly political, which has led several host countries to withdraw from the ICSID framework, focuses on the perceived structural bias of the whole regime, famously described by José Alvarez as a special interest human rights regime for investors<sup>8</sup>. Thus, BITS, or their accompanying contractual arrangements between host government and private investor<sup>9</sup>, result in a confiscation of local regulatory sovereignty, in fields as sensitive as taxation, public health and environment; if public interest is persistently sidelined, it is no doubt because the negotiation of such treaties and the accompanying contractual regime takes place outside the public sphere<sup>10</sup>.

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*Diffusion of Bilateral Investment Treaties: 1960-2000.*

<sup>8</sup> Jose Alvarez, "Critical Theory and the North American Free Trade Agreement's Chapter Eleven" (1997) 28 *University of Miami Inter-American Law Review* 303, p.308.

<sup>9</sup> BITS are international treaties which create obligations for the state parties (in fact, essentially, for the host, capital-importing, state) under international law. They are inseparable from the development of a doctrine of international state contracts or Host Government Agreements (HGAs), which are concluded directly between private investors and foreign governments. While these are "private" international contracts (domestic public law providing the conditions of state party's consent) and not international treaties, public international law may nevertheless be chosen by the parties as governing law. This blurring of categories tends to work to the advantage of the private party (see H. Muir Watt, "Private International law Beyond the Schism" (2011) 2(3) *Transnational Legal Theory* 347–427).

<sup>10</sup> This "participation deficit" critique is thus formulated by Marc Jacob (op cit, sub § 2.4.2) "(A) potential concern is the fact that, despite the ultimately far-reaching impact of major international investments (e.g. power plants, water and sewage infrastructure, landfills, mining pits etc.), the BITS providing the basic legal framework for such large-scale projects have traditionally been negotiated and concluded outside the public sphere. This acute participation deficit of concerned sectors of society and NGOs is of course not uncommon when it comes to international treaties. One curt

Moreover, while foreign capital input is clearly a condition of access to economic growth for the most impoverished countries, the real contribution of foreign direct investment as it is currently designed is called into question, since incoming capital has no countervailing duties, and profits from delocalized production rarely flow back into the local economy. Worse, contracts for the extraction of natural resources such as oil and gas concessions may come with an infernal cycle of indebtedness that makes the host country an easy prey for vulture funds<sup>11</sup>; land-grabbing or various short-sighted policy choices dictated by the interests of international agro-industry may impact on access to food. Ethical and social concerns highlight repeated abuses by foreign multinational investors, whether in the form of violence, exploitation or discrimination in respect of the local workforce. Environmentalists point in turn to the negative externalities generated locally by intensive industrial activities, in the form of pollution and other durable ecological harm, while local cultural or religious heritage may not come out unscathed.

5. Other complaints target the arbitration regime more specifically, and denounce once again systemic investor-bias. Part of the problem here may be procedural. Attention is drawn to arbitration's lack of transparency; the recruitment processes are seen to operate by means of old-boy networks, or through a market for complicit arbitrators. Moreover, the compulsory offer of arbitration by the host state, and the correlative privilege of the private investor to trigger the arbitration process, exemplifies a lack of mutuality. More radically, beyond the unfairness of process, challenges to investment arbitration stigmatize a privatized regime which entrusts law-making on highly sensitive issues of public interest to expert panels devoid of any democratic legitimacy. In this respect, the contractual nature of arbitration makes it ill-equipped to consider the effects of any negative externalities generated by investment-linked activities for third parties. Much thought is currently given to improving the arbitration process, making it more transparent and less unpredictable. Case-law might then develop informally, providing better consistency and less suspicion of arbitrariness, while the interests of affected individuals or communities outside the arbitration process may be taken into account by allowing third party

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*answer to this is that the citizens' consent can be indirectly derived from their respective governments' participation in the treaty-making process. This places a potentially unwarranted degree of faith in national governments' ambitions to promote and protect human rights, which some states will unhesitatingly subordinate to economic development. Another reply furtively questions the wisdom of even having the public participate in all aspects of what is essentially a highly specialised technocratic exercise... (It is important to note that public awareness and participation, and therefore ultimately democracy and legitimacy, have traditionally been sidelined in erecting the fundamental tenets of the current investment regime".*

<sup>11</sup> Jonathan C. Lippert, "Vulture Funds: The Reason Why Congolese Debt May Force A Revision Of The Foreign Sovereign Immunities Act" 21 N.Y. Int'l L. Rev. 1(2008).

interventions, class actions or amicus briefs. To what extent this is enough to reverse the perceived investor-bias is questionable, however. Arbitration, like the entire investment regime, is consent-based. When consent is the result of an unequal economic system, the answer can only lie in the transformation of the substantive content of the investment regime.

6. Whether such concerns touch upon the substantive content of the investment treaties or the specific dispute resolution mechanism designed to enforce the commitments of the host state, they are frequently couched in human rights language. While BITs sought to safeguard investor interests by means of a liberal private law framework of individual property rights, the current evolution breaks away from this framework and attempts to open the investment regime to collective social and economic rights, such as access to food or water, or so-called “third generation” rights such as the right to a clean environment. Since the bilateral treaties are devoid of any explicit reference to human rights (whatever the generation), this new challenge to the investment regime relies on external sources, of which the relevance and potential primacy can no longer be readily justified through the concept of (state) consent, and may be considered by many investment arbitrators as lying beyond the confines of their jurisdiction. This is why the current confrontation between the international investment regime and the values embodied in human rights bears potentially wider theoretical implications for the structure and content of the international legal order.

