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INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON INTERNATIONAL INVESTMENT LAW AND HUMAN RIGHTS

Not all rights are created equal: A loss–gain frame of investor rights and human rights

Tomer Broude[1]* and Caroline Henckels[2]

[1]Hebrew University of Jerusalem, Mt. Scopus, Jerusalem, Israel 91905, Israel Email: tomerbroude@gmail.com and [2]Monash University, VIC 3800, Australia Email: caroline.henckels@monash.edu

Abstract

International investment tribunals often use the language of 'rights' to characterize foreign investors' claims against host states, evoking the language of human rights and, in some cases, appearing to conflate the two concepts. We investigate the cognitive framing of the relationship between investor rights and human rights in investor-state dispute settlement (ISDS), as characterized by investment tribunals. We first establish that arbitrators (and scholars and counsel) tend to characterize investor claims as rights claims in general and property rights claims in particular, even if this normative basis is far from precise. Second, building on behavioural economics and cognitive psychology, we argue that this characterization places human rights considerations at a structural disadvantage in ISDS. Investor rights are perceived by arbitrators as endowments that are possessed and that risk being lost, while the human rights of host state populations are viewed as aspirational demands that might only be fully realized in the future. Thus, governmental actions interfering with investments are perceived by arbitrators as actual losses, while competing human rights claims are perceived as potential gains or demands. Following prospect theory, the former (certain losses) will usually be weighed more heavily in a decision-making calculus than the latter (possible gains). This loss–gain frame provides a cognitive explanation for the prevalence of arbitral decisions that prefer investor claims over human rights, a phenomenon that is highly problematic in times in which the legitimacy of the ISDS system rests on its ability to consider the rights of non-investors.

Keywords: cognitive psychology; human rights; international investment law; property rights; prospect theory

1. Introduction

International investment tribunals' use of the language of 'rights' to characterize foreign investors' claims against host states evokes human rights, and indeed, there are optical similarities between the subject-matter of investor claims and human rights, such as the protection of property, non-discrimination obligations, due process standards, and judicial protections from asymmetric power relations. At a higher level of abstraction, investor rights may be conflated with human rights, although their justificatory bases (utilitarian or deontological) remain contested. In this article, we focus on the differential deployment of concepts of 'rights' by arbitrators in ISDS.[1]

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[1]Unless otherwise stated, we use the term 'rights' in relation to investors in relation to investors' enjoyment of the substantive protections set out in the relevant investment treaty and as afforded by customary international law, rather than procedural rights such as a right to bring proceedings or a right to eschew redress in domestic courts.

In particular, we explore the systematically asymmetrical references regarding foreign investors' claims towards the enjoyment of substantive obligations owed to them by host states under international investment agreements (IIAs) on the one hand, and the individual and collective rights of those who have or might have been harmed by foreign investors in host states, on the other hand. The deficiencies of the current system with respect to the protection of the human rights of non-investors have risen to the fore in the last several years in relation to aspects of ISDS reform, such as third-party participation[2] and investor responsibility.[3] This article is intended to contribute to the ongoing analysis and understanding of these issues.

We first establish, on the basis of a theoretical framework of investor rights and a survey of ISDS cases, that arbitrators (and indeed most scholars and legal counsel) tend to characterize (post-establishment) investor claims as rights claims in general and property rights claims in particular, even if the normative basis for this formulation is undertheorized, imperfect and imprecise. In contrast, references to the competing human rights of the host state population are few and far between. Indeed, most references to human rights by arbitrators in ISDS relate to the so-called 'human rights' of investors, as complements to their property rights, rather than the human rights of those who may be adversely affected by investors' activities.[4] Moreover, arbitral tribunals assimilate investor claims to rights claims to the detriment of any competing human rights engaged in particular cases, and without explication of the rationale for characterizing investors' entitlements as rights, as opposed to some other type of legal advantage. This differential approach to rights requires explanation, in particular (but not only) if it is considered to be normatively undesirable.

