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Paper for the Symposium ‘Bringing the “human problem” back into transnational law– The example of corporate (ir)responsibility’

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The human side of protecting foreign investment

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ABSTRACT

This article looks at the human side of protecting foreign investment in the sense that it zooms onto the role stereotypes play in the development of the relation between human rights and investment law. I demonstrate that international human rights law not only protects from discrimination based on stereotypes but also creates and reiterates stereotypes. These stereotypes may entrench differences between communities but also bear potential for new convergences. I argue that we need to focus on the humans producing the transnational legal discourse and the process of normalisation of those humans in order to destabilise stereotypes that hinder possible convergences of human rights and investment community. In short, this paper explores in what way international law’s stereotypes encourage convergence or divergence in transnational legal discourse on the intersection between human rights and investment law.

KEYWORDS Human rights; investment law; social cognition; stereotypes; transnational law

1. The transnational situation

In 2002, in Greater Buenos Aires, the populations’ human right to water was under distress: it became clear that the company, established by foreign investors, holding the concession for water and sewage services had not provided the necessary investment in that regard.¹ The same story, told from the company, however, holds that in 2002, Argentina failed to protect sufficiently the foreign investment of the aforementioned company – and that this had little to do with any human rights aspirations.²

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¹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, [2016] Award, ICSID Case No. ARB/07/26, [36] (*‘Urbaser’*).

² *Ibid.*, [34].

This article has been corrected with minor changes. These changes do not impact the academic content of the article.

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This setting exemplifies the transnational situation we are concerned with: a problem that transcends national borders as much as distinctions between public and private, national and international law.³ Conflicts between these different areas seem then to be a fundamental part of the problem.

The very aim of investment law is to protect foreign investment. The law relies therefore on the triangular relation between home and host state and the private investor.⁴ Human rights are alien to that logic, and only recently have some investment law actors – reluctantly – taken up the issue. However, from the perspective of human rights, the space that investment treaties provide for foreign investors is prone to be a site of human rights violations, because investors regularly find themselves in asymmetric power-relations: On the one side, the regulatory power of the host state can be a threat: abuse of that power endangers the stability of the investment.⁵ On the other side, the investors' economic power can be a threat: abuse of that power endangers the human rights of involved society.⁶

This becomes further complicated by a north-south dimension: the investment regime resulted from reactions to decolonisation: corporations enrooted in the Global North but active in States of the Global South pushed for a setting in which conflicts with the host country would not need to be solved at national courts.⁷ The question of economic sovereignty was transformed into an issue concerning the regulation of foreign investment.⁸ So, in a sense, the protection of property became internationalised into a web of bilateral treaties on the protection of foreign investment and the jurisprudence of the adjunct ad hoc investment tribunals – with a claim to *inter partes* applicability.⁹ The process of internationalisation, however, could not have been more different to the process in which human rights were established on the international plane. While the expansion of the domain covered spread potentially even more and quicker than investment law, human rights law was developed through multilateral conventions – often with universalistic aspirations, and the adjunct permanent dispute resolution bodies – and their claim to a

³ Philip C Jessup, *Transnational Law* (Yale University Press 1956) 2–4; Laura Knöpfel and Felix Lüth, 'Bringing the 'Human Problem' Back into Transnational Law – The Example of Corporate (Ir)Responsibility' (2020) *Draft Paper for the Workshop on Transnational Law* 2 and 5–6.

⁴ David Collins, *An Introduction to International Investment Law* (Cambridge University Press 2017) 1; As will become clear in the subsequent elaborations, this situation displays clearly the features identified by Koh as distinctive for transnational legal process. Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 184.

⁵ Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2010) 107.

⁶ See on economic power in a transnational situation: Jessup (n 3) 76.

⁷ Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago University Press 1996) 86–88.

⁸ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Oxford University Press 2011) 99.

⁹ Dezalay and Garth (n 7) 88.

much more general applicability.¹⁰ In other words, the investment and the human rights regime seem to be destined either to exist in relative isolation from one another or to clash in conflicts.

If one looks more into the human side of this situation, this picture appears however more nuanced, particularly because of the asymmetrical regulation of participation in law-making processes. In both fields, the treaties are concluded between states in order to protect a third element: the individual human/the individual investor.¹¹ In both cases, the protected element obtains a direct right to file claims, and in both cases, those claims are the major motor for developments of the respective fields.¹² However, in both cases the individual protected by one regime has only limited access to the law-making in the other regime: most human rights courts do not accept legal persons as claimants, and investment tribunals barely allow for the participation of human rights proponents.¹³ While there is an argument to be made vice-versa, too, this paper limits its focus to the role of human rights in the investment field.

In fact, all relevant actors in the investment field put forward human rights claims in order to bolster their argument: (a) civil society agents attempt to file *amicus curiae* in order to draw attention to human rights violations of the investor (b) host states highlight their human rights obligations clashing with the investors claims (c) home states/corporations rely on the right to property as the basis of their claim.

In a sense, all actors attempt to promote the human rights legal transplant into investment law that suits them best.¹⁴ Hence, in this transnational legal process it is crucial who is defined as key-agent for the process of internalisation.¹⁵ In PHILIP JESSUP's words, we need to remember that transnational situations are 'after all human problems'.¹⁶ Building on this perspective, I argue that one kind of those fundamentally human problems are

¹⁰ Moshe Hirsch, 'The Sociology of International Investment Law' in Zachary Douglas, Joost Pauwelyn, and Jorge E Vinuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 156.

¹¹ Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' (n 5) 98.

¹² *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, Award, ICSID Case No. ARB/87/3, [1997] Hirsch, 'The Sociology of International Investment Law' (n 10) 155; Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge Univ Press 2015) 139–145; Dezalay and Garth (n 7) 93.

¹³ Silvia Steininger and Jochen Bernstorff, 'Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate "Human" Rights in International Law' (Max Planck Institute for Comparative Public Law & International Law (MPIL) 2018) Research Paper No 2018-25 3 <<https://ssrn.com/abstract=3254823>> (all websites last visited 31 March 2021); Johannes Hendrik Fahner and Matthew Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration' (2019) 68 *International and Comparative Law Quarterly* 741.

¹⁴ Harold Hongju Koh, 'Why Transnational Law Matters' (2006) 24 *Penn State International Law Review* 745, 746; regarding the change of a norm through transplantation to a new field see: Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 *The Modern Law Review* 11.

