

THE PUBLIC INTEREST PERSPECTIVE OF INTERNATIONAL COURTS AND TRIBUNALS

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I. INTRODUCTION

The proliferation of international courts and tribunals since the early 1990s has sparked debates about their overlapping interests and jurisdiction, the need for some consistency, the scarcity of available financing, as well as their precise role and function in alleviating justice and other concerns of interest to the international community. It should not, however, be forgotten that international courts and tribunals are living organisms whose stakeholders may not always share common core beliefs or expectations, which in time give rise to tensions that are not susceptible to remedial action. By way of illustration, in the creation of the International Criminal Tribunal for Rwanda (ICTR), the post-genocide Rwandan government broke ranks with the United Nations (UN) and the Security Council (UNSC) because of its desire to control a large part of the processes of the tribunal.² Similarly, the initial case law of what is now known as the Court of Justice of the European Union (CJEU) evinces its judges' struggle to break away from the shackles of the narrow meaning ascribed to the European Court (EC) treaties by their founding members. The European Court of Justice, as was known then, could well have been disbanded by its creators in the aftermath of the *Van Gend en Loos*³

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² See Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 505 (1996).

³ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 1; see Damian Chalmers & Luis Barroso, *What Van Gend en Loos Stands For*, 12 INT'L J. CONST. L. 105, 105-06 (2014).

case; yet not only did it survive, but it also went on to flourish. Some tribunals are not so lucky as the tug-of-war between the judiciary and the tribunal's creators can lead to its demise. This is amply demonstrated by the elimination of the Southern African Development Court (SADC).⁴ In between international judicial institutions that contest the authority of their creators—which go on to thrive—and those whose struggle culminates in their demise, one also finds a plethora of courts and tribunals that lead an uneventful existence. Some are hugely successful and generate a significant caseload, such as the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), as well as the vast majority of international commercial arbitral entities, such as the International Chamber of Commerce (ICC) or the London Court of International Commercial Arbitration (LCIA). Others are ambitious, but their caseload does not seemingly justify the tremendous costs associated with their operation. Some of the new generations of hybrid dispute resolution fora (HBRD), which operate in special economic or financial zones, such as the Astana International Financial Centre (AIFC) Court,⁵ fall within this sphere of criticism.

This academic and practical interest in the proliferation of international courts and tribunals has also given rise to a discussion as to when, and the conditions under which, these may be characterized as “failed” institutions.⁶ This discussion is centered on two axels, namely the legality and legitimacy of a tribunal on the one hand, and the capacity of the tribunal to attract sustainable end users on the other. The two are usually inter-linked, but there could well exist such political and financial circumstances whereby certain stakeholders have little choice but to employ the services of an otherwise illegitimate tribunal. By way of illustration, developing states, with investment disputes before investment tribunals, may well feel that the bilateral investment treaties (BITs)—signed with powerful industrial states—gave them little bargaining space to agree on other forms of dispute settlement that take into consideration their human rights and environmental obligations and concerns. As a result, even though investment tribunals attract a significant number of end users, many end users are justified in viewing their jurisdiction as being largely illegitimate and the result of “coercion.”⁷

⁴ See Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. Q. 870, 871 (2013); *infra* note 42.

⁵ WELCOME TO THE AIFC COURT, <https://aifc-court.kz/> (last visited Sept. 27, 2020); see THE COURTS OF THE FUTURE: INTERNATIONAL COMMERCIAL COURTS AND THE FUTURE OF INTERNATIONAL DISPUTE SETTLEMENT (G. Dimitropoulos & S. Brekoulakis eds., forthcoming 2021) (providing a more detailed account of HDRF).

⁶ See THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS 3-5 (Theresa Squatrito et al. eds., 2018).

⁷ Several Latin American nations have entered into unilateral denunciations of BITs, as well as international investment agreements (IIAs) in recent years, as was the case with the denunciation of the ICSID Convention by Bolivia, Venezuela, Nicaragua and Ecuador

This article, while acknowledging the emerging literature on the failure of international courts,⁸ seeks to assess their legitimacy on the basis of their public interest dimension. Indeed, this author strongly believes that the only thread that ultimately renders all international courts and tribunals legitimate is their pursuit of public interest, in one or more shapes and forms. It is, therefore, important to not only define the meaning of public interest, but also to incorporate it into the substantive rules of tribunals and hold them accountable in their pursuit of the parties' claims. Of course, it may be claimed that the public interest dimension of international courts and tribunals should only be of concern to those entities funded by states directly or through state-generated assets. This is not entirely true. There is a legitimate interest for states to control and be appraised of the commercial dealings of non-state actors. Any other result would legalize cartels and monopolies, consumer fraud, tax evasion, or even the collapse of financial institutions.⁹ Hence, public interest should permeate the operation of even those courts and tribunals that deal with private disputes, such as (commercial) arbitral tribunals.¹⁰ The European Court of Human Rights (ECtHR) has clearly stated that article 6 of the European Convention on Human Rights (ECHR), which chiefly concerns the right to fair trial in criminal proceedings, covers also civil and commercial proceedings.¹¹

(also known as *Alternativa Bolivariana*) through a series of successive denunciations from 2007 to 2012. See Helen Yaffe, *The Bolivarian Alliance for the Americas: An Alternative Development Strategy*, 3 INTL. J. CUBAN STUD. 128 (2011).

⁸ The Max Planck Institute for International, European and Regulatory Procedural Law in Luxembourg set out a research agenda in 2016 to explore this very topic. The agenda's title was 'Debacles: Illusions and Failures in the History of International Adjudication'. See *Debacles: Illusions and Failures in the History of International Adjudication*, MAX PLANCK INST. LUX. FOR PROCEDURAL L., <https://www.mpi.lu/news-and-events/debacles-illusions-and-failures-in-the-history-of-international-adjudication/> (last visited Sept. 23, 2020). The project does not seem to have made any progress since its initial conference in 2016, but it has set out the tentative outlines for a theoretical debate.

