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## Fragmentation of International Law: The Case of International Finance & Investment Law Versus Human Rights Law

Sabine Schlemmer-Schulte  
*University of the Pacific*

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# Fragmentation of International Law: The Case of International Finance & Investment Law Versus Human Rights Law

Sabine Schlemmer-Schulte\*

*Presented in March 2011 at the University of the Pacific, McGeorge School of Law Symposium on The Global Impact and Implementation of Human Rights Norms.*

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\* Associate Professor of Law, Dr. (S.J.D.), LL.B., L.E.D., LL.M. European Union Law, LL.M. European Banking Law, LL.M. International Business and Finance Law, University of the Pacific, McGeorge School of Law, Sacramento, CA. The author wishes to thank Karen Halverson Cross, Professor of Law, John Marshall School of Law, Chicago, IL, for her comments. The author also thanks Monica Frey and Anton Petrov for research assistance.

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I. INTRODUCTION

*A. The Issue of Fragmentation of International Law: Select Case Studies*

While many scholars and practitioners still perceive international finance/investment law and human rights (“HR”) as “two separate branches of international law, with no substantial overlap”, foreign investors’ rights have clashed with the HR of the people of the investors’ host countries in a number of recent cases brought before both domestic courts and international arbitral tribunals.<sup>1</sup> Pertinent examples in this respect are the cases before New York<sup>2</sup> and German courts<sup>3</sup> of the so-called “vulture fund,” or hold-out bondholders against Argentina.<sup>4</sup> Other examples are the cases before the International Centre of Settlement of Investment Disputes (“ICSID”) tribunals of United States (“U.S.”) equity investors in the Argentine energy sector against Argentina.<sup>5</sup> These disputes between the foreign debt investors and Argentina, the debt instrument issuer, as well as the disputes between foreign equity investors and Argentina, the investors’ host country, both arose in the context of the recent Argentine financial crisis.<sup>6</sup>

1. See Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 45, 46 (Pierre-Marie Dupuy et al. eds., 2009).

2. *Lightwater Corp. v. Republic of Arg.*, No. 02 Civ. 3804(TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003); *EM Ltd. v. Republic of Arg.*, 473 F.3d 463 (2nd Cir. 2007); *EM Ltd. v. Republic of Arg.*, 131 F. App’x 745 (2nd Cir. 2005).

3. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 8, 2007, docket number 2 BvM 1/03 (Ger.), available at [http://www.bverfg.de/entscheidungen/ms20070508\\_2bvm000103.html](http://www.bverfg.de/entscheidungen/ms20070508_2bvm000103.html).

4. Mark Weisbrot, *Vultures Circle Argentina*, THE GUARDIAN (June 5, 2009, 4:00 PM), <http://www.guardian.co.uk/commentisfree/cifamerica/2009/jun/02/argentina-debt-us-vulture-funds>.

5. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), 44 I.L.M. 1205 (2005), available at [http://italaw.com/documents/CMS\\_FinalAward.pdf](http://italaw.com/documents/CMS_FinalAward.pdf); *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007), available at <http://italaw.com/documents/Enron-Award.pdf>; *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), available at <http://italaw.com/documents/SempraAward.pdf>.

6. See Weisbrot, *supra* note 4.

*Global Business & Development Law Journal / Vol. 25**B. Background: The 2001-2002 Argentine Financial Crisis*

At the end of 2001 and the beginning of 2002, Argentina experienced a financial crisis of catastrophic proportions.<sup>7</sup> The crisis began with Argentina's default on external debt obligations due to balance of payments difficulties.<sup>8</sup> Subsequently, the country imploded when, in one day alone, the Argentine peso lost forty percent of its value.<sup>9</sup> As the peso broke down, a run on banks ensued.<sup>10</sup> Throughout the collapse, "income per person in dollar terms . . . shrunk from around \$7,000 to just \$3,500," and unemployment rose to perhaps 25% in Argentina.<sup>11</sup>

This economic chaos meant that, by late 2002, over half the Argentine population was living below the poverty line. The [financial] crisis soon spread from the economic to the political sphere. In December 2001, one day of riots left 30 civilians dead and led to the resignation of President Fernando de la Rúa, and the collapse of the [Argentine] government.<sup>12</sup>

Five presidents succeeded each other over the next ten days.<sup>13</sup> In response to the crisis, Argentina adopted, first unilaterally and later on the basis of the International Monetary Fund's ("IMF") advice, several measures to stabilize the economy and restore political confidence.<sup>14</sup> "Among these efforts was a significant devaluation of the peso through the termination of the currency board which pegged the peso to the U.S. dollar, the pesification of all financial obligations, and the effective freezing of all bank accounts through a series of measures known collectively as the *Corralito*."<sup>15</sup> Argentina also announced its wish to restructure the arrangements under its foreign currency bond issues.<sup>16</sup> Although "these measures offered a long-term prospect of restored economic

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7. See PAUL BLUSTEIN, *AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF AND THE BANKRUPTING OF ARGENTINA* 1-2 (2005). For details of the economic background of the Argentine financial crisis, see INDEP. EVALUATION OFFICE, INT'L MONETARY FUND, *THE IMF AND ARGENTINA 1991-2001* (2004).