¹⁵ Koh (n 14) 746.

¹⁶ Jessup (n 3) 15.

mechanisms of social cognition. Those mechanisms, in particular the use of stereotypes, make agents in the arbitration setting a lot less likely to provide a solution satisfying the human rights and the investment field than the agents involved in the drafting of investment treaties.

2. The argument

The question whether and to what extent an investor has human rights obligations towards the population of the state in which the investment takes place has only rarely been addressed by investment arbitration tribunals.¹⁷ Most of the human rights arguments introduced into the investment law discourse concern the host state's human rights commitments or the investor's human rights claims, in particular regarding the right to property.¹⁸ Indeed, the right to property has an extraordinary position in the investment law regime – it is treated in a peculiar separation from other human rights considerations.¹⁹

The argument advanced here is that the reason for the reluctance of the investment regime to accommodate human rights claims is less due to the incompatibility of two fragments of international law, and more due to the incapability of concerned lawyers to recognise the common transnational character of the situation. Relying on structures of social cognition, it can be demonstrated how this incapability is sustained and perpetuated, in particular through the use of stereotypes. Based on this analysis, the argument is then advanced that the inhibiting character of the stereotypes can be better overcome in the drafting process of treaties than through judicial developments.

In sum, the argument is twofold: Based on the premise that investment law is reluctant to accommodate human rights, and that this is a non-desirable situation, it is argued: (1) that social cognition, in particular the use of stereotypes can explain this reluctance, and (2) the site to tackle this problem is not arbitration but treaty-making because there, the potential to create a transnational community composed of human rights and investment lawyers transgressing inhibitions provided by stereotypes is considered much higher due to the differences in social dynamics of the encoding process.

While several authors have provided useful overviews and fertile grounds for the use of social cognition in considerations of international

¹⁷ See the outstanding decision *Urbaser* (n 1) [1210], admitting that the investor may have a direct duty to refrain from human rights violations.

¹⁸ Steininger and Bernstorff (n 13).

¹⁹ See: Tomer Broude and Caroline Henckels, 'Not All Rights Are Created Equal: A Loss-Gain Frame of Investor Rights and Human Rights' (2021) 34 *Leiden Journal of International Law* 93, 94; Sheng Zhang, 'Human Rights and International Investment Agreements: How to Bridge the Gap?' (2020) 7 *The Chinese Journal of Comparative Law* 457, 460.

law,²⁰ this paper takes those points into the context of a specific transnational law situation – thereby connecting social cognition considerations with the theory of transnational law.

3. Property centred v human centred rights claims

PEER ZUMBANSEN argues that gradual acceptance of core human rights values is fundamental to the fostering of a global set of values that is necessary for ‘constitutionalizing’ a global order.²¹ This points us to a fundamental difference between the investment and the human rights law regime: while the investment obligations are conceived as inter-se obligations, human rights obligations are conceived as obligations that (ideally) everyone enjoys. Nevertheless, repeated attempts of Global South countries to reassert their economic sovereignty were met with the claim to ubiquity of obligations to protect foreign investment.²² In a sense, the obligation to protect property of non-nationals has become the ‘constitutionalizing’ value of a globalised economy. However, due to trends in globalisation, the investment law regime has seen fundamental changes in the last decades: it expanded to an extent that demands for ‘constitutionalizing’ it beyond the initial scope – in other words demands to consider rights other than the right to property, too – become increasingly louder and persistent. So far, the attempts to link human rights with investment law have not been consistent.

Broadly, human rights interact with the protection of foreign investment in several, distinct ways: Firstly, as claim of the investor in the form of the right to property. Secondly, as response of the host state in the form of the host states’ obligation to regulate based on international human rights treaties. Thirdly, as response of the host states’ population in the form of allegations of direct obligations of corporations. Those inconsistencies in the formulation of the link between human rights and investment law point to the different social groups behind the respective formulations. The state representatives highlight very different features of the human rights system than the elements representatives of investors emphasize. Regularly, the claim put forward by the investor will be the right to property – their ‘human right’.²³ At the same time, the relevance of human rights of ‘real

²⁰ See in particular: Eva Brems and Alexandra Timmer (eds), *Stereotypes and Human Rights Law* (Intersentia 2017); Moshe Hirsch, ‘Cognitive Sociology, Social Cognition and Coping with Racial Discrimination in International Law’ (2019) 30 *The European Journal of International Law* 1319.

²¹ Peer Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’ (2011) 7 *Osgoode CLPE Research Paper Series* 1, 3.

²² See: Pahuja (n 8) 95–171, in particular 122–123.

²³ Steininger and Bernstorff (n 13); Broude and Henckels (n 19) 94; See also Silbey on the narrative highlighting the importance that private property rights be paramount and inviolable: Susan S Silbey, ‘“Let Them Eat Cake”: Globalization, Postmodern Colonialism, and the Possibilities of Justice’ (1997) 13 *Law and Society Review* 207, 215.

humans' within the investment arbitration system remains contested.²⁴ While this is a striking imbalance for human rights lawyers, it is only logical for many investment or corporate lawyers. On the other end of this spectrum, and of limited convincing power to many investment lawyers, it is only logical for human rights lawyers that individuals have claims under treaties concluded between states – and that those rights should also be protected against non-state entities.²⁵ To some extent the 'right' becomes here secondary: what is crucial is the 'politics of shame' of NGOs aiming to induce moral feelings of obligations into corporations: corporations are supposed to have feelings – they are 'humanized'.²⁶

This is however misled: it is humans who feel shame, and what they feel ashamed about is largely determined by their social identity.²⁷ As will be elaborated below, the group identity, which is relevant for the individual social identity of the investment and human rights community is constructed in antagonisation to one another. To individual interrelationships are added relationships of the individual to the group and those among the groups themselves.²⁸

So, to bring the rights of 'real humans' back into aspects of transnational law dealing with the protection of foreign investment, the humans within the fields have to become the focus of analysis. Who has the authority to define rights and obligations of legal entities (ie states or corporations) – and what is the legal background those actors rely on?²⁹ It is the role of intermediaries providing forms of translation for the specific situation which is crucial.³⁰

4. Stereotypes

4.1 Social cognition background

'The more wedded we become to a particular classification (...) the more our thinking tends to be frozen.'³¹ JESSUP holds, before emphasizing the centrality of the human problem in his concept of transnational law. However, the

²⁴ See for instance: Simone Cusack, 'Building Momentum Towards Change. How the UN's Response to Stereotyping is Evolving', in Eva Brems and Alexandra Timmer, *Stereotypes and International Human Rights Law* (Intersentia 2017) 11–38.