Second, working towards such an explanation and building on behavioural economics and cognitive psychology, we argue that ISDS arbitrators' tendency to characterize investor claims as rights claims places competing human rights considerations at a structural disadvantage in ISDS. Arbitrators who conceive of investor claims as property rights claims position those claims as endowments – what one possesses and stands to lose – and if proven factually, they are viewed as certain rather than possible harms in conditions of risk. In contrast, competing human rights such as the right to water or Indigenous peoples' rights may be viewed as demands for something that might potentially be partially or fully realized in the future. Thus, the impacts of governmental actions interfering with investments are perceived as actual losses, while human rights claims are perceived as merely potential gains (or demands). As we will explain, under prospect theory,[5] the former (certain losses) will usually be considered greater than the latter (possible gains), all other things being equal. This holds true also when the gains and losses are borne by different agents, and their evaluation is conducted by a third-party, such as an arbitrator. Thus, consideration of investor claims as rights creates a loss–gain frame that works against the incorporation of human rights considerations. We are not concerned here with explaining *why* this frame of analysis is preferred by arbitrators; the causes may relate to several factors, including the social construction of such a general tendency or bias, as based on the social profiles of arbitrators.[6] Rather we wish to expose the underlying psychological rationalization and legal justification of an interpretive approach that prefers investor claims over human rights.

[2]Columbia Center on Sustainable Investment, International Institute for Environment and Development and International Institute for Sustainable Development, 'Third Party Rights in Investor-State Dispute Settlement: Options for Reform', Submission to UNCITRAL Working Group III on ISDS Reform, 15 July 2019.

[3]For an overview see J. T. Gathii and S. Puig, 'Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law', (2019) 113 *American Journal of International Law Unbound* 1, and subsequent contributions in that issue.

[4]For a thorough analysis of property as a human right see J. E. Alvarez, 'The Human Right of Property', (2018) 72 *University of Miami Law Review* 580.

[5]See D. Kahneman and A. Tversky, 'Prospect Theory: An Analysis of Decision under Risk', (1979) 47 *Econometrica* 263.

[6]See M. Hirsch, 'The Interaction between International Investment Law and Human Rights Treaties: A Sociological Perspective', in T. Broude and Y. Shany (eds.), *Multi-Sourced Equivalent Norms* (2011), 211.

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The article proceeds as follows. In Section 2, we provide a theoretical discussion of the normative framing of investor claims as rights claims (especially as property rights claims). In Section 3, we present an analysis of investment tribunals' tendency to characterize investor claims as rights claims, and in Section 4, the converse tendency to undervalue the competing human rights of host state populations. In Section 5, we develop the argument that investment arbitrators have adopted a loss–gain frame of investor rights and human rights that perpetuates disregard for the latter. In Section 6 we conclude with some brief observations on how this situation might be rectified in legal argumentation and legal reasoning.

2. The normative basis for investor claims as rights claims

The structural interpretive imbalance between investor claims on one hand, and human rights on the other, stems at least in part from the prevalent framing of investor claims as rights claims in general, and property rights claims in particular.

Viewing investors' enjoyment of foreign governments' obligations as rights is not novel. In his 1919 monograph on diplomatic protection, Borchard appeared to view aliens' property rights as inviolable, regardless of where the alien sought to enjoy them. Protection of aliens' property rights was, in his view, a general principle of law; such norms appeared in 'constitutions which placed the individual on a high plane of protection in his relations with the state'. These were (in language that was acceptable at the time) 'elementary rights which we have come to associate with the modern world and enlightened civilisation'.[7] The same view was taken by Dunn, who referred to the customary international law minimum standard of treatment of aliens as something that 'provides essentially for two things—the security of the person from injury or restraint, and the preservation of private property'.[8] However, these visions of property rights were by no means a consensus, let alone universal state practice.[9] For example, while the development of the police powers doctrine in relation to indirect expropriation was an inroad to the idea of an absolute rule of protection of private property,[10] it was evident that certain general regulatory measures modifying systems of land tenure and redistributed property[11] would not offend the customary international law 'minimum standard of treatment'.[12]

Although IIAs typically set out a broad definition of covered investments including a list of assets in which property rights inhere, they do not employ the language of rights (whether property rights or otherwise) to describe the nature of states' substantive obligations of investment protection.[13] Rather, these obligations are typically framed as standards of treatment, or standards of investment protection. The nature of the corresponding legal entitlements is left open-ended, leaving it to tribunals to fill in these conceptual gaps. This raises the question of why the terminology of rights has been so pervasively employed by tribunals and in the literature. In our view, the question of whether investors are holders of such substantive rights vis-à-vis states ought to be a fundamental question concerning the regime, but this issue is relatively unexplored. There seems

[7]See, eg., E. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1919), at 61; E. Borchard, 'The "Minimum Standard" of the Treatment of Aliens', (1940) 38 *Michigan Law Review* 445, at 452.

