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María José Luque Macías

Re-Politicising International Investment Law in Latin America through the Duty to Regulate Paradigm

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Preface

The development of the 'duty to regulate' paradigm in the present study is an attempt to revisit the long-standing critical stand of Latin American countries towards international legal instruments protecting foreign investment and steer it towards the contentious issues which, from a human rights law perspective, should be addressed.

By using Latin America as a case example, this monograph invites international investment law (IIL) scholars to integrate international human rights law (IHRL) in their analysis. These legal standards not only indisputably apply to states in the investment context, but also normatively inform foreign investors' responsbilities throughout the undertaking of their economic activities in these countries. Concerning human rights scholars, this work provides a normative tool to frame the issues of contention regarding the IIL regime's operation and to articulate their views in a way that IIL is familiar with while consistent with IHRL.

This monograph, which was originally submitted with the title 'International Investment Protection and the Duty of Latin American Host States to Regulate Private Foreign Investment in Furtherance of Human Rights', was the result of many years of research at the Law Faculty of the FAU Erlangen-Nürnberg.

This book owes much to the many persons and institutions that inspired and supported me throughout this path. I am most grateful to my doctoral supervisor, Professor Dr. Markus Krajewski, for his support and guidance during the years of this doctoral project. I also thank my second examiner, Professor Dr. Laura Clerico, for her comments and constant critical exchange. This project would have never been possible without the financial support of the doctoral scholarship provided by the German Academic Exchange Service (DAAD) and the grant of the STIBET-DAAD Program for supporting foreign doctoral candidates, provided by the FAU Erlangen-Nürnberg.

In addition, I want to thank all my friends and colleagues in Erlangen for their immense support. My gratitude also goes to Mxolisi and Martin for the proof-

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I dedicate this book to my parents, Nelly and Isidro.

Landau, Germany
January, 2021

María José Luque Macías

Contents

Abbreviations/Acronyms

1899 Hague Convention	Convention adopted for the Settlement of International Disputes
ACHR	American Convention on Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
ADRIP	American Declaration on the Rights of Indigenous Peoples
ALBA (Spanish acronym)	Bolivarian Alternative for the Americas
ANCOM	Andean Common Market
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BITs	Bilateral Investment Treaties
CAITISA (Spanish acronym)	The Ecuadorian Citizens' Commission for a Comprehensive Audit of Investment Protection Treaties
CESCR	Committee on Economic, Social and Cultural Rights
CFIAs	Cooperation and Facilitation Investment Agreements
CIL	Customary International Law
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSR	Corporate social responsibility
DPAIC	Draft-Pan African Investment Code
ECLAC	Economic Commission for Latin American and the Caribbean
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ESC rights	Economic, social and cultural rights
ESIA	Environmental and Social Impact Assessment
FCN treaties	Friendship, Commerce and Navigation Treaties

FET	Fair and equitable treatment
FPIC	Free, prior and informed consent
FTA	Free trade agreement
FTAA	Free Trade Agreement of the Americas
FTC (NAFTA)	Free Trade Commission (NAFTA)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HRC	Human Rights Council
IACoHR	Inter-American Court of Human Rights
IACommHR	Inter-American Commission on Human Rights
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IHRL	International Human Rights Law
IIA	International Investment Agreement
IIL	International Investment Law
ILC Fragmentation Report	Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law
ILC	International Law Commission
ILO	International Labour Organization
ILO Convention 169	Convention concerning Indigenous and Tribal Peoples in Independent Countries
IMF	International Monetary Fund
ISDS	Investor-state dispute settlement
ISI policy	Import-Substitution Industrialization policy
LAFTA	Latin American Free Trade Association
MERCOSUR (Spanish acronym)	Southern Common Market
MFN	Most-favoured nation
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement
NCP	National Contact Points
NIEO	New International Economic Order
OAS	Organization of American States

OECD	Organisation for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
OPIC	Overseas Private Investment Corporation
Pacific Alliance Protocol	Additional Protocol to the Framework Agreement of the Pacific Alliance
PAHO	Pan American Health Organization
PAU	Pan American Union
PCA	Permanent Court of Arbitration
Protect, Respect and Remedy Framework	Protect, Respect and Remedy: A Framework for Business and Human Rights
Report on Business and Human Rights	Report on Business and Human Rights: Inter-American Standards
The Hague Conventions and Declarations of 1899 and 1907	James Scott (ed), *The Hague Conventions and Declarations of 1899 and 1907* (OUP 1915)
The International Conferences of American States 1889–1928, Scott Collection	Scott JB (ed) (1931) *The International Conferences of American States 1889–1928; A Collection of the Conventions, Recommendations, Resolutions, Reports, and Motions Adopted by the First Six International Conferences of the American States, and Documents Relating to the Organization of the Conferences*. OUP, New York
TPP	Trans-Pacific Partnership
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNASUR (Spanish acronym)	Union of South American Nations
UNASUR Centre	UNASUR Centre for the Settlement of Investment Disputes
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNGP	UN Guiding Principles on Business and Human Rights
UNHRC	United Nations Commission on Human Rights
USMCA	United States–Mexico–Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

Chapter 1
Introduction

1.1 Setting the Scene

1.1.1 The Ways and Moments in Which IIL Frustrates States' Protection of Human Rights in Latin America

International investment law (IIL) protects private foreign investors and their investment against any state action that may adversely impair the legal treatment to which they are entitled under international investment agreements (IIAs). This is usually done by means of investor-state arbitration, the most effective mechanism in investor-state dispute settlement (ISDS). On this basis, transnational corporations investing in the provision of drinking water services have continuously brought investment treaty claims against Argentina, for the executive measures conducive to protect users' right to water.[1] Similarly, an increasing number of Latin American

