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Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism

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Abstract

In the context of ongoing debates concerning the reform of the investor-State dispute settlement (ISDS) mechanism, this article critiques the widely-accepted approach that seeks to fit international human rights law (IHRL) into the existing structure of ISDS and argues that IHRL should at least be treated as 'primus inter pares' vis-à-vis international investment law. Testing ISDS on the touchstone of the human rights to equality, non-discrimination, and an effective remedy, the authors demonstrate that ISDS is incompatible with IHRL. Considering various structural and systemic problems, abolishing ISDS is perhaps the only normatively sound solution to address this incompatibility with IHRL. However, as this may not be politically feasible in the near future, this article articulates eight principles for a human-rights compatible international dispute settlement mechanism. We argue that these principles should inform the current efforts to reform the ISDS mechanism to avoid the risk of making only cosmetic changes.

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1 Introduction

The current investor-State dispute settlement (ISDS) mechanism is anomalous within international law. Generally, only one party can initiate a claim[1] without exhausting domestic remedies.[2] This privileged access is afforded to foreign investors to pursue claims before a arbitral tribunal which the investor helps appoint, a unique right for non-State actors in public international law.[3] The tribunal operates without precedent or a clear expectation of *jurisprudence constante*.[4] With a limited mandate, the tribunal adjudicates only the specific

1 States can sometimes initiate claims under investor-State contracts, but this remains rare. See Tomoko Ishikawa, 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 AJIL Unbound 33, 33.

2 See Jesse Coleman, Kaitlin Y Cordes and Lise Johnson, 'Human Rights Law and the Investment Treaty Regime' in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar 2020) 292.

3 Generally, non-State actors have limited rights to enforce international law, and in the few other systems where they do have rights the tribunals are elected by States parties. See eg European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos 11 and 14 (1950) 5 ETS art 22; American Convention on Human Rights (1969) OAS Treaty Series No 36, arts 36, 53; Protocol on the Statute of the African Court of Justice and Human Rights (2008) art 7 <www.refworld.org/docid/4937f0ac2.html> accessed 25 April 2023; International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (ICCPR) art 29.

4 Scholars have argued that investment arbitration decisions should result in a *jurisprudence constante*, and it would be possible to develop consistent jurisprudence. Some tribunals have even sought to ensure consistency, but ongoing conflicts and inconsistency in the law suggest this has not yet happened. On the potential for *jurisprudence constante* in investment law, see eg Andrea Bjorklund, 'Investment Treaty Arbitration as *Jurisprudence Constante*' in Colin Picker and others (eds) *International Economic Law: The State and Future of the Discipline* (Bloomsbury 2008) 265; Stephan W Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 12 German Law Journal 1083, 1099–10. On the ongoing inconsistencies, see Coleman, Cordes and Johnson (n 2) 292; David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010) 30 Northwest J Intl L & Bus 383, 387–93; Tara Van Ho, 'Obligations of International Assistance and Cooperation in the Context of Investment Law' in Mark Gibney and others, *Routledge Handbook on Extraterritorial Human Rights Obligations* (Routledge 2021) 325, 239–330.

case brought before it by the investor, in a siloed manner, and often gives insufficient weight to other areas of international law or to the rights and interests of third parties.[5] The tribunal's decision generally cannot be appealed to correct legal or factual errors.[6] Other stakeholders whose rights and interests are implicated in the dispute, including affected individuals and communities,[7] must obtain the tribunal's permission to intervene, and such permission can be and has often been denied.[8] Finally, the tribunal's decision is enforceable with limited review against a State's assets in up to 185 States and territories.[9] These factors cumulatively create 'justice bubbles for the privileged' few foreign investors who can afford to access the process.[10]

Scholars have long argued, for various reasons, that ISDS harms the protection of human rights and the environment.[11] Four specific deficiencies are

5 Coleman, Cordes and Johnson (n 2) 292; Tara Van Ho, 'Angels, Virgins, Demons, Whores: Moving Towards an Antiracist Praxis by Confronting Modern Investment Law Scholarship' (2022) 23 JWIT 347, 365.

6 The International Centre for Settlement of Investment Disputes offers an annulment procedure for grave legal errors, but this is not equivalent to an appeal as the best a party can hope for is the opportunity to re-adjudicate the dispute. See generally Gabriel Bottini, 'Present and Future ICSID Annulment: The Path to an Appellate Body?' (2016) 31 ICSID Rev 712.

7 See Nicolás M Perrone, 'Investment Treaty Law and Matters of Recognition: Locating the Concerns of Local Communities' (2023) 24(3) JWIT 437–60.

8 See *von Pezold (Bernard) and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order (26 June 2012) para 62 (denying intervention of four indigenous communities because their interests were too similar to those of the Zimbabwean State); Lise Johnson, Kaitlin Cordes and Jesse Coleman, 'Letter in Response to Procedural Order No 6' (Columbia Center on Sustainable Investment, 3 August 2016) <https://ccsi.columbia.edu/sites/default/files/content/docs/blog/CCSI-Repsonse-to-Procedural-Order-No.-6.pdf> accessed 27 April 2023 (responding to a tribunal's decision to deny the academic institution Columbia Centre on Sustainable Investment a right to intervene).

9 Convention on the Enforcement of Foreign Arbitral Awards (1958) 330 UNTS 38, art V; Convention on the Settlement of Investment Disputes Between States and Nations of Other States (International Centre for Settlement of Investment Disputes) (entered into force 14 October 1966) 575 UNTS 159, arts 53–54.

10 Anil Yilmaz Vastardis, 'Investment Treaty Arbitration as Justice Bubbles' in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2020) ch 26; Anil Yilmaz Vastardis, 'Justice Bubbles for the Privileged: A Critique of the Investor-State Dispute Settlement Proposals for the EU's Investment Agreements' (2018) 6 Lond Rev Intl L 279.

11 For a longer list of complaints, see eg Maria Laura Marceddu and Pietro Ortolani, 'What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments' (2020) 31 EJIL 405, 407; Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 AJIL 361, 408; Malcolm Langford and others, 'The Revolving Door in International Investment Arbitration' (2017) 20 JIEL 301.

relevant for this article. First, ISDS provides a level of protection for foreign investors that privileges their interests over the rights and interests of others, including local communities affected by investment-related projects.[12] Second, ISDS tribunals often fail to address or seriously consider the respondent State's international human rights law (IHRL) obligations. For example, when the tribunal in *Suez v Argentina* was confronted with credible claims that investment protections would impinge on the human right to water, it dismissed those concerns without significant engagement.[13] It concluded simply that there was no tension between the State's investment law duties and its human rights obligations without defining or interrogating the State's IHRL obligations, and without explaining how the State could meet both sets of obligations simultaneously.[14] Third, investment treaties rarely impose direct human rights obligations or firm responsibilities on investors.[15] In contrast, human rights law now recognises businesses have responsibilities[16] and was designed with an internal system for addressing conflicts between rights-holders.[17] Investment tribunals, however, have disregarded the issue of investor responsibilities in relation to human rights or have outright dismissed claims of investor responsibility.[18] Finally, these factors - together with the system's structural inconsistency and *jurisprudence incohérente*[19] of ISDS awards – produce such a level of uncertainty for States that the mere threat of an ISDS claim can prevent a State from adopting or implementing necessary

12 See Yilmaz Vastardis (2020) (n 10) 623.

13 *Suez et al v Argentina*, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010) para 262.

14 ibid. See also Coleman, Cordes and Johnson (n 2) 296.

15 See generally Nicolas Bueno, Anil Yilmaz Vastardis and Isidore Ngueuleu Djeuga, 'Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses' (2023) 24 JWIT 179.

16 United Nations Guiding Principles on Business and Human Rights (2011) UN doc A/HR/17/31 (UNGPs).

17 See eg International Covenant on Civil and Political Rights (n 3) arts 3–4, 18–22 (establishing mechanisms for addressing conflicts between individuals and community or national interests); International Covenant on Economic, Social and Cultural Rights (1966) 9993 UNTS 3, art 2, and as interpreted by the Committee on Economic, Social and Cultural Rights 'General Comment No 3: The Nature of States Parties' Obligations' (1990) UN doc E/1991/23 (establishing standards for addressing conflicts arising from limited resources).

18 See eg *Urbaser v Argentina*, ICSID Case No ARB/07/26, Award (8 Dec 2018) para 1220 (concluding, contrary to human rights law, that individuals are not entitled to reparation for breaches of the right to water); Nicolás M Perrone, 'The "Invisible" Communities: Foreign Investor Obligations, Inclusiveness, and the International Regime' (2019) 113 AJIL Unbound 16, 17–21; Barnali Choudhury, 'Investor Obligations for Human Rights' (2020) 35 ICSID Rev 82.

19 See Van Ho (n 4) 329.

measures to protect human rights.[20] These concerns, amongst others, have led to a 'backlash' against ISDS[21] and calls for reforming the system that range from modest procedural changes to significant structural or substantive reforms.[22]

In response to the concerns about the impact of international investment law (IIL) on IHRL, tribunals and scholars have claimed that the two fields are easily reconcilable.[23] IIL scholars often invoke a common heritage in the 'rights of aliens' and the human rights to non-discrimination and access to remedies to suggest the fields have a common foundation.[24] Scholars have also suggested IHRL can be easily integrated into ISDS through better treaty drafting,[25] more careful interpretation by arbitrators,[26] or stronger third-party participation.[27] These solutions focus on fitting IHRL into the existing struc-

20 This is sometimes called a problem of 'regulatory chill.' UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (United Nations 2018) 23, 48, 106–07; Peter Muchlinski has argued that 'the need for some system of appeal' has become 'more pressing, so as to give greater legitimacy and consistency to ICSID awards.' Peter Muchlinski, *Multinational Enterprises and the Law* (3rd edn, OUP 2021) 745.

21 See generally Michael Waibel and others, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010).

22 See UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Forty-Second Session' (23 March 2022) UN Doc A/CN.9/1092; David Gaukrodger, 'The Future of Investment Treaties: Possible Directions' (28 June 2021) OECD Working Papers on International Investment 2021/03 <https://doi.org/10.1787/946c3970-en> accessed 27 April 2023.

23 See Suez (n 13) para 262; Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox' (2011) 37 NC J Intl L 1107.

24 See eg Todd Weiler, 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order' (2004) 27 Boston College International & Comparative Law Review 429, 430; Francesco Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 EJIL 729, 731–32; Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Ernest-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (2009) 45, 49–53. The two fields are known to offer significant differences on the right to property. See generally Ursula Kriebaum and Christoph Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law' in Stephan Breitenmoser and others (eds), *Human Rights, Democracy and the Rule of Law: Liber Amiroum Luzius Wildhaber* (Nomos 2007) 743.