⁹ Indeed, the global financial crisis that began in 2008 is the result of imprudent behavior by the private financial industry, the repercussions of which impacted largely middle and lower-income households. See *generally* SOVEREIGN DEBT AND HUMAN RIGHTS (Ilias Bantekas & Cephas Lumina eds., 2018).

¹⁰ That the mandatory/peremptory laws of the seat are binding on the parties and tribunals is further evident from the fact that arbitration agreements may not circumvent mandatory EU legislation, as is the case with the EU Commercial Agents Directive. In *Accentuate Ltd v. Asigra Inc*, [2009] EWHC 2655 (QB), the English High Court held that the parties could not circumvent the indemnity and compensation provisions of the Directive and any award that was in breach of these mandatory provisions would be refused on grounds of public policy.

¹¹ As a result, the ECtHR has held "that contracting states have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases" *Dombo Beheer B.V. v. Neth.*, 18 Eur. Ct. H.R. 213, ¶ 32 (1993); *Levages*

The article is divided in three large sections. The first explores legitimacy and public interest from the purview of international law with a view to later situating within this framework the mandate and functions of international courts and tribunals. Section III undertakes a typology of international versus domestic courts and tribunals. Finally, Section IV examines the emerging public purpose of international courts with particular reference to investment tribunals, whose legitimacy deficit has given rise to multilateral efforts to introduce a unified and coherent system of investor-state dispute resolution.¹²

II. LEGITIMACY AND PUBLIC INTEREST

Some argue that international adjudication is a “law-based way of reaching a final decision” and that the “law-based nature of adjudicative decision-making distinguishes adjudication from other processes, such as political decision-making and mediation.”¹³ Two legitimacy-based approaches have been advanced in the literature and these have been adapted in turn to explain the concept of judicial legitimacy from the perspective of international law, namely: sociological (or descriptive) and normative legitimacy.¹⁴ The sociological approach is chiefly concerned with the perception of legitimacy ascribed to a particular judicial institution, whereas the normative approach investigates whether such institution deserves to be regarded as authoritative (or whether its authority is justified).¹⁵ It is evident that both approaches are predicated on external perceptions by relevant constituencies. A court that makes a claim for normative legitimacy is effectively arguing for the ‘right to rule,’ whereas a claim of sociological legitimacy is

Prestations Serv. v. Fr., Eur. Ct. H.R. 1530, ¶ 46 (1996); see also C Ambrose, *Arbitration and the Human Rights Act*, LLOYD’S MAR. & COM. L. Q. 468 (2000); Charles Jarrosson, *L’Arbitrage et la Convention Européenne des Droits de l’Homme*, 4 Revue de l’Arbitrage 573 (1989) (Fr.); Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights*, 21 J. INT’L ARB. 413 (2004); see also MATTI S. KURKELA ET AL., *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* (2d. ed., 2010).

¹² The reform of investor-state dispute resolutions is of concern to several inter-governmental organizations and the EU has taken concrete steps to streamline the process, at least with respect to its investment competence. See Thomas Dietz, Marius Dotzauer & Edward S. Cohen, *The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System*, 26 REV. INT’L POL. ECON. 749, 760 (2019).

¹³ Cesare P.R. Romano et al., *Mapping International Adjudicative Bodies, the Issues, and Players*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 4-5 (Cesare P.R. Romano et al. eds., 2014).

¹⁴ See, e.g., C Thornhill et al., *Introduction: Legality and Legitimacy – Between Political Theory and Theoretical Sociology*, in LEGALITY AND LEGITIMACY: NORMATIVE AND SOCIOLOGICAL APPROACHES 7-12 (Samantha Ashenden et al. eds., 2010).

¹⁵ *Id.* at 10-12.

perceived as already having that right.¹⁶ Normative legitimacy is prescriptive, whereas sociological legitimacy is agent-relative and subjective.¹⁷ Judicial legitimacy, particularly in the sphere of international law, is inextricably woven around the concept of authority, which ultimately dictates adherence, obedience or even disobedience.¹⁸ Because of the horizontal nature of international law and the juridical equality of states, which itself is based on consent, the legitimacy of domestic courts is different from (as is also its origin) their international counterparts.¹⁹ The source of authority, for example, is directly affected by perceptions as to the legitimacy of the source itself (e.g., the UNSC as creator of tribunals in countries where the UN has allowed grand massacres to take place).²⁰ In contrast, acts of parliament (or constitutions) from which regular courts derive their creation are not under dispute. The same is true of the processes employed by an international tribunal in exercising its powers, as well as the overall outcomes such processes produce.²¹

This article takes the view that irrespective of the source of authority of an international tribunal, its legitimacy is guaranteed only where its outcomes and processes are in the public interest, namely if they adhere to fundamental human rights standards (or whichever of the two generates a higher standard). Von Bogdandy and Venzke argue that international courts are multifunctional actors who exercise public authority and therefore require democratic legitimacy. Their perception of a public law theory of international adjudication is predicated on three main building blocks, namely: multi-functionality, the notion of an international public authority, and democracy.²² One cannot artificially divorce source from processes and outcomes because the source dictates those who sit at the helm of the tribunal and in turn restricts their decision-making autonomy. The source does so, not necessarily by forcing judges to decide in a particular way,²³ but by artificially

¹⁶ Daniel Bodansky, *The Concept of Legitimacy in International Law*, in LEGITIMACY IN INTERNATIONAL LAW 313 (Rüdiger Wolfrum & Volker Röben eds., 2008); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, in LEGITIMACY, JUSTICE AND PUBLIC INTERNATIONAL LAW 29 (Lukas H. Meyer ed., 2009).

¹⁷ Bodansky, *supra* note 16, at 313.

¹⁸ *Id.* at 313-16.

¹⁹ See, e.g., N.P. Adams, *Institutional Legitimacy* (2018) 26 J. POL. PHIL. 84, 86 (2018).

²⁰ ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? ON THE FUNCTIONS, A PUBLIC LAW THEORY ON INTERNATIONAL ADJUDICATION 28-101 (2014).

²¹ See Clifford James Carrubba, *A Model of Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 J. POL. 55, 68 (2009).

²² BOGDANDY & VENZKE, *supra* note 20, at 5-28.