[1] *Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux, Claimants v Argentine Republic*, ICSID Case No. ARB/97/3, Award (21 November 2000) (*Vivendi v Argentina I*); *Azurix Corp. v Argentine Republic* (I), ICSID Case No. ARB/01/12, Award (14 July 2006) (*Azurix v Argentina I*); *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v Argentine Republic*, ICSID Case No. ARB/03/18, Order Taking Note of the Discontinuance of the Proceeding (24 January 2007) no public available (*Aguas Cordobesas and Suez v Argentina*); *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v Argentine Republic)* ICSID Case No. ARB/97/3, Award (20 August 2007) (*Vivendi v Argentina II*); *Impregilo S.p.A. v Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011) (*Impregilo v Argentina*); *SAUR International v Argentine Republic*, ICSID Case No. ARB/04/4, Award (22 May 2014) (Spanish version) (*SAUR v Argentina*); *AWG Group Limited v The Argentine Republic*, UNCITRAL (9 May 2015); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v Argentine Republic,* ICSID Case No. ARB/03/19, Award (9 April 2015) (*Suez and Vivendi v Argentina II*); *Suez, Sociedad General de Aguas de Barcelona,*

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countries have had to respond to claims for regulatory measures taken in the wake of local[2] and indigenous communities' concerns[3] about the negative effect that foreign investment in mining,[4] oil,[5] and even tourism activities may have over their livelihood.[6] More recently, the judicial protection of high-altitude wetlands to safeguard natural sources of water supply has given rise to a growing number of investment treaty claims against Colombia,[7] while a judicial decision issued to preserve glaciers against the performance of nearby mining exploration and exploitation activities nearby could mean the submission of a new investment treaty claim for Argentina in the near future.[8]

On the other side of the spectrum are those in Latin America who are deprived from enjoying their human rights in the investment context, which constantly withstand the adverse human rights impacts of foreign investment activities that derive from states' omission to protect their enjoyment.[9] Within the United Nations (UN) human rights system, for instance, right-holders in Latin America have brought

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S.A. and Interagua Servicios Integrales de Agua, S.A. v Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016) (*Urbaser v Argentina*); *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/03/30 (*Azurix v Argentina II*) no pleadings are publicly available.

[2]See *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No. ARB/09/12 Award (14 October 2016) (*Pac Rim Cayman v El Salvador*).

[3]For investment treaty claims specifically interlinked with indigenous peoples' rights see *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA No. 2012-2, Award (15 March 2016) (*Copper Mesa v Ecuador*); *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/2, Award (30 November 2017) (*Bear Creek v Peru*); *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (22 November 2018) (*South American Silver v Bolivia*); *Burlington Resources Inc. v Republic of Ecuador (formerly Burlington Resources Inc. and others v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (7 February 2017) (*Burlington v Ecuador*); *Álvarez y Marín Corporación S.A. and others v Republic of Panama*, ICSID Case No. ARB/15/14, Reasoning of the Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) (4 April 2016) (*Alvarez Marin v Panama*).

[4]*Pac Rim Cayman v El Salvador* (n 2); *Copper Mesa v Ecuador* (n 3); *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/16/41, Request for Arbitration (8 December 2016) (*Eco Minerals Corp v Colombia*); *Bear Creek v Peru* (n 3); *South American Silver v Bolivia* (n 3).

[5]See *Burlington v Ecuador* (n 3).

[6]See *Alvarez Marin v Panama* (n 3).

[7]*Eco Oro Minerals Corp. v Colombia* (n 4); *Red Eagle Exploration Limited v Republic of Colombia*, ICSID Case No. ARB/18/12, Notice of Intent (14 September 2017); *Galway Gold Inc. v Republic of Colombia*, ICSID Case No. ARB/18/13, Request for Arbitration (Spanish) (21 March 2018). For an overview of the court's decision, see Hill (2016).

[8]See Centro de Informacion Judicial (2019).

[9]Adverse human rights impacts are commonly understood as the business entities' acts conducive to remove or reduce the ability of a third party to enjoy his or her human rights. See High Commissioner of Human Rights of the United Nations, The Corporate Responsibility to Respect Human Rights, An Interpretative Guide (2012) 5.

complaints before the UN Human Rights Council (HRC) to bring to the fore capital-exporting countries' breaches of their extraterritorial human rights obligations in recipient states of their nationals' investment.[10] More frequently, however, they have resorted to the Inter-American human rights systems, to challenge their own states' omission to protect their rights as laid down in the American Convention on Human Rights (ACHR).[11] To illustrate, those affected by foreign investment activities usually request the adoption of precautionary measures before the Inter-American Commission on Human Rights (IACommHR).[12] This is usually done to prevent the irreparable harms that the operation of foreign investment projects may have upon their rights.[13] Yet, if the state omits to follow these precautionary measures, the IACommHR may still request the Inter-American Court of Human Rights (IACoHR), in a case not yet submitted to its jurisdiction, to order the adoption of provisional measures to avoid irreparable harms if the situation at stake is of 'extreme gravity and urgency'.[14] Otherwise, rights holders traditionally seek legal

[10]To illustrate, a group of Latin American NGOs submitted a set of reports before the HRC, alleging China's violations of extraterritorial human rights obligations in investment projects within the context of the Universal Periodic Review (UPR) of China's human rights record, see Colectivo sobre Financiamiento e Inversiones Chinas.

[11]See American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

[12]The IACommHR promotes and protects human rights in its capacity as OAs organ and as a treaty body of the American Convention on Human Rights (ACHR). For an overview of this double function within the Inter-American human rights system, see Sect. 3.2.1.2, Chap. 3.

[13]For illustrations of Commission's precautionary measures requesting to ensure the non-contamination of water sources of indigenous communities by a foreign corporation's minining activities, see *Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala*, Precautionary Measures 260-07, IACommHR (Communities of the Maya People) (7 December 2017).