8. Weisbrot, *supra* note 4.

9. William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 407 (Michael Waibel et al. eds., 2010).

10. *Id.*

11. *Argentina's Collapse: A Decline without Parallel*, *ECONOMIST* (Feb. 28, 2002), <http://www.economist.com/node/1010911>.

12. Burke-White, *supra* note 9, at 409-10.

13. *Id.* at 410.

14. For data reproduced in the Report, see INDEP. EVALUATION OFFICE, INT'L MONETARY FUND, *supra* note 7, at 57-58.

15. Burke-White, *supra* note 9, at 410. For details on the Argentine situation and government intervention, see BARRY EICHENGREEN, *FINANCIAL CRISES: AND WHAT TO DO ABOUT THEM* 101-33 (2002).

16. *Argentina's Debt Restructuring: A Victory by Default?*, *ECONOMIST* (Mar. 3, 2005), [http://www.economist.com/node/3715779?story\\_id=3715779](http://www.economist.com/node/3715779?story_id=3715779).

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confidence and stability, they also imposed immediate and painful costs on all participants in the Argentine economy, including foreign investors.”<sup>17</sup>

While Argentina ultimately agreed with seventy-six percent of its creditors to a settlement of approximately thirty-four cents on the dollar, several creditors not participating in the debt restructuring continued pursuing their claims in national courts and international arbitral forums.<sup>18</sup> U.S. and German courts decided unequivocally in favor of hold-out bondholders to whom, at least on paper, Argentina still owed one-hundred percent of the original debt.<sup>19</sup> Similarly, several equity investors fought Argentina successfully before ICSID tribunals.<sup>20</sup>

## II. INVESTORS’ RIGHTS VERSUS HUMAN RIGHTS

### A. Hold-Out Bondholders Versus Argentina in U.S. Courts

Litigation in U.S. courts resulted in the bondholders winning their cases on the merits because the courts rejected defenses that are traditionally available to the sovereign, such as the act of state doctrine, sovereign immunity, and the doctrine of comity.<sup>21</sup> Instead, the U.S. courts immediately focused on the breach of the bond contract explicitly waiving immunity on Argentina’s part.<sup>22</sup> However,

17. Burke-White, *supra* note 9, at 410.

18. Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT’L ARB. 335 (2006). For details of the debt restructuring agreement between Argentina and willing bond holders, see Gabriel Gomez-Giglio, *A New Chapter in the Argentine Saga: The Restructuring of the Argentine Sovereign Debt*, J. INT’L BANKING L. no. 2, 2005, at 345.

19. See *supra* notes 2-3.

20. Recently, bond holders also took Argentina before ICSID. The bond holders’ cases are still pending. See Giovanna Beccara & Others v. Argentine Republic, ICSID Case No. ARB/07/5; Giovanni Alemanni et al. v. Argentine Republic, ICSID Case No. ARB/07/8; and Giordano Alpi et al. v. Argentine Republic, ICSID Case No. ARB/08/9. *List of Pending Cases*, ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last updated Mar. 4, 2012). In the first case, which was renamed Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, a decision on jurisdiction and admissibility of the bondholders’ claims supported by two of the three arbitrators of the ICSID tribunal opening ICSID’s jurisdiction to the claims was issued in August 2011. Abaclat & Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, (Aug. 4, 2011), available at <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf>. In a dissenting opinion, arbitrator George Abi-Saab heavily criticized the majority decision arguing that sovereign bondholders’ claims would—as portfolio investments are at stake that are traded in the secondary capital markets with high velocity and a remoteness vis-à-vis the territory of the sovereign issuer as well as vis-à-vis the development of the sovereign issuer’s economy—not qualify as investments for which the ICSID Convention sought to create facilities to arbitrate investment disputes between foreign investors and host countries. Abaclat & Others v. Argentine Republic, ICSID Case No. ARB/07/5, Dissenting Opinion of Arbitrator Professor George Abi-Saab (Aug. 4, 2011), available at <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf>.

21. For a recap of the decline in U.S. courts’ acceptance of traditional sovereign defenses, see Charles D. Schmerler, *Restructuring Sovereign Debt*, in THE LAW OF INTERNATIONAL INSOLVENCIES AND DEBT RESTRUCTURINGS 431 (James R. Silkenat & Charles D. Schmerler eds., 2006).

22. See *Lightwater Corp. v. Republic of Arg.*, No. 02 Civ. 3804(TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003); *EM Ltd. v. Republic of Arg.*, 473 F.3d 463 (2nd Cir. 2007).

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enforcement of these judgments in the bondholders' favor turned out to be a more difficult affair than initially thought, to the extent that U.S. courts actually yielded their precedence so as not to jeopardize the Argentine debt restructuring schemes' implementation.<sup>23</sup> While HR issues were not explicitly argued, the New York courts exercised discretion with respect to pre- and post-judgment remedies by vacating the hold-out bondholders' remedies "in order to avoid a substantial risk to the successful conclusion of the debt restructuring . . . [which] is obviously of critical importance to the economic health of a nation."<sup>24</sup> However, once Argentina settled with seventy-six percent of the bondholders participating in the debt restructuring, hold-out bondholders had no technical problems enforcing their judgments.<sup>25</sup>