[8]F. Dunn, 'International Law and Private Property Rights', (1928) 28 *Columbia Law Review* 166, at 176.

[9]D. Schneiderman, 'The Global Regime of Investor Rights: Return to the Standards of Civilised Justice?', (2014) 5 *Transnational Legal Theory* 60, at 68.

[10]Schneiderman, ibid., at 68, citing Sir John Fischer Williams, 'International Law and the Property of Aliens', (1928) 9 *British Yearbook of International Law* 1, at 24.

[11]Schneiderman, ibid., at 68.

[12]Ibid.

[13]However, we note that FET clauses in some more recently concluded IIAs that refer to 'substantive rights' in order to contain the ambit of the clause: see, e.g., Art. 10.5 Oman–US FTA (2006): 'the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by [customary international law] and do not create additional substantive rights'. See also, e.g., with similar wording, Art. 6 Ch. 11, Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (2009).

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to be little elaboration, much less consensus, concerning the nature and scope of such rights. Rather, there appears to be an implicit assumption that the standards of investment protection correlate to some form of rights – probably property rights – without further foundational explication. We do not suggest that such characterizations are necessarily deliberate and made with a view towards systemic implications. Rather, tribunals appear to have made unconsidered references to rights without regard to the normative claims that attend such a characterization. As Hohfeld observed in 1913, people tend to use the term 'right' in a generic and indiscriminate manner 'to denote any sort of legal advantage, whether claim, privilege, power, or immunity, rather than a right in the strictest sense'.[14] This problem is alive and well today.

How have investment tribunals conceived of investor claims as property rights? International investment law neither grants property rights to investors nor otherwise establishes them, but nor are investment claims restricted to reliance on such rights. Property rights are clearly relevant to the concepts of direct and indirect expropriation, which control the circumstances in which governments can deprive investors of either the title to their property, or take measures of equivalent effect (although government action that amounts to expropriation can also involve action interfering with an investor's powers and/or privileges).[15] However, the relevance of property rights is less obvious with respect to the other standards of investment protection, in the sense that one could envisage many instances where fair and equitable treatment or national treatment claims, for example, would succeed in the absence of interference with property rights (e.g., when the claim relates to interference with purely contractual rights, or where there is mistreatment of the investor as opposed to their investment).

Property law determines other issues concerning how property rights are created and extinguished, how competing claims to property are resolved, and how contemporaneous rights or interests in property are dealt with. Using the language of property rights to define the nature and scope of foreign investor claims brings with it a great deal of conceptual baggage, such as the privileges, powers and immunities that attend the right/s in question.[16] The effect of using property rights terminology, therefore, is that investment tribunals are often at least implicitly called upon to resolve a number of conflicts that pervade property law more generally, including between prioritizing the exploitation of property rights in order to maximize individual or corporate wealth on the one hand, and viewing property as having a role in maximizing the public good, with government intervention being appropriate to ensure the safeguarding of that function, on the other hand.[17]

More broadly, understanding the manner in which investment tribunals view investment claims as rights claims gives rise to one key question: the precise nature of the relevant entitlement that is said to amount to a right.[18] When thinking about the nature of rights, it is useful to take as a starting point the approach of Hohfeld, who tells us that a right exists where there is an interest that is significant enough to give rise to a correlative duty on behalf of other persons, on the basis that right and duty are jural correlatives.[19] For example, there is a duty on behalf of states to protect the human rights of those people in their jurisdiction. The argument in favour of investor *rights* would be that investors' enjoyment of the protections found in IIAs should be characterized as rights because they correlate to states' obligations (*duties*) of investment protection. Alternatively, we could view the standards of investment protection as giving the investor a *power*

[14]W. N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1917) 26 *Yale Law Journal* 710, at 717.

[15]We discuss the distinctions between these types of entitlements below.

[16]See Hohfeld, *supra* note 14, at 742–3, 747.

[17]See G. Alexander, 'Property as Propriety', (1998) 77 *Nebraska Law Review* 667, at 668 (noting different views concerning what the role of property in the proper social order should be).

[18]We note for the sake of completeness that rights talk has also begun to pervade the characterization of what is termed states' 'right to regulate' to promote public welfare. In Hohfeldian terms, the preferable characterization would be a privilege.

[19]Hohfeld, *supra* note 14, at 717.