²³ See Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008). Significant research has also been undertaken by lawyers using methods and sources from cognitive psychology and behavioral economics, much of which can be applied to analyze decision-making of international judges and arbitrators, particularly as regards heuristics and the biases debate. See Tomer Brode, *Behavioral International Law*, 163 U. PA. L. REV. 1099 (2015). And, more recently the

fragmenting the law or by dictating a choice of law that excludes human rights as an underlying, overarching, and primary consideration in all cases. A typical example is investment arbitration where human rights play only a spasmodic, non-systematic role in disputes where fundamental human rights are at stake and their non-implementation in a particular dispute affect significant numbers of people.²⁴ Moreover, in inter-state loan or finance agreements, the choice of private law as the parties' governing law is equally unacceptable as the court or tribunal assuming jurisdiction in the event of a dispute will be justified in avoiding reference to the human rights dimension of the dispute in question because of its strict mandate under the choice of law clause. In such cases, the source of the tribunal may well be legitimate, but the process and outcome are certainly not.

Ordinarily, an outcome predicated on human rights and public interest would be perceived as legitimate by all constituents. But this is hardly the case. Even the most fundamental human rights are viewed conspicuously in liberal democracies, let alone countries where the abuse of rights is a daily and uncontested phenomenon. Terrorism, for example, has given rise to popular perceptions in the West, particularly as a result of negative propaganda, that equates all adherents to Islam with terrorists.²⁵ It is not surprising, therefore, that the application of human rights standards to suspected terrorists and the prohibition of torture is viewed by many as mere political correctness.²⁶ In equal manner, the business world, lawyers, politicians, and financiers see nothing wrong with the evils of liberalized trade, simply blaming corrupt leadership and too much public engagement instead of private initiative for the massive poverty engulfing the globe. From the perspective of all these stakeholders, a process and outcome that ensures fundamental civil and political and socio-economic rights to all people is simply unfair and unjust because of their unequal participation in global wealth.

III. TYPOLOGY OF INTERNATIONAL VS. DOMESTIC COURTS

In the scholarly literature, an international court or tribunal implicitly consists of a judicial entity established directly by treaty or by the executive organ

theory of 'nudges'. See NUDGING: POSSIBILITIES, LIMITATIONS AND APPLICATION IN EUROPEAN LAW AND ECONOMICS (Klaud Matis & Avishalom Tor eds., 2016).

²⁴ Several cases are provided in following sections of this article. See Bree Farrugia, *The Human Right to Water: Defences to Investment Treaty Violations*, 31 ARB. INT'L (2015) (for a positive perspective). See generally *Human Rights in International Investment Law and Arbitration* (Pierre-Marie Dupuy, Francesco Francioni & Ernat-Ulrich Petersmann eds., 2009).

²⁵ See John Sides & Kimberly Gross, *Stereotypes of Muslims and Support for the War on Terror*, 75 J. POL. 583 (2013).

²⁶ See ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 738 (2d. ed., 2016).

of an international organization.²⁷ The first category is the most prevalent and includes courts such as the ICJ, as well as quasi-judicial entities, such as the UN Human Rights Committee,²⁸ whereas the second category comprises the likes of the International Criminal Tribunal for Yugoslavia (ICTY) and Rwanda (ICTR). In between, one finds several hybrid tribunals, such as the Sierra Leone Special Court (SLSC), which are not necessarily set up by treaty and whose existence is predicated on both domestic and international law, with significant financial and “intellectual” input from one or several international organizations.²⁹ This typology of international tribunals/adjudication is predicated on traditional dichotomies between public and private, states and non-state actors, as well as the legal nature of the underlying agreement (e.g. treaty versus private agreement). On this basis, tribunals set up by private agreement, even if they ultimately resolve matters pertaining to the heart of the state, such as public procurement or enforcement against state assets, are not viewed as international tribunals. I am referring particularly to international commercial arbitral tribunals, as well as those extraordinary domestic courts designated by states to resolve disputes that would otherwise engage the jurisdiction of international courts and tribunals such as the ICJ and the Permanent Court of Arbitration (PCA). An example of the latter kind includes choice of court clauses in favor of the courts of EU nations in multilateral lending agreements between states (as both lenders and borrowers) and multilateral development banks (which are inter-governmental organizations) or inter-governmental bail out funds.³⁰

As a result of the comments offered above, an international judicial organ is, in the opinion of this author, any entity set up to resolve an international or transnational dispute (irrespective of whether the actors pursuing its resolution are

²⁷ Michael Zurn, *International Courts: Command v. Reflexive Authority in INTERNATIONAL COURT AUTHORITY* 382, 384 (Karen J. Alter et al. eds., 2018); YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS: A GOAL-BASED APPROACH* 240 (Cambridge Univ. Press 2016).

²⁸ SHANY, *supra* note 27, at 225 (explaining that quasi-judicial entities, that is entities whose pronouncements or findings are not binding on the parties, as is the case with UN treaty-based human rights organizations such as the Human Rights Committee (HRCtee), are not always encompassed within the sphere of international courts and tribunals).

²⁹ Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137; *see also* U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (Oct. 4, 2000); Avril McDonald, *Sierra Leone's Shoestring Special Court*, 84 *Int'l Rev. of the Red Cross* 121 (2002).

³⁰ By way of illustration, article 13 of the Financial Assistance Facility Agreement of 14 March 2012 entered into between Greece and EFSF stipulated that English law was the governing law of the agreement, with the courts of Luxembourg being granted jurisdiction in the event of dispute.

states or non-state actors), whether through a binding or non-binding judgment/award and irrespective of the legal nature of the agreement in which the parties' chosen dispute resolution mechanism is included.³¹ Indeed, the nature of the dispute (and although the different nationality of the parties most often plays a crucial role, in the field of human rights, it does not) and the parties' autonomy over the process and governing law ultimately dictate the domestic or international character of the court or tribunal.