7. The collision between the two regimes is often cited as a paradigmatic example of the fragmentation of the international legal order<sup>12</sup>. Moreover, through the conjunction of its largely contractual or private law components and its far-reaching social, economic and ecological consequences, the international investment field is seen to illustrate the epistemological blurring which appears to be the hallmark of global law, straddling the liberal divides between national and international law, or public and private spheres. The debate has focused on the real or apparent antinomies between the human rights and the investment regime, and proposals for improvements have been made accordingly - either through the resources of interpretation by arbitrators, or more radically through renegotiation of the general content of BITs. Much thought has been given to the ways in which conflicting norms or values might be reconciled, and the shattered unity of international law recovered<sup>13</sup>. Is there not room for human rights before the arbitrator? Is the investment regime not subordinated to general international law? Might the interests of affected communities not be represented through amicus briefs, supported by ONGs?

8. All these paths are promising and have already been thoroughly mapped. But there may be more. This paper will attempt to pursue the

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<sup>12</sup> On fragmentation and the problems attendant on the multiplication of specialized regimes, to the detriment of wider values, see Marty Koskiennemi, *The Politics of International Law* (Hart Publishing, 2011), spec. p.359.

<sup>13</sup> See James Fry, James Fry, “International Human Rights Law In Investment Arbitration: Evidence Of International Law’s Unity”, 18 *Duke Journal of Comparative & International Law* 77 (2008).

discussion by linking it up to various contemporary efforts to theorize both the components of global disorder and the processes of transformative legal change in the global arena. The aim of this paper is therefore, firstly, to explore some of the wider analytical frameworks through which to understand the conflicts between autonomous regimes, with a view to imagining the ways in which human rights might impact upon the investment regime. In this respect, recent scholarship using systems theory and institutional analysis to conceptualize legal change tends to suggest that the most promising path by which to secure an essential rebalancing of the investment regime without ungluing the legal and economic system through which equitable development might be achieved, is through the instauration of “spaces of contestation” - or, in a different terminology, sites of “learning pressure” - outside the investment regime and its arbitral forum. Once this conceptual framework in place, it is easier to map the route by which, in more concrete terms, the contestation of the investment regime might exit the sole arbitral forum and relocate to more propitious sites.

### **I. – The resources of regime-collision (or how institutional change within the contested investment regime might take place through contestation).**

9. Absent the reassuring vision of a hierarchical, unitary international legal order built upon customary or universally accepted foundational norms administered by the International Court of Justice as a world court, many attempts have been made to understand what role law has to play and what form it takes beyond, above or across the sovereign nation-state. The difficulty of such an exercise owes much to the emergence of multiple specialized or regional supra-national law-making bodies and courts, which now govern a significant part of world trade and finance; to the economic significance of non-state profit and non-profit actors wielding informal power at a global level; and to the growth of a parallel, semi-private system of investment arbitration with no clearly defined relationship with parallel public interest regimes. While some still place faith in the unity of customary international law, project all-encompassing constitutional orders<sup>14</sup>, or turn to the conflict of laws for the design of a meta-signpost rule<sup>15</sup>, others point more realistically to the fragmentation in multiple colliding expert regimes, of which human rights on the one hand, and world trade and investment on the other, are excellent examples<sup>16</sup>. But beyond a form of pragmatism<sup>17</sup>, efforts to conceptualize this

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<sup>14</sup> See the various contributions to J Dunod and J Trachtman (eds), *Ruling the World? Constitutionalism, International law and Global Governance* (Cambridge University Press, 2009).

<sup>15</sup> C Joerges, ‘The Idea of a Three-Dimensional Conflicts Law as Constitutional Form’ in Joerges and Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing, 2011) 413;

<sup>16</sup> Martty Koskiennemi, *op cit*, whose point is that fragmented specialization also means depolitization : ‘What we see now is an international realm where law is everywhere—the law of this or that regime—but no politics at all ...’ p.359).

global disorder are few and far between.

10. Potentially, an investment arbitration may well clash violently, in terms of outcomes and values, with a competing human rights regime. In the Belize case discussed below, an indigenous people claimed title to land which has been conceded by the national government to a foreign investor. One can easily imagine a successful arbitration claim brought against the host state by an investor whose (more formal) property rights under the concession are adversely affected by a ruling favorable to the native occupants. In such a case, the autonomy of the two regimes makes for a destructive clash. When the human rights regime, administered by the public court system, collides with investment arbitration bypassing domestic fora (with the host state trapped here between the hammer and the anvil<sup>18</sup>), the resulting conflict is beyond the sway of the usual tools of coordination between competing norms, such as the quest for an overlapping consensus, or the search for the relevance of a different regime (though such an avenue must undoubtedly be encouraged). Indeed, it is not a mere conflict of laws, to be arbitrated in favor of one or the other by the competent forum. It involves a collision between regimes as a whole, complete with their foundational values or biases, their courts or dispute resolution processes, their modes of enforcement or coercion.

11. The resulting disorder could look much like the landscape emerging in a case such as the notorious Chevron saga<sup>19</sup>, involving a head-on clash between autonomous systems constituted by the Ecuadorian courts, the US courts and an arbitration panel under the aegis of the Permanent Court of arbitration at the Hague. A judgment in Ecuador in favor of the claims of indigenous forest-dwellers of the Amazon against Shell for ecological damage, has led to a deadlock,

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<sup>17</sup> Benoit Frydman, "Approche pragmatique du droit global", seminar Sciences po 9 Feb. 2012, Publication forthcoming, PILAGG yearbook 2012.

<sup>18</sup> As shown below, any compensation for expropriation awarded to the private investor against the host government will be detrimental to the local population, since it implies using taxes or development aid to make the payment. Indeed, it is doubtful that the terms of any such concession, obtained within a wider context of fierce competition for capital, would be sufficiently favorable to cover (even the equitable) the costs.

