

HUMAN RIGHTS LAW IN INTERNATIONAL INVESTMENT ARBITRATION

Vivian Kube & E.U. Petersmann

ABSTRACT

This paper discusses problems of legal fragmentation of international investment law and human rights law and related legal methodology questions regarding person-oriented principles of justice (such as human rights and “proportionality balancing”) in contrast to the more commonly applied focus on judicial balancing of state-centered “principles of justice” (like state responsibility). The paper builds on a comprehensive survey of publicly available investor-states disputes in which human rights were invoked by the parties to dispute (investor, host state and arbitrators ex officio) or third party interveners.

The assessment of these awards in Part II of this paper suggests that arbitral tribunals are more open towards human rights as due process rights and as principles of procedural fairness and balancing than towards integrating human rights as an authoritative legal regime consisting of legally enforceable entitlements. The only exception to this general trend remains the right to property. However, the assessment generally reveals a lack of any systematic methodology as to how to respond to human rights argumentation.

Part III traces the legal reasons behind these observations by looking into the entry points for human rights and obstacles for integration as they emerge from the texts of BITs and IIAs. This part demonstrates the possibilities that already exist for arbitrators to take

· Vivian Kube is a doctoral candidate at the Law Department of the European University Institute in Florence. Ernst-Ulrich Petersmann is emeritus professor of international and European law at the European University Institute in Florence. The authors can be reached at Vivian.Kube@EUI.eu and Ulrich.Petersmann@EUI.eu.

into account human rights, such as jurisdiction clauses, applicable law clauses, definitions of “investments”, the customary rules of treaty interpretation, preambles of BITs, relevant protection standards and rules on awarding damage compensation.

The conclusion suggests that the shortcomings are not an inevitable result of textual limitations, as alternative outcomes of ISDS disputes are legally possible and justifiable. In the absence of any development of a clear methodology, textual adjustment might thus not counter fragmentation. Systemic reform might be necessary to ensure transparent, coherent and balanced approaches to human rights argumentation.

KEYWORDS: *human rights, investment law, investor-state arbitration, judicial comity, legal methodology, principles of justice, treaty interpretation*