25 See eg Weiler (n 24) 437–40; Radi (23) 1111–12; Niccolò Zugliani, 'Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treatment' (2019) 68 ICLQ 761, 770.

26 See Radi (n 23).

27 See Francioni (n 24) 740; Columbia Centre on Sustainable Investment, International Institute for Environment and Development, and the International Institute for Sustainable

tures of ISDS. Neither supporters nor critics of ISDS have considered what it would entail to adopt instead a human rights-centred approach into which ISDS must fit.[28]

In this article, we flip the traditional debate over the relationship between IHRL and ISDS. We focus on how IHRL defines the rights to equality, non-discrimination, and an effective remedy as commonly claimed foundations for IIL and IHRL.[29] We analyse the compatibility of modern ISDS established under bilateral and multilateral investment treaties with these core human rights. This step allows us to expose an inherent tension between IIL and IHRL that has not yet been fully articulated or understood, and to offer prospects for ISDS reform.

This article makes four original contributions to the existing literature. First, it provides three justifications for prioritising IHRL in the context of ISDS reform. Two of these justifications appear in earlier critiques but by bringing them together and adding a novel, third argument, we strengthen the case not just for the integration of IHRL into IIL but for the primacy of IHRL within ISDS reform debates. Second, we demonstrate in this article that ISDS is inconsistent with the human rights to equality, non-discrimination, and an effective remedy as defined in IHRL. Third, we make an explicit case for the abolition of ISDS in light of its incompatibility with IHRL. In doing so, we also establish a normative claim for the exceptional use of an investment-specific mechanism and create a bridge from abolition to reform that is important for reimagining ISDS. Finally, we articulate eight principles for a human-rights compatible international dispute settlement mechanism. We note where current efforts to reform the system offer some promise but determine that the current efforts largely fall short of the demands of IHRL.

Development, 'Third Party Rights in Investor-State Dispute Settlement: Options for Reform' (15 July 2019) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_reformoptions_0.pdf> accessed 27 April 2023.

28 Stephan W Schill has argued ISDS reform should centre on constitutional principles, of which human rights is one. See Stephan W Schill, 'Reforming Investor-State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20 JIEL 649. This still fits human rights into investment law instead of the other way around. Both Anil Yilmaz Vastardis and Ivan Alvik considered questions of equality without engaging with human rights law. See Yilmaz Vastardis (2018) (n 10); Yilmaz Vastardis (2020) (n 10); Ivar Alvik, 'The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy' (2020) 31 EJIL 289.

29 See supra n 24.

2 Centring Human Rights

One might question why ISDS should centre IHRL at all. The issue has been extensively debated[30] and to date investment tribunals have not accepted any normative justifications for giving priority to human rights.[31] In view of distinct institutional arrangements for creating and enforcing international law norms, the hierarchy debate may not be resolved easily or fully. Therefore, building on the 2021 report of the UN Working Group on Business and Human Rights – which claimed that 'international human rights should, at a minimum, be regarded as *primus inter pares* (first among equals) among different branches of international law'[32] – we take a different normative route. Even if there is no hierarchy between IHRL and IIL for the sake of argument, the former should enjoy the 'first among equals' status. If IHRL is indeed first among equals, then its articulation of the rights to equality, non-discrimination, and an effective remedy must be at the core of ISDS. Determining a normative hierarchy between IHRL and IIL, even absent a formal legal hierarchy, is important because while international law generally accepts a fragmented legal system, there is equally 'a presumption against normative conflict' and a strong preference for a coherent system or 'harmonization' in international law.[33] The current movement to reform ISDS provides an important opportunity to align investment law with human rights structurally so as to alleviate tensions and reduce the impact of investment law, which privileges a minority of individuals, on human rights that are deemed fundamental to all.

In this section, we supplement the UN Working Group's report by offering three rationales to justify its prioritization of IHRL. We then differentiate the IHRL standards from cases focused on EU law and domestic constitutional provisions before turning to the IHRL standards for the rights to equality,

30 See Olivier De Schutter, *International Human Rights Law* (2nd edn, CUP 2014) 72–73; Radi (n 23) 1111–12.

31 Silvia Steininger, 'The Role of Human Rights in Investment Law and Arbitration: State Obligations, Corporate Responsibility and Community Empowerment' in Ilias Bantekas and Michael Ashley Stein (eds), *Cambridge Companion to Business and Human Rights Law* (CUP 2021) 406, 414.

32 UN Working Group on Business and Human Rights, 'Human Rights-Compatible International Investment Agreements' (2021) UN Doc A/76/238, para 58, quoting Surya Deva, 'Investors' International Law: Beyond the Present' in Jean Ho and Mavluda Sattorova (eds), *Investors' International Law* (Bloomsbury 2021) 313, 321.

33 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) Document A/CN.4/L.682, paras 37–42.

non-discrimination, and an effective remedy as a foundation for evaluating the legitimacy of both ISDS and its reform efforts.

2.1 *Human Rights as* Primus Inter Pares

The first reason to treat IHRL as 'first amongst equals', compared to IIL, is that human rights feature heavily in the UN Charter.[34] This inclusion of human rights so frequently in the Charter came out of recognition of the necessity and centrality of human rights to the post-war international order.[35] The *travaux préparatoires* of the Charter demonstrates a strong recognition by States that respect for human rights is necessary for international peace and security, but also that human rights cannot be sacrificed in the pursuit of international peace and security.[36] As such, their explicit inclusion within the Charter was intended to ensure respect for human rights guided the management of affairs and obligations between States.[37] This is not true of investment law or investment protections. As the UN Charter explicitly requires its obligations to prevail whenever a legal conflict arises,[38] it seems human rights obligations should prevail over competing investment law claims and should guide, as applicable law, the interpretation and limits of investment law claims so that States can meet the Charter's demands.[39]

A second reason is that, unlike investment protection, the realisation of human rights is considered a central function of the State and is a clear part of international public policy.[40] This vitality is reflected in States' choices to solidify IHRL through nine core global treaties.[41] Every State is a party to at least one of these treaties.[42] In contrast, investment law remains fragmented

34 Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) (UN Charter) preambular para 2, arts 1(3), 13(1)(b), 55(c), 62(2), 68, 76(c).

35 For more on the history and evolution of these provisions, see eg Thomas Burgenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 Human Rights Quarterly 703; Katarina Månsson, 'Reviving the "Spirit of San Francisco": The Lost Proposals on Human Rights, Justice and the International Law to the UN Charter' (2007) 76 Nordic JIL 217.

36 See Månsson (n 35) 223–24.

37 ibid 224.

38 UN Charter (n 24) art 103.

39 See De Schutter (n 30) 72–73.

40 ibid.

41 OHCHR, 'The Core International Human Rights Instruments and their Monitoring Bodies' <www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> accessed 27 April 2023.

42 For up-to-date ratifications, see OHCHR, 'Status of Ratification: International Dashboard' <https://indicators.ohchr.org/> accessed 27 April 2023.

among thousands of mostly bilateral and multilateral treaties.[43] States have consistently resisted efforts to create a global treaty on investment law.[44] As opposed to realising a central State function, the protection of foreign investment is treated as something a State can (and should) pursue when it suits the State's own interests.

These first two reasons for treating IHRL as *primus inter pares* have been invoked elsewhere.[45] Here, we also offer a third reason that others have not: the normative justifications of investment law, and of specific rights and protections for foreign investors, often draw on IHRL,[46] but the inverse – employing IIL to justify human rights protections – is not true. This observation should settle the debate. To illustrate, while definitions of the customary minimum standard of treatment and of fair and equitable treatment standards in IIL often rely on human rights,[47] the justification for human rights stands alone. It does not refer to and it has no need for investment law.[48] The frequent invocation of IHRL within IIL shows that even the most fervent IIL advocates

43 For a comprehensive overview, see UN Conference on Trade and Development, 'International Investment Agreements Navigator' <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 27 April 2023.

44 Even efforts to develop a common treaty amongst developed States failed. See M Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 3 (discussing the OECD's effort at a multilateral treaty).

45 See De Schutter (n 30) 72–73.

46 See eg *von Pezold* (n 8) para 274; *Merrill and Ring Forestry LP v Canada*, ICSID Case No UNCT/07/1, Award (31 March 2010) para 201; *International Thunderbird Gaming Corp v Mexico*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005) paras 3, 4, 13, 27, 93, 133; *Técnicas Medioambietnales Tecmed, SA v Mexico*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 116; *Phoenix v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 79; *Total v Argentina*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010) para 129; *Al-Warraq v Indonesia*, UNCITRAL Final Award (15 December 2014) para 177; *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, ICSID Case No ARB/03/16, Award (2 October 2006) para 497; For a comprehensive review of the use of human rights in investment cases, see Steininger (n 31).

47 In addition to the scholarship (supra n 24) and cases (supra n 46), see eg Timothy G Nelson, 'Human Rights Law and BIT Protection: Areas of Convergence' (2013) 12 JWIT 27, 28–30; Nicolas Klein, 'Human Rights and International Investment Law: Investment Protection as Human Rights?' (2012) 4 Goettingen J Intl L 179.

48 This is not to suggest no one has ever invoked investment law when discussing human rights, but rather that if it has occurred it is an aberration. Proving this negative would require an extensive citation to all the texts that fail to do this (see eg De Schutter (n 30) 13–146); Yet Steininger similarly identifies a 'visible linkage between human rights and investment law' through 'cross-referencing in investment arbitration' but does not indicate a similar practice by human rights tribunals, Steininger (n 31) 35; Francioni argues the development of access to justice in investment law jurisprudence has strengthened

recognize its normative limitations and must draw on IHRL to amplify their own robust claims for investment protection. Unfortunately, many ISDS tribunals and IIL commentators employ IHRL only selectively, using the language of human rights to strengthen investment law protections but not to affirm the higher and more fundamental objectives of human rights.[49]

As a first among equals, IHRL's definitions of the rights to equality, non-discrimination and remedy should inform the evaluation, development, employment and contours of ISDS. Next, we explain the benefit of examining the international standards when a small number of courts have already analysed ISDS under EU or domestic constitutional standards for equality and non-discrimination.