<sup>19</sup> An arbitrator acting under the aegis of the Permanent Court of Arbitration at the Hague ordered provisional measures to prevent the enforcement of the judgment of Ecuador, the sovereign party, to the extent that its award of damages to indigenous peoples dwelling at the site of the oil and gas extraction interfered with the protection of a private property right guaranteed under the bilateral agreement. See Permanent Court of Arbitration at the Hague, Interim Award of 9 February 2011. On 25 January 2012, the same tribunal asserted its jurisdiction to decide on the company's liability under an investment treaty. Then a global anti-suit injunction was ordered in favour of Chevron, only to be lifted a year later (see District Court, Southern District of New York, Orders of 6 February and 7 April 2011; Federal Court of Appeals for the Second Circuit, Judgment of 17 March 2011). On 26 January 2012, Judge Gerard Lynch of the US Court of Appeals for the Second Circuit said that such an injunction could only be sought 'defensively, in response to an attempted enforcement'. In the present case, the Ecuadorean plaintiffs 'made no effort to enforce their judgment in New York (nor indeed, in any other jurisdiction)'. The Ecuadorian judgment was handed down by the Court of Sucumbíos, Lago Agrio, Ecuador, on 14 February 2011. On the whole saga, see H Muir Watt, (2011) *Rev crit DIP* 339. The arbitration under the BIT here was a United Nations Commission on International Trade Law (UNCITRAL) arbitration.



involving the wielding of judicial retaliatory weapons such as global anti-suit injunctions, while international arbitrators give orders which purport to bind the Ecuadorian judiciary. In such cases, the last word belongs to the party with the most extra-judicial leverage. Ecuador has denounced its participation in ICSID. The glue which held the whole system together has dissolved. Whatever the wrongs either in a specific case or in the bias of the whole investment regime, this also means that unless it has leverage to renegotiate its own BITs, the recalcitrant state is cut off from external supplies of capital. Is there, then, no other answer than to accept that “true conflicts” are insoluble in a context of pluralism of systems, each with its own values, fora and tools? A key may be found in three strands of contemporary scholarship which, combined, lead to the conclusion that the most promising way in which to reduce the risk of deadlock while sewing transformative seeds would be, perhaps counter-intuitively, to secure sites of productive contestation at the interface of the two regimes.

12. 1. -Thus, firstly, Colin Scott and Robert Wai have called attention to the ways in which private law contestation before domestic courts may operate to effect a “migration” of human rights norms to new sites<sup>20</sup>. The starting point is the conviction that *“the current transnational order involves more interaction between and among systems in different legal venues than some systems theories of global networks imagine”*. They then explore how *“governance strategies that would promote the objectives of international human rights norms can be developed through the migration of these norms into legal interpretation and application in venues of transnational private litigation in domestic courts”*. In this latter context, they seek to show that *“human rights law provides a vehicle for the introduction and consideration of alternative policy considerations and value-laden premises ... that help channel and structure reasoning within law”*.

13. The two important insights of this project are, in the one hand that, when wielded in a different forum – here, before domestic courts, - international human rights norms may help to bring out the *internal conflicts* that have been obscured within the importing – here the domestic – system. Thus, it is through the bringing such conflicts to the surface that the intersystemic “migration” of human rights norms takes place. Secondly, we are urged to consider a “rough” version of transnational law, far from the smooth picture of custom, community and consensus which tends to characterize narratives of the emergence of the *lex mercatoria*<sup>21</sup>. This alternative account sees the global legal order as fraught with conflict through which plural competing systems interconnect in the language of the law. They are seen to evolve through mutual interaction, operating through (often hidden) tensions within the importing system. These insights on the links between (private law) contestation and migration of legal norms lays the

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<sup>20</sup> Colin Scott and Robert Wai, “Regulating Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational Private Litigation”, in Colin Scott (ed), *As Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Oxford, Hart Publishing, 2001, p. 287. The following excerpts are from pp. 289 s.

<sup>21</sup> Robert Wai, ‘The Interlegality of Transnational Private Law’ (2008) 71 *Law and Contemporary Problems* 107

groundwork for considering the complex interdependencies between human agency, institutions and wider social systems (which may well be wider than the nation-state) in bringing about legal change.

14. 2.- In Katarina Pistor's account<sup>22</sup>, mutual interactions between institutions and systems are depicted through what she describes as a "weaving metaphor": social systems are represented as open, institutions may have interfaces with multiple systems, and interdependencies work both ways<sup>23</sup>. Such interdependencies suppose however a common "glue", which takes the form of shared sources of legitimacy. To the extent that the institutional regimes *"become exclusive legal orders for particularized interests, they may erode common sources of legitimacy on which a broader legal system rests. Such a system, however, is needed to provide a space for contesting priorities among competing regimes"*. Applied to the investment regime, which look much like "an exclusive legal order for particularized interests" in this description, this analysis requires locating a space in which the regime can be contested and changed in the light of human rights.

15. Indeed, two case-studies are proposed to illustrate the thesis<sup>24</sup> that *"access to a forum for resolving disputes – whether a tribunal, committee or a court – creates an open space for contestation where the interpretation of norms and their application to different fact patterns can be interpreted, amended, and changed over time"*. When the space for contestation is beyond the system (if the system is the nation-state, the opened space may be transnational or supranational), contested institutions may ultimately impact upon it, inducing legal change. The strain put upon the wider system by institutional contestation depends upon whether such contestation challenges the system's own legality. *"As long as institutional regimes endorse a system's common source of legitimacy for determining their relation to other institutional regimes, even when this conflicts with their own preferences, they remain an integral part of that system. If and when this common source of legitimacy is openly challenged, the relation becomes more tenuous; and when they claim that their source of legitimacy is*

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<sup>22</sup> Katharina Pistor (2011) "Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change," *Global Jurist*: Vol. 11: Iss. 2 (Frontiers), Article 6. Available at <http://www.bepress.com/gj/vol11/iss2/art6>. This study departs from recent trends in literatures on institutions and institutional change by focusing on the complex *interdependencies* between systems and institutions.