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(in the Hohfeldian sense) to activate ISDS in the event of certain conduct on the part of the host state. This gives rise to a correlative *liability* on the part of the state to be brought to ISDS (and to pay compensation in the event of an adverse finding). In other words, we could characterize international investment law as a regime that confers power on foreign investors vis-à-vis host states, with the role of ISDS as determining whether the host state's conduct is sufficient to trigger treaty's remedial provisions.[20] Another approach would be to characterize the investor as enjoying *immunity* from certain types of government action, with a corresponding *disability* imposed on the state. That is, the investor is immune from government action that goes against the state's commitments in the IIA, and by dint of its IIA commitments, the state foregoes its ability to alter the investor's normative situation in certain relevant ways.

It is true that each type of entitlement that Hohfeld identifies can be described as a 'right' in a non-technical sense because each is a type of individual advantage vis-à-vis another actor. But the key difference is that each type of Hohfeldian entitlement correlates to a different type of relationship, and only a right in the strict sense enlivens a correlative duty.[21] Assuming for the sake of argument that investors do indeed enjoy rights (as distinct from other advantages), further questions arise in relation to what would amount to an interference with the relevant right, and the circumstances in which any such interference would be permissible. In other words, if an investor enjoys a substantive right under the relevant treaty, what is the exact nature of the correlative duty on the host state? What is the scope of the right? In what circumstances, if any, is the right defeasible by countervailing factors, including but not limited to the state's duty to give effect to the human rights of the host state population? Does the fact that the claim is characterized as a rights claim give it greater normative weight than it would otherwise have had, were it regarded as some other type of claim, in the sense that it would exclude the consideration of other reasons that might point in a direction other than a duty toward the right-bearer?[22] In which circumstances may a government fail to carry out what would otherwise be its duty toward an investor because it has more compelling duties to its population? In other words, assuming that the relevant right is not absolute in nature,[23] when may it be infringed?[24]

We do not seek to answer these fundamental questions here, but rather to observe, firstly, that the nature of investors' entitlements under IIAs is far from certain and secondly, that to the extent that the literature engages with the question of the nature of investor rights, it generally only discusses the similarities between international investment law and human rights in relation to access to adjudication, due process, non-discrimination, and the protection of property, rather than interrogating the characterization of investor claims as rights claims.[25] Some authors have, however, dealt with the nature of investor rights in more detail, noting the absence of justification for the normative positions that investment tribunals appear to take with respect to the rights at issue. Douglas notes that tribunals rely on a variety of conceptions of the nature of the investment (investment-as-property, investment-as-contractual rights, investment-as-expectations, and investment-as-value), in some cases apparently unwittingly and in other cases, apparently as a

[20]This is a civil recourse theory type argument transplanted to international law – the idea that a state's failure to comply with the IIA endows the investor with a legal power to seek redress (rather than the corrective justice theory, which holds that failure to comply with first-order duties toward the investor enlivens a second-order duty to repair): see B. Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts', (1998) 50 *Vanderbilt Law Review* (1998) 1.

[21]S. Munzer, *A Theory of Property* (1990), at 20.

[22]See generally F. Kamm, 'Rights', in J. Coleman, K. Himma and S. Shapiro (eds.) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2004), 476.

[23]Dunn, *supra* note 8, at 177: 'It is apparent ... that the social conception of property has made little if any progress among the dominant powers of the world, and that vested property rights are still looked upon as absolute and inviolable.'

[24]Kamm, *supra* note 22, at 478, citing J. Thomson, *The Realm of Rights* (1990) (distinguishing between permissible and impermissible transgressions of rights).

[25]See, e.g., some of the contributions in P. Dupuy, F. Francioni and E. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009).

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means to justify a particular outcome.[26] Bonnitcha observes that one of the rationales invoked to justify a certain level of substantive protection under investment treaties is the intrinsic desirability of the protection of property rights, yet the basis for this view is not articulated by tribunals – rather, it appears to be based on a view that privileges the free market over government intervention, and obliges governments to compensate a right-holder for any interference with those rights.[27] Perrone likewise suggests that arbitrators' understandings of investor rights privilege wealth maximization by the exercise of rights of exclusion or exclusivity over a theory of property that treats property rights as existing only insofar as they aid 'the creation and maintenance of the social order'.[28] In other words, investment tribunals have tended to take a Blackstonian, indefeasible view of property, at the expense of more liberal, pluralistic conceptions thereof.[29]