²⁵ See for instance: Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights* (Oxford University Press, 3rd edn 2013) 42.

²⁶ Moshe Hirsch, *Invitation to The Sociology of International Law* (Oxford University Press 2015) 150–151; see also: Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law & Social Inquiry* 975, 978.

²⁷ Hirsch, *Invitation to The Sociology of International Law* (n 26) 99–100; See also: Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37 *Law & Social Inquiry* 229, 246.

²⁸ See: Jessup (n 3) 8; see also: Shaffer (n 27) 247.

²⁹ See: Jessup (n 3) 8 and 70; Craig Scott, "'Transnational Law" as Proto-Concept: Three Conceptions' (2009) 10(6) *German Law Journal* 859, 871; Peer Zumbansen, 'The Continuing Search for Law in a Globally Interconnected World: Engaging and Contextualizing Jessup's "Transnational Law"' (2019) 7 *Think! A Dickson Poon Research Paper Series, Kings College London* 9–10.

³⁰ Engle Merry (n 26) 992–993; see also: Koh (n 14) 746–745; Shaffer (n 27) 246.

³¹ Jessup (n 3) 7.

‘freezing of our thinking’ in itself is profoundly human: social cognition research shows how stereotypes structure the perception of social reality. In this social reality, law provides a set of conceptual categories that are used for constructing and interpreting social interaction.³²

For the analysis of the transnational problem, the role of stereotypes can provide a useful perspective. Contrary to the common use of the term, in social cognition research, stereotypes are conceived as not inherently negative, but a common tool to manage expectancies about a group, in order to structure the way we think about this group.³³ In fact, GORDON MOSKOWITZ suggests that stereotypes are used so routinely that they operate outside of awareness.³⁴ It is however crucial to emphasize that stereotypes remain a molecule in the process constructing social identity, and consequently, the perspective taken in this argument zooms into one detail of a much larger transnational problem.

In the context of communication, stereotypes are of fundamental relevance for the social interactions concerning the group membership of interactants.³⁵ Stereotypes based on a person’s group membership guide the processing and use of information and the subsequent course of action based on that information.³⁶ For instance, stereotypes guide the interactants’ attention to stereotype-relevant aspects of the information and lead to inferences based on the person’s group membership.³⁷

While the content of stereotypes is regularly described in the language of traits, it actually goes beyond that: in particular, also mental representations of specific experiences with group members are important.³⁸ Behaviour performed by others is regularly ambiguous and open to interpretation.³⁹ Consequently, it only obtains meaning when the perceiver imposes interpretation on the behaviour.⁴⁰ The more abstract descriptions of behaviour are, the less they are verifiable and the less they provide information

³² Silbey (n 23) 231; Shaffer (n 27) 249.

³³ It is important to note the difference between stereotype and prejudice: stereotype concerns the structuring of knowledge about a group, prejudice concerns the feeling or (negative) affect we have regarding a group. However, the placement of an individual into a stereotype based category creates meaning by triggering associated beliefs and affects linked to this category. This enmeshment of prejudice and stereotype becomes relevant for the encoding process, which will be elaborated below. Gordon Moskowitz, ‘Stereotypes and Expectancies’ in *Social Cognition – Understanding Self and Others* (Guilford Press 2005) 438–439; 444, 450.

³⁴ *Ibid.*, 439.

³⁵ David Hamilton and others, ‘Language, Intergroup Relations and Stereotypes’ in Gün Semin and Klaus Fiedler (eds), *Language, Interaction and Social Cognition* (Sage 1992) 102.

³⁶ Moskowitz (n 33) 442; Hamilton and others (n 35) 102; See also: Galen V Bodenhausen, Neil Macrae, and Kurt Hugenberg, ‘Activating and Inhibiting Social Identities: Implications for Perceiving the Self and Others’ in Galen V Bodenhausen and Alan J Lambert (eds), *Foundations of Social Cognition – A Festschrift in Honor of S. Wyer, Jr.* (Lawrence Erlbaum Associates Publishers 2003) 133.

³⁷ Hamilton and others (n 35) 102; Moskowitz (n 33) 441, 455–456; Regarding the entanglement of different stereotypes see: Bodenhausen, Macrae and Hugenberg (n 36) 135.

³⁸ Hamilton and others (n 35) 103.

³⁹ *Ibid.*, 105.

⁴⁰ *Ibid.*

about circumstance, the better those descriptions perpetuate stereotypes.⁴¹ In that process, group membership can influence the language used to describe the behaviour in question.⁴² ANNE MAASS and others demonstrate that beliefs about ingroup and outgroup members produce diverging interpretations and evaluations of the same behaviour, and that consequently the linguistic label applied to the same behaviour differentiates between ingroup and outgroup members' activity.⁴³ In other words, the linguistic encoding is influenced by different mental representations of ingroup and outgroups members, which are representations that go beyond the language of traits.⁴⁴

So, stereotypes draw attention to stereotype-relevant features and lead to in-/outgroup differentiation in the encoding of behaviour.⁴⁵ This becomes relevant in the process of communication, ie, the process in which knowledge and thoughts are retrieved from the memory and translated into speech: the speaker's cognisance of group memberships – her own and of the person she interacts with – influences her communication process.⁴⁶

Comparing the interactants speech behaviour in different settings provides evidence of convergence adjustments reflecting the speaker's desire for social approval.⁴⁷ On the one hand, convergence is most likely when the social cost is minimal, ie, when social norms of efficiency considerations align the individuals' behaviour with the groups' norms.⁴⁸ Divergence, on the other hand, occurs in intergroup encounters when the difference to the other group is highlighted, emphasizing negative features of the other group and focusing on the positive self-identity the own group.⁴⁹ So, convergence and divergence are predominantly based on the interactant's perception of message characteristics, and not on more 'objective' features.⁵⁰ Stereotypes, as cognitive structures, play an important role in the establishment of these perceptions.⁵¹

⁴¹ *Ibid.* See on psycholinguistics regarding the inhibiting of contextually inappropriate meanings: Bodenhausen, Macrae and Hugenberg (n 36).