This typology is not meant to serve a mere theoretical construct, but rather to make the very practical point that an international tribunal must always dispense international law, as opposed to holding as sacrosanct any domestic law designated by the parties. The idea is that international tribunals cannot and should not be set up in order to violate existing international law, including fundamental human rights, but to resolve disputes submitted by the parties within the overall framework of international law. If the mandate of international tribunals violates existing norms of international law, then clearly they fall foul of the international legal order on which they are predicated and such an outcome is absurd and unsustainable. The purpose of international tribunals must be to conform and promote international legal order because this is consistent with the procedural and substantive rules with which they must comply. Arguments in favor of a selective fragmentation can have no place in such a discourse.³² The prevalence of international law in the

³¹ By analogy, an international arbitration under Article 1504 of the French Code of Civil Procedure (CCP) is dependent on the existence of international trade interests. CODE DE PROCÉDURE CIVILE [C.P.C.] [CODE OF CIVIL PROCEDURE] art.1504 (Fr.). This is taken to mean that the arbitration is commercially linked to more than one country. The concept of "international trade" need not involve more than one nation, so long as this is not just France. Although the different nationalities of the parties or the law chosen may be relevant in distinguishing between domestic and international arbitration, neither of these is determinative in-and-of-themselves. Equally, the intention of the parties as to the international nature of the arbitration is of no relevance. *See also* Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Mar. 13, 2007, 04-10.970. Bull. civ. I, No. 102 (Fr.); Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Oct. 17, 2000, 98-11.776. Bull. civ. I, No. 243 (Fr.).

³² Investment tribunals, although generally considered anti-human rights, are increasingly willing to accept that human rights law imposes a set of obligations on host states that are overall consistent and not in conflict with their obligations towards foreign investors. *Aguas Argentinas, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ¶ 19 (May 19, 2005); *Aguas Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability ¶ 263 (July 30, 2010) ("Argentina is subject to both international obligations, *i.e.*, human rights *and* treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations"); *SAUR Int'l v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Responsibility ¶ 330 (June 6, 2012). Be this as it may, no investment tribunal has ever

substantive and procedural adjudication of international and transnational disputes is taken for granted even with respect to arbitration between private parties.³³ An arbitral tribunal cannot issue an award in the knowledge that the parties' conduct involved a serious crime, such as fraud, corruption or murder, nor can they ignore serious torts, such as infringement of EU competition rules or failure to comply with public procurement legislation.³⁴ If arbitral tribunals were allowed to do so (presumably on the basis of party autonomy), then the transnational nature of the dispute would necessarily entitle the parties to freely recognize and enforce their award throughout the world on the basis of the 1958 New York Convention.³⁵ Hence by submitting a transnational dispute to arbitration, the parties would be freed from obligations otherwise existing under domestic or international law and, as a result, arbitration would constitute a lawful vehicle to evade obligations under national law. To drive the point even harder, it is now widely accepted that both arbitrators and arbitral institutions enjoy liability in tort and under contract if they knowingly violate the law of the *lex arbitri*.³⁶ Hence, there is no stipulation or assumption of any kind that somehow transnational private dispute resolution allows parties to escape public scrutiny or liability in tort or criminal law.

explained where the appropriate balance lies, other than stipulating that a state's regulatory competence allows it to expropriate a foreign investment subject to appropriate and prompt compensation.

³³ As already stated in the introduction, the ECtHR has established a long line of precedent whereby international commercial (arbitral) tribunals are bound to observe due process guarantees. See Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 BRIT. INST. INT'L & COMP. L. Q. 991 (2020).

³⁴ See generally INT'L CHAMBER OF COM., *Addressing Issues of Corruption in International Commercial and Investment Arbitration* (Domitille Baizeu & Richard H. Kreindler eds. 2013).

³⁵ One should not confuse the applicability of domestic, as opposed to international, public policy dictated in Art V(2)(b) of the 1958 New York Convention. 330 U.N.T.S. 38 (1959). Even so, countries such as France and Switzerland have shown themselves willing to substitute domestic public policy with international public policy in their assessment of foreign awards. The Swiss Federal Tribunal in *W v. F and V*, (1995) Bull ASA 217, specifically intimated in favor of a universal conception of public policy, under which an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognized in all civilized countries. See Cour d'appel [CA] [The Court of Appeal] Paris, Sept. 30, 1993 *European Gas Turbines SA v. Westman International Ltd.*, [1994] REV. ARB. 359, (holding that bribery was not only contrary to French public policy but moreover contravened the ethics of international commerce).

³⁶ On the other hand, a private dispute between two private parties sharing the same nationality is not an international dispute (with the exception of countries such as France and Portugal, as demonstrated above), and the enforcement of any mandatory rules will be undertaken by the competent authorities of the forum in accordance with its laws.

IV. EMERGING PUBLIC PURPOSE OF INTERNATIONAL TRIBUNALS

The previous section made the point that the characterization of a judicial entity as either domestic or international should be predicated on the nature of the dispute under consideration and the autonomy of the parties to dictate its processes and governing law. Prior to the end of the Cold War, the assumption was that conduct produced solely in one state could not give rise to reaction and protest from other states, unless the conduct in question caused injury to these other states.³⁷ But the concept of injury did not, in practice, encompass human rights or other violations (e.g., stemming from the laws of internal armed conflict) committed by the state against its own citizens. This artificial assumption no longer holds ground whether in law or in respect of the current perception of the impact (political or legal) of domestic conduct.³⁸ Indeed, in the era of globalization, even the trade, commercial, or consumer practices of one nation can produce an adverse effect on the citizens of other states thousands of miles away.³⁹ This dense inter-connectivity between the conduct of states—or conduct stemming from non-state actors from within a state,⁴⁰ which is accepted and regulated by states—requires that it become the subject matter of international law. By extension, the adjudication of disputes concerning such conduct, whether submitted to “domestic” or international tribunals, must also be subject to international law, both procedural and substantive. The “real” governing law of a dispute regulated within the sphere of international law is ultimately the subject matter of the latter body of law and no tribunal deciding a pertinent dispute can avoid its application.

The *Tecmed* investment arbitration is illustrative of the artificiality of applicable laws whose effect is to prevent judges and arbitrators from applying customary rules premised on public policy (not to mention common sense)

³⁷ See Kristen Walker, *An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law*, 26 NYU J INT’L L & POL 173 (1994) (exploring the history of this non-intervention provision during the Cold War).