[14]ACHR (n 11) art 63 para 2.

remedies before the IACoHR to redress violations of their rights suffered in the context of land,[15] logging,[16] oil,[17] mining,[18] and touristic development projects.[19]

The above scenario shows that IIL and international human rights law (IHRL) promotes the values and objectives of their respective legal regimes through different institutional, procedural and substantive tools, to the point of turning themselves into self-contained regimes.[20] These opposite paths constitute the functional cause of the so-called 'fragmentation' of international law that aims to respond in a decentralised vein to the legal problems associated with globalisation.[21] Yet, although the fragmentation of international law has brought a number of benefits,[22] it has also posed considerable challenges. The overlapping investment and human rights treaty obligations of some Latin American countries clearly exemplifies the normative and institutional frictions that may arise between IIL and IHRL. The following cases illustrate ways and moments in which IIL has thwarted Latin American countries' regulation of foreign investment to hinder related human rights abuses.[23]

[15] *Yakye Axa Indigenous Community v Paraguay*, (Merits, Reparations and Costs) Judgement, IACoHR Series C no 125 (17 June 2005) (*Yakye Axa v Paraguay*); *Sawhoyamaxa Indigenous Community v Paraguay*, (Merits, Reparations and Costs) Judgement, IACoHR Series C No. 146 (29 March 2006) (*Sawhoyamaxa v Paraguay*); *Case of the Xákmok Kásek Indigenous Community v Paraguay*, (Merits, Reparations, and Costs) IACoHR Series 214 (24 August 2010) (*Xákmok Kásek v Paraguay*).

[16] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, (Merits, Reparations and Costs) Judgement, IACoHR Series C No. 79 (31 August 2001) (*Awas Tingni Community v Nicaragua*).

[17] *Kichwa Indigenous People of Sarayaku v Ecuador*, (Merits and Reparations) Judgement, IACoHR Series C No. 245 (27 June 2012) (*Sarayaku v Ecuador*).

[18] *Case of the Kaliña and Lokono Peoples v Suriname*, (Merits, Reparations and Costs) Judgement IACoHR, Series C No. 309 (25 November 2015) (*Kaliña and Lokono Peoples v Suriname*) para 224; *Caso Comunidad Garifuna de Punta Piedra v Honduras* (Excepciones Preliminares, Fondo, Reparaciones, y Costas) Sentencia, CIDH Serie C No. 304 (8 de Octubre 2015) (*Comunidad Garifuna de Punta Piedra v Honduras*); *Case of the Saramaka People v Suriname*, (Preliminary Objections, Merits, Reparations, and Costs) Judgement, IACoHR Series C No. 172 (28 November 2007) (*Saramaka v Suriname*).

[19] *Caso Comunidad Garifuna Triunfo de la Cruz y sus Miembros v Honduras* (Fondo, Reparaciones, Costas) Sentencia, CIDH Serie C No. 305 (8 de Octubre 2015) (*Comunidad Garifuna Triunfo de la Cruz v Honduras*).

[20] ILC, 'Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (18 July 2006) UN Doc. A/CN.4/L.702 (ILC Fragmentation Report) paras 11–16.

[21] While Peters particularly highlights the institutional and ideational dimensions of international law's fragmentation, she also contends that the root causes of fragmentation lie on functional and political objectives. Peters (2017), pp. 674–678.

[22] Peters (2017), pp. 680–682.

[23] In this study, the term 'human rights' abuses' means the acts of these economic actors conducive to deprive third parties' enjoyment of the human rights codified in internationally recognised human rights instruments, and is used interchangeably with the term 'adverse human rights impacts'. See HRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on

IIL may frustrate the objectives pursued by IHRL at the normative level in the shadow of a submission of an investment treaty-based claim. The host state may exercise self-restrain to regulate foreign investment activities, phenomenon commonly referred to as the 'regulatory chill' effect of ISDS.[24] Bounded rationality is adduced as one of the causes of this regulatory self-restraint of states, and with this, the impossibility of predicting legal outcomes in ISDS as a result of the vague nature of legal standards enshrined in IIAs and the jurisdictional powers of arbitrators to assess them in an expansive vein.[25]Another cause of regulatory chill is arguably the large sums of legal expenses in which respondent states must incur for their defence.[26] In fact, in some cases, the quantum of damages awarded in ISDS has considerably comprised respondent states' coffers.[27] In this context, although the discussion about the 'chilling effect' of ISDS has primarily taken place in connection with states' environmental measures,[28] the *Sawhoyamaxa v Paraguay* case clearly shows how IIL may considerably discourage states' protection of indigenous people's rights in benefit of foreign investment.[29] In this case, Paraguay sought to justify the non-recognition of Sawhoyamaxa people's land rights and the non-restitution of their ancestral lands in the hands of German nationals by invoking its obligation to protect German landowners' rights under the bilateral investment treaty (BIT) in force with Germany.[30] Accordingly, *Sawhoyamaxa v Paraguay* clearly illustrates that host states may prioritise their observance of investment treaty obligations over the protection of human rights considering the policy and monetary implications that are stake when responding to investment treaty claims.

Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc. A/HRC/17/31 (UNGP) para 12.

[24]See UNGA, Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples, A/70/301 (7 August 2015) para 46. See also Bonnitcha (2014), p. 114. According to Tienhaara, ISDS only exerts an *indirect* chilling effect over state's regulatory autonomy that is contingent upon the implementation of *specific* policies. See Tienhaara (2011), p. 615.

[25]In this regard, Poulsen suggests that bounded rationality is also the underlying motive behind developing countries' decision to sign IIAs. See Poulsen (2015). See also, Tienhaara (2011), p. 615.