⁴² Hamilton and others (n 35) 105.

⁴³ Anne Maass, D Salvi, and Gün Semin, 'Language Use in Intergroup Contexts: The Linguistic Intergroup Bias' (1989) 57 *Journal of Personality and Social Psychology* 981.

⁴⁴ Hamilton and others (n 35) 105–106.

⁴⁵ Steven Sherman and Amy Johnson, 'Perceiving Groups: How, What, and Why?' in Galen V Bodenhausen and Alan J Lambert (eds), *Foundations of Social Cognition – A Festschrift in Honor of S. Wyer, Jr.* (Lawrence Erlbaum Associates Publishers 2003) 170–171.

⁴⁶ Bodenhausen, Macrae and Hugenberg (n 36) 131–132; Hamilton and others (n 35) 106.

⁴⁷ Howard Giles, 'Accommodation Theory: Some New Directions' in S de Silva (ed), *Aspects of Linguistic Behavior* (University of York Press 1980).

⁴⁸ Hamilton and others (n 35) 107; See also: Bodenhausen, Macrae and Hugenberg (n 36) 135–136; Moskowitz (n 33) 443.

⁴⁹ Hamilton and others (n 35) 107.

⁵⁰ Bodenhausen, Macrae and Hugenberg (n 36) 144–145; Hamilton and others (n 35) 108.

⁵¹ Hamilton and others (n 35) 107.

In international law, the importance of stereotypes is most evident in human rights law: non-discrimination regulations aim at preventing the use of 'bad' stereotypes.⁵² In particular, gender- and race-based stereotypes are at the forefront of this discussion.⁵³ However, this is only one dimension of the power of stereotypes, and it does regularly not pay sufficient tribute to the ubiquity of stereotypes structuring social interactions and communication. Therefore, the following sections will go beyond this dimension of non-discrimination, and delve deeply into the analysis of the social context in which the practice of transnational law takes place, emphasizing the collaborative dimension of transnational law creation.⁵⁴ In this dimension, stereotypes point us to a crucial circular relationship between the human actors relying on stereotypes and the stereotypes' role in structuring fields of international law.

In fact, international human rights law creates and reiterates stereotypes: On the one hand, it continuously creates new categories of victims that need protection by law. On the other hand, it also provides a clear image of the human rights-violators against which victims need protection. In doing so, human rights law paints a clear picture of good and evil: good is who respects and promotes human rights. In that sense, human rights and their explicit and implicit stereotypes provide a standard according to which humans ought to be normalised. Those stereotypes, however, are of little relevance for the investment law regime. There, stereotypes are much more concerned with standards that can be expressed in terms of efficiency and monetary assets. Section 4.2 addresses those incongruencies, and section 5.1 proposes a path towards more congruence.

More broadly, stereotypes exert control in emphasizing the stereotype-relevant features and thereby limiting the sphere that non-stereotype relevant features can cover.⁵⁵ So, it is crucial who has the social power to further dominance of certain stereotypes. Regularly, power asymmetries are determinant for the dominance of certain stereotypes.⁵⁶ International human rights law as much as international investment law are characterised by a certain power-asymmetry between Global North and Global South. This will be addressed in section 5.3.

⁵² See: Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *International and Comparative Law Quarterly* 573.

⁵³ See: Brems and Timmer (n 20); Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2011); Hirsch, 'Cognitive Sociology, Social Cognition and Coping with Racial Discrimination in International Law' (n 20) 127–131 and 135 (in particular).

⁵⁴ Zumbansen (n 29) 9–10. See also: Hirsch (n 10) 144, holding that 'individuals' normative choices are significantly affected by the social context and socio-cultural factors'.

⁵⁵ Susan T Fiske, 'Controlling Other People – The Impact of Power on Stereotyping' in *Social Cognition – Selected Works of Susan T. Fiske* (Routledge 2018) 101.

⁵⁶ *Ibid* 102–103.

4.2 Investment v human rights stereotypes

Regularly, from the perspective of human rights law, the investor will be the bad human rights violator, and humans will be the (voiceless) victims that need protection.⁵⁷ From the perspective of corporate governance, human rights obligations are often seen as an unnecessary, added burden to the primary aim of making profit. However, stereotypes also play out in a more subtle way: an investment lawyer considers herself ‘good’ when increasing the monetary assets of a corporation, but a human rights lawyer considers herself ‘good’ when protecting the human dignity of the voiceless. Each of these groups is inclined to belittle the typical work and aspirations of members of the other group, producing a diverging, negative, external stereotype. In that process, focus on differences marginalises common features.

In fact, investment and human rights lawyers seem to belong to groups that are structured very differently:

Firstly, in the investment law community, it is a small group of frequently appointed arbitrators – very homogenous (Global North based, male)⁵⁸ – that constitutes the core group with significant influence.⁵⁹ While the investment field is built on private and public law elements, it is clearly the commercial law, ie, the private law paradigm that dominates the field.⁶⁰ So, while the law on the protection of foreign investment has features of public and private law, the communities’ social identity revolves around and highlights the private law elements.⁶¹ The private element is reinforced by the dispute settlement framework: tribunals established on an ad hoc basis with case-specific appointed arbitrators, highlighting contractual elements of the legal framework.⁶²

Secondly, the members of the human rights law community are much more dispersed.⁶³ The identity of the community revolves around a net of multilateral treaties and their respective enforcement mechanisms.⁶⁴ There is little contestation of the public law character of the field.⁶⁵ However, the guarantees established also contain the basis for any economic activity to

⁵⁷ Makau Mutua, *Human Rights – A Political and Cultural Critique* (University of Pennsylvania Press 2002) 10–38.

⁵⁸ Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *The European Journal of International Law* 387.

⁵⁹ Hirsch, ‘The Sociology of International Investment Law’ (n 10) 147; Hirsch, *Invitation to The Sociology of International Law* (n 26) 144.

⁶⁰ Anthea Roberts, ‘Clash of Paradigms: Actors and Analogies Shaping the International Investment System’ (2013) 107(1) *American Journal of International Law* 45.