³⁸ The creation of the ICTY and ICTR, as well as subsequent hybrid tribunals, such as that of Sierra Leone, Cambodia, Lebanon, Timor Leste, and the vast majority of cases before the ICC effectively concern domestic conflicts or situations. Although it is true that they caused transnational ripples such as internal displacement and refugee flows, massive human rights violations, regional instability and intervention by third states, and inter-governmental organizations. See THE INTERNATIONAL CRIMINAL COURT AND AFRICA (Charles Chernor Jalloh & Ilias Bantekas eds., 2017).

³⁹ In Bangladesh, for example, the mere consideration by the US Congress of banning products manufactured by child labor led to the dismissal of female children in the textiles industry, many of whom were forced into prostitution by destitute parents. See Jose E. Alvarez & Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT’L L. 126, 132 (2002).

⁴⁰ In the case of *Elmi v. Australia*, UN Doc CAT/C/22/D/120/1998 (1999), ¶ 5.5, the Committee Against Torture (CAT) (treating members of the Hawiye clan in central Somalia as holding ‘effective control’).

considerations.⁴¹ This tension is nowhere more striking than in the field of international foreign investment. Despite the often-cited fragmentation of international investment law from general international law the tide seems to be shifting towards a human-centered investment architecture through the practice of investment tribunals and BITs, albeit at a slow pace. Model BITs are gradually rendering human rights commitments an integral part of investment. The preamble to the 2015 Norwegian Model BIT recognizes that:

The promotion of sustainable investments is critical for the further development of national and global economies as well as for the pursuit of national and global objectives for sustainable development, and understanding that the promotion of such investments requires cooperative efforts of investors, host governments and home governments.⁴²

Moreover, in its definition of national treatment (i.e., that foreign investors shall be afforded the same treatment as the host state's nationals) in Article 3(1), as well as most favored nation (MFN) treatment, the BIT includes a very important footnote, which clarifies that:

A measure applied by a government in pursuance of legitimate policy objectives of public interest such as the protection of public health, human rights, labor rights, safety and the environment, although having a different effect on an investment or investor of another party, is not inconsistent with national treatment and most favored nation treatment when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment.⁴³

⁴¹ The *Tecmed* case involved an investment agreement between Tecmed and Mexico with the purpose of constructing a landfill. Following the expiry of the first license period the Mexican government refused to renew the license, arguing correctly that the project caused adverse environmental and health effects on the local population. As a result, the investment was effectively terminated, and the investor stood to suffer a financial loss. The investment tribunal to which the dispute was referred held that the 'government's intention [was] less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measure.' See *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ARB(AF)/00/2, Merits, ¶ 116 (May 29, 2003); see also *Compãnia del Desarrollo de Santa Elena S.A. v. Costa Rica*, ARB/96/1, Merits, ¶ 71 (Feb. 17, 2000).

⁴² 2015 Norwegian Model BIT, NOR. GOV'T SEC. & SERV. ORG. 2 (May 13, 2015), <https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf>.

⁴³ *Id.* at 5 n.1.

The new generation of Model BITs is gradually making express and detailed reference to the obligation of parties to respect their environmental, labor, and transparency obligations, thus implicitly stipulating that MNCs should not deviate from such standards even by means of contract.⁴⁴ These provisions somewhat approach Simma's proposal in favor of a "human rights audit," whose objective is to incorporate all of the host state's human rights obligations into contracts with foreign investors.⁴⁵ Investment tribunals are equally redrawing the boundaries of the host state's sovereign authority to take measures of an expropriatory nature. For example, there is in practice a presumption in favor of tax sovereignty (and hence of fiscal self-determination), which renders expropriation claims almost redundant.⁴⁶ In the *Methanex* case, the investment tribunal held that the banning of a harmful gasoline additive was legitimate because it was not discriminatory and was undertaken within the scope of the host state's *bona fide* police powers.⁴⁷ The tribunal in *Saluka* fleshed out the competing tensions as follows:

It is now established in international law that states are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare. [Given the absence of an appropriate international definition] it thus inevitably falls to the adjudicator to determine whether particular conduct by a state crosses the line that separates valid regulatory activity from expropriation.⁴⁸

A similar approach was adopted in *Mamidoil v. Albania*, which concerned a fuel distributor's claim that reforms by Albania to its maritime transport sector in pursuit of an environmental policy amounted to creeping expropriation.⁴⁹ The ICSID

⁴⁴ See, e.g., 2012 U.S. Model BIT, OFF. U.S. TRADE REPRESENTATIVE 14-19, arts. 11-13 (2012), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

⁴⁵ Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L. Q. 573, 592-95 (2011) (stating that in this manner, the investor's legitimate expectations would be clear and effectively remove an arbitral tribunal's discretion to ignore human rights).

⁴⁶ See Ali Lazem & Ilias Bantekas, *The Treatment of Tax as Expropriation in International Investor-State Arbitration*, 30 ARB. INT'L L. 26 (2015) (citing *El Paso Energy International Company v. Argentine Republic*, ICSID Case. No. ARB/03/15, Award, ¶ 297 (Oct. 31, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf>) (considering the export withholding taxes imposed on the investor to be 'reasonable governmental regulation within the context of the [Argentinian] crisis').

⁴⁷ *Methanex Corp v. USA*, Final Award and Merits, pt. IV, ch. D, at ¶ 15 (Aug. 3, 2005).

⁴⁸ *Saluka Investments BV v. Czech Republic*, Partial Award on Merits (Perm. Ct. Arb. Mar. 17, 2006), ¶¶ 262, 264.