[26]For a detailed statistical overview of the legal fees incurred by disputing parties in ISDS (such as legal fees for counsels, experts, arbitrators, or remedies), see Gaukrodger and Gordon (2012).

[27]Recent examples of exorbitant quantum of damages in ISDS include two awards issued by arbitral tribunals constituted under the ICSID Convention: an award ordering Pakistan's payment of $5.75 billion in favour of Tethyan Copper Company for breaches of the Australia-Pakistan BIT and an award ordering Venezuela's payment of $8,7 billion in favour of ConocoPhillips companies for violations of the Netherlands-Venezuela BIT. See Hepburn (2019) and Peterson (2019), respectively. Yet, the most outrageous quantum of damages known so far is $ 50 billion in three investment arbitration proceedings commenced against Russia under the Energy Charter Treaty and administered by the Permanent Court of Arbitration (PCA). See Brauch (2014).

[28]To illustrate, see Tienhaara (2018) and Gross (2003).

[29]*Sawhoyamaxa v Paraguay* (n 15).

[30]*Sawhoyamaxa v Paraguay* (n 15) paras 115 lit. b and 137.

Beyond that, the same set of facts may trigger reaction among foreign investors and those facing adverse investment-related impacts leading to recourse in parallel to *ad-hoc* arbitral tribunals and international human rights bodies, respectively, producing an indirect interplay between IIL and IHRL without any direct inter-institutional encounter.[31] Examples of this indirect inter-institutional interplay include (a) the interaction between the provisional measures issued by the IACoHR in favour of Sarayaku indigenous communities[32] and the *Burlington v Ecuador* case, where the same facts provided the cause of action against Ecuador for its omission to guarantee full security and protection to their investment,[33] and (b) the interaction between the 2007 precautionary measure issued by the IACommHR in favour of La Oroya population[34] and the *Renco v Peru* case, submitted by the claimant investor in 2011, following refusal by domestic authorities' to grant reasonable extensions of the environmental management plan that prevented its subsidiary from securing funding to resume operations at the metallurgical complex at la Oroya.[35]

Yet throughout the conduct of investor-state arbitration proceedings, direct inter-institutional interactions might develop, having the potential effect of hindering host states' protection of human rights.[36] The interaction between the protective measures issued by the *Chevron v Ecuador II* tribunal and the precautionary measures almost issued by IACommHR in connection with this investment treaty case clearly portrays the likelihood of troublesome inter-institutional encounters. In *Chevron v Ecuador II*, for example, claimant investors successfully alleged that substantive parts of the domestic judgement issued in the environmental dispute between Lago Agrio plaintiffs and Chevron, where claimant investors were found liable and ordered to pay plaintiffs substantial damages, were corruptly 'ghostwritten' for the competent domestic judge by Lago Agrio plaintiffs' representatives in return for a promise of a bribe's payment resulting from the enforcement of that domestic

[31] See Hepburn (2012).

[32] The 2004 provisional measures issued by the IACoHR sought to counteract Ecuador's failure to adopt precautionary measures formerly required by the IACommHR to prevent the irreparable harms that the resumption of an Argentinian oil company's seismic exploration have over their lands and access to water sources. *Provisional Measures regarding Ecuador Matter of Pueblo Indígena Sarayaku*, IACoHR Order (6 July 2004).

[33] See Binder and Hofbauer (2016).

[34] This precautionary measure requested Peru to undertake and provide medical diagnosis and treatment for the health risks faced by La Oroya population resulting from metallurgical activities of the Doe Run Peru, subsidiary of the Renco Group Inc. IACommHR, Community of La Oroya, Peru, Precautionary measures (31 August 2007).

[35] Claimant's Notice of Arbitration and Statement of Claim from the Renco Group, Inc. and Doe Run Peru S.R.LTDA, to the Republic of Peru and Activos Mineros S.A.C (4 April 2011) (Claimant's Notice of Arbitration, Renco v Peru) para 53. Available via ITA Law. https://www.italaw.com/sites/default/files/case-documents/italaw3264.pdf. Accessed 10 December 2020.

[36] Emblematic cases in this context include *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II (30 August 2018) (*Chevron v Ecuador II*) and *The Renco Group, Inc. v The Republic of Peru*, ICSID Case No. UNCT/13/1, Final Award (9 November 2016) (*Renco v Peru*).

judgement.[37] The potential for institutional clashes arose when the *Chevron v Ecuador II* tribunal issued several interim measures against Ecuador, ordering the suspension of the enforcement of the domestic court's judgement within and outside its jurisdiction,[38] and the Lago Agrio plaintiffs requested, albeit later withdrawn, IACommHR's precautionary measures to have Ecuador abide by these tribunal's interim measures, alleging irreparable harms to their rights of judicial character and their right to life and health.[39] Had Lago Agrio plaintiffs continued with their request and the IACommHR thus issued precautionary measures in their favour, Ecuador would have been in the uncomfortable situation of choosing to meet one protective measure over the other with all the consequence that the choice of such a policy implies.[40]

Granted foreign investors not only seem to seek damages from respondent states as legal remedies, but also to block domestic proceedings for civil liability claims instituted against them by third parties by means of arbitral awards. In *Chevron v Ecuador II* and *Renco v Peru*, claimant investors sought, among others, tribunals' issuance of declaratory reliefs in which they were released from any civil liability for their subsidiaries' operation and the respondent states were held responsible and liable for any pending environmental remediation and payment of damages to third parties.[41] While claimant investors' pretensions in *Renco v Peru* were unsuccessful due to tribunal's dismissal of its claim on jurisdictional grounds,[42] the *Chevron v Ecuador II* tribunal partially conferred the legal remedies sought by the claimants since Ecuador was found liable for a denial of justice under the fair and equitable treatment (FET) standard and for the treatment required under customary international law (CIL) pursuant to the Ecuador-USA BIT since it 'maintain(ed) the

[37] *Chevron v Ecuador* II (n 36) Part X-1, para 10.4. For an overview of the claims and findings, see Desierto (2018).