*B. Hold-Out Bondholders Versus Argentina in German Courts*

Holders of Argentine bonds that traded on the Frankfurt Exchange ended up even better off. Proceedings brought against the Republic of Argentina before the first instance courts in Frankfurt, Germany resulted in a full victory for the plaintiffs after the German Constitutional Court in Karlsruhe, Germany rejected the argument that a "general rule of public international law" existed—which, by virtue of Article 25 of the German constitution applied directly within the German legal order—possibly allowing a government to suspend payment on its debt obligations in a state of economic emergency.<sup>26</sup> Apparently in complete ignorance of the long-standing practice for over three decades of the so-called "three ring circus"<sup>27</sup> of sovereign debt restructuring based on (i) IMF and World Bank bail-out measures in a first ring, (ii) Paris Club restructuring of bilateral official debt in a second ring, and (iii) restructuring of debt owed to private creditors in the London Club in the third ring, the German Constitutional Court's majority decision found that a general rule assisting sovereigns in suspending payments on external debt does not exist temporarily without "a uniform or

23. *EM Ltd. v. Republic of Arg.*, 131 F. App'x 745 (2nd Cir. 2005).

24. *Id.* at 747.

25. *Gomez-Giglio*, *supra* note 18, at 345.

26. Beate Rudolf & Nina Hüfken, *Joined Cases Nos. 2 BvM 1-5/03 & 2 BvM 1-2/06*, 101 AM. J. INT'L L. 857 (2007). Under Article 25 of the German constitution, "allgemeine Regeln des Völkerrechts" (or general rules of public international law) are directly effective and applicable within the German legal order, and trump German statutes, which contain contradicting provisions. Following the jurisprudence of the BVerfG, such general rules of public international law include universal customary law and general principles of international law in the sense of sources of international law listed in Article 38 of the Statute of the International Court of Justice. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179; *see* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. art. 25 (Ger.); *see* 2 BvM 1/03, at para. 31 (Ger.).

27. The term "three-ring-circus" was coined by Daniel D. Bradlow & Sabine Schlemmer-Schulte, Negotiating International Financial Transactions, UNITAR e-learning course, offered via UNITAR's webpage. Daniel D. Bradlow & Sabine Schlemmer-Schulte, Negotiating Int'l Fin. Transactions e-Learning Course for UNITAR (Nov. 25-Oct. 31, 2011) (on file with Pacific McGeorge Global Business & Development Law Journal).

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codified insolvency law for sovereign states.”<sup>28</sup> Moreover, the state of emergency rule reflected in Article 25 of the International Law Commission (“ILC”) Articles on State Responsibility is inapplicable in non-public international law scenarios in which a private creditor extended credit to a sovereign debtor on the basis of waived immunity arrangements.<sup>29</sup>

The German Constitutional Court’s majority decision distinguished the private creditor-sovereign debtor relationship from the private foreign investor-host country relationship which is, among others, regulated by instruments such as bilateral investment treaties (“BITs”), the ICSID Convention, and individual contracts between an investor and the host country. Adopting an antiquated “black and white” analysis without hesitation, the German Constitutional Court deemed BITs and the ICSID Convention to be public international law instruments, a qualification that overlooked the rather special nature of these instruments because these instruments eliminate the classical investor home-state’s discretionary exercise of diplomatic protection on behalf of the foreign investor by virtue of substituting classical public international law state-sovereign powers with direct investor rights.

To her credit, Justice Lübke-Wolff in her dissenting opinion criticized the majority decision’s “black and white” analysis.<sup>30</sup> Justice Lübke-Wolff also recognized the customary law principle of economic emergency, particularly as a result of a sovereign’s unequivocal obligations to uphold superior, international law guarantees such as HR.<sup>31</sup> In terms of threats to people’s lives and health, the extreme consequences of the Argentine financial crisis on its population were deemed sufficient grounds to warrant Argentina’s chosen intervention, i.e. the temporary suspension of payments to foreign creditors to protect HR by preventing social unrest from taking its own dangerous, and potentially life-threatening, course.<sup>32</sup>

*C. U.S. Equity Investors Versus Argentina in the International Centre of Settlement of Investment Disputes (“ICSID”)*

Like the U.S. and German court decisions, the majority of ICSID tribunals awarded damages ranging in the hundreds of millions of U.S. dollar to foreign

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28. Sabine Schlemmer-Schulte, Sustainable Development and Sovereign Debt: “Sustainable Sovereign Debt” in Courts, Arbitral Tribunals, and IMF/World Bank Policy (June 16, 2011) (on file with Pacific McGeorge Global Business & Development Law Journal); see 2 BvM 1/03, at para. 32 (noting that “[d]as Völkerrecht kennt weder ein einheitliches noch ein kodifiziertes Konkursrecht der Staaten” [international law has neither a uniform nor a codified law of state bankruptcy]).

29. See 2 BvM 1/03, at paras. 32-33; see also G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

30. 2 BvM 1/03, at paras. 72-73.

31. See *id.* at paras. 81, 87.

32. J.F. HORNBECK, CONG. RESEARCH SERV., R41029, ARGENTINA’S DEFAULTED SOVEREIGN DEBT: DEALING WITH THE “HOLDOUTS” 3 (2010).