⁶¹ Hirsch, ‘Investment Tribunals and Human Rights: Divergent Paths’ (n 6) 109; See for an analysis of the development of international commercial arbitration: Dezalay and Garth (n 7).

⁶² Hirsch, ‘Investment Tribunals and Human Rights: Divergent Paths’ (n 5) 110–111; Hirsch, *Invitation to The Sociology of International Law* (n 26) 149–150.

⁶³ See: Engle Merry (n 26) 977.

⁶⁴ Malcolm N Shaw, *International Law* (Cambridge University Press, 8th edn 2017) 210–215.

⁶⁵ Hirsch, ‘The Sociology of International Investment Law’ (n 10) 154.

take place: the right to property, the right to assemble, the right of free speech, for instance.

The relationship between the two communities is generally dominated by mistrust and antagonism.⁶⁶ One tool furthering this and deepening the trenches is the use of stereotypes.⁶⁷ In order to reinforce group-identity, specific personal traits are attributed to people based on their group membership:⁶⁸ for instance, investment law is perceived as private and commercial law dominated – persons involved in investment arbitration are much more linked to those values than to public law values.⁶⁹ This focus on those specific stereotype traits leads then to the dismissal of other elements.⁷⁰ For instance, the focus on the private law in investment arbitration leads to downplaying the role of public interests in investment disputes.⁷¹ In order to reinforce the identity of the investment community, the public law values are stereotyped as foreign – belonging to the human rights community. In this adversarial setting, both groups reinforce their identity by distinguishing themselves from one another.

In fact, it is this process of distinction, and exclusion that leads to the divergent perspectives on the interaction between human rights and investment law.⁷² Property rights, the basis for much private law interactions, resonate much more closely with the in-group values of the investment law community than other human rights that are stereotyped as out-group values, as belonging to the other group, the human rights community.

This insistence on differences overshadows the common ground of the two fields. Firstly, they have the same origin: the protection of aliens through diplomatic relations.⁷³ This is closely related to the second point: both fields are concerned with asymmetric legal relationships between states and individuals.⁷⁴ A relationship that is determined through the use of rights as a tool protecting the individual against the power of the state. The convergence between the two fields focalises then on the role of rights in the two fields: the discussion transforms into one reconsidering the balance between the right to property and other human rights. In other

⁶⁶ For an excellent overview see: Francesco Corradini, 'Proximity and Resistance in the Entanglement of International Investment Law and Human Rights' in Nico Krisch (ed), *Entangled Legalities* (Cambridge University Press 2021 forthcoming) 4–8; see also: Hirsch, 'The Sociology of International Investment Law' (n 10) 156.

⁶⁷ Bodenhausen, Macrae and Hugenberg (n 36) 131–132; See: Hirsch, *Invitation to The Sociology of International Law* (n 26) 100.

⁶⁸ Hamilton and others (n 35) 105; See: Hirsch, *Invitation to The Sociology of International Law* (n 26) 100.

⁶⁹ Hirsch, 'The Sociology of International Investment Law' (n 10) 147.

⁷⁰ Sherman and Johnson (n 45) 170–171.

⁷¹ Hirsch, *Invitation to The Sociology of International Law* (n 26) 146.

⁷² See section 3.

⁷³ Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' (n 5) 98.

⁷⁴ *Ibid*; Hirsch, 'The Sociology of International Investment Law' (n 10) 155.

words, overcoming stereotypes opens space for investment and human rights lawyers to discuss to what extent and why the right to property merits such a particular protection. From a transnational law perspective, it would be much more useful to focus on those convergences in the transnational situation.⁷⁵

In sum, human rights and investment lawyers perceive themselves as belonging to two different groups, and reiterate this perception using stereotypes.⁷⁶ Increasing direct interpersonal interactions between the members of the two communities is likely to reduce prejudice.⁷⁷ More precisely, in order to overcome the hindering influence of stereotypes in the present case, stereotype inconsistent information has to be introduced in interpersonal communications in order to destabilize the in-/outgroup perceptions.⁷⁸ It is crucial that those interactions are based on an equal and cooperation-focused setting.⁷⁹ As will be demonstrated in the following, the investment arbitration system has only limited capacities in this regard. Thus, as will be elaborated, it is much more promising to group human rights and investment lawyers together for the negotiation of investment treaties.

5. The role of stereotypes in the relation between human rights and investment law

5.1 Investment tribunals' reluctance towards human rights

While recent years have seen a considerable increase of human rights arguments raised in investment arbitrations, the awards quite consistently dismiss those arguments as non-significant.⁸⁰ TOMER BROUDE and CAROLINE HENCKELS demonstrate how the cognitive framework of the relationship between investor rights and human rights places human rights considerations at a structural disadvantage.⁸¹ Through the lens of stereotypes, this appears not overly surprising, for four reasons: (1) the position of the arbitrator in the system, (2) the perception of human rights as outgroup values, (3) the adversarial character of the arbitration and (4) the case-specific setting of arbitrations.

⁷⁵ See: Jessup (n 3) 64–65.

⁷⁶ Typologically, these groups seem to have features of task-oriented groups, built to fulfill achievement-type needs, but also features of social categories, that are expected to fulfill identity-type needs. See: Sherman and Johnson (n 45) 164.

⁷⁷ Hirsch (n 10) 157.

⁷⁸ Gordon Moskowitz, 'Control of Stereotypes and Expectancies' in *Social Cognition – Understanding Self and Others* (Guilford Press 2005) 481–492.

⁷⁹ Samuel L Gaertner, John F Dovidio, and Melissa A Houlette, 'Social Categorization' in John F Dovidio and others (eds), *The SAGE Handbook of Prejudice, Stereotyping and Discrimination* (SAGE 2010) 530; Hirsch (n 10) 157, footnote 90.

⁸⁰ Corradini (n 66); Hirsch (n 10) 149–150.

⁸¹ Broude and Henckels (n 19).

Firstly, the authority to decide puts the arbitrator at the centre of the investment system.⁸² In fact, the identification of arbitrators as the centre and core of one community puts them in the perfect position to reinforce distinctions of ‘their’ group from another group.⁸³ As has been elaborated in section 4.1, stereotypes can be a useful tool to highlight the positive elements of the own group and to dismiss out-group values as negative. For instance, investment tribunals have been confident to expand the scope of jurisdiction through the use of ever broader definitions of investment.⁸⁴ However, at the same time they argued regularly that the tribunal has only limited jurisdiction in order to block attempts at introducing human rights considerations.⁸⁵ Using the same tool, the determination of jurisdiction, the tribunal reinforced its own groups’ core value, the protection of foreign investment and reinforced the distinction from the human rights group.