2.2 *The Benefit of This International Legal Inquiry*

Before we examine IHRL, it is necessary to note that a small number of courts interpreting domestic constitutional and EU treaty law have considered whether ISDS violates their own guarantees of equality and non-discrimination.[50] Unfortunately, these cases are not dispositive for international law generally or for this article specifically for two distinct reasons. First, the courts have often focused on narrow comparators. For example, when the Colombian Constitutional Court considered whether the French-Colombian Bilateral Investment Treaty was compatible with the Colombian Constitution, it limited the comparators to national investors.[51] Similarly, when the French Constitutional Council analysed the constitutionality of the Canadian-European Union Comprehensive Economic and Trade Agreement (CETA), it focused on whether Canadian investors were privileged above 'other foreign investors.'[52] Finally, the Court of Justice for the European Union (CJEU) had an even narrower comparator when assessing the compatibility of the CETA with the Treaty on the Functioning of the European Union (TFEU).[53] The non-discrimination provision of the TFEU focuses only on discrimination between nationals of Member States, meaning that questions

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the protection in IHRL, but he does not cite to any reliance on investment by human rights tribunals, Francioni (n 24).

49 See eg Steininger (n 31); Coleman, Cordes and Johnson (n 2).

50 See eg Constitutional Court of Colombia, Sentencia C-252/19 (6 June 2019); French Constitutional Council, Decision no 2017–749 (31 July 2017) <www.conseil-constitutionnel.fr/en/decision/2017/2017749DC.htm> accessed 27 April 2023; CJEU, *EU-Canada CET Agreement*, Opinion 1/17 (30 April 2019) ECLI:EU:C:2019:341.

51 Constitutional Court of Colombia, Sentencia C-252/19 (n 50) paras 120, 366.

52 French Constitutional Council, Decision no 2017–749 (n 50) paras 37–38.

53 *EU-Canada CET Agreement* (n 50) paras 170–86.

of discrimination between EU investors and Canadian investors was largely irrelevant for the CJEU.[54] Still, the CJEU chose to analyse the potential discrimination against EU investors, but like the French and Colombian tribunals it focused only on that narrow comparator group of domestic investors.[55]

We do not think the appropriate comparator should be limited to foreign or domestic investors. Instead, the substantive conflicts between human rights and investment law mean that appropriate comparators extend beyond investors to consider others whose interests could be harmed by an investment decision. By focusing on the narrow comparator of domestic investors, the tribunals begin their inquiry from the wrong starting point, corrupting all the subsequent analysis.

The second problem with the existing case law is that even if one were to limit comparators to domestic investors, the courts have generally applied different tests or have interpreted similar tests differently than how IHRL tribunals approach equality and non-discrimination. One of the most important differences between the domestic practices and the IHRL standard is the level of deference afforded to the executive and legislative branches. This difference has even led to conflict between the international systems and the venerated, regional European Court of Human Rights, the latter of which accepts 'public interests' that the international legal bodies have not.[56] The Colombian court, like the French Constitutional Council,[57] determined that the 'public interest' in securing foreign investment sufficiently justifies differentiated treatment.[58] The Colombian court also found that the treaty furthers Colombia's constitutional 'duty to promote the internationalization of the political, economic, social and ecological relations' and helps the State 'avoid litigation.'[59]

As we explain below, it is unlikely that IHRL tribunals would agree with the French and Colombia courts that the identified public interests justify privileging foreign investors as starkly as ISDS does. This is partly because of the

54 ibid para 170.

55 ibid para 180–86.

56 For example, the United Nations Human Rights Committee has issued two decisions finding France's ban of the *niqab* to breach the State's equality and non-discrimination obligations while the European Court of Human Rights has found the French law does not breach the European Convention's equality and non-discrimination protections. See *Hebbadj v France*, CCPR/C/123/D/2807/2016 (12 December 2022); Human Rights Committee, *FA v France*, CCPR/C/123/D/2662/2015 (24 September 2018); *Case of SAS v France* Application no 43835/11, Judgment (ECtHR, 1 July 2014).

57 French Constitutional Council, Decision no 2017–749 (n 50) paras 37–40.

58 Constitutional Court of Colombia, Sentencia C-252/19 (n 50) para 122.

59 ibid para 373–75, Colombia's Constitution of 1991 with Amendments through 2015, art 266.

limited evidence that investment protections actually lead to greater investment or other benefits for the State writ large.[60] We maintain that the different tests employed by the international and domestic or regional systems merits a distinct inquiry. To ensure a coherent legal framework, ISDS reforms should be aimed at addressing the highest legal standards for the rights to equality, non-discrimination, and an effective remedy, whether they stem from domestic or international law. We next outline the contents of the IHRL obligations.

2.3 *Rights to Equality and Non-Discrimination*

The rights to equality and non-discrimination are often treated as two sides of the same coin, with the prohibition on non-discrimination being a negative obligation on the 'differential treatment on unreasonable grounds', while the right to equality carries positive obligations to ensure equality between people.[61] Of the nine core IHRL treaties, eight of them have at least one article on equality or non-discrimination, with racial, ethnic, or national origins appearing commonly as protected characteristics.[62] Like the right to a remedy, the human rights to equality and non-discrimination are both stand-alone

60 See eg Zachary Elkins, Andrew T Guzman and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' (2006) 60 Intl Org 811; Anil Yilmaz Vastardis, 'From Risk to Rights: Reorienting the Paradigms at the Heart of Corporate Legal Form and Investment Treaty Standards in Foreign Investment Governance' in Ho and Sattorova (n 32) 89, 110; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart 2018); Jennifer Tobin and Susan Rose-Ackerman, 'When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties' (2011) 6 Review of International Organizations 1, 17.

61 Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli and others, *International Human Rights Law* (OUP 2010) 189, 190–91.

62 International Convention on the Elimination of All Forms of Racial Discrimination (signed 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 1; ICCPR (n 3) arts 2(1), 3, 25, 26; International Covenant on Economic, Social and Cultural Rights (signed 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2(2)-(3); Convention on the Elimination of Discrimination Against Women (signed 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 1; Convention on the Rights of Persons with Disabilities (signed 2007, entered into force 3 May 2008) A/RES/61/106, arts 5–6; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family (signed 1990, entered into force 1 July 2003) A/RES/45/158, art 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1 (including 'discrimination of any kind' as one of the purposes that can satisfy the *mens rea* element of torture); Convention on the Rights of the Child (signed 1989, entered into force 2 September 1990) 1577 UNTS 3, art 2.

rights and core components of all other rights.[63] They constitute 'a basic and general principle relating to the protection of human rights.'[64]

While the rights to equality and non-discrimination are ubiquitous in IHRL, their core content is primarily defined in four treaties: the International Covenant on Civil and Political Rights (ICCPR),[65] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[66] the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[67] and the Convention on the Elimination of Discrimination against Women (CEDAW).[68] The first two of these treaties, the ICCPR and ICESCR, lay out the most fundamental and commonly accepted standards for human rights. The latter two focus on the elimination of discrimination based on specific characteristics (race and gender). Collectively, these treaties, supplemented by jurisprudence generated by the expert bodies responsible for overseeing their implementation, establish the foundation for understanding IHRL's approach to equality and non-discrimination. The prohibition on discrimination on the basis of race, gender, and religion are also regarded as customary international law or general international law.[69] The Inter-American Court of Human Rights has declared that 'the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all law.'[70]

The ICCPR contains a general obligation on States to ensure that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'[71] The Human Rights Committee, as the expert body under this treaty, has determined that this obligation 'prohibits discrimination in law or in fact of any field regulated and protected by public

63 See eg *SWM Broeks v The Netherlands*, Human Rights Committee Communication 172/1984 (1987); *FH Zwaan-devries v The Netherlands*, Human Rights Committee Communication (1987).

64 Human Rights Committee, 'General Comment 18: Non-Discrimination' (1989) para 1; Human Rights Committee, 'General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)' (2000) UN Doc CCPR/C/21/Rev.1/Add.10 para 4.

65 ICCPR (n 3).

66 ICESCR (n 62).

67 CERD (n 62).

68 CEDAW (n 62).

69 Moeckli (n 61) 189, 194.

70 Advisory Opinion OC-18/03 on the Juridical Condition and the Rights of the Undocumented Migrants (2003) IACtHR Series A No 18, para 101.

71 ICCPR (n 3) art 26.

authorities' regardless of whether the act or law relates to a right within the Covenant.[72] CERD similarly prohibits

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[73]

For its part, CEDAW largely mimics this language in CERD, although it does not include a prohibition on 'preferences' for reasons we return to shortly.[74]

Despite the strong language in these prohibitions, IHRL still allows for differential treatment in some circumstances. According to the Human Rights Committee, a differential treatment is acceptable when (1) there are 'reasonable and objective' criteria to differentiate between two sets of persons or things, (2) the differentiation has a rational nexus to a legitimate State interest, and (3) the measures employed are proportional to the goal pursued.[75] In employing this test, context is important but discrimination on the basis of nationality is generally suspect. For example, the Human Rights Committee has repeatedly concluded that laws providing for the restitution of property confiscated by the State is arbitrary and discriminatory if it distinguishes between citizens and non-citizens.[76] It has also found that it was unreasonable to exclude an undocumented immigrant from national health insurance designed for immigrants where they faced life-threatening health conditions.[77] In contrast to these unlawfully discriminatory measures, the denial of child benefits to foster parents on the basis of whether the foster child lived with them has been deemed objective and reasonable.[78]

Although discrimination on the basis of race and national identity is almost never justifiable, States can adopt what are varyingly called 'special

72 General comment 18 (n 64) para 12.

73 CERD (n 62) art 1(1).

74 CEDAW (n 62) art 1.

75 General comment 18 (n 64) para 13. See also the Advisory Opinion of the Inter American Court of Human Rights in *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (19 January 1984) paras 55–57.

76 *Simunek and others v Czech Republic* (1995) UN Doc CCPR/C/54/D/516/1992; *Des Fours Walderode v Czech Republic* (2001) Comm 747/1997, paras 8.3–9.1; *Miroslav Klain and Eva Klain v Czech Republic* (2011) UN Doc CCPR/C/103/D/1847/2008, para 8.3.

77 *Nell Toussaint v Canada* (2018) UN Doc CCPR/C/123/D/2348/2014, para 11.8.