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equity investors.<sup>33</sup> Applying domestic contracts law and international treaties (BITs and the ICSID Convention), the tribunals found that Argentina breached the contracts it had with foreign investors.<sup>34</sup> These contracts extended exclusive licenses to foreign investors for thirty-five years and required Argentina to purchase energy from foreign investors who had acquired local energy firms in connection with a privatization program of government-owned industries and public utilities on the basis of tariffs to be calculated in U.S. dollars and were adjusted every six months in accordance with U.S.-Producer Price Index ("U.S. PPI").<sup>35</sup> The tribunals found further that Argentina violated standards for the protection of foreign investment under the U.S.-Argentina BIT.<sup>36</sup> The tribunals rejected the argument that Argentina's monetary policy measures were justified because of an economic emergency under either the special BIT provisions or customary international law.<sup>37</sup> Although the tribunals found that Argentina's measures fell short of an illegal expropriation, the tribunals agreed that full compensation for losses was due.<sup>38</sup> In particular, the tribunals applied the fair market value formula to calculate damages resulting in the full amount of lost tariff revenues through the licenses' thirty-five year term were awarded.<sup>39</sup>

None of the tribunals accepted Argentina's argument that, under its constitution as well as international HR instruments, Argentina was obliged to intervene in the crisis via monetary policy actions to prevent widespread social unrest.<sup>40</sup> While all of the tribunals explicitly or implicitly referred to the 1969

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33. See *supra* notes 5, 20 and accompanying text. It remains to be seen whether the ICSID tribunals dealing with the claims of holders of sovereign bonds issued by Argentina follow suit and render similarly big awards to foreign portfolio investors/bondholders.

34. See *supra* note 4 and accompanying text.

35. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, paras. 54-58, (May 12, 2005), 44 ILM 1205 (2005), available at [http://italaw.com/documents/CMS\\_FinalAward.pdf](http://italaw.com/documents/CMS_FinalAward.pdf).

36. See *id.* at 139-40.

37. *Id.* at 104. Note that one of the decisions (CMS Decision) was partially annulled. See CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Annulment Proceeding, para. 44 (Sept. 25, 2007), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687\\_En&caselId=C4](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caselId=C4). Note, however, that, based on the limited grounds for annulment, the annulment committee, while criticizing the award for flawed analysis in connection with the concepts of necessity in the format of custom or treaty norm, could neither find that the ICSID tribunal failed to state reasons nor that it manifestly exceeded its powers in the sense of Art. 52(1) ICSID Convention. *Id.* at 31-36. For a comprehensive analysis of ICSID tribunals' handling of Argentina's emergency defense, see Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 459 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

38. CMS Gas Transmission Co., ARB/01/8, Award, paras. 73-77; Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, paras. 75-80 (May 22, 2007), available at <http://italaw.com/docuemnts/Enron-Award.pdf>; Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, paras. 79-85 (Sept. 28, 2007), available at <http://italaw.com/documents/SempraAward.pdf>.

39. The fair market value measures an enterprise's value on the basis of the DCF (discount cash flow) method which in essence includes the net present value of future earnings in any amounts of damages in addition to moneys invested in the past. See CMS Gas Transmission Co., ARB/01/8, Award, paras. 411-17.

40. *Id.* at paras. 91-109; Enron Corp., ARB/01/3, Award, paras. 91-107; Sempra Energy Int'l, ARB/02/16, Award, paras. 96-115. Note that one ICSID tribunal which is not referred to above in footnote 4 accepted the notion



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Vienna Convention on the Law of Treaties (“VCLT”) in interpreting the relevant BIT and the ICSID Convention, none of the tribunals ever mentioned the explicit reference to HR in the preamble of the VCLT or the VCLT’s reference to other relevant rules of international law in Article 31(3)(c).<sup>41</sup> None of the tribunals seriously discussed the issue of conflicting norms of international economic law and HR (or sovereign monetary policy); by contrast, the tribunals seemed to be blind on the HR issues, let alone deem the HR issues to be *jus cogens*.<sup>42</sup> Similarly, no questions were raised regarding “unconscionable contracts” for the license arrangements, or “fundamental change of circumstances” as to the narrow economic emergency provisions of the BIT.<sup>43</sup>

### III. APPROACHES TO FRAGMENTATION ISSUES

#### A. Taking Stock: The Current Trend in Favor of Foreign Investors

The above cases of foreign debt and equity investors before domestic courts and international arbitral forums illustrate that, while proliferation of international law led to fragmentation and in turn may result in conflicts between norms of equal authority under our current system of international law, domestic courts and international arbitral tribunals facing the tension between several international law norms tend to favor the private corporate actors over sovereign debtors/host countries of foreign investment.<sup>44</sup> This tendency is not surprising since these corporate actors, because of their bargaining power, directly or indirectly influenced the design of the sources of law in the first place, i.e. loan/bond contracts, license contracts, and BITs applicable to their investments.<sup>45</sup>

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of an economic emergency in Argentina’s case. See *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (July 27, 2007), available at [http://italaw.com/documents/LGEEEnglish\\_003.pdf](http://italaw.com/documents/LGEEEnglish_003.pdf).

41. *CMS Gas Transmission Co.*, ARB/01/8, Award, para. 89; *Enron Corp.*, ARB/01/3, Award, paras. 65, 83, 87; *Sempra Energy Int’l*, ARB/02/16, Award, paras. 69, 112.

42. See generally *CMS Gas Transmission Co.*, ARB/01/8, Award; *Enron Corp.*, ARB/01/3, Award; *Sempra Energy Int’l*, ARB/02/16, Award.