[38] *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (II)*, PCA Case No. 2009-23, First Interim Award on Interim Measures (25 January 2012) para IV lit. (i. Failing Ecuador to comply with the former interim measure, the tribunal renewed its request. See *Chevron v Ecuador II* (n 36) Second Interim Award on Interim Measures (16 February 2012) para 3 lit. (i.

[39] 'Letter from Pablo Fajardo, Julio Prieto and Juan Pablo Saenz (Plaintiffs' Legal Representatives Aguinda v Chevron Corp.) and Aaron Marr Page (Counsel) to Santiago Canton (Executive Secretary, Inter-American Commission on Human Rights)' (9 February 2012). Available via Slide Share Net. https://www.slideshare.net/EmbajadaUsaEcu/ex-114 accessed 10 December 2020.

[40] Presumably, the Lago Agrio plaintiffs withdrew their precautionary measures' request because of Ecuador's decision to not comply with any of these procedural measures to safeguard the legal interests of those affected by Texaco's activities domestically. *Chevron v Ecuador II* (n 36) para 10.18.

[41] As a form of reparation, the Renco Group requested a declaration that '[the respondent State] is required to (1) appear in and defend the Lawsuits and any similar lawsuits, (2) assume responsibility and liability for any damages that may be recovered and any judgments that may be issued in the Lawsuits and in any similar lawsuits, (3) indemnify, release, protect and hold Renco, DRP and their affiliates harmless from those third-party claims and (4) remediate the soil in and around the town of La Oroya'. See *Claimant's Notice of Arbitration, Renco v Peru* (n 35) para 84 lit. c.

[42] See *Renco v Peru* (n 36) Final Award.

enforceability and execute(ion of) the Lago Agrio judgement and knowingly facilitate(d) its enforcement outside Ecuador'.[43] As a result, the *Chevron v Ecuador II* tribunal not only granted the above-mentioned declaratory relief, but also an injunction ordering Ecuador's suspension of the domestic judgement where claimant investors are required to pay damages for their collective liability for environmental harms to the Lago Agrio population, and adoption of all measures to preclude its enforceability in third countries.[44] Therefore, the *Chevron v Ecuador II* case unambiguously illustrates how IIL may hinder states' protection of human rights through the domestic legal remedies' provision to those affected within the context of foreign investment activities even after the conclusion ISDS.

Faced with the far-reaching implications that investment treaty protection could have over host states' protection of human rights before, during, and after the conduct of investor-state arbitration proceedings, to what extent have Latin American countries deployed human rights arguments within ISDS? Does the relationship between IIL and IHRL human bear any relevance in ISDS? Such questions are answered in this study.

1.1.2 The Functional Underpinning of IIL as the Reason Behind the Limited Success of Human Rights Argumentation in States' Favour

Within the ISDS context, Latin American countries seem, at least, as an argumentative strategy, to call for a resolution of inter-regime tensions in favour of human rights. Some states have frequently invoked human rights as matter of applicable law,[45] and sought to justify their regulatory measures at the merits phase[46] and/or to challenge tribunals' jurisdiction and the admissibility of foreign investors' claims based on human rights arguments.[47] *Urbaser v Argentina*, for example, has been the first case, where a host state brings a separate cause of action, in terms of counterclaims, alleging claimant investors' breaches of users' enjoyment of their human right to water by failing to provide the necessary level of investment in the water service's concession.[48] Nevertheless, the deployment of human rights arguments by Latin American countries in ISDS has had so far marginal success,[49] and this trend

[43] *Chevron v Ecuador II* (n 36) part X-2, paras 10.5.

[44] *Chevron v Ecuador II* (n 36) Second Partial Award on Track II (30 August 2018), p. X-3-4, paras 10.12 (i) to 10.13 (viii).

[45] See Sect. 4.1.1, Chap. 4.

[46] See Sect. 4.1.2, Chap. 4.

[47] See Sect. 4.1.3.2, Chap. 4.

[48] *Urbaser v Argentina* (n 1). Guntrip (2018).

[49] For an extensive discussion, see Sect. 4.1.1, Chap. 4.

raises the general question of whether the relationship between IIL and human rights bears any relevance in current investment arbitration practice.

In most cases, IHRL has only played a prominent role in ISDS if it underpins the values and objectives pursued by IIL, namely the effective legal protection of foreign investment.[50] According to *Steininger*, claimant investors or respondent states' references to human rights have only bare relevance in tribunals' review of alleged breaches of claimant investors' rights to property and to fair trial, and the case law of the European Court of Human Rights (ECtHR) has great importance in the ISDS context since tribunals drew inspiration from this regional court's reasoning to determine breaches of the right to property.[51] Considering this arbitral tribunals' practice, some scholars have considered that, rather than competing, IIL and IHRL are gradually converging,[52] thereby posing no threat for the unity to international law.[53]

This understanding of the interaction between IIL and IHRL is based on a functional underpinning of IIL that past and current rationales have continuously reinforced. Traditionally, IIL has been regarded as an international legal instrument that contributes to the 'de-politicisation' of international investment dispute settlement,[54] understanding it as the process by which the legal resolution of these disputes is relocated from the diplomatic (inter-state) sphere to international and neutral *ad hoc* tribunals in accordance with a set of pre-established legal standards by means of IIAs.[55]

In addition, another attached advantage of IIL has been affording an additional layer of comprehensive protection to foreign investment in contexts where domestic recipient states' laws and regulations are likely to constrain its activities.[56] In fact, the Latin American region has usually featured as a case study in this historical account for portraying the considerable challenges faced by foreign investors in seeking effective legal protection of their property rights prior the consolidation of the investment treaty protection regime.[57] With the massive ratification of many treaties since the 1990s, IIL has been perceived as a set of almost widely-accepted set of neutral international legal rules and enforcement mechanisms,[58] which mitigates host states' political risk,[59] because investment treaty standards and their application by *ad hoc* arbitral tribunals subject states to the international rule of law, thereby

[50] See Steininger (2018), pp. 38–45; Petersmann and Kube (2016).