78 *Lahcen B M Oulajin and Mohamed Kaiss v Netherlands* (1992) UN Doc CCPR/C/46/D/1990 and 426/1999, paras 7.4–7.5.

measures',[79] 'specific measures',[80] or (the term we will employ) 'positive measures'[81] to address ongoing harms against groups that have suffered from historical discrimination.[82] As the Committee that oversees the implementation of CEDAW has explained, such measures can be necessary to address 'the underlying causes of discrimination.'[83] They should be 'aimed at accelerating de facto' or substantive equality and, as such, they may seek to address structural, social or cultural challenges that have led to or facilitated discrimination or they may provide compensation and remediation for marginalised groups.[84] While intended to be temporary, the appropriate duration depends on the 'functional result' of a given measure 'in response to a concrete problem' rather than on 'a predetermined passage of time.'[85] The necessity of temporary measures to redress historical and ongoing discriminatory beliefs and conduct may explain why CEDAW does not include a prohibition on 'preferences.'

The text of CERD does include a prohibition on preferences but it also allows for 'special measures' if required 'to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms.'[86] The treaty stipulates, however, that these measures must be temporarily limited and should cease once the objective justifying the measure is achieved, similar to the standard articulated by the Committee responsible for CEDAW.[87] As such, these measures must not 'lead to the maintenance of separate rights for different racial groups.'[88]

ICESCR also recognises that certain 'preferences' or 'measures' are allowed when needed to ensure substantive equality for historically marginalised groups. Under an anomalous provision in that treaty, '[d]eveloping states, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.'[89] This exception to strict equality and non-discrimination stems from a concern for States that had, at the

79 CEDAW (n 62) art 4; CEDAW, 'General Recommendation 32 on the Meaning and Scope of Special Measures' (2009).
80 Convention on the Rights of Persons with Disabilities (signed 2007, entered into force 3 May 2008) A/Res/61/106, art 5(4).
81 General comment 28 (n 64) para 3.
82 ibid para 3.
83 CEDAW, 'General Recommendation 25 on Article 4(1)' (2004) para 10.
84 CEDAW (n 62) art 4(1); General recommendation 25 (n 83) paras 10, 15.
85 General recommendation 25 (n 83) para 20.
86 CERD (n 62) art 1(4).
87 ibid.
88 ibid.
89 ICESCR (n 62) art 2(3).

time of the drafting, recently emerged from colonialism.[90] It was intended 'simply to address situations where non-nationals effectively controlled the national economy' and allows for a narrow limitation to the rights to equality and non-discrimination with regard to 'economic rights.'[91] A State invoking this article must still protect foreigners' social and cultural rights on a non-discriminatory basis.[92] However, the State can also pursue 'more equitable access to economic opportunities' for historically marginalised and excluded communities.[93] This ICESCR exception reinforces the general rule, found in the other treaties, that positive measures privileging a group can be justified only where needed to redress and remedy historical inequality and discrimination. Otherwise, discrimination is permitted only if there is an objective and reasonable basis for distinguishing between groups and if the distinction is necessary and proportionate to meet a legitimate State goal.

In contrast to what IHRL allows, IIL serves to privilege foreign investors in its provisions for remediation. Investment treaties construct foreign investor rights 'as a special category of entitlements vis-à-vis competing local interests.'[94] The key site for this special entitlement is ISDS, which provides foreign investors with a special pathway to compensation from the State, backed by legally binding arbitration if an investor feels the State has breached a relevant investment law obligation. In contrast to domestic investors or other rights holders harmed by State action, ISDS allows foreign investors to bypass domestic legal mechanisms on the basis of their national identity.[95] Moreover, domestic investors and affected third parties, such as communities harmed by the investor, are unable to enforce their rights via the tribunal. While they may attempt to intervene via an *amicus* brief, the tribunal cannot adjudicate the third party's rights and interests or award them reparations.[96] Even this limited participation is often met with scepticism amongst ISDS proponents, as allowing such participation absent explicit party consent is 'contrary to the consensual nature of the arbitration.'[97] States similarly face difficulty filing counterclaims against an investor for its own misconduct, meaning States are often effectively

90 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 216.
91 ibid 216–17.
92 ICESCR (n 62) art 2(1); Saul, Kinley and Mowbray (n 90) 216–17.
93 ibid 214–15.
94 Perrone (n 18) 393.
95 See Alvik (n 28) 291; see also Yilmaz Vastardis (2018) (n 10).
96 See Gary Born and Stephanie Forrest, '*Amicus Curiae* Participation in Investment Arbitration' (2019) 34 ICSID Rev 626, 630–46.
97 ibid 640.

denied treaty-based ISDS remedies against foreign investors.[98] Thus, ISDS creates a one-way access to justice avenue for privileged foreign investors. This feature of IIL raises two questions. First, how does IHRL approach the right to a remedy for the full range of affected actors? Second, is the privileging of foreign investors in this manner acceptable under IHRL? We address these questions in turn in the next sections.

2.4 *Right to an Effective Remedy*

Like the rights to equality and non-discrimination, IHRL guarantees the right to an effective remedy both as a stand-alone right and as a component of all other human rights.[99] Everyone is 'entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'[100] Key to this foundational right is the principle of equality before both judicial and non-judicial bodies, inclusive of an equality of arms.[101] An effective remedy requires an adequate and appropriate process capable of ordering substantive remedies aimed at wiping out the consequences of the human rights violation.[102] There are numerous components of the right but for present purposes we focus only on two: the meaning of effectiveness of a process, and the standard of appropriateness for substantive remedies.

In addition to any administrative or non-judicial avenues, the ICCPR specifically requires a judicial remedy.[103] Its primary criteria for procedural effectiveness is that the available remedy must be capable of redressing the breach[104] and the State must secure both the legal avenue and one's practical access to that avenue.[105] This duty requires remedial processes that are accessible, affordable, adequate, and timely.[106] As the UN Basic Principles

98 See Ishikawa (n 1) 33.

99 Human Rights Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 15.

100 ICCPR (n 62) art 14(1); See also Human Rights Committee, 'General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial' (2007) CCPR/C/GC/32 paras 15–21.

101 General Comment 32 (n 100) paras 2, 13.

102 Dinah Shelton, *Remedies Under International Human Rights Law* (2nd edn, OUP 2006) 16–17.

103 ICCPR (n 62) art 2(3).

104 Shelton (n 102) 18.

105 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, CUP 2016) 685.

106 OHCHR, 'United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2006) UN Doc A/RES/60/147,

and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law assert, the provision of a remedy requires the State to '[t]ake measures to minimize the inconvenience to victims and their representatives' as well as to '[p]rovide proper assistance to victims seeking access to justice.'[107] Finally, remedial processes need to be adapted for more vulnerable individuals, such as children, persons with disabilities, or those in poverty.[108]

In IHRL, the obligation to provide an effective remedy falls on the State. International tribunals have a subsidiary role and can be accessed only if the State has failed to meet its primary obligation.[109] Victims must therefore exhaust domestic remedies before they can access an international tribunal.[110] When it comes to the responsibility of businesses to facilitate access to remedies for individuals and communities affected by their operations, the UN Guiding Principles on Business and Human Rights synthesized procedural standards for an effective remedy from IHRL. They indicate that remedial processes need to be:

(1) legitimate, meaning independent, trustworthy and accountable for all affected stakeholders;
(2) accessible, both financially and physically;
(3) predictable, with clearly identifiable processes and timeframes, and a means of monitoring implementation;
(4) equitable, with all parties having reasonable access to information, advice, and expertise so they can participate in the process appropriately and respectfully;
(5) transparent, with clear public information that builds confidence in the system;
(6) rights-compatible, meaning the process and outcome must both comply with IHRL; and

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para 2(c) (Basic Principles); Committee on Economic, Social and Cultural Rights, 'General Comment No 9 (1998) on the Domestic Application of the Covenant' (1998) UN Doc E/C.12/1998/24, para 9.

107 Basic Principles (n 106) para 12(b)–(c). See also *Aksoy v Turkey* 1000/1995/606/694 (ECtHR, 18 December 1996) para 95.

108 Human Rights Committee, General Comment 31 (n 99) para 5.

109 Shelton (n 102) 58–59.

110 For a discussion of the contours and limits of this standard, see Cesare P R Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in Nerina Boschieroand others, *International Courts and the Development of International Law* (Springer 2013) 561.

(7) a source of continuous learning so that the mechanism informs preventative measures and, in doing so, reduces the likelihood of future harms.[111]

When an IHRL court or tribunal orders reparations, the preferred form of redress is restitution. However, full restitution is often impossible and tribunals tend to seek a combination of other measures such as apology, mental, physical, social, and vocational rehabilitation, punitive damages for criminal offences, financial and non-financial compensation, and guarantees of non-recurrence.[112] These broader sets of reparatory measures are crucial, especially in situations of widespread and systematic violations of human rights. The demands of full reparations in situations of widespread and systematic human rights violations would lead to what James Crawford, in his role at the International Law Commission (ILC), described as 'crippling compensation.'[113]

'Crippling compensation' is best understood as compensation that would effectively 'result in depriving a population of its own means of subsistence.'[114] When Crawford wrote the ILC report in 2000, he claimed that concerns about crippling compensation were 'exaggerated.'[115] However, as Martins Paparinskis has shown, the past two decades since Crawford's ILC report produced a series of large awards by international tribunals, including the European Court of Human Rights, which raise significant concerns about compensatory standards.[116] In response, Paparinskis has called for creating an exception to full reparation in international law for instances of crippling compensation.[117] He proposed a 'tripartite rule, consisting of a core proposition vague in the literal sense of the word, a methodology for asking questions, and a list of relevant factors and circumstances for answering them' that would collectively help define a limitation on 'crippling compensation.'[118] He left the practicalities of the methodology and relevant factors for future 'determination by State and judicial practice.'[119]

111 UNGPs (n 16) principle 31.

112 See General Comment 31 (n 99) para 17; Basic Principles (n 106); UNGPs (n 16) principles 22–23; Shelton (n 102) 58.

113 See James Crawford, 'Third Report on State Responsibility' (2000) UN Doc A/CN.4/507 and Add.1–4, para 162; Martins Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83 MLR 1246.

114 Crawford (n 113) para 162.

115 ibid para 163.

116 Paparinskis (n 113).

117 ibid 1251.

118 ibid 1281.

119 ibid 1282.

