

The Boundaries of Investment Arbitration: The Use of Trade and European Human Rights Law in Investor-State Disputes

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PITAD Data Base (1990-June 1, 2016)

- 65 Rulings from 343 not discontinued/settled: about 20 percent with ECtHR or WTO reference
- But 53 with serious ECtHR reference vs. 35 for WTO (but these most likely distinguishing substantive trade)

Compare Tables I (ECtHR) and II (WTO)

(Case/Treaty/Brief Description/Respective positions of claimants and respondents/panel disposition of issue/topic on which ECtHR/WTO cited)

Caveats

Citation



Choice of Law

May **understate** b/c mentions in briefs, role in settlements, in rulings not in PITAD, or in other material (e.g., expert opinions) not included; also existing disputes not under contemp. IIAs.

May **overstate**: even 53 with 'serious' references to ECtHR may not affect the final result.

Tables only reflect citations in public rulings, not full examination of briefs.

Why do arbitrators cross the road?

- Appeal of juridical rulings generally for fellow adjudicators
- Need for gap-fillers
- Encouraged by some NGOs and academics
- Appeal of “public law”
- Response to ISDS backlash
- Prominence/legitimacy of ECtHR/WTO rulings
- Genuine substantive/procedural commonalities between two regimes
- Variable geometry of VCT rules of interpretation

“Progressive” Expectations of H. Rts. Advocates vs. Reality

- Nearly equal references by claimants and respondent states
- No sign (so far) of harmonization/defragmentation
- No sign (so far) of resulting “humanity’s law”

Apparent Commonalities b/t IIAs and ECHR

- Both defend rts to compensation for property deprivations, especially for foreigners
- Both defend procedural rts to fair process
- Both defend rts to non-arbitrary and non-discriminatory treatment
- Both extend rts to humans and other legal persons
- Both (arguably) protect “legitimate expectations”
- Both attempt to “balance” rts of state and individual

The Use of ECtHR Law: A Selective Survey

To interpret IIA provisions:

Covering “investment”

Requiring non-discriminatory, non-arbitrary, and fair and equitable treatment

Requiring the “international min. standard”

Requiring compensation for direct/indirect takings

Requiring full or constant protection

Excepting certain “measures not precluded”

Use of ECHR (conti)

To explain the powers of ISDS arbitrators to:

Exercise 'inherent jurisdiction'

Issue binding interim measures

Award and allocate certain forms of damages or costs

Retain jurisdiction over a 'continuous wrong'

Use of ECHR (conti)

To support “general rules”:

Requiring ‘deference’ to states

Supporting a ‘general’ rule of ‘proportionality’

Supporting the application of a “margin of appreciation”

To permit retroactive legislation in non-criminal contexts such as tax

To explain what “natural justice” demands

Competing Lines of Cases

- Competing visions of whether ISDS is *lex specialis*: Tulip Real Estate v. Turkey/Rompetrol v. Romania, ST-AD v. Bulgaria, Spyridon Rossalis v. Romania
- Competing views on ECtHR law's relevance to expropriation: Tecmed v. Mexico, Azurix v. Argentina/Fireman's Fund v. Mexico, Siemens v. Argentina
- Competing views on the applicability of the ECtHR's margin of appreciation: Continental Casualty v. Argentina, Philip Morris v. Uruguay (Majority)/Siemens v. Argentina, Quasar v. Russia, Bernhard von Pezold v. Zimbabwe

The ECtHR's Margin of Appreciation as Constitutional Principle

- To respect culturally and geographically delimited European democratic preferences
- To respect gradualist deepening of ECHR regime
- To insulate ECtHR judges from charges of judicial activism
- To manage European-styled form of federalism
- To manage the ECtHR's caseload
- To avoid re-opening matters that have been examined under exhaustion of local remedies requirement

vs. MofA just a malleable tool of (unpredictable) deference?

Philip Morris v. Uruguay as Case Study: The “essential emptiness” of many ECHR references

The Majority vs. Gary Born’s Dissent

Disagreement over the *lex specialis* nature of ISDS vs. the ECHR Regime or just two different views of the interpretation of the Swiss-Uruguay BIT’s FET clause?

Problematic Aspects of ECtHR

Crossovers

- Failure to consider/explain whether ‘applicable law’
- One-size-fits-all concept of “proportionality”
- Unreflective deployment of “margin of appreciation” as a form of *in dubio mitius*
- Conflation of “investment” with “possessions”
- Ignoring IIA language with respect to distinguishing regulatory takings
- Ignoring the many different forms of FET
- Other unreflective boundary crossings (e.g., damages, fair trial, what merits annulment under ICSID)

Trade and Investment Law: Convergence Expectations vs. Reality

Convergence expectations: “on parallel tracks headed in the same direction”/”twins wrongly separated at birth”

E.g., Kurtz’s reasons:

- “common telos”/common treaties (FTAs)
- “common norms to enhance competitive opportunities”
- prospects for parallel proceedings/forum shopping
- converging economic logic and realities
- converging adjudicators produce converging jurisprudence

. . . vs. Complex Realities

- Only 2 IIAs responsible for 14 of 34 rulings in Table II
- Many of which refer to procedure and VCT law
- Considerably fewer evidence of substantive ‘trade-infused investment law’

Example from direction of ISDS: Methanex v. US (NAFTA)

Example from direction of WTO: Essential Security Exceptions and Russia-Ukraine (WTO)(2019)

Comparing WTO Dispute Settlement to ISDS

- Party Control
States vs. Non-state complainants
- Institutional
DSU/App. Body vs. Ad hoc arbitration/Annulment
Adjudicators' Background
- Remedies
Prospective vs. Retrospective
Removal of Measure vs. Damages
- Perceived Impact on 'Sovereignty'

Comparing human rights tribunals to ISDS

Regional h. rtgs. tribunals

- Full time judges
- Hearings open to public
- Claims and decisions available to the public
- Exhaustion of local remedies required
- Emphasis on preventing repetition of violation
- “Balanced” property right

Investor –state arbitration

- Ad hoc arbitrators
- Hearings normally not open to public
- Claims/decisions not always available to public
- Exhaustion of local remedies typically not required
- Emphasis on remedial damages
- Property rt not typically subject to explicit balancing

Why Boundary Crossings Matter

- Relevant to roles/powers of international adjudicators?
- Relevant to debates about the 'nature' of ISDS?
- Relevant to ISDS backlash and its remedies (e.g., should we adopt GATT Art. XX/XXI exceptions into IIAs and what to expect if we do?)
- Relevant to aspirations for 'defragmentation' of public international law?