[51] See Steininger (2018), pp. 38–45.

[52] See Dupuy and Viñuales (2015) and Hirsch (2008).

[53] Binder (2015) cited from author's abstract in its English version.

[54] See, for instance, Kriebaum (2018a), pp. 14, 27–28. Also, Kriebaum (2009), p. 653.

[55] Kriebaum (2018a).

[56] See Taillant and Bonnitcha (2011), pp. 57, 61.

[57] To illustrate, see Salacuse (2015), pp. 75–77; Vandevelde (2005), p. 157.

[58] See Sornarajah (2010), p. 18.

[59] See Webb Yackee (2014), pp. 491–497.

promoting regulatory predictability by limiting their arbitrary behaviour.[60] Under this perspective, frictions between IIL and IHRL have been either denied as a result of the perception that human rights treaties only prescribe the attainment of a specific result, leaving at states parties' discretion the regulatory means by which they achieve that goal in conformity with IIAs,[61] or implicitly acknowledged under the premise that tribunals could satisfactorily resolved these frictions through the application of the systemic integration principle.[62]

In recent times, however, IHRL seems to have acquired, albeit to a minor degree, certain relevance in ISDS when it comes to the review of foreign investors' conduct in recipient states. The *Urbaser v Argentina* tribunal extensively engaged in reviewing whether claimant investors had an international obligation towards the human right to water.[63] In *Bear Creek v Peru*, relying upon the findings in the latter case, Professor Philippe Sands acknowledged in his separate opinion that although the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) only obliges states parties, it had legal significance for claimant investors.[64] He contends that this non-investment treaty was applicable at the dispute before the tribunal, and that if the claimant investor had observed the international standards enshrined therein, it would have reduced its own losses.[65] Finally, the *Avec v Costa Rica* tribunal also addressed the issue of investors' obligations in connection with the concept of *erga omnes* norms within the framework of a counterclaim that arose from alleged investor's inobservance of environmental law of the respondent state in the development of a tourism project.[66] This tribunal held that investors could be considered subjects of international law when it came to 'rights and obligations that are the concern of all states, as it happens in the protection of the environment'.[67] With basis on this principle, it added that since the applicable treaty requires protected investors to abide and comply with the environmental measures of states parties, there is no justification to exempt the claimant

[60] See Guthrie (2013), pp. 1151, 1159–1160.

[61] See Fry (2007), p. 77.

[62] *Urbaser v Argentina* (n 1) para 1192. In relation to the application of the integration principle to cope with tensions between international investment and human rights, see Dupuy and Viñuales (2015), pp. 1739–1767. While endorsing the same view, Simma acknowledges that the challenges inherent to the normative tensions between IIL and IHRL cannot be solved by the current international dispute settlement system due to the availability of *ex post* remedies only. On this ground, he proposes to, inter alia, clarify the human rights' obligations of states from the outset in IIAs. Simma (2011), pp. 579–583.

[63] See Sect. 4.1.3.2, Chap. 4.

[64] *Bear Creek v Peru* (n 3) Separate Opinion of Philippe Sands para 10. See Convention concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention 169).

[65] *Bear Creek v Peru* (n 3) Separate Opinion of Philippe Sands para 11.

[66] *David R Aven and Others v Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (18 September 2018) (*Aven v Costa Rica*).

[67] *Aven v Costa Rica* (n 66) para 738.

from the application of that treaty norm.[68] Despite latter dismissed at the merits, the value of the *Urbaser* and *Aven* tribunals' approach to counterclaims and the reflections of Professor Sands resides in their explicit engagement with an exogenous legal regime to IIL, namely IHRL, in a way that departs from the functional values and objectives of IIL, giving space for the occurrence of -what some scholars have labelled as the 'moment of law'.[69]

Given the above-mentioned considerations, the following questions emerge: How true is the proposition under current universal and Inter-American human rights doctrine that states have a wide margin of discretion on how they protect human rights to achieve this end in a manner compatible with their investment treaty obligations? Which proposals have been put forward so far to align IIL with human rights that go beyond the application of the 'systemic integration' interpretive maxim? By which means have Latin American countries articulated their need for regulatory space outside the ISDS context?

1.1.3 The Need for Re-politicising IIL in View of Its Increasing Problematic Interplay with States' Protection of Human Rights

Parallel to the view that IIL and IHRL gradually come together on questions relating to investment treaty protection is also the belief that IIL and IHRL collide in the sense that IIL undermines states' protection of human rights by regulatory means.[70] In line with this perception, international human rights bodies and civil society have increasingly appealed to states to maintain an adequate policy space when observing their investment treaty obligations[71] or even called for the protection of investment treaty rights in conformity with human rights treaties owing to the multilateral

[68] *Aven v Costa Rica* (n 66) para 739.

[69] Crawford and Nevill define the 'moment of law' as 'the avoidance by tribunals of both conflict and zero-sum outcomes that would either deny or disregard the regimes or rules in conflict or fail to achieve the purpose of litigation, that of resolving disputes peacefully'. Crawford and Nevill (2012), p. 235.

[70] See Joseph (2013).