Neither Crawford nor Paparinskis address the fact that IHRL has already tacitly accepted a 'crippling compensation' exception. Despite stated commitments to full reparation,[120] the international community has allowed for 'creative' approaches to reparation when full compensation would impede a State's ability to meet other, sometimes competing, demands, such as peacebuilding or development initiatives.[121] In other words, 'adequate', rather than 'full,' reparation has often been found to be sufficient when the State's resources would make the latter impractical or would cause undue harm to other rights-holders.[122] This more accommodating standard of reparation is particularly common in situations of widespread and systematic violations of IHRL. For example, the international community widely embraced South Africa's post-apartheid transitional justice process. As part of this process, South Africa provided limited financial compensation to victims alongside other reparatory measures such as acknowledgements of wrong-doing and guarantees of non-recurrence.[123] Other States have similarly paired less-than-full compensation with apologies, institutional reforms, and other measures to provide adequate reparation where full reparation was impractical.[124] To date, these measures have largely been accepted by the international community and by IHRL scholars.[125]

Thus, victims of widespread and systematic violations of human rights are often expected to curb any expectations of full reparation when this tolerance

120 See Basic Principles (n 106).

121 See Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?' in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar 2017) 377.

122 See OHCHR, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' (2019) UN Doc A/HRC/42/45, para 39–44 (noting uncertainty as to whether victims are entitled to full reparations in the context of domestic reparation programmes); Statement of Eminent Jurists on Legal Obligations when supporting Reconstruction in Syria (24 September 2018) 2, 8–9, principle 9 and commentary <https://media.business-humanrights.org/media/documents/files/documents/Eminents_Jurists_Statement_Syria_reconstruction.pdf> accessed 27 April 2023.

123 See eg Charles Abraham, 'Lessons from the South Africa Experience' in Sabine Michalowski (ed), *Corporate Accountability in the Context of Transitional Justice* (Routledge 2013) 153, 154–55, 160; Tara L Van Ho, 'Transnational Civil and Criminal Liability' in Michalowski (n 105) 67–68 (noting US courts acceptance of limited reparation in post-apartheid South Africa); Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2002) 12 International Legal Perspectives 73, 76–77.

124 Moffett (n 121); Tara Van Ho, 'Is it Already too Late for Colombia's Land Restitution Process?' (2016) 5 International Human Rights Law Review 60.

125 Moffett (n 121). For a fuller discussion on when compromises have been acceptable, see Coleen Murphy, 'On Principles Compromise: When Does a Process of Transitional Justice Quality as Just?' (2020) 120 Proceedings of the Aristotelian Society 47.

is needed to protect the ongoing functioning of the State. IIL, however, has been allowed to operate in contradiction to this principle. As a recent study has shown, the imbalance between IHRL and IIL on this issue appears to have led Colombian judges to limit reparatory awards aimed at redressing IHRL violations that took place during the State's civil war out of concerns that the reparatory awards could trigger new and costly ISDS claims.[126] This situation raises particularly thorny questions,[127] but one may similarly question whether the procedural and substantive privileging of foreign investors is appropriate at all under IHRL. The next section examines this question.

3 Examining Special Protection of Foreign Investors

In this section, we evaluate ISDS from the perspective of IHRL and show how ISDS is indefensible when measured against the rights to equality, non-discrimination, and an effective remedy. This scrutiny is distinct from challenges to ISDS that originate in public or constitutional law perspectives,[128] allowing us to provide a more holistic critique. For example, Riffel has questioned whether ISDS discriminates against national investors under the German Basic Law by providing foreign investors with an extra avenue to challenge State measures.[129] He writes that, '[t]o opponents of ISDS, the whole issue comes down to this: Do foreigners need special remedies?'[130] Here, the question whether foreign investors *need* special remedies may appear appropriate. Yet, that metric is far from the only one required for an IHRL-based critique of ISDS. Riffel's framing over-simplifies the discriminatory nature of ISDS. Multiple forms of differential treatment are in play, most notably discrimination against domestic investors, discrimination against affected individuals and local communities whose human rights or legal interests are directly implicated by an ISDS claim, and discrimination against indirectly-affected individuals and communities impacted by ISDS claims. There is also a further concern

126 Enrique Prieto-Rios, Juan Francisco Soto Hoyos and Juan P Pantón-Serra, 'Foreign Concerns: The Impact of International Investment Law on the Ethnic-Based Land Restitution Programme in Colombia' (2022) 27(1) IJHR 1.

127 See Prieto-Rios, Soto Hoyos and Pantón-Serra (n 126); Van Ho (2016) (n 124).

128 See Alvik (n 28) 292–93. See also Schill (n 28); David Schneiderman, 'Global Constitutionalism and Its Legitimacy Problems: Human Rights, Proportionality, and the Future of International Investment Law' (2018) 12(2) Journal of Law & Ethics of Human Rights 251.

129 Christian Riffel, 'Does Investor-State Dispute Settlement Discriminate Against Nationals?' (2020) 21 German Law Journal 197.

130 ibid 197. See also Alvik (n 28) 295–96.

about the inequality of arms provided to developing States who are supposed to (and are sometimes obligated to) represent these own interests, as well as the interests of their citizens, before the arbitral body.

In this section, we begin our evaluation with a return to the issue of remedy, identifying how ISDS effectively privileges foreign investors over others in what appears to be a discriminatory manner. It then turns to the Human Rights Committee's three-pronged test to evaluate whether ISDS can be justified under the rights to equality and non-discrimination. Finally, we ask the broader question of whether ISDS, even if discriminatory, is nonetheless justifiable as a positive measure.

3.1 *Privileged Justice for Investors*

From the perspective of the human right to an effective remedy, ISDS raises two sets of concerns. The first is that investors can employ ISDS to frustrate the enforcement of court orders obtained by other actors such as local communities, and to insulate themselves from claims by individuals and communities affected by investment-related projects, or correspondingly by States, in other judicial fora.[131] While individuals or communities can seek remedies domestically, in practice investment proceedings have stalled and delayed domestic efforts at securing remedies from businesses,[132] and at least one study found judges were less likely to award full reparation due to concerns their decisions could trigger ISDS claims.[133] This availability of ISDS both as a sword and as a shield undermines the human rights of others to an effective remedy. The second concern is that ISDS provides an exclusive pathway for foreign investors to seek remedies against States for alleged breaches of investment protection. The former issue is addressed well elsewhere, including in this special issue,[134] and as such we focus mostly on the second concern.

Procedurally, ISDS offers foreign investors several distinct advantages that also undermine the rights of others to an effective remedy. As noted above, investment treaties usually allow an investor to directly access the ISDS

131 See Coleman, Cordes and Johnson (n 2) 292, 299–300; CCSI and Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Impacts of the International Investment Regime on Access to Justice' (Roundtable Outcome Document, September 2018) 11–12 <www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf> accessed 27 April 2023.

132 CCSI and Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (n 131) 11–12.

133 Prieto-Rios, Soto Hoyos and Pontón-Serra (n 126).

134 See eg Perrone (n 18).

tribunal without exhausting domestic remedies.[135] A special tribunal is established as the primary mechanism for investor redress. This process denies the respondent State an opportunity to fully hear other claims implicated by the case, or to develop a balanced response that redresses these competing rights and interests, as is the norm under IHRL.[136] The investor then helps appoint the tribunal that will hear its claim, and the decision of the tribunal is binding, not subject to appeal, and enforceable even where there are concerns about its legal or factual accuracy.[137] The investor's involvement in the appointment of the tribunal undermines the process' legitimacy from the perspective of other affected parties, enhancing the (at least perceived) one-sidedness of the tribunal process. For treaty-based disputes, States may in rare cases file a limited counterclaim, but they have no ability to initiate a claim directly.[138] Again, this adds to the perception of one-sidedness. For their part, local communities and individuals impacted by the investment or the investor's misconduct are confined to the possibility of submitting *amicus* briefs, the availability of which cannot be claimed as of right.[139] As such, foreign investors can access an internationally enforceable remedy where others with relevant rights and interests are mostly or entirely excluded from the said international remediation process. By relegating impacted third parties to 'amicus' status, rather than a party to the case, the process denies other rights-holders access to an effective remedy. Cumulatively, these privileges deny the equality of arms required by IHRL for remedial processes.[140]

There are other procedural concerns for IHRL as well. In particular, while ISDS is often touted as an inexpensive alternative to courts, it is in fact financially inaccessible to all but a few privileged investors.[141] More worryingly, defending an ISDS claim costs States an estimated average of USD 4–8 million.[142] As such, ISDS can be effectively unaffordable for developing States

135 Van Ho (n 124) 72; UNCTAD, 'Investor-State Disputes Arising from Investment Treaties: A Review' (2005) 3 <http://unctad.org/en/Docs/iteiit20054_en.pdf> accessed 27 April 2023.

136 Yilmaz Vastardis (2020) (n 10) 293–94.

137 Van Ho (n 124) 72; UNCTAD, 'Investor-State Disputes Arising from Investment Treaties: A Review' (2005) 3 <http://unctad.org/en/Docs/iteiit20054_en.pdf> accessed 27 April 2023.

138 See Ishikawa (n 1).

139 Gus Van Harten, *The Trouble with Foreign Investor Protection* (OUP 2020) 67.

140 See supra n 101; UNGPs (n 16) Principle 1 Commentary.

141 Yilmaz Vastardis (2020) (n 10) 636–37.

142 Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (Allen & Overy and BIICL, 2021) 4; OECD, 'Investor-State Dispute Settlement' (2012) 18 <www.oecd.org/daf/inv/internationalinvestmentagreements/50291642.pdf> accessed 27 April 2023.

in their role as respondents. The *jurisprudence incohérente* of ISDS[143] also means that there is no clear predictability to the outcome of disputes, and the process cannot be a source of continuous learning.[144] Collectively, the lack of predictability and the high costs of defending a claim creates an incentive for States to prioritise investors' interests and demands over the State's human rights obligations.[145] Compared to the remedial requirements consolidated in the UN Guiding Principles, ISDS thus has significant defects in its legitimacy, accessibility, predictability, equitability, and rights-compatibility, and as a source of continuous learning. It may sometimes deliver an effective remedy for some foreign investors, but the procedural flaws limit its broader utility and creates discriminatory effects on the rights of others to an effective remedy for human rights violations.

Beyond the procedural concerns, there are problems with the substance of the available remediation in ISDS. Arbitral panels have determined that 'since investment treaties almost never contain provisions on remedies for breaches,' investors are entitled to full reparation, with compensation as the primary, and usually exclusive, form of reparation.[146] This exorbitant demand goes to the heart of Paparinskis' 'crippling compensation' concerns.[147] In listing the range of awards that have exceeded or could exceed USD 1 billion in the past two decades, Paparinskis identifies seven investment law cases, one human rights case and two potential inter-State disputes relating to weapons sales and violations of international humanitarian law.[148] He acknowledges that the 'sheer frequency' of cases in investment law raises particular concerns not present in other areas of international law.[149] The impact is indeed staggering, particularly when compared to the remedial allowances in IHRL for States that have committed widespread and systematic violations of human rights. For example, Venezuela was ordered to pay approximately USD 8.7 billion in a single investment law case in the same week the country was hit with a major, weeklong electricity blackout.[150] In 2019, an award against Pakistan

143 See supra n 19.

144 See UNGPs (n 16).

145 See Prieto-Rios, Soto Hoyos and Pantón-Serra (n 126); Van Ho (2016) (n 124).

146 David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment 2012/03, 25; Toni Marzal, 'Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS' (2021) 22 JWIT 249, 258.