<sup>23</sup> In this framework, *"a system comprises multiple institutions or institutional regimes, but not necessarily in a hierarchical fashion. Instead, an institutional regime can develop outside a given system and can interface with more than one. It can have rule makers and rule takers different from other institutional regimes, and from those found in the systems they seek to affect"*. Her point is that the relationship between systems and institutions may be two-way, since institutions may impact in turn upon systems, which are open (and not closed as in accounts which often take place within the nation-state). Like Scott and Wai, she also emphasizes the role of human agency within institutions, in the form of contestation.

<sup>24</sup> Advanced in historical institutionalism by Wolfgang Streeck & Kathleen Thelen (Introduction: Institutional Change in Advanced Political Economies) In *Beyond Continuity: Institutional Change in Advanced Political Economies*, edited by W. Streeck and K. Thelen, 2005, Oxford University Press.

*superior to that of legality, frictions occur that may weaken the commonality of legality as a source of legitimacy. Put differently, institutional regimes may weaken the legitimacy of existing systems not only by contesting a particular form of ordering (as suggested by Streeck and Thelen), but by offering alternative sources of legitimacy".* In such a case, the survival of the system itself is threatened, with the disappearance of the consensus on its own parameters for balancing between competing institutions.

16. A first example of contested property rights is used to show how contestation within a transnational institutional regime may endorse the legitimacy of the wider social system with which interfaces. The example is particularly apposite for our purposes, since it concerns a situation in which there is a clear tension between human rights and the requirements of foreign investment, at least as mediated through the governmental policy of the host state. Thus, the *Belize* case documents the struggle of the Maya people to retain lands which they had occupied historically (albeit without formal title), and from which the Belize government had sought to evict them, in order to provide concessions to foreign oil and gas investors. After appealing in vain to the national authorities, they took their case to the Inter American Court of Human Rights (IACtHR), which recognized their property rights over the land under an "autonomous" definition of property<sup>25</sup>. Lack of reaction by the Belize government led ultimately to their title being endorsed by the national Supreme Court, which judged the ruling of the IACtHR to be "persuasive", and integrated the outcome into its own findings on a distinct legal (constitutional) basis<sup>26</sup>. For the purposes of the proposed framework for analysis of legal change, the availability of a place of contestation for the institutional regime, outside the constitutional system, led in the end to change within. The intermediation of the domestic supreme court ensured the structural change. Thus, *"the establishment of dispute resolution mechanisms outside the sovereign's reach was critical – and so was the discovery of these mechanisms by international NGOs, law firms, and other norm entrepreneurs"*.

17. So why does a second instance, taken this time from the field of NAFTA investment arbitration, herald such significantly different outcomes from the Belize case? It seems to show that while a contractual forum may similarly open a space for external contestation, legal change may not necessarily ensue when there is insufficient interface, and lack of legitimacy consensus, with the wider system. Thus, in the *Metalclad* case<sup>27</sup>, a NAFTA tribunal allowed an expropriation claim against the Mexican government when, despite approval

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<sup>25</sup> "Autonomous concepts" are a strategy used by supranational courts to ensure the primacy of given interpretation without appearing to affect domestic/national law directly.

<sup>26</sup> Interestingly, this mode of interdependency is recognizable as an example of "relevance" in systems theory and has long been an essential tool for managing pluralism of legal orders in conflict of laws theory. On this point see "Private International Law Beyond the Schism", p.400 and the references cited FN 257.

<sup>27</sup> *Metalclad Corporation v. United Mexican States*, CASE No. ARB(AF)/97/1 under the auspices of the International Centre for Settlement of Investment Disputes (Additional Facility) of 30 August 2000.

given by this government, a municipality blocked a project led by an American company and its Mexican subsidiary to build a hazardous waste landfill. Here, federal distribution of power interfered with the enforcement of the investment agreement. As Kataraina Pistor points out, there was no involvement in this case of any domestic court in adjudicating whether the actions of the municipality did indeed amount to a violation of property rights. Since NAFTA gives investors the option to go directly to outside tribunals that have the power to grant them monetary relief against the host state, there is therefore no need to re-litigate the dispute domestically. *By the same token, there are no mechanisms by which the normative conclusions of the case are transposed into national law or by which the findings of the tribunal would be contested within the domestic legal system.* It is doubtful therefore whether the condemnation of the Mexican government here will actually bring about any significant amendment within the domestic system.

18. Thus, legal change will depend not only on the design of the contestable space, but also on the remedies available to the tribunal. The lack of structural remedies, indeed the absence of intermediation of any domestic tribunal, means that outsourcing dispute settlement and establishing a parallel transnational property rights regime may not work to bring change in domestic regimes. However, more significantly still, *“the major reason appears to be that they lack the legitimacy associated with the domestic legal system, which would require contestation within that system”*. Outsourcing of the dispute *“ignores legitimate competing interests within the domestic regime and thereby delegitimizes the NAFTA property rights regime in its member states”*. For the contestation to sew the seeds of change, it would therefore need to find space both outside *and* within the domestic legal system.