Secondly, human rights are perceived as such ‘outgroup’ values: BROUDE and HENCKELS argue that arbitrators view investor rights as endowments while the rights of the host state population are perceived as aspirations, to be realized in the future, through positive governmental action.⁸⁶ This has to be nuanced with regards to the particular human rights analysed. Socio-economic rights, for example, tend to be perceived as more programmatic.⁸⁷ However, it highlights the problem even more succinctly: the basis of economic activity, the investors rights, are not considered to be ‘economic rights’, ie, aspirational, but endowments that can be claimed – human rights on the other hand cannot. In this argument, rights on both sides are reduced to a caricature, a stereotype. The right to property, in itself used to be a human rights claim – and it has aspirational character, too: without sufficient infrastructure, the right to property is reduced to only what one can defend and maintain all by oneself – which hardly is what investment claims are about. Human rights are in fact often taken for granted as precondition for successful investment: free speech, in the sense of covering commercial speech, freedom of movement, freedom to assemble (of course not so much for the employees as for the employers). Stereotypical

⁸² Dezalay and Garth (n 7) 82–83.

⁸³ See: Broude and Henckels (n 19) 105–106.

⁸⁴ Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 136–190.

⁸⁵ Filip Balcerzak, *Investor-State Arbitration and Human Rights* (Brill Nijhoff 2017) 100–126; For a similar argumentation see: Eric De Brabandere, ‘Human Rights and International Investment Law’ in Markus Krajewski and Rhea Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019).

⁸⁶ Broude and Henckels (n 19) 100–104.

⁸⁷ See: Urbaser (n 1) [1210] (2016), par 1210: ‘The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case’.

representation of values of the investment and human rights group blind arbitrators to those nuances.

Thirdly, the adversarial character of the arbitration setting provides fertile grounds for reinforcing rather than overcoming stereotypes.⁸⁸ Each of the participants is in fact encouraged to simplify and overstate their own claims in order to win the argument. While there are arguably different degrees to which human rights are taken into account in investment arbitration cases, human rights are consistently perceived as an external element, to be introduced through reference to treaties that do not belong into the investment community.⁸⁹

Fourthly, investment awards are issued on a case-by-case basis. Therefore, even if actors take human rights into account, they are not in a position to aim at developing a consistent approach to the relationship between human rights and investment law.⁹⁰

It is however wrong to think of arbitration and treaty making in opposition to or isolation from each other. As has been elaborated by GARTH and DEZALAY regarding commercial arbitration, the legal battle and the political negotiation form a whole.⁹¹ What is crucial is that the investment law community is organised around a net of arbitrators, and distinguishes itself from the human rights community, as has been elaborated in section 3. The social structure of the two communities makes the negotiation of treaties the more likely site in order to overcome stereotyping.

5.2 BITs as platform for discussion

In the past, the hostile relationship between the human rights and investment communities also played out during treaty negotiations. For instance, the failure of the negotiations for a comprehensive Multilateral Agreement on Investment has been attributed to the opposition of human rights and environmental NGOs.⁹²

Human Rights Law and Investment Law interact on different levels: much research focuses on the role of investment tribunals. Their awards, however, are (or at least should be) based on legal texts, in particular on diverse Conventions and Bilateral Investment Treaties. It is in the drafting of those texts, that the foundations for possible reiteration or challenge of stereotypes is provided. The setting in investment related dispute settlement mechanisms reinforces the adversarial character of arguments, and is hence particularly prone to reinforce stereotypes (see section 5.1). In contrast, the negotiation

⁸⁸ See: Dezalay and Garth (n 7) 82.

⁸⁹ See: Fahner and Happold (n 13).

⁹⁰ Hirsch (n 5) 107.

⁹¹ Dezalay and Garth (n 7) 84.

⁹² UNCTAD, 'Lessons from the MAI' (UNCTAD 1999) 24–25; Hirsch (n 10) 156.

of treaties requires much more collaboration – which makes it a setting much more favourable to the overcoming of hindering stereotypes.⁹³ Also, arguably, at the treaty negotiation stage, the gap between the parties' legal capacities may be smaller.⁹⁴

So, in order to bring back the human into the transnational legal discourse, we need to focus on the humans producing this discourse and the process of normalisation of those humans.⁹⁵ In this process of normalisation, stereotypes can obstruct and enable the convergence between investment and human rights protection. As has been elaborated above, stereotypes enable investment lawyers to qualify human rights considerations as irrelevant. However, human rights norms drafted for treaties focusing on the protection of foreign investment can provide an occasion to renegotiate common grounds for stereotypes that are within the horizon of human rights and corporate lawyers. From a transnational law perspective this connection of two fields of international law can be promising, if we look at it as an instance of negotiation not only between two states but between different fragments of international law: BITs can be an option for new convergence between the facilitation of transnational corporate activity and transnational human rights advocacy.⁹⁶

The relation between BITs and human rights is usually framed as a balancing between the investor's need to protect financial interests, and the host State's need to regulate.⁹⁷ It has much been elaborated how BITs can constitute a chilling effect on the host states compliance with its human rights obligation.⁹⁸ However, as will be elaborated below, the negotiation of BITs can also be used to promote and entrench human rights protection.

In particular, the 'new generation' BITs provide insights into how this link may become more substantial. For instance, in the deliberation process for the 2015 India Model BIT, the explicit objective was to 'balance between

⁹³ See: Hirsch, 'The Sociology of International Investment Law' (n 10) 157, footnote 90; Hirsch, *Invitation to The Sociology of International Law* (n 26) 154–154.

⁹⁴ Hirsch (n 5) 108; Jun Zhao, 'Human Rights Accountability of Transnational Corporations: A Potential Response from Bilateral Investment Treaties' 8 *Journal of East Asia and International Law* 47, 65; See however: Corradini (n 66) 16–18. Corradini criticizes the general and broad nature of human rights norms in Investment Treaties making it impossible to establish a clear picture of the link between human rights and the law on the protection of foreign investment. This argument is however more or less forceful depending on who states send as their representatives. While the space for non-state actors may vary, the argument advanced here is that the arguments in favour of human rights may always find more fertile grounds than in the adversarial setting of investment tribunals.