147 Martins Paparinskis, 'Crippling Compensation in the International Law Commission and Investor-State Arbitration' (2021) 37(1–2) ICSID Rev 1, 24.

148 Paparinskis (n 113) 1248–49.

149 Paparinskis (n 147) 24.

150 Paparinskis (n 113) 1246–47.

exceeding USD 6 billion was issued in the same month the IMF gave Pakistan a loan of USD 6 billion to support the State for the next 39 months.[151] Russia's nationalization of Yukos led to ISDS awards totalling over USD 50 billion in compensation (USD 40 billion in a single case),[152] or between 3.85% to 8.5% of Russia's annual GDP in the years of the takings.[153]

A comparison of the lone human rights case cited by Paparinskis – also stemming from the Yukos nationalisation – highlights how ISDS awards tend to be far higher, and therefore much more burdensome, than those in IHRL. In contrast to the ISDS award of USD 40 billion for a single Yukos case, the European Court of Human Rights awarded EUR 1.86 billion, its largest award ever, for multiple claims in its own *Yukos* decision.[154] This appears to be part of a larger trend, although exact comparisons are difficult, in which foreign investors' claims are monetarily privileged over those from other rights-holders. Strikingly, the total compensation awarded by the European Court of Human Rights across 1,331 human rights cases between 2011 and 2016, excluding the year of the Court's *Yukos* decision, was just over EUR 520.5 million.[155] In contrast, the average ISDS award in 140 cases from 2013 to 2017 (again excluding *Yukos*) was USD 171 million.[156] Thus, even when one excludes the *Yukos* award, ISDS tribunals awarded nearly USD 12 billion for 70 cases over four years, or approximately 23 times what the European Court of Human Rights awarded claimants in its 1,300 cases over a similar period.

The level of damages awarded in ISDS leads to specific harms for States, local communities, and other rights-holders. First, it limits the financial

151 ibid 1246–47, 1249. While Paparinskis does note the IMF loan's total, he does not emphasise how long it was to support the State. But see IMF, 'IMF Executive Board Approves US$6 billion 39-month EFF Arrangement for Pakistan' (3 July 2019) <www.imf.org/en/News/Articles/2019/07/03/pr19264-pakistan-imf-executive-board-approves-39-month-eff-arrangement> accessed 27 April 2023.

152 *Hulley v Russia* accounted for USD 40 billion of the total compensation awarded. *Hulley Enterprises v Russia*, PCA Case No 2005-03/AA226, Final Award (18 July 2014).

153 The takings took place over multiple years. Russia's GDP in 2004 was USD 591 billion and in 2007 USD 1.3 trillion. In 2014, the year *Hulley* (n 132) was awarded, it was USD 2.06 trillion and in 2020, it was USD 1.48 trillion. See World Bank, 'Data: Russia' <https://data.worldbank.org/country/russian-federation> accessed 27 April 2023.

154 Paparinskis (n 113) 1248; See also Yilmaz Vastardis (2018) (n 10) 291; *Oao Neftyanaya Kompaniya Yukos v Russia*, Application no 14902/04, Judgment (Just satisfaction) (15 December 2014).

155 Council of Europe, '10th Annual Report of the Committee of Ministers' (2016) 51, 75, <https://rm.coe.int/prems-021117-gbr-2001-10e-rapport-annuel-2016-web-16x24/16807280b> accessed 27 April 2023.

156 Matthew Hodgson and Alistair Campbell, 'Damages and Costs in Investment Treaty Arbitration Revisited' (*GAR*, 2017) 4.

resources available to the State to meet IHRL obligations.[157] The difference in damages can also incentivize States to prioritise foreign investor rights over those of local communities.[158] The mere threat of an ISDS claim can cause a 'regulatory chill', or even a 'judicial chill' on the provision of remedies and the enforcement of human rights.[159] As such, the ISDS mechanism creates a systematic privileging of foreign investors' access to remedies over access by States and other rights-holders. It does so by creating a differentiated path to remediation and then demanding full reparation even in instances of crippling compensation for the State. The next question is whether this privilege is nonetheless necessary or justifiable under IHRL.

3.2 *An Example of Entrenched Inequality?*

As we have seen, ISDS is accessible to some but not all investors based on their national origin and identity. This exclusivity suggests, *prima facie*, that ISDS runs afoul of IHRL's rights to equality and non-discrimination. Despite the harms caused by ISDS, the privileged treatment of foreign investors can still be justified under IHRL if it satisfies the Human Rights Committee's three-prong test discussed above: (1) differentiation on the basis of objective criterion, (2) with a rational nexus to a legitimate State goal, (3) and proportionate to the stated goal. Providing access to an international remedial mechanism on the basis of foreign nationality meets the first prong. Foreign investors may arguably be treated as a separate class, differentiated from, say, domestic investors, based on their identity or other 'reasonable and objective' criterion. Additionally, investment disputes historically gave rise to 'gunboat diplomacy,' meaning aggressive use of inter-State force in the protection of foreign investors, that can suggest a need for a distinct dispute resolution process.[160] Developing a remedial mechanism for foreign investors on the basis of their nationality employs clear and reasonable criterion for differentiated treatment.

The second prong requires a rational nexus to a legitimate goal. Here, the privileges afforded by ISDS are questionable. There are seemingly four

157 The ICESCR explicitly ties a State's obligations to its 'maximum available resources' and recognises that a limit on resources will necessarily impact the realisation of human rights. ICESCR (n 44) art 2(1); see also Abby Kendrick, 'Measuring Compliance: Social Rights and the Maximum Available Resources Dilemma' (2017) 39 Hum Rts Q 657.

158 See Van Ho (n 124); Prieto-Rios, Soto Hoyos and Pontón-Serra (n 126).

159 UN Working Group on Business and Human Rights (n 32) para 21; Prieto-Rios, Soto Hoyos and Pontón-Serra (n 126).

160 See Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart 2009) 31–55.

potential goals. The first is to stop 'gunboat diplomacy.' Yet, the rationality of this is questionable as international law provides other measures to address this concern, including the *jus cogens* prohibition on the aggressive use of force.[161] The historical justification for ISDS has lost its resonance in the modern era and a nexus between ISDS's privileges and this goal seems dubious.

Related to the issue of gunboat diplomacy, but distinct from it, is a second potential goal: 'depoliticising' investment disputes.[162] One could argue that the prohibition on the aggressive use of force would not deter States from using coercion to protect their investors abroad; instead, the prohibition merely induces States to change tactics and use trade sanctions and other leverage instead of physical violence.[163] As Lauge Poulsen notes, however, depoliticization has rarely been an actual motivation for States to adopt investment treaties.[164] Poulsen also shows that there is scant evidence, at least beyond anecdotal claims and counter-factual narratives, to support the theory that ISDS has reduced the use of political pressure in support of foreign investors.[165] In fact, the most persuasive empirical work indicating investment law reduces political conflict between States predates the rise of ISDS claims, suggesting ISDS is not a primary or significant factor.[166] More generally, Poulsen found that anecdotal evidence suggests the availability of ISDS has no impact on whether States escalate investment disputes.[167] If ISDS does not actually depoliticise investment disputes, then its provision cannot enjoy a 'rational nexus' to this State interest. As such, this argument also fails the second prong of the IHRL test.

The third potential State interest is in attracting foreign investment through the provision of international protection and direct access to ISDS. The Advocate General at the Court of Justice for the European Union invoked this interest as a justification for privileging foreign investors.[168] Yet, it seems unreasonable to regard as a legitimate goal of the State an economic agenda that promotes the economic interests of certain actors while ignoring the human

161 UN Charter (n 38) art 2(4); ILC Articles on State Responsibility for Internationally Wrongful Acts with Commentaries (2001) 112, 641.

162 See Lauge Poulsen, 'The Politics of Investment Treaty Arbitration' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (OUP 2020) 740, 741–50.

163 ibid 743–44.

164 ibid 744–48.

165 ibid 748–50.

166 ibid.

167 ibid 749–50.

168 Opinion of the Advocate General Bot, CETA Opinion (29 January 2019) ECLI:EU:C:2019:72, para 209.

rights of local communities. Instead, it would seem that attracting investment must be a means to achieving other desirable ends, such as the realisation of human rights or accomplishment of the Sustainable Development Goals, rather than an end in itself.[169] This conclusion is buttressed by the preambles to many investment agreements that assert that the purpose of providing foreign investment protection is to 'improve living standards'[170] or advance the economic development of the host States.[171] Unfortunately, there is no conclusive evidence that investment treaties and ISDS actually attracts foreign investment,[172] and in many contexts domestic investors may also be able to provide much-needed investment. Again, absent indications that the differential treatment (access to ISDS) actually has, in fact, a rational nexus to a legitimate State interest, ISDS cannot withstand the scrutiny of IHRL.

A final potential State goal is to protect investors from undue discrimination. This appears to be the only State interest that survives the second prong: one can justify special protections for those individuals in situations of vulnerability. Here, however, there is question about the proportionality of ISDS in meeting this goal, meaning the Human Rights Committee's third prong. As our analysis above indicates, the absolutist nature of ISDS serves to exclude totally (rather than partially) States and local communities from seeking remedies against foreign investors, while the privileges provided through ISDS effectively deny the right to a remedy for third parties affected by an investment.

169 For an articulation of this premise, see Giorgio Sacerdoti, 'Investment Protection and Sustainable Development: Key Issues' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 19.

170 US Model BIT (2012) <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 27 April 2023.

171 ibid; Investment Treaty Between Pakistan and the Federal Republic of Germany (signed 2009, not entered into force) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/78/germany>; Agreement Between the Government of the Republic of Seychelles and the Government of the French Republic on Reciprocal Promotion and Protection of Investments (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/72/france>; Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Chile for the Promotion and Protection of Investments (1996) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/716/download>; Agreement Between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (2016) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/136/mexico accessed 1 August 2022> all accessed 27 April 2023.