19. 3. - Framed in different terms, Gunther Teubner provides an analytic of “regime collisions” in the global arena which reaches a similar conclusion<sup>28</sup>. Thus, clashes between autonomous specialized orders may in certain circumstances lead to their combination and an ensuing re-foundation of a new regime. A remarkable example used to illustrate the deep transformation of a contested regime through collision, is the constitutionalization of corporate codes of conduct<sup>29</sup>. Flagging improved corporate governance, these private codes were initially designed far more to protect their corporate author from liability (in an attempt, directed essentially at the green consumer market, to show best efforts in compliance in the field of human rights and environment), rather than to generate legally binding obligations which could be invoked by third parties harmed by transnational corporate activities. However, gaining gradual support from the outside, through parallel – though equally “soft” - human rights norms developed in international fora, the corporate governance mechanism appears to

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<sup>28</sup> A Fischer- Lescano and G Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

<sup>29</sup> Gunther Teubner, “Self-Constitutionalizing TNCs? On the Linkage of “Private” and “Public” Corporate Codes of Conduct” , in Galf-Peter Calliess (Hrsg.) *Governing Transnational Corporations - Public and Private Perspectives*, *Indiana Journal of Global Legal Studies* 17, 2010.

be evolving gradually into a fully-blown new legal order, complete with the teeth of enforceability in domestic courts. Seeking to understand how soft corporate codes brought about real change in the form of improved labor conditions, increased environmental protection or higher human rights standards, Teubner notes that the interplay of private and public codes has led not only to a “juridification” but also of a “constitutionalization” of their content<sup>30</sup>. Such transformation is explained by the fact that strain put on society and the environment by globalized markets and corporations (unhampered by nation-state counter programs) through “the negative effects of their own differentiation, specialization and high-performance orientation”, has reached a tipping point. *“It is only a question of time until the released energies trigger, apart from positive, also such negative effects that emerging social conflicts force a drastic correction”*.

20. What matters here, he says, is *“learning pressures, i.e. internal changes induced by external constraints”*<sup>31</sup>. Evocative of the external and internal spaces of contestation present in Katerina Pistor’s analysis, Teubner’s hypothesis is that “both elements have to be present in order to enable public and private codes to act in combination: *an internal change of cognitive and normative structures and external pressure directed towards it...*”. The tipping point is already apparent in positions taken by domestic courts, which appear to be increasingly ready to make corporate codes containing obligations in sensitive human rights fields “backfire” and provide grounds for - and not a shield from - the liability of their conceptor<sup>32</sup>. However, clearly, such a transformation, announcing a radical reshaping of the contested regime for corporate liability for human rights violations, could only happen if the various institutional factors needed to create sufficient interface between the colliding regimes were actually present.

21. Drawing these three strands of scholarship together in the specific context of the international investment arbitration, it seems therefore that the next avenue must therefore be a search for sites where the requisite processes for elaboration and reformulation, in the light of human rights, may take place<sup>33</sup>.

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<sup>30</sup> The concept of “constitutionalization” requires some explanation: «Corporate codes fulfil constitutional functions in a twofold sense: They establish constitutive rules for corporate autonomy and – at present increasingly – limitative rules meant to counter their socially harmful tendencies....Corporate codes need to be characterized as constitutions in their own right, if they develop features typical for a constitution – double reflexivity and binary meta-coding” (p.5 above note 21).

<sup>31</sup> “Behind the metaphor of “voluntary codes”, therefore, lies anything but voluntariness. Transnational corporations enact their codes neither on the basis of their understanding of common good requirements nor due to motives of corporate ethics. They comply only “voluntarily”, when massive learning pressures on them are exerted from the outside. The learning process does not proceed within the legal system from code to code via validity transfer of rules, but on a long-winding detour through other social systems and other media of communication.” (p.16, above FN56).

<sup>32</sup> For examples in case involving the corporate codes of Nike and Total, see “Private international law beyond the Schism”, p.416.

<sup>33</sup> In areas of public law, the lessons drawn from the *Solange* case in terms of “overlapping consensus” are not dissimilar (see J Cohen and C Sabel, ‘Directly-Deliberative Polyarchy’ (1997) 3 *European Law Journal* 314)

Once again, this may mean creating spaces for productive contestation of the investment regime. To return again to the Belize example, “*the major impetus for change came from institutional regimes outside Belize, specifically from the increasing recognition of (collective) customary land use practices as enforceable property rights. By appealing to law and legality as the source of legitimacy for resolving the dispute, the plaintiffs and their representatives created an opening for the Supreme Court of Belize to follow international and foreign examples (not precedents in any formal sense) and to embrace similar legal arguments, notwithstanding political pressure to the contrary*”<sup>34</sup>. For the investment regime to integrate transformative values of mutuality of obligations and accountability, ultimately enforceable moreover through its own arbitration processes, we need therefore to explore its interfaces with human rights in order to make a *legal* case for change.

## **II. – The missing link (or how home state commitments to human rights through the investment regime could migrate to investment arbitration)**

22. Contestation of property rights under the investment regime in terms of human rights might take place in several different places. In many cases, the victims of human rights violations will be indigenous peoples who complain that their property, cultural or ecological interests were sacrificed by the government to the foreign investor, to whom for instance land, or the exploitation of natural resources, was conceded. In such a case, the collective right invoked appears to be in direct collision with the content of a contractual or treaty conferred property right. This well illustrated by the Belize case discussed above. In other instances, it may be less the content of the contract than the conduct of the investor which is the source of the violation; for instance, violence, pollution, deforestation or various other abuses are unlikely to be part of the contractual package<sup>35</sup>. To what extent can the investment regime leave room for these two categories of human rights concerns? While structural bias may disqualify arbitration tribunals as a likely forum for transformative arguments, incremental change may take place through interpretative techniques (1). More radical moves may be expected in regional human rights courts, but research on this point highlights structural dissymmetry between the obligations of capital-importing states (2), and the legal duties of the home states of investors (3).