43. See generally *CMS Gas Transmission Co.*, ARB/01/8, Award; *Enron Corp.*, ARB/01/3, Award; *Sempra Energy Int’l*, ARB/02/16, Award.

44. Based on the above discussed cases and for further reasons, several scholars diagnosed a backlash against investment arbitration. See *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Michael Waibel et al. eds., 2010). Some scholars even called into question the legitimacy of international investment arbitration. See Burke-White, *supra* note 9. Other scholars suggested renegotiating BITs. See Marc Jacob, *International Investment Agreements and Human Rights*, 2010 HUM. RTS, CORP. RESP. & SUSTAINABLE DEV. 33-34.

45. An unusual side effect of the domestic courts and international arbitral tribunals’ decisions was that, on the international plane, portfolio investors normally lose something in sovereign borrowing cases (the overwhelming majority of lenders have always agreed to restructure debt to the extent that some debt forgiveness can be called the norm by now), whereas equity investors whose riskier investments would be lost in a domestic bankruptcy case prevail over lenders. See Louis T. Wells, *Backlash to Investment Arbitration: Three Causes*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 341, 344-45 (Michael Waibel et al. eds., 2010) (noting that the longstanding practice by the majority of bondholders to agree to restructuring of

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From a broader international law perspective, the conflict between two or more primary norms of international law results from the proliferation of substantive international law rules. Primary substantive norms of international law are not necessarily always crafted by their authors to avoid conflicts with other international law norms established in different contexts. The ensuing issue of fragmentation of international law is systemic because the current international law system offers only a few rudimentary mechanisms to avoid conflicts among divergent substantive international law rules.<sup>46</sup> Rules on peremptory norms or *jus cogens* are among these few mechanisms.<sup>47</sup> Under Article 53 VCLT, *jus cogens* trumps conflicting inferior norms in the otherwise flat and non-hierarchical sphere of international law.<sup>48</sup> Further sources of public international law such as international treaties, customary law, and general principles of international law are all equal.<sup>49</sup> Other means that could be used to assist in eliminating perceived conflicts of primary norms of international law include tools that focus on chronology or speciality, e.g. *lex posterior* trumps *legi anteriori*, and *lex specialis* trumps *legi generali*.

None of the rules or tools listed even address the problem of a growing body of international law of a blurred nature, i.e., the body of law that cannot easily be qualified as either public international law or domestic law. Therefore, this growing body of international law may not be subject to the above noted rudimentary set of tools which manage conflicts between international law norms, nor may it be easily reigned-in based on domestic law hierarchies. Public international law is the body of law created by, and applicable to, states and international organizations: the classical subjects of public international law, dealing with each other. Domestic law applies to private individuals' (natural and legal persons) dealings with each other. Based on the traditional approach, in which there are only two spheres of law (public international or domestic), numerous activities in the global economy risk being wrongly characterized or to remain in limbo. In fact, many global commercial activities are so complex that they comprise a range of features, running from public international law elements

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debt, i.e. willingness to incur losses, as opposed to equity investors' recourse to arbitration for full satisfaction "creates a topsy-turvy world where foreign direct investors stand ahead of debt holders in the queue for claims in crises").

46. For a comprehensive analysis of the issue of fragmentation of international law, see Rep. of the Int'l Law Comm'n, 57th sess, May 2–June 3, July 11–Aug. 5, 2005, U.N. Doc. A/60/10; GAOR, 60th Sess., Supp. No. 10 (2005).

47. See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

48. *Id.*; see Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006) (discussing the interface of *jus cogens*, *erga omnes*, and U.N. charter norms with other norms of international law and the possible superiority of the former norms over the latter norms).

49. See Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 (implying equality to all three of the listed sources of international law).

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in the traditional sense (mixed elements), to domestic law elements in one single arrangement. Many arrangements actually open their very own chapter of international law and deliberately refrain from referencing classical public international law or any domestic law by creating their own legal terms of reference. Among the areas of a blurred nature in the sense of the traditional distinction between public international and domestic law are parts of foreign investment law<sup>50</sup> and the body of law created by the international financial institutions (“IFIs”). For example, the IFIs’ direct cooperation with private investors in connection with international development finance is difficult to put into either traditional category of law. While the participating IFIs such as the World Bank, the International Finance Corporation (“IFC”), and the Multilateral Investment Guarantee Agency (“MIGA”) are blessed with immunity from the jurisdiction of national courts by virtue of their founding charter when cooperating with private investors, the agreements these IFIs enter into with their counterparts deliberately lack a reference to applicable public international law or domestic law.<sup>51</sup> The agreements themselves create a new species of international law following policies primarily adopted by the IFIs internally, which are reproduced as financing conditionalities in the financial agreements.<sup>52</sup> In terms of the legal nature, the same analysis applies to the thousands of credit arrangements entered into by the IMF and the World Bank with their borrowing member countries. This is because the IMF and the World Bank have categorically refrained from ratifying the Second Vienna Convention on the Law of Treaties, and instead insist that the terms of their lending arrangements—rather than any public international contract law (treaty or custom)—are the sole source of law applicable to their economic activities.<sup>53</sup>

50. While BITs as well as the host countries’ tax codes and so forth may be easily identified as public international law and domestic law respectively, the millions of contracts between foreign investors and host countries, as well as all jurisprudence and arbitral awards related to foreign direct investment (“FDI”), are better classified as a new special species of international law without the public or private as a qualifying adjective in front of them. See Christian Tietje & Alexander Szodrich, *Staatsnotstand bei Staateninsolvenz—Individualrechte und Gemeinwohlbelange im transnationalen Wirtschaftsrecht* [State of Emergency in States Bankruptcy], 6 *Zeitschrift für Bankrecht und Bankwirtschaft* [ZBB] 498 (2007) (Ger.) (stressing that the ICSID Convention explicitly prohibits the intervention of an investor’s state of origin and the latter’s exercise of diplomatic protection in Article 27, Section 1, the moment the investor has started arbitration proceedings against a host state, in effect devoiding these proceedings of public international law nature).