⁴⁹ *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Awards, 9-38 (Mar. 30, 2015).

tribunal held that the claimant could not benefit from the BIT because the investment had been undertaken in violation of Albanian law and, as a result, no legitimate expectations could be lawfully anticipated.⁵⁰ Moreover, the adoption of environmentally-friendly laws were within the host state's "legitimate policy choices,"⁵¹ given that the only impact on the investment was a decrease in profits.⁵² Regulatory sovereignty as a means of promoting and fulfilling fundamental socio-economic policies has been recognized by investment tribunals.⁵³ In *Postova Banka AS and Istrokapital SE v. Greece*, an ICSID tribunal noted in respect of measures adopted by Greece following its debt crisis that:

In sum, sovereign debt is an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a State.⁵⁴

The fact that host states possess authority to undertake regulatory actions in the pursuit of general welfare (i.e., for a public purpose) does not mean that they can directly or indirectly substantially deprive the enjoyment of the investment in an arbitrary and discriminatory manner. Meaningful investments are crucial to the economic development of states. At the same time, however, as will be demonstrated, the regulatory power of states vis-à-vis their investment obligations is not tantamount to the obligation of states (both the home and host state) to fulfill their international human rights obligations under customary and treaty law.

Of course, not all tribunals are willing to compromise their existence, or anger their creators, in order to produce socially just outcomes or construe the obligations of states and non-state actors through a public policy/human rights perspective. The ICJ, even though under intense political pressure, has shown itself willing to stretch the boundaries of the law and expand its jurisdiction against the conduct of states, as in the *Nicaragua* case, where it masterfully evaded the jurisdictional hurdles of the US by assuming that the UN Charter was effectively reflective of customary international law.⁵⁵ The ICJ, in equal manner, makes use of its advisory opinions to infuse a public interest dimension to international law,

⁵⁰ *Id.* at 129-141, 148-153.

⁵¹ *Id.* at 126.

⁵² *Id.* at 148-153.

⁵³ PEDRO J. MARTINEZ-FRAGA & CR REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE MODERN ERA (Cambridge Univ. Press 2015).

⁵⁴ *Postova Banka AS and Istrokapital SE v. Greece*, ICSID Case No. ARB/13/8, Merits, ¶ 324 (Apr. 9, 2015).

⁵⁵ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, Judgment, I.C.J. 14, ¶ 27.

as in the *Palestinian Wall*⁵⁶ and *Nuclear Weapons*⁵⁷ advisory opinions, albeit with varying degrees of success. Other tribunals such as SADC went as far as risking – and ultimately paying the price for – construing the applicable law in light of human rights and advancing just claims.⁵⁸ Yet, other international tribunals have simply been labeled “activist” when embarking and validating human rights considerations in the discharge of their mandates, as has been the case with the Court of Justice of the European Union (CJEU), both in its early case load,⁵⁹ as well as more recently.⁶⁰ In the debate over the legal nature of memoranda of understanding (MoU) involving EU institutions, where said institutions were aiming to circumvent the application of EU law, the Grand Chamber of the CJEU came to the conclusion that it would be contrary to the Union’s fundamental rights and accountability architecture if not viewed as EU acts and mandatory.⁶¹

Such “activism” is also evident in the work of international human rights tribunals, far beyond the clear limitations of their applicable law. The Inter-American Court and Commission for Human Rights, for example, have not hesitated to consider international humanitarian law in their examination of cases

⁵⁶ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall case), Advisory Opinion (2004) I.C.J. 136, ¶ 161-62.

⁵⁷ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) I.C.J. 226, ¶ 99.

⁵⁸ The Southern African Development Community (SADC) tribunal was effectively suspended following its judgment in *Mike Campbell (Pvt) Ltd and Others v. Zimbabwe*, [2008] SADCT 2 (Nov. 28, 2008), which held that the complainant’s eviction from his land was unlawful and a form of discrimination against white people.

⁵⁹ See *Van Duyn v. Home Office*, (Case 41/74) [1974] ECR 1337 (Dec. 4, 1974) (holding that public policy restrictions to freedom of movement should be predicated on ‘personal conduct’); see also T. TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* (2d ed., 2007) (finding that fundamental rights arising from an expansive interpretation of EU have crystallized into distinct rights in the EU legal order, beyond the rights enshrined in the EU Charter of Fundamental Rights.)

⁶⁰ *Joined Cases C-8/15P to C-10/15P, Ledra Advertising Ltd. & Others v. European Comm’n & European Central Bank*, ECLI:EU:C:2016:701, ¶¶ 59-67 (Sept. 20, 2016) (emphasizing that the EU Commission must “refrain from signing an MoU whose consistency with EU law [which implicitly encompasses fundamental rights] it doubts.” While reaffirming the non-applicability of the EU Charter of Fundamental Rights to the European Stability Mechanism (ESM), as originally expounded in the *Pringle* case, it made it clear that “the Charter is addressed to the EU institutions, including . . . when they act outside the EU legal framework. This is a clear message by the CJEU that EU institutions are at liberty to function outside the legal framework of the EU Charter and in this manner to opt out of intra-EU human rights obligations.”)

⁶¹ It was only in *Case C-258/14, Eugenia Florescu and Others v. Casa Jude țeana de Pensii Sibiu and Others*, ECLI:EU:C:2017:448, ¶ 36 (Jun. 13, 2017), that the CJEU came to the conclusion that the MoU under EU financial assistance mechanisms and balance-of-payment processes qualified as EU acts under art 267(1)(b) TFEU, and hence susceptible to interpretation by the Court. See also Menelaos Markakis & Paul Dermine, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu*, 55(2) COMMON MKT. L. REV. 643 (2018).

involving an armed conflict⁶² (something which the ECtHR has strenuously refused to do)⁶³ and has advanced the scope and content of socio-economic rights,⁶⁴ in a manner that similar human rights courts in the northern hemisphere have failed to do.

Unlike the international courts and tribunals in the previous paragraph, which by-and-large have desisted from fragmenting fundamental human rights (including socio-economic rights) and justice claims from the law applicable to the dispute before them,⁶⁵ investment tribunals have largely taken a different approach to their mandate. A similar approach (i.e., inclined towards fragmentation) would no doubt be assumed by specialized tribunals set up to deal with disputes of a very particular nature, such as sovereign debt, as their creators would endow them with specific powers within a very narrow mandate. Moreover, any judge or arbitrator called on to assume a judicial function in the context of such specialized tribunals would be unlikely to expand their mandate as any “dangerous” candidates would have been eliminated beforehand by those financing such a tribunal.