23. 1. - What then should an arbitrator do if made aware of the violation of a human right not mentioned in the contract and moreover not part of the sources of contractually applicable law? There are obviously several possible responses<sup>36</sup>. Many arbitrators position themselves upon a purely jurisdictional

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<sup>34</sup> Katharina Pistor, *op cit*, p.17.

<sup>35</sup> These are typically instances for which attempts have been made to use the resources of the Alien Tort Statute in the US. While clearly litigation on the basis of this statute allows for the migration of legal norms (as shown by Scott & Wai, *op cit*), uncertainty as to the direction of the case-law of the US Supreme Court on this point at the time of writing has led us to exclude its specific consideration here.

<sup>36</sup> See the excellent overviews of arbitral awards proposed by Kriebaum *op cit*, p. 178 et s ; Jacob, *op cit*, sub § 2.1. ; Fry, *op cit*, p. 83 s.

terrain to decline to bring human rights issues into a strictly contractual dispute. Some accept to engage in the weighing process that now accompanies collisions of rights in human rights *fora*, with no mandate other than the demands of equity within the applicable law. This approach includes “factoring in” human rights into the calculus of compensation due to the investor. Others use techniques of interpretation to integrate the persuasive authority of human rights case-law in the reading of concepts used by the applicable law, or in the determination of the scope and density of rights to which it might implicitly or explicitly defer. References to judicial rulings and dicta are frequent when defining key categories in investment treaties. While many of these cross-references have served to cement the protection of investor property rights (through the definition of expropriation, for instance), a body of arbitral doctrine more favorable to a rebalancing of the terms of the investment relationship in favor of the host state has been growing incrementally. Thus, for example, under the doctrine of “police powers”, a host state may escape any duty to compensate for economic harm that is a consequence of *bona fide* regulation designed to enhance the general welfare (in fields such as public health or safety, taxation, cultural property and, far more controversially, environmental protection)<sup>37</sup>.

24. Certain NAFTA decisions are perceived moreover to display sensitivity to the wider context in which investment takes place, highlighting its public dimension<sup>38</sup>. As Katarina Pistor has pointed out, “context” here is typically a proxy for interdependencies between an institutional regime and its systemic environment<sup>39</sup>. It is used to allow a more holistic perspective on investment, which then appears embedded in a larger package of economic and social relations. To this extent, therefore, the multilateral investment treaty may make more room for human rights considerations than BITs. According to Mark Jacobs, its multi-faceted design might help to explain why its investment chapter and consequently also certain NAFTA arbitrations do not seek to push investment protection to the maximum, a tendency to which individual BITs are more prone. *“Investment protection is increasingly seen not as a privilege for a special group of people but as one component of a state’s foreign and economic policy network on matters such as trade, industry, the mobility of persons and capital, development,*

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<sup>37</sup> On the unclear borderline between regulatory takings and police power, see Kriebaum, op cit, p. 178 et s.

<sup>38</sup> Jacob, op cit, sub § 2.2.1 (citing *Glamis Gold, Ltd v United States of America (Glamis)*, NAFTA Ch.11 Tribunal, Award, 8 June 2009, paras 5-8) but concluding that there remains “ample uncertainty... While the purpose of regulation is increasingly being factored into arbitral decisions, public welfare is by no means a definite trump card. States managing public affairs with human rights in mind will likely continue to find themselves at the receiving end of expropriation claims”.

<sup>39</sup> Pistor, p.1. « The context metaphor, of course, can also be interpreted as a reference to the broader *social system*, that is, the structures that determine the *collective* reproduction of allocative and authoritative resources in a given system”.

and the environment”<sup>40</sup>.

25. Arbitration may therefore be less of an unlikely forum for change within the investment regime than global trends in awards would tend to show. However, the whole arbitration regime is nevertheless affected by a structural defect which requires that arbitrators decide as purely contractual disputes, situations which clearly create negative externalities for unrepresented interests (whether local or indeed foreign, in cases of cross-border pollution for instance). Procedurally, the difficulty is then whether to allow third party interventions or amicus briefs. While a trend seems to be appearing in favor of the former<sup>41</sup>, many arbitrators are nevertheless ill at ease with such interferences, which point to legitimacy conflicts within the whole system. A recent ICSID arbitration rejecting requests for amicus intervention by human rights groups and indigenous communities, in a case asserted to “raise critical questions of international human rights law, which engage both the duty of the Zimbabwean state and the responsibility of the investor company, with regard to the affected indigenous peoples” well illustrates this arbitral caution<sup>42</sup>. The arbitrators felt that the submissions did not address an issue which came within the scope of the dispute. Clearly, and in line with the conclusions outlined above, the impetus for greater consideration of human rights needs to come from outside the regime.

26. 2. - Of the various courts entrusted with human rights adjudication, the only one to date to have brushed directly or indirectly with the international investment regime, is the Inter-American Court of Human Rights. However, two obvious limits on the Court’s action are immediately apparent. Firstly, the judicial process is triggered by claims against the host state, not against the private investor. Moreover, secondly, since the jurisdiction of the Court obviously covers non-contractual claims against the host state – that is, claims based on the violation of human rights, distinct from claims for the enforcement of the investment regime as between the parties to a state contract or covered by a bilateral treaty - brought against the host state, the typical scenario is one in which *third parties* challenge the negative impact of an investment regime in respect of their own rights or interests. The problem then becomes one of the accountability of the state for the actions of the private contractor<sup>43</sup>. Typically, when the claim is successful, the host/defendant state is judged to have positive obligations to ensure that human rights are exercised.

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<sup>40</sup> Jacob, *op cit*, sub § 6.3

<sup>41</sup> Notably, the US Model BIT (2004) provides for a tribunal to have the authority both to accept submissions from non-disputing parties and provide of documents to the wider public.