⁹⁵ See: Scott (n 29) 873–875.

⁹⁶ See: Zumbansen (n 29) 9.

⁹⁷ Cristina Bodea and Fangjin Ye, 'Bilateral Investment Treaties (BITs): The Global Investment Regime and Human Rights' (2017) *British Journal of Political Science* 1, 7; Zhao (n 94) 64.

⁹⁸ See for instance: Ryan Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization' in Oliver De Schuetter (ed), *Transnational Corporations and Human Rights* (Hart Publishing 2006).

the investor's rights and the Government obligations.⁹⁹ This balancing increases the government's ability to enforce its human rights obligations. The final Model BIT conceives of investor obligations as voluntary commitments, while the Draft contained an obligation of investors to comply with host states' human rights laws.¹⁰⁰ Therefore, in the deliberation process, a middle ground was found between human rights protection and the investor's freedoms.¹⁰¹ Similarly, the SADC Model BIT 2012 holds that 'Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located.'¹⁰²

Using 'buscará'¹⁰³ instead of the more common 'se esforzarán'¹⁰⁴ or 'reconocen la importancia de promover',¹⁰⁵ the 2015 Brazil Colombia BIT may point to a shift of the aspirational human rights language towards stronger commitments. Such interpretation may find support in the more recent 2017 Colombia Model BIT that provides that investors 'shall respect the prohibitions established in international instruments (...) pertaining to human rights (...)'.¹⁰⁶ In that sense, the Nigeria-Morocco BIT 2016 goes one step further and imposes more far reaching obligations directly on foreign investors.¹⁰⁷ The 2019 Morocco Model BIT currently provides for some of the most elaborate and substantive human rights formulations in the investment treaty regime.¹⁰⁸

Those treaties demonstrate possible first steps of a promising path or reconciliation between the human rights and investment law communities. While the

⁹⁹ Law Commission of India, 'Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty' (2015) Report No 260 Chapter 4.5.4.

¹⁰⁰ Sanhita Ambast, 'Human Rights Protections in India's Model BIT: A BIT Left to Go' (2017) 57 *Indian Journal of International Law* 121, 127 and 134.

¹⁰¹ See: Zhang (n 19) 473.

¹⁰² SADC Model Bilateral Investment Treaty Template 2012, Article 15, online: [www.iisd.org](http://www.iisd.org/wp-content/uploads/2012/10) > wp-content > uploads > 2012/10. While the 2016 Draft Panafrican Investment Code (online: <https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf>) has been lauded for the integration of a whole chapter of investors' obligations, the reference to human rights within that chapter does not go beyond aspirational formulations. See for a detailed analysis: Makane Moïse Mbengue and Stefanie Schacherer, 'Africa and the Rethinking of International Investment Law – About the Elaboration of the Pan-African Investment Code' in Anthea Roberts and others (eds), *Comparative International Law* (2018) 547, 558–560 (in particular).

¹⁰³ Translation: 'seek to'.

¹⁰⁴ Translation: 'will make an effort'.

¹⁰⁵ Translation: 'recognize the importance of promoting'.

¹⁰⁶ 2017 Colombia Model BIT, online: <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>.

¹⁰⁷ Article 17(3): 'investors (...) shall not be complicit in any act of corruption', Article 18: investors 'shall uphold human rights in the host state' and 'shall act in accordance with core labour standards' Article 24: 'investors shall strive to apply and achieve the higher-level standards'. Niccolo Zugliani, 'Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty' (2019) *International and Comparative Law Quarterly* 761, 766; Okechukwu Ejims, 'The 2016 Morocco-Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty' (2019) 34 *ICSID Review* 62, 74–78.

¹⁰⁸ 2019 Morocco Model BIT. Arguably the Netherlands Model BIT is highly ambitious with respect to the protection of human rights, as well. Both mentioned agreements are available online: <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>.

respective deliberations were still clearly dominated by the investment community, we can see how the communities' identity was in this less adversarial setting not in the same need to reinforce and reiterate stereotypes. For instance, the reform of the Indian Model BIT was triggered by the *White Industries* case, a case in which the tribunal very clearly dismissed the relevance of human rights,¹⁰⁹ yet the Model BIT allowed for human rights to enter.

Looking at the settings of deliberation highlights the relevance of the question who has the authority to define rights and obligations of legal entities (ie, states or corporations) – and the legal background those actors rely on.¹¹⁰ ZACHARY ELKINS and others argue that cultural similarities facilitate the conclusion of BITs.¹¹¹ This is not only a valid argument for nation-state cultures but also for legal cultures of different fragments of international law: the more the human rights and investment communities perceive themselves as similar, the easier it becomes to draft BITs that are respectful of human rights. It is in this context that it is particularly interesting that convergence of human rights and protection of investment materialises much more easily when representatives of Global South states are actively involved.

5.3 Countries of the global north v. countries of the global south?

It is striking how the more progressive versions of 'new generation' BITs predominately originate from Global South countries.¹¹² While the European Union has human rights requirements being part of their trade agreements,¹¹³ it is much more reluctant to insist on such policy regarding investment agreements.¹¹⁴ Arguably, this divergence originates from a different process establishing the states' identity:¹¹⁵ It is different to condition the delivery of goods on the respect of human rights or to agree to limit the economic capacities of investors through human rights obligations. In the first case, the 'receiving' state has to own up to standards already accepted within the EU. In the second case, the EU-originating foreign investor is prevented from 'downgrading' from said EU-standards.

In fact, according to the mapping of the UNCTAD Investment Policy Hub, most of the BITs that address human rights do so in their

¹⁰⁹ *White Industries Australia Limited v. The Republic of India*, [2011], UNCITRAL Award, [61] and [102]; Ambast (n 100) 122.

¹¹⁰ Jessup (n 3) 107–108.

¹¹¹ Zachary Elkins, Andrew T Guzman and Beth A Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' (2006) 60 *International Organization* 811; See also: Jessup (n 3) 58–60.

¹¹² See however: Zhang (n 19) 464.