The next section will offer a glimpse of this author’s vision of a public interest perspective to international adjudication.

A. Necessary Elements of a Public Interest-Based International Adjudication

There are various concepts in international law that pretty much describe, or best, underpin the same issue, although perhaps in its various manifestations, contexts, or fields of application, namely: rule of law, public interest, and human rights-based approaches. All of these are predicated on the notion that the human being is, or should be, the principal beneficiary of all the aims pursued through public governance, which in turn fortifies and enhances all aspects of governance.⁶⁶ This is in contrast to the post-2008 crisis and general neo-liberal rationale whereby the aim of government should be to build a strong state, which may involve a sharp

⁶² Inter-state Petition IP-02 Admissibility Franklin Guillermo Aisalla Molina (Ecuador-Colombia), Inter-Am. Comm’n H.R., Report No. 112/10, OEA/Ser.L/V/II.140, doc. 10, ¶¶ 117-122 (2010).

⁶³ Bantekas & Oette, *supra* note 26, at 660-61.

⁶⁴ Case of the Five Pensioners v. Peru, Inter-American Court of Human Rights, Judgment (12 Sept. 2005) (recognizing the right to social security as a human right by reference to the right to property, which was found to have been violated by a decrease in the amount of pension received by the applicants).

⁶⁵ This author does not view the overall claims in Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening), Judgment, 2012 I.C.J. Rep. 99, ¶¶ 90-91 (Feb. 3, 2012), as compromising justice claims. This is because the particular claim can be exercised through inter-State adjudication or unilateral state action by the public authorities of the claimant.

⁶⁶ See the classic work of TOM BINGHAM, *THE RULE OF LAW* (Penguin 2011), particularly chapter 7, where it is made clear that human rights underpin the rule of law and that the latter is a human-centered process.

deterioration of the living standards of its people. If the state is financially and militarily strong, so will be its people, the neo-liberal narrative tells us.⁶⁷ This model of governance justifies—and indeed has been used to justify—severe austerity, privatization of otherwise public goods, and ultimately the violation of entrenched human rights, both civil and political, as well as socio-economic. It is clear that this model of public governance reduces states to mere managers and accountants of their revenues and wealth, albeit with the best interests of their people being wholly divorced from this process. In short, the absence of rule of law or a human rights-based approach to governance necessarily means that the international system has returned to a Westphalian model of states interacting with each other, with the rights of their respective populations playing a mere subservient role.

What is clear is that if the prevailing model of domestic and international governance is repugnant—and presumably contrary to the human rights and *jus cogens* obligations of states—then the system of international adjudication should also refuse to adhere to and follow such a repugnant system. At present, to a large degree, the so-called fragmentation of international law has a significant impact also on the applicable law of international adjudicatory mechanisms, including human rights ones, and their capacity to adopt and impose just processes and outcomes. There is an urgent need to re-design the international judicial architecture on the basis of a set of rules that recognizes an equal balance between the varying international obligations of states, in a manner in which the obligations under one set of obligations does not trump those existing under another set of rules. Such a system would not allow human rights defenses to trump the rights of investors and vice versa. Justice cannot be achieved at the expense of injustice against one actor over the claims of another.

A public interest-based international adjudication would consist of the following elements:

- (1) Transparency in the dealings of states with other states and private actors, save for trade secrets, and national defense. Such transparency encompasses all agreements between the parties, including choice of forum clause.⁶⁸
- (2) The governing law of all international adjudicatory organs shall consist, in addition to the specific law set out by their

⁶⁷ SOVEREIGN DEBT AND HUMAN RIGHTS, *supra* note 9, at 1-13.

⁶⁸ As set out in the UN Convention on Transparency in Treaty-Based Investor-State Arbitration, *adopted* Dec. 10, 2014.

- constitutive instruments, of fundamental civil, political, and socio-economic rights.⁶⁹
- (3) The particular governing law of all international adjudicatory mechanisms must be construed in accordance with the aforementioned fundamental human rights and rendered compatible with that body of law.⁷⁰
 - (4) Where an international adjudicatory mechanism employs fundamental human rights as its default governing law, or in order to construe its institutional governing law, this shall never be declared as being *ultra vires* or constitute a basis for annulment or setting the award aside.⁷¹
 - (5) Public interest and human rights shall not be considered defenses (such as necessity, which is common in investment arbitration),⁷² but as integral substantive obligations under international law.⁷³ It shall also constitute a rule of treaty construction.⁷⁴

⁶⁹ A common denominator could be the HRBA to development cooperation. All entities involved within the UN system in development projects adopted in 2003 a statement on their common understanding of a human rights-based approach (HRBA) to development cooperation. There, it is stated that all projects must be guided by the International Bill of Human Rights and that development cooperation “contributes to the development of the capacities of “duty-bearers” to meet their obligations and of ‘rights-holders’ to claim their rights.” The HRBA principles are non-discrimination, empowerment, transparency, participation and accountability.

⁷⁰ See *Sociedad de Aguas v. Argentina*, Decision on Liability, *supra* note 32.

⁷¹ Generally speaking, there does not exist a basis for setting an award aside on the ground that the tribunal applied a body of law that the parties had not designated in their *compromis*. At best, a party can claim that the award deals with a dispute not contemplated by or not falling within the scope of the *compromis*, as is the case with Art 36(1)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration.

⁷² Hence, Arts 61 and 62 of the 1969 Vienna Convention on the Law of Treaties (VCLT) will be inapplicable where the cause of non-compliance is an overriding human rights obligation. Arts 61 and 62 of the VCLT will remain applicable in respect of non-public interest/human rights defenses.

⁷³ See ANDREAS KULICK, *GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW* (2014), whose otherwise excellent thesis revolves around the idea of using global public interest (as drawn from general and customary international law) in the form of defenses to alleged investor rights infringements.

⁷⁴ Hence, Art 31(1) of the VCLT would be paraphrased somewhat to read as follows: ‘The governing law of international tribunals shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, so long and in accordance with fundamental civil and political and socio-economic rights.’