<sup>42</sup> See BERNHARD VON PEZOLD AND OTHERS (CLAIMANTS) v. REPUBLIC OF ZIMBABWE (RESPONDENT) (ICSID CASE NO. ARB/10/15).

<sup>43</sup> For a classic instance involving abuses committed by Coca Cola’s Guatemalan subsidiary, for which Guatemala was held liable by the InterAmerican Commission: See case 4425 (Guatemala) 25 June 1982 (IACHR 1980-81).



27. While the terms of the potential conflicts thus appear to be relatively simple, the human rights claims made in such cases are nevertheless problematic for two reasons. The first is structural, and connected to the liberal Westphalian paradigm on the basis of which both the investment regime and the regional human rights regime were designed. Both assume that the interests of affected communities are aligned on those of the state. Thus, in theory, neither type of conflict between the investment regime and the rights of affected local communities should exist. If the violation is alleged to stem from the contract, the theory goes that the interests of such communities were represented in the negotiation process by the territorial sovereign, while the benefit accruing to the state in terms of foreign investment is also their own. Similarly, if the violation is linked to abusive conduct of the investor, the state supposedly has the means to take care of its own and call the investor to account under the terms of the contract or the bilateral treaty with the investor's home state. However, the assumption of alignment of governmental interests and those of local communities is clearly overly optimistic. Indeed, cases where the defendant/host state is condemned for violation of human rights by the Court of Human Rights (neglect of property rights, or abusive conduct insufficiently discouraged) clearly signal that the supposed alignment does not exist.

28. The difficulty, however, is that in such a case, the obligation to provide compensation to the private investor will come out of fiscal revenue. Once again, this makes sense when interests of the host state, party to the contractual investment arrangement, and the affected communities, are aligned. When this is not so, those who bear the burden either of governmental shortsightedness in the pursuit of short term benefits (or corruption of officials), or of the regulatory competition which makes it unavoidable to accept the investment arrangements on the investor's terms, are always the uncompetitive, immobile local workforce or inhabitants. At best in such a case, the host state will be torn between conflicting loyalties and obligations, of which one may be imposed by the Court, the other by arbitration. It may decide it has no choice but to pull out of one or the other. This is what happened when Ecuador walked out of ICSID in the context of the Chevron saga. Why not, then, look to the investor's home state in order to ensure, at the very least, non-abusive conduct on the part of the investor in its activities abroad? Here there may be a significant role for the European Court of Human Rights.

29. 3-. The European Court of Human Rights (ECtHR) appears to be out of the fray, as far as collisions between the human rights and investment regimes are concerned. The reason is twofold. On the one hand, beyond the right to private property, the first-generation individual liberal rights written up in the Convention are less immediately likely to enter into conflict with an investment regime than second-generation rights to water or food. This hurdle may be more apparent than real, however, given the interpretative resources already used in many instances by the Court. Article 2 and the right to life might provide the

legal basis for such rights, <sup>44</sup>. Similarly, article 8 has been successfully invoked with regard to pollution by waste treatment facilities and fertilizer factories. Moreover, the Court has developed various techniques (such as so called “pilot cases”) by which it can deal with plural applications, or ensure collective effect to its rulings (for instance, on issues such as immigration or discrimination concerning the Rom people<sup>45</sup>).

30. But, the second reason for which the European court has not been involved to a similar extent in disputes linked to foreign investment regime is the status of many of the European Member states who are, or at least were traditionally, capital- exporting states rather than hosts to foreign investment. This asymmetry in respect of the situation of the Inter-American Court, whose members are largely capital importers, means that the European states will usually appear as home countries to the private investor. Therefore, they have not been concerned by the investment arbitration as host states under BITs, and have not therefore found themselves in circumstances of divided loyalty, towards the investor and towards the local population, which are generated by regulatory competition for capital.

31. This asymmetry is clearly problematic. It adds to the already one-sided nature of foreign direct investment arrangements. While the host state may be doubly subject to arbitration and human rights obligations, the home state appears to be correlatively beyond the pale. In turn, this puts the private investor in a particularly comfortable position, because, benefiting from a unilateral option to take the disputes to arbitration under the investment treaty, it is also free from horizontal obligations under a human rights regime. It may therefore be time to think again, and reconsider the interface, or the potential for interdependency, between human rights and investment on the investor’s side. This may not simplify matters, of course, since it is potentially likely to enhance the global disorder in places which now appear to be consensual, or at least uncontested for want of contestants. Nevertheless, it may also be the opportunity to consider the productive impact of contestation, in which legitimacy issues may be fought out in legal terms rather than kept below the surface. The system will work as such, as Katarina Pistor reminds us, if it has the “glue” needed to keep the competing regimes in conversation over issues of legitimacy.

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<sup>44</sup> Indeed, one might argue that it could ground the right to development altogether. As suggested by James Fry (op cit, p.104), “ it might be enough that BITs deny states the opportunity to develop in order to denounce these agreements, since, as Mary Robinson has stated, ‘Denial of the right to development puts all other rights at risk.’”.

<sup>45</sup> For example, see the decision of the Grand Chamber (GC 16 March 2010, *Oršuš v. Croatia* , Req. n° 15766/03): discrimination against Rom children in schools). The Court has developed the means to effect structural changes in the domestic legal order of Member states, and uses the technique of “pilot cases” to respond to violation of collective social and economic rights – here, on the basis of article 14 (prohibition of discrimination).