¹¹³ Ionel Zamfir, 'Human Rights in EU Trade Agreements – The Human Rights Clause and Its Application' [2019] *European Parliamentary Research Service* online: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI\(2019\)637975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf).

¹¹⁴ Zhang (n 19) 464–467.

¹¹⁵ Hirsch (n 26) 111.

preamble,¹¹⁶ or in otherwise vague aspirational formulations.¹¹⁷ While it goes beyond the scope of this paper to provide a detailed analysis of the treaties and their negotiation processes, with respect to transnational dynamics of stereotyping, two possible trends can be identified:

Firstly, in agreements that involve investment and human rights, the EU tends to be the actor that invokes the term ‘human right’ the most within its treaties.¹¹⁸ However, those invocations are not providing much of a basis for actual obligations. Human rights seem to be considered as values that underpin and guide the whole process of cooperation, but should not or need not be clarified into a clear scope. From a social cognition perspective, this could indicate that human rights determine the in-group identity, yet they are not perceived in opposition to specific outgroup characteristics. In fact, to the extent that in-group values are stereotyped as a given within a group of Global North countries, human rights language is shifted even more to the periphery: The treaty between EU and Canada barely references human rights. In fact, while the treaty between EU and Canada does not provide for a specific corporate social responsibility clause, another twelve BITs that are based on the Canadian Model BIT all provide for such a clause. Interestingly, the only instance in which this model clause has been changed into a stronger formulation (‘shall’ instead of ‘should’) is in Canada’s BIT with Côte d’Ivoire, which points already to the second possible trend.

Secondly, as has been elaborated in the previous section, the clearest standard for regulating human rights obligations in a BIT always originates in countries of the Global South. In fact, no European country is involved in any signed or concluded BIT that goes beyond vague human rights language.¹¹⁹

¹¹⁶ See for instance: Norwegian Model BIT 2015, online: <https://ielp.worldtradelaw.net/2015/05/norways-draft-model-bit.html>. According to UNCTAD Investment Policy Hub, 223 of 2575 mapped Investment Agreements reference social investment aspects in their preamble, but only 40 reference CSR in a treaty clause. However, this can not be directly contrasted as other social investment aspects that are included in the mapping of preamble references appear much more often in treaty clauses. These results are available online: <https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>.

¹¹⁷ UNCTAD, Investment Policy Hub maps 40 out of 2575 Investment Agreements as referencing Corporate Social Responsibility. Within those 40 Agreements only 3 use terminologies that go beyond aspirational and voluntary formulations. While regulations regarding labour and health standards vary a little more, the tendency remains the same.

¹¹⁸ The treaties mapped by UNCTAD as referencing Corporate Social Responsibility are the 2014 cooperation agreements with Georgia, Moldova and Ukraine, the EU – Kazakhstan EPCA (2015) and the Canada – EU CETA. All mentioned treaties available online: <https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>.

¹¹⁹ Interestingly the 2019 Dutch Model BIT provides for very strong links between investment and human rights, and it remains to be seen how those models will find their way into practice. This may however become the exception to the European standard: the 2020 Italian Model BIT only provides for an optional clause on human rights, the Belgium-Luxembourg Economic Union Model BIT 2019 remains faithful to the usual aspirational language, the 2019 Slovakia Model BIT references human rights only in the preamble and the 2016 Czech Model BIT does not mention human

Following ANNE-MARIE SLAUGHTER's argument that liberal democracies are more likely to do law with one another and to dismiss interactions with other states more quickly as 'political',¹²⁰ KOH argues that identity is relevant for compliance with transnational law.¹²¹ KOH emphasizes however that it is the interaction, the participation in the transnational legal process that is crucial in order to constitute the states' identity.¹²² In this process, the Global North is able to shape the culture and economics by offering the legal forms through which social exchange takes place.¹²³ The law protecting foreign investment as much as human rights law can be seen as prime example of legal systems through which the Global North dominates the Global South.¹²⁴ In both cases, it is crucial that the distinctions between national and international are the outcome of a struggle over the meaning of those terms in economic and/or political contexts,¹²⁵ – hence not the distinction between specific spheres of law but the construction of law in the specific transnational situation is crucial.¹²⁶ The here presented transnational situation is indeed at the heart of one of the most important struggles over human rights in economic and (or versus) political contexts. In that struggle, the construction of law is not a static process. In fact, the most recent developments may point to the possibility for Global South countries increase agency.¹²⁷

6. Conclusion

Does a foreign investor have the obligation to protect the right to water of the host countries population? Who has the authority to answer this question? Perceiving the question of human rights obligations of foreign investors as the core of a transnational situation helps us to see the hindering boundaries between the investment law and human rights law community. The reinforcement of identity through opposing and stereotyping the other community makes it hard to introduce human rights considerations into investment law.

We have seen that the reluctance of the investment regime to accommodate human rights claims is less due to the incompatibility of two fragments

rights at all. All mentioned agreements are available online <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>.

¹²⁰ Anne-Marie Burley (Slaughter), 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' (1992) 92 *Columbia Law Review* 1907.

¹²¹ Koh (n 4) 202–203; see also: Pahuja (n 8) 112; Zumbansen (n 29) 26–28.

¹²² Koh (n 4) 203–204.

¹²³ Silbey (n 23) 220–221.

¹²⁴ Pahuja (n 8) 122–123; Mutua Makau, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002).

¹²⁵ Pahuja (n 8) 123; Engle Merry (n 26) 979 and 986–987.

¹²⁶ See: Scott (n 29) 864–865.

¹²⁷ See: Shaffer (n 27) 258.

of international law, but due to the incapability of concerned lawyers to recognise the common transnational character of the situation. This becomes evident in the analysis of the role of stereotypes. The process of stereotyping, however, is not set in stone but can be adapted.

Particularly stereotyping the other communities' traits entrenches the opposition and hinders collaboration on existing common grounds. Through the lens of this social cognition phenomenon, we can focus on the humans relevant for the transnational problems' solution: the use of rights in order to protect individuals against state's power is common to investment and human rights law. Social cognition theory on stereotypes highlights how the emphasis of this common ground is much easier in a collaborative setting like treaty negotiations rather than in the adversarial setting of arbitration. In particular, the newly negotiated BITs of States of the Global South point to possibilities that a reflected use of stereotypes can provide.

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