51. See generally Sabine Schlemmer-Schulte, *Sovereign Debt: The Argentine Bonds Case*, in FRIEDEN IN FREIHEIT: PEACE IN LIBERTY: PAIX EN LIBERTÉ 973, 989 (Andreas Fischer-Lescano et al. eds., 2008). The World Bank provides guarantees to private investors or lenders, enters into co-financing arrangements with private firms, and engages in private-public-partnerships. The IFC lends to private productive enterprises as well as invests equity in them. The MIGA provides political risk insurance for private investors investing in developing countries. *Id.*

52. See generally *id.* at 990-94.

53. With their activities, the IFIs have opened a new chapter of international law which is largely independent from public international law or domestic law. The IFIs’ self-created body of law (rules, processes, and even new institutions such as the World Bank Inspection Panel applying this law) distinguishes itself from classical public international law in the sense that it contains quasi-enforcement mechanisms. The IFIs’ lending arrangements include clauses on suspension, cancellation of loans, acceleration of maturity in the case of default of

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Most scholars view fragmentation as problematic, while the report of ILC's Study Group on the Fragmentation of International Law seems to identify "the rapid expansion of international legal activity into various new fields and diversification of its objects and techniques"<sup>54</sup> as positive developments—to the extent that it appears that the report sees fragmentation of international law and related conflicts of various primary norms as possibly healthy competition.<sup>55</sup> Consequently, scholars have made various suggestions on how to remedy the specific fragmentation issue arising in developing countries' financial crises and resulting in tensions between the rights of foreign (debt and equity) investors as well as the HR of host country citizens. The non-exhaustive list of suggestions includes the following approaches: (i) Article 31(3)(c) VCLT; (ii) HR as *jus cogens* and/or *erga omnes* norms; (iii) *clausula rebus sic stantibus* (fundamental change of circumstances); (iv) general principles of international law such as unconscionable contracts concepts; (v) constitutionalization of international law; (vi) soft law codes of ethics for multinational corporations; and (vii) comprehensive reform of the framework for the global economy.

### C. De lege lata Approaches to Fragmentation

#### 1. Harmonizing Investment Protection and HR Based on Article 31(3)(c) of the VCLT<sup>56</sup>

In order to solve the tension between rights claimed by investors under BITs, investment contracts, and international custom on the one hand and HR claimed by the host country on behalf of its people on the other, an interpretation of BITs and further international norms protecting foreign investors in light of international HR on the basis of Article 31(3)(c) VCLT has been suggested.<sup>57</sup>

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payment, etc. The IFI borrowers are aware of these clauses and abide by the IFI lending arrangements' terms to avoid sanctions from the IFIs. See Sabine Schlemmer-Schulte, *Internationales Währungs—und Finanzrecht*, in *INTERNATIONALES WIRTSCHAFTSRECHT* 375 (Christian Tietje ed., 2009).

54. See Fragmentation of Int'l Law: Difficulties Arising from the Diversification and Expansion of Int'l Law, Int'l Law Comm'n, 58th sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682, at 8, 14 (Apr. 13, 2006).

55. See Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9 (2007).

56. Vienna Convention on the Law of Treaties, *supra* note 47, at art. 31(3)(c).

57. See Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY* 678, 682 (Christina Binder et al. eds., 2009); Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 82 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersman eds., 2009); Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Protection*, (Univ. of St. Gallen Law Sch., Working Paper No. 2008-1, 2008), available at <http://ssrn.com/abstract=1097529> (illustrating fragmentation issues in international investment law and making the case that harmonious interpretation of non-investment law related to investment cases by investment arbitration bodies carries the danger of de facto overruling of judicial bodies democratically).

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While international arbitral tribunals deciding investment disputes have been accused of solely reverting to investment law and turning a blind eye to HR norms,<sup>58</sup> HR arguments made by host countries may actually be easily adopted and integrated into the legal analysis by arbitrators of international investment disputes. The explicit reference to HR in the preamble of the VCLT, as well as the reference of Article 31(3)(c) VCLT to “any relevant rules of international law applicable in the relations between the parties,” opens the door for the adoption of international/regional HR regimes and their integration into an arbitral tribunal’s analysis of investment law cases.<sup>59</sup>

Such inclusion of the HR arguments is further encouraged by compromissory clauses laid out in BITs and/or in the contract, as well as Article 42 ICSID Convention featuring yet another explicit reference to applicable rules of international law, including HR law.<sup>60</sup> It should be noted that such inclusion of HR arguments has been suggested not only as an argument for a host country’s emergency measures in financial crises, but also in connection with a host country’s general regulation of foreign investors’ businesses outside crisis contexts.<sup>61</sup>