32. How then could an investment dispute reach the European Court? One (unlikely) case would arise in the context of a request for enforcement, before the courts of a third, European Contracting State, of an arbitral award obtained by a private investor against a third, host state. However, this avenue is excluded in ICSID arbitrations, at least when the enforcement state is also a party to ICSID<sup>46</sup>. But could one imagine that a claim be brought by the same indigenous people harmed either by expropriation or by tortious activity by a local domiciliary/citizen investor in the context of activities in the host state? At first glance, redress - or at least, human rights jurisdiction over the claim - would appear to be the very least that should be provided in cases of abusive activity abroad by a local individual or corporation, surely subject to the jurisdiction of the Court. But such a claim is likely to encounter unexpected hurdles. Under the case-law of the European Court (which does not appear to differ from international law in general on this point), while positive obligations of the home state would certainly extend to preventing its citizens from causing harm at home, they do not appear to extend extraterritorially, so that claims arising out of tortious acts in foreign lands are not justiciable when not caused by a public official<sup>47</sup>. The legal explanation lies in the fact that, on the one hand, state liability for acts committed abroad rests on an agency foundation; such liability is not engaged therefore, by the conduct of private actors, the state being accountable only for the conduct of the agents which represent it elsewhere. On the other hand, while acts committed by private citizens may generate liability under a theory of positive obligations, these arise only on home ground, that is, within

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<sup>46</sup> In contrast to awards in commercial arbitration governed by the New York Convention, where the public policy exception (or, alternatively, the inarbitrability of the dispute) may be used to ensure the protection of rights if patently violated, the ICSID arbitration framework provides for directly enforceability against the host state. Under article 53, enforcement of ICSID awards must not be made subject to conditions for their recognition and enforcement not provided for by the Convention. Nor is it permissible to subject them to review on the occasion of their recognition and enforcement. In the process of recognition and enforcement, the domestic court's task is limited to verifying the authenticity of the ICSID awards. It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. Not even the *ordre public* (public policy) of the State where recognition and enforcement of an ICSID award is sought, is a valid ground for a refusal to recognize and enforce (see UNCTAD Report 2003 on *Dispute Settlement in International Trade, Investment and Intellectual Property*, §2.9: "binding force and settlement", spec. p.16).

<sup>47</sup> For an excellent overview and analysis, see Jacco Bomhoff, « The Reach of Rights : The Foreign and the Private in Conflict of Laws, State Action, and Fundamental Rights Cases with Foreign Elements », 70 *Law and Contemporary Problems* 39 (2008).

the limits of the defendant state's territory. A (perhaps not-so-curious?) vestige of territoriality therefore shelters the private actors in their activity abroad.

33. Thus, there is a missing link, preventing the extraterritorial extension of any positive obligation of the home state to ensure that its citizens or corporations respect Convention rights when exercising an economic activity. This immunity for the acts of private actors abroad is provided by the public/private divide. It may be however that the international investment regime - commonly cited as an example of the blurring of traditional distinctions - provides the means to cross it. A state which has encouraged its own citizens or corporations to take up the opportunities laid out by the bilateral investment agreement is surely accountable when their actions then lead to abuse? Might the river-dwellers of the Nigerian Delta not complain that the home state of Shell has not provided sufficient control of its economic agents?<sup>48</sup> Such obligations could also of course be invoked horizontally, in that the national courts bound by the European Convention (and the rulings of the Court) would be obliged in turn to give effect to such obligations, in all those relationships between claimant and investor which fell within their jurisdiction, notably by virtue of the domicile of the defendant.

34. Reciprocity which is lacking in the whole investment regime could be at least partially restored. If BITs were not formally renegotiated so as to impose human rights obligations on the part of the investor and reduce at least in part the one-sidedness of treaty (or contractual) arrangements, they could be re-read this way by courts outside the arbitral forum, and ultimately, through the processes of collision, contestation and migration of norms, before the latter. By opening up this space for legal contestation, this "rougher" account of global legal change - with its own obvious risks and perils<sup>49</sup> - might lead to a far-

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<sup>48</sup> This example is borrowed from the *Kiobel* case (*Kiobel v Royal Dutch Petroleum Co*, 621 F 3d 111, 142 n 44, 2d Cir. 2010). The literature on this case is already so voluminous, particularly given the numerous other—dissonant—decisions that have been handed down more recently in other circuits, that, since certiorari has now been granted by the Supreme Court, it is no doubt wiser to direct the attention of non-US readers to the various amicus briefs, including the brief for the US government in support of the petitioners. See, for an update on the multiple procedures pending, S Symeonides, 'Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey' (2012) 60 *American Journal of Comparative Law* 64, and for a synthesis in French of the litigation and the various legal issues involved, H Muir Watt, 'Les enjeux de l'affaire *Kiobel* devant la Cour Suprême des Etats-Unis: la responsabilité des personnes morales au regard des droits de l'homme' (2012) *Comité français de Droit international privé* (forthcoming).

<sup>49</sup> There is no guarantee that contestation itself may not lead to deadlock, when, as Katharina Pistor describes it, shared sources of legitimacy are eroded. Both regional human rights Courts are encountering deep contestation of their own legitimacy. At the time of writing, the Lexisnexis International and Foreign Law Community blog (07/26/2012 10:25:00 PM EST) posts: "Venezuela Abandons the Inter-American Court of Human Rights". The Court is accused of anti-governmental bias. There has been equally strong opposition in Brazil, when, in April 2011, the Court issued precautionary measures in favour of indigenous communities of the Xingu River and ordered the Brazilian government to halt the construction of the Belo Monte hydroelectric dam project. Meanwhile, in Europe, the European Court has had to brave the Brighton Conference, with similar British claims

reaching rebalancing of the investment regime similar to the “constitutionalization” which appears to be taking place in the field of corporate codes.

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that the Court is interfering with national sovereignty (over the prisoners’ rights blanket ban). This is of course another story.