172 Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 155–66.

Coupled with the robustness of ISDS enforcement, these exclusions mean that IIL can be used effectively to override other rights, without proper consideration of those rights or of the State's obligation to address and balance competing interests. These variables suggest that ISDS is a disproportionate tool for the purported goal of protecting the so called vulnerable investors. Less harmful and more proportionate alternatives exist, including but not limited to the development of local systems of justice or international mechanisms that also have a remit to address competing human rights claims.

Considering the above analysis, ISDS fails to meet the criteria for a legitimate differentiation under IHRL. Alternatively, one could argue that ISDS for foreign investors is justifiable as a 'positive measure' in line with affirmative measures under CEDAW or CERD. Foreign investors, unlike States, are not sovereign and it may be said they need special protection against potentially capricious State policies.[173] Some scholars have argued that States are more likely to discriminate against foreign investors as compared to domestic investors, and that the domestic courts may not be sufficiently accessible and reliable to address foreign investors' grievances.[174] In our view, these arguments can be convincingly rebutted, including by the application of the IHRL criteria for positive measures. Most importantly, the use of ISDS as a 'positive measure' is inappropriate as such measures are meant to be temporary and aimed at securing substantive equality for historically disadvantaged groups.

First, one should not assume that foreign investors are vulnerable and thus deserving of particular protection as is the case for others in situations of vulnerability, such as indigenous peoples, human rights defenders, asylum seekers, or migrant workers. All of the latter groups are less well protected domestically and internationally than foreign investors.[175] It is not simply that there are others who also need protection, but that foreign investors as a class do not lack power in the way historically marginalised groups do. As Anil Yilmaz Vastardis explains, the hurdles to accessing ISDS mean that 'the type of investor likely to use' ISDS already enjoys 'far more political leverage … within the domestic legal system than many other portions of society.'[176] ISDS therefore offers additional and further protection to an already elite group of actors who have benefitted from structural inequalities. In contrast to positive

173 The regime is also 'justified because foreign investors do not vote or participate in domestic political decisions', Perrone (n 18) 403.

174 See Muchlinski (n 20) 709.

175 See Yilmaz Vastardis (2018) (n 10) 293–94.

176 ibid 293.

measures for the benefit of historically disadvantaged groups under IHRL, ISDS entrenches structural inequalities.

It is also unconvincing to claim that ISDS is necessary as a legitimate substitute for weak local governance.[177] While weak governance can be a problem, these concerns are only selectively employed. When investors are sued by local communities for alleged human rights abuses or environmental pollution, the investors commonly demand such claims to be heard locally rather than in their home States or another forum.[178] Thus, they conveniently disregard corresponding concerns about the supposed weakness of the domestic judicial system, undermining the claim that ISDS is needed to assure investors of the security of their investment. As a group, foreign investors simply have not been shown to need heightened protection to address capricious conduct by States or to secure their right to non-discrimination.

Finally, ISDS is not designed to be a temporary measure as required for positive measures in IHRL. In fact, the circular logic underpinning the case for ISDS would appear to justify ISDS in perpetuity. In her searing critique of ISDS, Yilmaz Vastardis articulates how the belief that domestic courts are untrustworthy for investor protection means that domestic courts are never given the opportunity to prove their reliability; the inability to prove their trustworthiness justifies investors' distrust, which again justifies never giving domestic courts the opportunity to prove themselves.[179] This justification loop is so deeply embedded in IIL that even the European Union has called for institutionalising ISDS into standing courts,[180] deviating from its normal practice of requiring rights-holders to use domestic remedies to challenge a State's breach of treaty protections.[181] The circular logic Yilmaz Vastardis identifies means ISDS can never be a temporary measure and can never be aimed at achieving substantive equality. It necessitates permanency, consistent with a deeper prioritization of those already in elite positions and disconnected from any potential purpose of achieving substantive equality. Or, in the words of CERD, ISDS 'lead[s] to the maintenance of separate rights for different … groups' on

177 For discussion, see Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25 Intl Rev L & Econ 107.

178 UN Working Group on Business and Human Rights (n 32) para 16.

179 Yilmaz Vastardis (2018) (n 10) 284.

180 Submission of the European Union and its Member States to UNCITRAL Working Group III, 'Establishing a Standing Mechanism for the Settlement of International Investment' (18 January 2019) <https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf> accessed 27 April 2023.

181 Treaty of the Functioning of the European Union (1 January 1958) art 258. Rights-holders can directly access the Court of Justice of the European Union only to challenge acts of the European Union itself.

the basis of their national origin.[182] CERD also defines racial discrimination as inclusive of discrimination on the basis of national origin, indicating that what ISDS does is actually institutionalise racial discrimination rather than combat it. The perpetual maintenance of distinct rights is antithetical to what CERD permits. In short, ISDS cannot be justified under IHRL as a positive measure.

By subjecting ISDS to IHRL standards, we have demonstrated that the privileging of foreign investors through ISDS is unjustified and unjustifiable under the rights to equality, non-discrimination, and an effective remedy. Instead, our analysis indicates ISDS functions as a discriminatory and disproportionate mechanism that cannot withstand scrutiny under IHRL. If IHRL is indeed *primus inter pares* with IIL, the current approach based on ISDS cannot continue. The next question is, what could and should ISDS become?

4 An Alternative Dispute Settlement Mechanism

As we have demonstrated, ISDS is incompatible with the human rights to equality, non-discrimination, and an effective remedy. In this section, we re-imagine the future of ISDS in two ways. First, we consider why and how its abolition could secure greater coherence between IIL and IHRL, in line with IHRL's status as *primus inter pares*. Second, we identify elements that an alternative, specialist IIL mechanism could adopt in an effort to be human rights compatible. Our focus here is normative. We examine what IHRL requires, without considering what is politically feasible.

4.1 *Abolition as a Necessary Reform*

If ISDS fails to meet the IHRL standards, what is its actual justification? Alvik has argued that its 'only convincing justification … is the one provided by the international minimum standard' of foreigners, specifically because it was developed 'in a dialogue with' concerns of equality.[183] He concludes that ISDS should only serve as a secondary forum for dispute resolution, following domestic courts instead of replacing them.[184] Alvik's findings echo Yilmaz Vastardis's conclusion that by withdrawing ISDS claims from domestic courts ISDS actively harms the courts' ability to develop, while privileging elite foreign investors over other rights-holders.[185] Both similarly called for domestic

182 CERD (n 62) art 1(1), (4).
183 Alvik (n 28) 291.
184 ibid 291.
185 Yilmaz Vastardis (2020) (n 10) 293.

courts to be given an opportunity to address IIL claims before investors can access ISDS. In light of the incompatibility of ISDS with IHRL, however, it may be necessary to actually pursue the full abolition of ISDS.

The system and structure of ISDS breaches the rights to equality, non-discrimination, and an effective remedy. The privileging of foreign investors also bifurcates rights when they are affected by the same set of facts. A foreign investor's concerns can be fast-tracked into ISDS, can achieve full reparation regardless of its impact on the State or other rights-holders, and the decision is widely enforceable at home and abroad. By comparison, others who are directly implicated by the same facts can be excluded from effective participation in the process, are fully excluded from any reparation, must separately exhaust domestic remedies, and may be forced to accept reduced reparation orders in light of the State's economic realities. Their rights face significant barriers because of the divergence in remedial paths. Others may be indirectly impacted by an ISDS claim if the State must divert resources towards a privileged remedial process or to appease foreign investors through regulatory choices so they do not formally initiate an ISDS claim. All these impacts follow from the unjustifiable distinctions ISDS makes based on national identity. If the ISDS system causes the problem, then it follows that the only effective means to ensure compliance with IHRL is to dismantle the system.

If ISDS were abolished, it would put foreign investors in the same position as other rights-holders. A foreign investor, like anyone else, would need to pursue remedies through the domestic legal system, exhaust those remedies, and then rely on the available international mechanisms, including international and regional human rights bodies where relevant. While foreign investors may object to such an arrangement, it would achieve the greatest equality for all parties and would facilitate State compliance with the prohibition on non-discrimination as defined by IHRL. Additionally, and contrary to the status quo,[186] a system that subjects foreign investors to domestic judicial systems could incentivize States to improve those systems of justice to attract investment.

Importantly, the abolition of ISDS might not only address the IHRL concerns; it could also strengthen normative claims for specific mechanisms of investment relief in a particular context. That is, if a domestic legal system proves inadequate, the call for developing a new ISDS mechanism to address a limited number of claims for a defined period of time would be much clearer and more compelling. In the right conditions, its application could meet the IHRL standards discussed above. Were that to happen – or, more likely, if States

186 See generally Sattorova (n 60).

fear ISDS abolition and wish to seek milder reforms – it would be important to consider the contours and limits demanded by IHRL for such a system.

4.2 *An Alternative Mechanism*

To overcome the systemic problems with ISDS from a human rights perspective, any alternative mechanism – whether a permanent international investment court or otherwise[187] – should satisfy at least eight principles.[188] It must be equal, accessible, participatory, independent, diverse, coherent, transparent, and reviewable.[189] All these elements flow, directly or indirectly, from the human rights to equality, non-discrimination and an effective remedy as discussed in this article. As becomes apparent in our discussion here, these elements interact and sometimes overlap with one another. For example, accessibility is a requirement for an effective remedy but it is also an element to equality as without an accessible process, individuals in situations of vulnerability might be precluded from participating in the dispute settlement mechanism on an equal footing. Yet, various ISDS reform initiatives do not fully consider the eight principles or, at least, do not take IHRL as a vital starting point. Here, we briefly outline the key components any reformed process needs to have to comply with IHRL. Unfortunately, the current reform patchwork is generally reactive and aimed at salvaging ISDS, rather than at developing a more just mechanism for all parties;[190] as such, we acknowledge how current reform efforts align or deviate from these principles only where relevant.

4.2.1 Equality

Disputes among those affected by investments are inevitable. Some parties, like States and investors, may be active agents in an investment, but others, including local communities, tend to be more passive or diffused agents. An alternative dispute settlement mechanism should have jurisdiction to hear all investment-related disputes raised by any affected party. These may encompass disputes that are primarily State versus investor, State versus State, investor versus investor, State versus community, community versus investor, and so on.

187 For some of potential alternatives, see UNCTAD, 'Reform Package' (n 20) 55–58.

188 Some of these principles are also part of the effectiveness criteria laid down by Principle 31 of the United National Guiding Principles on Business and Human Rights (2011).