### 2. HR as *jus cogens* and/or *erga omnes* Norms

Elevating HR norms to the category of *jus cogens*—which, as peremptory norms of international law, would then trump investors’ rights derived from BITs or custom—has also been suggested.<sup>62</sup> While there is consensus that some HR have indeed achieved the status of peremptory norms, there is also consensus that most have not.<sup>63</sup> Hence, in the alternative, host countries may possibly rely on the *erga omnes* character of HR to solve the tension between investors’ rights and their own people’s HR in support of regulatory measures.<sup>64</sup> As *erga omnes* obligations or obligations owed to the international community as a whole, certain HR obligations deserve more attention than other international

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empowered with the original competence of dealing with the respective interpretation issues).

58. See LUKE ERIC PETERSON & KEVIN R. GRAY, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 24, 33-34 (2003), available at [http://www.iisd.org/pdf/2003/investment\\_int\\_human\\_rights\\_bits.pdf](http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf).

59. Vienna Convention on the Law of Treaties, *supra* note 47, at pmb1., art. 31(3)(c).

60. See Dupuy, *supra* note 1, at 56.

61. See Simma & Kill, *supra* note 57.

62. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 8, 2007, docket number 2 BvM 1/03, paras. 86-87 (Ger.), available at [http://www.bverfg.de/entscheidungen/ms20070508\\_2bvm000103.html](http://www.bverfg.de/entscheidungen/ms20070508_2bvm000103.html).

63. Examples of HR with *jus cogens* status include the prohibition of slavery, torture, genocide, racial discrimination, and apartheid. See MALCOLM N. SHAW, INTERNATIONAL LAW 720-21 (5th ed. 2003).

64. See the ICJ’s *obiter dictum* in Barcelona Traction. 1970 I.C.J. 32; see also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 188-215 (1989) (highlighting that HR obligations may be among those owed by states *erga omnes*).

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obligations, including investor protections, because of the public interest character of HR.

### 3. *The Fundamental Change of Circumstances*

Both BIT necessity clauses and Article 25 ILC Articles necessity defense reflect the concept of a possible deviation from the *pacta sunt servanda* obligation in the instance of a fundamental change of circumstances.<sup>65</sup> While the BIT and ILC Articles necessity concepts may invariably differ in terms of substantive content and a determination as to the relationship between them is of crucial importance, it suffices here to stress the fact that both the treaty-based emergency exceptions and the necessity defense under customary international law may be explored for their inherent HR arguments in financial crisis situations of the investors' host country.<sup>66</sup>

### 4. *General Principles of International Law Based on Unconscionable Contracts Concepts*

Aside from BIT provisions and customary international law, another strong argument tipping the balance in favor of HR may be found in the unconscionable contracts concepts of the common law, civil law, and further domestic law jurisdictions, which, if taken together, rise to the level of general principles of international law.<sup>67</sup>

## D. *De lege ferenda Approaches to Fragmentation*

### 1. *The Constitutional Hierarchy for International Law*

In response to fragmentation issues in international law, a constitutionalization of international law norms similar to the multilevel governance norms in domestic legal systems has been called for.<sup>68</sup> The

65. See Vienna Convention on the Law of Treaties, *supra* note 47, at art. 62.

66. For details regarding a possibly different substantive content and the relationship between treaty-based and customary emergency clauses, see Christina Binder, *Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 608 (Christina Binder et al. eds., 2009).

67. For an analysis of the unconscionable contracts concept under U.S. contracts law, see Wells, *supra* note 45, at 341; see also KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW: THE INSTITUTIONS OF PRIVATE LAW 61-70 (1987) (surveying common law and civil law contracts concepts that allow invalidation of contracts that are contrary to "public policy"); see, e.g., BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGBL.] 195, as amended, §138(1) (declaring null and void contracts which contravene society's sense of morals and justice).

68. See Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism, and 'Public Reason' in Investor-State Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 877 (Christina Binder et al. eds., 2009).

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constitutionalizing international law movement has been driven by the HR bodies' view that economic freedoms—including labor rights that protect collective bargaining, private contract law, and property rights—are legal preconditions for self-governance in civil societies and for competition in economic markets, just as much as the constitutional protection of HR is a legal precondition for democratic self-governance in political markets.<sup>69</sup> While “multilevel economic constitutionalism” and “multilevel HR law” supposedly complement each other, the world is far from having achieved such a constitutionalization of international law.<sup>70</sup>

### 2. *Soft Law Solutions: International Corporate Social Responsibility*

In light of the scarcity of domestic regulation in many capital-importing countries and the lack of investor regulation via BITs or custom, strong voices throughout the investor responsibilities debate have promoted international corporate social responsibility (“ICSR”).<sup>71</sup> ICSR obligations have been considered the flipside of investor protection in an otherwise weak regulatory environment in which multinational corporations (“MNCs”) are believed to enjoy impunity.<sup>72</sup> While a binding nature is absent, let alone any enforcement mechanisms, the entire ICSR concept remains a questionable one, but ICSR may at least shine some light on dubious MNC practices from the HR perspective, and thereby contribute to a change in MNC practices. It is hoped that ICSR soft law is converted into hard law.