[71] Member States of the United Nations (UN) have been explicitly encouraged to 'maintain adequate policy space to meet their human rights obligations when pursuing business-related policy objectives (. . .) through investment treaties'. See UNGP (n 23) para 9. Also, they have been encouraged to implement novel policy tools to ensure that IIAs are consistent with their human rights obligations. See HRC, 'Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements' (2011) Un Doc. A/HRC/19/59/Add.5. In the same direction, the IACoHR held in *Sawhoyamaxa v Paraguay* that the enforcement of foreign investor's treaty rights should be in conformity with the human rights obligations of the State concerned owing to the multilateral character of human rights treaties, which differs from the bilateral nature of IIAs. See *Sawhoyamaxa v Paraguay* (n 15) para 140.

character of human rights treaties that differs from the bilateral nature of IIAs.[72] Moreover, some scholars who endorse this view seek to accommodate both international legal regimes, but vary in their conceptualisation of how these legal regimes should interrelate with each other, thus leading to inter-regime tensions getting solved.[73]

Except in some instances,[74] this human rights-centred discussion has nevertheless overlooked the alleged *political* roots of IIL when developing options for its accommodation with human rights.[75] According to *Benvenisti* and *Downs*, the fragmentation of international law has been a deliberated-induced process by powerful states to restrict the negotiating capacity of weaker states and thus establishing an agenda that favours the creation of legal regimes aligned around their own interests.[76] This understanding of the cause of international law's fragmentation mirrors one conceptualisation of the relationship between politics and international law in international relations,[77] which has increasingly informed critical scholars' view about IIL.

In addition to the view that IIL continues to reflect the unsettled ideological tensions between North and South about the role that international legal instruments should play in protecting foreign capital[78] some contend that the emergence of IIL

[72]This was the opinion of the IACtHR in the *Sawhoyamaxa v Paraguay* case. See *Sawhoyamaxa v Paraguay* (n 15) para 140. As regard to the concerns of civil society in relation to the negotiation of investment treaties, see DPLF Staff (2018), p. 14.

[73]At the Inter-American level, Bustos and Bohoslavski, for instance, advocate for domestic courts' review of the conformity of arbitral tribunals' award with human rights standards if existing interpretative tools fail to achieve inter-regime harmonization, by giving an instrumental conceptualisation of IIL at the service of the realization of human rights. Justo and Bohoslavsky (2018). By recognising the importance of the two international legal regimes operating in the inter-American context, Urueña argues that the *ius constitutionale commune* could provide adequate normative and theoretical tools to allow arbitrators to establish when to give deference to states and when not. Urueña (2018). On the *ius constitutionale commune* project in the Latin American context, see von Bogdandy et al. (2017).

[74]Davitti (2019). In fact, Philip Alston, in his capacity as a Special Rapporteur contend that '[w]hile some proponents present privatization as just "a financing tool", others promote it as being more efficient, flexible, innovative and effective than public sector alternatives. In practice, however, privatization has also metamorphosed into an ideology of governance. As one advocate put it, "anything that strengthens the private sector [against] the State is protective of personal freedom". Freedom is thereby redefined as an emaciated public sector alongside a private sector dedicated to profiting from running key parts of the criminal justice system and prisons, determining educational priorities and approaches, deciding who will receive health interventions and social protection, and choosing what infrastructure will be built, where and for whom'. See UNGA, 'Report of the Special Rapporteur on extreme poverty and human rights' (26 September 2018) UN Doc A/73/396 para 2.

[75]According to Peters, the fragmentation of international law has also a political root because the existing relationships between legal regimes reflect the diverging perspectives that states have of their policy priorities. See Peters (2017), pp. 674–675; 700–701.

[76]See Benvenisti and Downs (2007), p. 615.

[77]Reus-Smit (2004).

[78]Kaushal (2009), pp. 491, 496; Sornarajah (2010), p. 18.

coincided with the European liberal ideological induced convergence between capital-exporting countries' interest with those of their nationals operating abroad.[79] Consistent with this view, other scholars further argue that IIL brought about a process of market deregulation in recipient states to facilitate and protect foreign investment activities through the sanctioning of their regulatory intervention by compensatory means, thus perceiving that IIL is not devoid of political ideology.[80] Based on this logic, others strongly challenge the alleged neutrality of IIL and view this latter argument as another way to 'de-politicise' the IIL regime.[81] It has been contended that historical rationales provided to justify the creation of the institutional machinery of IIL have contributed to the internalisation of the 'de-politicisation' narrative,[82] by intending to anchor the vision that IIL can provide legal technical solutions to disputes that actually have an inherent political character.[83]

Yet cases such as *Urbaser v Argentina* and *Aven v Costa Rica* might initially refute the argument that powerful economic actors, such as foreign investors, influence how IIL operates because these awards signalise IIL's potential to shape investors' behaviour and thus the inability of these stakeholders to evade the IIL regime. Notwithstanding the former, this study partially endorses the fact that the above-mentioned critical views are justified when it comes to the role of IIL in steering states' conduct. The predominant position in IIL has denied or averted it from sufficient engagement in critically discussing the potential for its normative overlapping with IHRL when states' obligation to protect human rights is at stake.[84] It is in this sense that the present study argues that the debate and reform about the IIL regime should be politicised, borrowing Peters' concept of 'politicisation', as 'a process through which certain issues become objects of public contention and debate',[85] and thus 'inevitably contestatory' due to the demands raised by stakeholders.[86]

[79]Miles (2013), pp. 39–40.

[80]See Tan (2015) and Sattorova (2018).

[81]See Davitti (2019), pp. 168, 172, 229. This study relies upon Fawcett, Flinders, Hay and Wood's definition of depoliticisation as the process 'that remove(s) or displace(s) the potential for choice, collective agency, and deliberation around a particular political issue. Fawcett et al. (2017), pp. 3, 5.