189 These principles build on elements proposed in Deva (n 32) 324–25.

190 See UNCITRAL Working Group III, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Note by the Secretariat' (30 July 2019) A/CN.9/WG.III/WP.166/Add.1 (UNCITRAL Possible Reforms) 10–12 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/082/01/PDF/V1908201.pdf?OpenElement> accessed 27 April 2023.

If the new mechanism dealt with all potential disputes arising from an investment, its role as a special remedial process would satisfy the IHRL demands outlined above.

4.2.2 Accessibility

An alternative mechanism should be accessible, especially to weaker or vulnerable parties in a dispute. For IHRL, accessibility relates to all aspects of the process, including physical location, financial feasibility, and informational or technical knowledge. Achieving accessibility requires the mechanism to have procedures capable of addressing inherent asymmetries in access to information, expertise, language, and cost.[191] Equality of arms, in terms of accessibility, can be established only by addressing such power imbalances.[192] As an illustration of the issue, the current UNCITRAL reforms aimed at managing cost and/or third party funding[193] will not address the huge asymmetries faced by local communities affected by investment-related projects in terms of access to ISDS. These reforms do not address the interests of affected communities and individuals in being parties to relevant disputes. Similarly, the proposal for a multilateral advisory centre capable of reducing the financial burden on developing and least developed States or small- and medium-sized enterprises[194] would not increase the accessibility of ISDS for other affected stakeholders. In fact, none of the reform proposals would seemingly allow stakeholders affected by an ISDS claim to access the investment dispute process.[195] Without increased accessibility, a reformed ISDS system risks perpetuating the structural inequalities that we have shown make ISDS incompatible with the *primus inter pares* IHRL.

4.2.3 Participation

Any mechanism that replaces ISDS should allow for effective participation of all affected parties. ISDS is lopsided partly because the regime was developed by States and investors without the awareness or participation of local communities. In relation to investment treaties, Nicolás Perrone has called for the inclusion of local populations in the design of investment agreements because 'the use of local resources is fundamental to people's lives' and that 'local

191 'High costs will likely generally play to the advantage of financially stronger parties.' Gaukrodger and Gordon (n 126) 23.

192 As noted above, the right to equality before the courts entails this 'equality of arms' (n 101).

193 UNCITRAL, Possible Reforms (n 190) 10–12.

194 ibid 2–3.

195 ibid.

populations should have the means to participate in any meaningful decision about these resources.'[196] This reasoning would also apply to any alternative dispute settlement mechanism that, like ISDS, had a direct bearing on the human rights and interests of local communities. Effective participation of local communities in designing the alternative mechanism is therefore essential to ensure that the mechanism is fair, equitable and accessible.

4.2.4 Independence

The adjudicators who serve on an alternative mechanism should be independent of the disputing parties. At present, ISDS is based on party-appointed ad hoc arbitrators, which raises concerns about conflicts of interests.[197] The ad hoc appointments are also a recipe for inconsistent and unpredictable awards.[198] Establishing a permanent mechanism whose adjudicators are selected in a transparent process and for a lengthy duration can alleviate these concerns.[199] UNCITRAL has similarly proposed reforming the selection and appointment of ISDS tribunal members and by developing a code of conduct for them,[200] which could alleviate some of the concerns about independence and impartiality of arbitrators.

4.2.5 Diversity

To satisfy substantive equality requirements and obtain legitimacy, decision makers should mirror the diversity of a given society. This principle applies to the selection of those settling investment disputes.[201] Adjudicators should be drawn from individuals with expertise or experience in a range of relevant fields, including investment law, human rights law, environmental law and climate change law. They should also reflect societal diversity in terms of gender, race, and geographic region. The presence of diverse adjudicators can be expected to strengthen the quality of internal deliberations, including by facilitating an

196 Perrone (n 18) 400.

197 See Puig and Shaffer (n 11) 408.

198 See Van Ho (n 13).

199 One may draw inspiration here from international norms regarding independence of judges from both external and internal pressures. See for example Basic Principles on the Independence of the Judiciary (endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985).

200 See 'Standing Multilateral Mechanism: Selection and Appointment of Arbitration Tribunal Members and Related Matters: Note by the Secretariat – 2021 Draft' (15 November 2021) <https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/standing_multilateral_mechanism__selection_and_appointment_of_isds_tribunal_members_and_related_matters__0.pdf> accessed 27 April 2023.

201 UN Working Group on Business and Human Rights (n 32) para 76(m).

understanding of marginalized perspectives and ensuring that awards capture the aspirations of local communities.[202] If subject-matter diversity were also present, one could expect adjudicators to approach disputes more holistically and to support greater policy coherence among different branches of international law.

4.2.6 Coherence

The development of coherence is not only a benefit but a requirement for a new IHRL-compliant mechanism. IIL should be seen as part of an ecosystem of international law, not as an autonomous regime. As such, the adjudicators on an alternative mechanism should contribute to the cohesive development of international law by interpreting investment treaties in the light of their objectives, including those in the Preamble, and other relevant international instruments.[203] By paying greater attention to how investment law interacts with IHRL than what ISDS tribunals have evidenced to date,[204] a new mechanism could articulate a better balance between investment law and IHRL. In doing so, it might not only alleviate concerns over the relationship between IIL and IHRL, but it could positively contribute to the legal, policy, and normative justifications of investment protections.

4.2.7 Transparency

Transparency is a critical component to enhancing public confidence in dispute settlement processes. It also encourages adjudicators to act fairly and consistently knowing that their assessments need to withstand public scrutiny. These elements in turn support the principle of access to an effective remedy by increasing public knowledge of and confidence in the procedure. Transparency will also allow ISDS to serve as a 'source of continuous learning'[205] so that States, stakeholders, and investors can develop greater competency in investment law. On this basis, an alternative mechanism should have open proceedings unless confidentiality is required to protect certain rights of the disputing parties, such as legitimate commercial secrecy or national security. If confidentiality is required in certain circumstances, the principle of

202 Muchlinski has previously wondered whether arbitrators are 'sufficiently varied in their professional, cultural, ethnic and gender backgrounds to provide the kinds of wider insights needed to answer the very complex economic, social and environmental issues raised by investor-State disputes', Muchlinski (n 20) 751.

203 See Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) art 31.

204 See supra n 18 and accompanying text.

205 See supra n 111 and accompanying text.

proportionality should guide the determination of any restrictions to transparency and openness.

4.2.8 Reviewability

The right to an effective remedy would be illusory if, in practice, there was no mechanism to correct errors of fact, law, or jurisdiction made by a first instance tribunal. ISDS currently lacks an appeal mechanism. An alternative mechanism should fill this gap by providing access to an appellate mechanism before orders or awards can be enforced. UNCITRAL is working to develop such an appellate system, although it is unclear what shape this reform will take.[206] Further, once an appellate mechanism is established, adjudicators would need to follow a system of precedent or *jurisprudence constante* to enhance predictability and assist the process of informed review.

Centring IHRL in the design of a new investment dispute mechanism brings these eight principles to the fore. That these principles are not always present, or are not fully present, in current reform efforts undermines the legitimacy of the reform process. The new process could simply re-entrench the problematic inequalities of the current system. In contrast, and as we note above, the inclusion of these elements in the reform could strengthen the normative, legal, and policy justification of the new mechanism.

5 Conclusion

In this article, we have asked what would happen if ISDS, and ISDS reform efforts, were to fit into IHRL as opposed to the usual question of how ISDS might better integrate IHRL. This small change in the centring of the two fields yielded significant results, as we made four contributions to the existing literature on the relationship between IIL and IHRL. First, we provided three reasons for why IHRL should be treated as *primus inter pares* vis-à-vis IIL. These are: (1) the centrality of human rights, and the absence of investment law protections, within the UN Charter as evidence of the necessity and centrality of the former, but not latter, to an effective international order; (2) the fundamental nature of IHRL to the functioning of a State, in contrast to IIL as an additional set of commitments pursued when it furthers the State's

206 See 'Appellate Mechanism: Note by the Secretariat 2022 Draft' (5 May 2022) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_for_the_website.pdf> accessed 27 April 2023.

interests; and, finally, (3) the normative reliance of IIL on IHRL to justify its existence. We argue that the final reason, new to the discussion, should settle the debate over the relationship between IIL and IHRL. While IIL recognises a need for IHRL and often predicates its claims on a commonality and reconciliation between the two fields, the inverse is not true. The reliance of IIL on IHRL for its normative worth clarifies that IHRL is the first among these equal legal systems.

Next, we evaluated the current approach to ISDS with reference to the IHRL standards for the rights to equality, non-discrimination, and an effective remedy. In doing so, the incompatibility of ISDS with these rights specifically, and IHRL generally, was laid bare. For example, the privileging of investors' rights in ISDS can only be justified under IHRL if it meets a three-prong test set out by the UN Human Rights Committee. As we established, ISDS does not have a rational nexus with a legitimate public goal and it cannot be regarded as a proportionate measure. As such, it fails the Human Rights Committee's test. Similarly, and contrary to the claims of some of its proponents, ISDS also cannot be justified as a 'positive measure' akin to what is sometime required to protect the rights of women or racialised communities. Such measures under IHRL should be temporary and aimed at achieving substantive equality for historically disadvantaged groups. Foreign investors are not in a situation of vulnerability, and the justification loop of ISDS means that the it is not used as a temporary measure to secure substantive equality. It therefore cannot meet the IHRL standard for positive measures.

Third, we articulated why IHRL requires the abolition of ISDS while also showing how its abolition could strengthen normative claims for using an alternative form of ISDS when required. Thus, the article condemns the current design of ISDS but also creates a bridge between ISDS abolition and the potential for alternative dispute processes in particular situations. The call for abolition is admittedly radical but also necessary for an honest discussion of what a human rights-centred approach to investment dispute settlement requires. This honesty also makes an important contribution to the reimagination of dispute settlement within IIL both for particular circumstances and in general.

Our final contribution has been to outline the elements of a human rights-based dispute settlement mechanism in IIL. We identify eight non-exhaustive principles for evaluating any proposed ISDS reform. These principles – including equality, accessibility, participation, independence, diversity, coherence, transparency, and reviewability – could be used to test whether current reform initiatives, such as those led by UNCITRAL, will meet IHRL standards. If

those standards are not met, it is unlikely that any ISDS reform can meaningfully address the structural deficiencies of IIL. In fact, superficial ISDS reform risks glossing over and entrenching investment law's discriminatory elements. In contrast, centring IHRL within the reform process, as we argue here, could strengthen the legitimacy of any subsequent mechanism.