### 3. *Comprehensive Reform of the Rules of the Game for the Global Economy*

Primarily for economic development reasons rather than HR reasons, an overhaul of the rules of the game for the global economy has been suggested.<sup>73</sup> Based on a combination of IMF/Bank conditionalities, the World Trade Organization (“WTO”) bargained for commitments to reduce trade barriers and

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69. See Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407 (2003).

70. See Petersmann, *supra* note 68, at 882.

71. See Peter Muchlinski, *Corporate Social Responsibility*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 637 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

72. See Shedrack C. Agbakwa, *A Line in the Sand: International (Dis)Order and the Impunity of Non-State Corporate Actors in the Developing World*, in THE THIRD WORLD ORDER AND INTERNATIONAL ORDER: LAW, POLITICS, AND GLOBALIZATION 1 (Antony Anghie, Bhupinder Chimni, Karin Mickelson & Obiora Okafor eds., 2003).

73. See Sabine Schlemmer-Schulte, *Die Rolle der Internationalen Finanzorganisationen im Nord-Süd-Konflikt*, in DAS INTERNATIONALE RECHT IM NORD-SÜD-VERHÄLTNIS 149 (Werner Meng et al. eds., 2005); Schlemmer-Schulte, *supra* note 51, at 1012.

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thousands of BIT-based standards.<sup>74</sup> This framework for the global economy relies on the idea of relative liberalization of economies and relative deregulation with an in-built North-South imbalance due to different bargaining powers.<sup>75</sup> As promoted by the IMF, the World Bank, the WTO, and BITs, the details of the rules of the game reflect asymmetries between North and South from an economic perspective.<sup>76</sup> The rules provide primarily for a one-way-street with the South giving full access to its markets to the North, but the North only reciprocating to a much smaller degree and maintaining relatively huge trade barriers.<sup>77</sup> From a legal perspective, irrespective of a formal equality between Northern and Southern governments, the material substance of the rules of the game for global trade, investment, and financial and capital movements between the North and South are neither uniform nor harmonized, and are inherently discriminatory in light of the South's disadvantages.<sup>78</sup>

## IV. CONCLUSION

The existing regime of international finance and investment law, taken in isolation, seems to privilege creditors/investors from capital-exporting countries over sovereign debtors/capital-importing host countries. The terms and conditions of international sovereign bond issues, and the terms and conditions under BITs for equity investments—possibly also extending to portfolio investments such as sovereign bonds traded on secondary markets<sup>79</sup>—carry primarily binding obligations towards creditors/investors from capital-exporting nations. In the particular context of BITs, there are no reciprocal requirements for the investor to carry responsibilities. Likewise, taken separately, the regime of international HR law is fraught with defects, mainly a lack of enforcement mechanisms. However, international practice of courts and arbitral forums is not

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74. Schlemmer-Schulte, *supra* note 51, at 1014.

75. *Id.* at 1013.

76. For a case study illustrating North-South asymmetries, see *LIFE AND DEBT* (Tuff Gong Pictures 2003).

77. From an economist perspective, see JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002), JAGDISH N. BHAGWATI, *THE WIND OF THE HUNDRED DAYS: HOW WASHINGTON MISMANAGED GLOBALIZATION* (2000), and WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS* (2001).

78. Schlemmer-Schulte, *supra* note 51, at 1013.

79. See *Abaclat & Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), available at <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf> (finding that ICSID's jurisdiction covers sovereign bonds as does the applicable Italy-Argentina BIT). This decision opening—in addition to the domestic courts designated under the bonds contracts as the competent courts to address claims by aggrieved bondholders—an international arbitral forum as another supplemental avenue for creditors of sovereign debtors may be another setback for the human rights of the people of the host country in light of the general trend of ICSID tribunals to give priority to business investors' rights based on BITs. It may also frustrate international efforts of meaningful sovereign debt restructuring in the absence of an international bankruptcy procedure for sovereigns mired in debt and default. See Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711 (2007).



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necessarily supposed to treat every specialized rule-system as independent from the rest of international law.<sup>80</sup> As noted above, there are *de lege lata* tools available that allow these courts and forums to apply international finance/investment law and international HR law in tandem. The combined application of international finance/investment law and international HR law may reduce the imbalances in the specialized field of international finance/investment law. At the same time, the combination may also add teeth to international HR law in terms of enforcement until policy-makers, in the long-term, agree on *de lege ferenda* measures to help solve the problems caused by the fragmentation of international law.<sup>81</sup>

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80. One of the few areas of international law that has skillfully meandered around other specialized regimes of international law and may indeed continue to qualify as an autonomous, self-contained regime is the IFI created body of law. For details regarding how the IFIs managed to remove themselves from much of the rest of international law, see Sabine Schlemmer-Schulte, *International Monetary Fund*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2011); Sabine Schlemmer-Schulte, *International Bank for Reconstruction and Development*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2011); Sabine Schlemmer-Schulte, *THE WORLD BANK, MONOGRAPH, INTERNATIONAL ENCYCLOPEDIA OF LAWS—INTERGOVERNMENTAL ORGANIZATIONS* (forthcoming 2012).

81. This approach to fragmentation of international finance/investment law and international HR law would also address a major concern of Philip Alston, an eminent HR lawyer. According to Alston, the HR community has mostly failed to effectively engage with the development agenda. See Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755 (2005).