[82]According to Perrone and Schneiderman, the internalisation of the 'depoliticisation' narrative has its origin in the functional rationales provided by international financial institutions to remove investment dispute settlement from the state realm and to justify the creation of new institutions endowed with the competence of enforcing international rules in a way that it 'neutralize disagreement over market fundamentals'. See Perrone and Schneiderman (2019), pp. 449–451.

[83]See Davitti (2019); Radovi (2018), p. 143.

[84]This debate would be reflective of the so-called politics within law, another dimension of the interaction between politics and international law, according to which the interpretation of IIAs would correspond to one stage of governance where politics and IIL interact and where the meaning of IIAs provisions thus constitute one of the contested issues. See Reus-Smit (2004).

[85]Peters (2017), p. 701.

[86]Ibidem. Maxwell defines contestation as the actions by which 'political and theoretical claims to final, universal, or absolute to political dilemmas' is challenged. Maxwell (2014), p. 738.

Considering the critical place frequently allocated to the Latin American region in the competing histories of the origins of IIL, and in the current challenges made to the IIL regime in place, two sets of questions should be addressed. The first focuses on whether the Latin American critical approach towards these international instruments can be categorised as a politicisation process, and if so, which issues of contention and claims have characterised this process. Yet, faced with the fact that IIL may considerably inhibit states' protection of human rights in the investment context, but nevertheless abstain from dealing with inter-regime clashes, the second inquiry becomes whether current forms currently prevailing for framing the discussion and reform of IIL are adequate to frame these concerns from a human rights debate.[87] More specifically, this requires answering whether the so-called 'right to regulate' paradigm pervasively used in IIL to highlight the states' need of preserving regulatory autonomy is adequate to frame the shortcoming placed by the IIL upon states' protection of human rights in the investment context,[88] and if not, whether a new paradigm consistent with IHRL, yet independent from that legal field, can be developed and be applicable in IIL.

1.2 Hypothesis, Aims and Structure of This Study

Borrowing Peter's understanding of the 'politicisation' term, the present study argues that Latin American countries have engaged in a long-standing 'politicisation' of international legal instruments protecting foreign property rights and that this contestation has always been based on the articulation of sovereign rights. However, it further contends that maintaining this paradigm from a human rights perspective is inappropriate and that an adequate re-politicisation of IIL regime demands states' reconceptualization of how they articulate their need of regulatory space in the investment context. It proposes the 'duty to regulate' paradigm to articulate these claims since IHRL places legal obligations upon states that demand taking all appropriate preventative measures to ensure the protection of human rights vis-à-vis investors.

Informed by these hypotheses, the present study aims to develop the concept 'duty to regulate' as a practical and compatible concept with IIL and IHRL to facilitate the re-politicisation of the IIL and human rights debate as follows: As a critical tool, this concept enables to critically examine states' articulation and tribunals' understanding of the international rights, duties, and obligations of host states vis-à-vis foreign investment in current IIL. Analytically, the concept 'duty to regulate' not only facilitates to anchor this notion in IIL in conformity with international human rights law, but also to distinguish this international duty from the 'right

[87] Mouyal (2018).

[88] See, for instance, Hindelang and Krajewski (2016) and Titi (2014).

to regulate'. Finally, this concept provides a new normative paradigm to frame the discussion about and reform of IIL in Latin America and beyond.

The remaining chapters of this book are divided as follows:

The second chapter puts into historical perspective ways in which Latin American countries have channelled the articulation of sovereign rights to politicise international legal instruments protecting foreign investment since their independence up to the present time. To adequately handle this phase, the chapter is divided into three historical periods. categorised according to the political, legal, and economic framings of foreign investment protection put in place in Latin America. It employs the national and regional legal practices prevailed by these countries to legally protect foreign property rights in each epoch as the basis of this historical review. In addition, this chapter contextualises these practices considering the corresponding case law of international tribunals on the subject as well as international attempts by actors outside this region towards its institutionalization. This historical review shows that the articulation of this criticism has been traditionally made in terms of sovereign rights and that these forms still instruct how they 'politicise' current IIL regime. Faced with the normative challenges already highlighted in Sect. 1.1.1, this historical review thus makes evident the need for a new normative paradigm to frame the discussion and reform about IIL.

After this historical undertaking, the third chapter develops the concept 'duty to regulate', with its basis on IHRL, to elucidate how this normative paradigm should be understood and applied in IIL. To this end, this chapter initially discusses the legal basis and scope of this states' duty as defined by universal and Inter-American principles on business and human rights, on one hand, and on international human rights treaties binding upon these states, on the other. Subsequently, this chapter proceeds to elaborate the states' duty to regulate foreign investment activities arising from the right to water and indigenous people's right to lands and territories, since both rights have traditionally been at stake in investment treaty claims responded by Latin American countries. The chapter goes on to examine the legal basis that specifically allocates this international duty in relation to both rights and develops its scope of application accordingly. This analytical review demonstrates that universal and Inter-American human rights doctrine offers sufficient normative arguments to facilitate a theoretically convincing substantiation and/or review of Latin American countries' duty to regulate foreign investment activities and to differentiate it from the so-called 'right to regulate' paradigm pervasively used in IIL.

Drawing upon the concept 'duty to regulate' elaborated in Chap. 3, Chaps. 4 and 5 formulate reform proposals to anchor this normative paradigm in the interpretation and application of IIAs' provisions. To this end, this study focuses on IIAs and the idea of creating a regional ISDS forum, since both legal instruments have had so far a considerable amount of supporters within the broad array of legal instruments that have emerged in Latin America to redefine investor-state relations.[89]

[89]See Sect. 2.3.3, Chap. 2.