- (6) Ideally, all of the above should be encompassed in a new multilateral treaty⁷⁵ and all new adjudicatory mechanisms that are set up, whether at regional or global level, will be deprived of legality and legitimacy if they fail to meet the criteria set out above.
- (7) The notion of public interest should never fall below the standards typically associated with fundamental civil and political and socio-economic rights.⁷⁶ The latter should never be equated with the right to regulate.⁷⁷

V. CONCLUSION

International courts and tribunals are established *ab initio* on the basis of a power imbalance between those that effectively create them and those that are subject to their jurisdiction. Powerful states do not desire to share or afford the same rules in respect of all serious international issues to their weaker counterparts, with humanitarian intervention being a key paradigm.⁷⁸ Likewise, they have no intention of being judged by a tribunal in the same manner as other states or entities subject to the control of other states. International commercial arbitration, which may seem to depart from this model, is in fact confirmation of the general rule. It is powerful states that have an interest in promoting arbitration because their investors and companies are involved in the bulk of transnational trade and commerce and, in this manner, said private actors can escape biased domestic courts.

The creation of several specialized international tribunals has been proposed, other than to pass judgment on international crimes. Chief among these

⁷⁵ Ideally, the UN International Law Commission (ILC) could be given a prominent role in this process, especially if requested by developing states in the UN General Assembly to prepare a draft convention either on the applicable law of international tribunals, or the draft of a treaty on sovereign debt, in which the principles enunciated in UNGA resolution 69/319, below n50. No doubt, both processes will be greatly resisted by powerful nations that have a significant stake in the current status quo of international adjudication.

⁷⁶ The precise formulation of such standards has become much easier with the introduction and extensive use of human rights indicators and benchmarks in respect of all human rights. See David McGrogan, *Human Rights Indicators and the Sovereignty of Technique*, 27 EJIL 385 (2016).

⁷⁷ See LONE WANDAHL MOUYA, *INTERNATIONAL INVESTMENT LAW AND THE RIGHT TO REGULATE* (Routledge 2016), for a survey of the trends of investment tribunals whereby the exercise of regulatory powers of the state is afforded significant primacy over other considerations. The notion of human rights is not only wider and imposes significant obligations on both the host and home state, it also gives rise to justiciable rights on behalf of all rights-bearers.

⁷⁸ This idea is explored convincingly in GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES* (2004).

is a sovereign debt tribunal,⁷⁹ as well as an international tax tribunal,⁸⁰ although several transnational tax mechanisms of a quasi-judicial nature exist at present.⁸¹ Those with an interest in setting up a sovereign debt tribunal are creditor states.⁸² Their aim in establishing such a tribunal would be to substitute the current process of debt restructuring – which is driven by creditors and institutions under their control, such as ECB, EFSF, IMF, Paris Club and others – by a judicial mechanism whose only concern would be to adjudicate on the modalities of payment. Hence, from the very outset, such a tribunal would take it for granted that any case brought before it concerns a sovereign debt. What this means is that it would have no authority to question the origin or nature of the debt, whether as odious, illegal, illegitimate, or unsustainable. A sovereign debt tribunal with authority to examine the origin and nature of sovereign debts and declare them odious is repugnant to creditor states, as is also the idea of a sovereign debt tribunal that has the power to strike a balance between a debt and overarching human rights obligations of both creditor and lending states.⁸³ The absence of binding human rights considerations from the statute of such a tribunal would render it illegitimate and failed under the thesis expounded in this article.

⁷⁹ See Ilias Bantekas, *A Human Rights-Based Arbitral Tribunal for Sovereign Debt*, 29 AM. REV. INT'L ARB. 52 (2018).

⁸⁰ The establishment of a permanent international tax tribunal (ITT) has been debated manifold in the past and governments and scholars are still deliberating on how best it may be employed, despite the practical issues involved. Altman, for example, suggests that the creation of an international tax tribunal (ITT) would give non-binding opinions to domestic courts and in the process provide some degree of coordination to the interpretation of tax treaties. He goes on to say that almost 60 per cent of cross-border tax disputes concern transfer pricing and hence because such disputes require extensive fact-finding and neutrality arbitration is the best method. For double tax disputes a permanent ITT more than suffices. ZVI DANIEL ALTMAN, *DISPUTE RESOLUTION UNDER TAX TREATIES* (2006).

⁸¹ See generally Ilias Bantekas, *Inter-State Arbitration in International Tax Disputes*, 8 J. INT'L DISP. SETTLEMENT 507 (2017).

⁸² The divergence on this issue between creditor and borrower states is nowhere more evident than in the voting for UNGA Res 69/319 (29 September 2015), Basic Principles on Sovereign Debt Restructuring Process.' This resolution received 136 votes in favor, only six against and 41 abstentions (not surprisingly, all from creditor nations) and put forward the customary rule that: 'A Sovereign State has the right, in the exercise of its discretion, to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures'.

⁸³ Such an outcome would effectively banish truth mechanisms, such as the Parliamentary Committee on the Truth of the Greek Debt, whose preliminary report found a big part of the Greek debt to have been odious, illegal, illegitimate and unsustainable. *The Truth Committee on Public Debt, Preliminary Report* (Jun. 2015), available at <http://cadtm.org/IMG/pdf/Report.pdf>; see also Ilias Bantekas, & Renaud Vivien, *The Odiousness of Greek Debt in Light of the Findings of the Greek Debt Truth Committee* 22 EUR. L.J. 539 (2016).

It is for all these reasons that the infusion of fundamental human rights in the institutional rules and statutes of international courts and tribunals has the effect of reshaping the power imbalance between the weak and the strong. Human rights/public interest is the yardstick for real juridical equality between states and the only tool towards a human-centered and de-fragmented international legal order. Given the absence of strong judicial institutions in all countries, the prevalence of unbiased and human-centered international courts and tribunals constitutes a significant guarantee against unilateral and multilateral excesses against the individual directly, but also indirectly (e.g., through policies that exacerbate climate change). The continued debate, albeit hopefully through some sort of institutional change, as to what constitutes a “debacle” in international adjudication is important in this regard.