Tribunals and commentators have rightly observed that the nature and scope of property rights are defined by the municipal law of the host state because international law does not itself provide substantive rules of private property law. Accordingly, one investment-related annulment committee emphasized that because investments are proprietary in nature, a tribunal would need to ascertain the exact nature of the relevant property rights in the domestic law of the host state as the first step in an analysis of whether an interference with those rights had occurred.[30] However, Sornarajah argues that investment tribunals have imposed what he terms 'a uniform principle of property protection, often in excess of even the best constitutional systems of protection that exist', in order to elevate concepts such as the protection of legitimate expectations into a type of property right.[31] Perrone similarly contends that tribunals depart from interpreting investor rights according to domestic law when they decide cases through the lens of legitimate expectations relating to their investment.[32]

What emerges, therefore, is that despite its theoretical weaknesses and imprecise limits, the normative understanding of investor claims as rights claims in general and property rights claims in particular is prevalent in the literature, generally without explication or justification. We turn now to see how this approach is expressed in the decided investment cases.

3. Investment tribunals' discussion of investor rights: Rights as *endowments*

Our survey of a large number of available investment treaty cases first reveals a significant gap between the frequency in which the language of rights is employed by tribunals (with respect to investors) on one hand, and the degree of attention devoted to the analysis of the justificatory basis

[26]Z. Douglas, 'Property, Investment, and the Scope of Investment Protection Obligations', in Z. Douglas, J. Pauwelyn, and J. E. Viñuales, *The Foundations of International Investment Law: Bringing Theory into Practice* (2014), 363.

[27]J. Bonnitcha, *Substantive Protection Under Investment Treaties: A Legal and Economic Analysis* (2014). See further, in relation to the intersection of the international law of expropriation with a variety of theories of property rights, J. Kurtz, *The WTO and International Investment Law: Converging Systems* (2016), 192–3.

[28]N. Perrone, 'The Emerging Global Right to Investment: Understanding the Reasoning Behind Foreign Investor Rights', (2017) 8 *Journal of International Dispute Settlement* 673, at 679.

[29]See J. Arato, 'The Private Law Critique of International Investment Law', (2019) 113 *American Journal of International Law* 1, at 3, 5 (also noting that in *Philip Morris v. Uruguay*, the tribunal took a more nuanced view that recognized the non-absolute nature of intellectual property rights, in the same vein as other investment tribunals that have considered intellectual property claims: *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016). These concerns are not new. As Judge Rosalyn Higgins observed in 1982 in relation to expropriation in international law, 'I am very struck by the almost total absence of any analysis of conceptual aspects of property … how … can we decide whether a particular deprivation is permissible, and if so on what grounds … unless we have some sense of the social function of property and what it is that judges and arbitrators are doing when they make these decisions.' R. Higgins, 'The Taking of Property by the State: Recent developments in International Law', (1982) 176 *Collected Courses of the Hague Academy of International Law* 268.

[30]See *Venezuela Holdings, BV and others v. The Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Annulment, 9 March 2017, paras. 168, 172. See also *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent Preliminary Objections, 22 December 2019, para. 135.

[31]M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015), at 224, 271, 275, 288.

[32]Perrone, *supra* note 28, at 689.

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of the use of this language and its scope and circumstances, on the other hand. It also shows that investor rights are generally treated by tribunals as the endowments of investors.

From a simple word search conducted among investment treaty cases (741 documents), it emerges that the majority of them make some use of terms indicative of an acceptance of investor claims as based on rights (regardless of whether the award was in favour of the claimant or the responding state). Thus, the terms 'investor rights', 'property rights', and 'proprietary rights' were mentioned at least once in 101, 332, and 20 tribunal decisions, respectively (with some overlaps).[33] Although the preponderance of references to property rights in the decided cases were quotes from treaty provisions regarding the definition of investment, or referring to the concept of expropriation as a deprivation of the property rights of the investor, the overwhelming majority of the other references ('investor rights' and 'proprietary rights') did not involve any analysis of the nature or scope of these rights, or why investor claims should be considered as rights at all. These findings are perhaps not surprising on the backdrop of our critique of the theoretical literature in the previous section. Indeed, most substantive discussion of investor rights in the decided cases concerns not the nature of any substantive rights that investors may enjoy but the question whether the rights-bearer is indeed the investor, or should rather properly be construed as the investor's home state.[34]

This gap between textual usage and theoretical analysis may have important implications for various questions that could arise, for example, with respect to the nature of the rights in question. We also searched for any discussion of the concept of the 'nature of the right', which appeared only three times in the database. In other legal contexts, such as domestic constitutional law or international human rights law, the characterization of the nature of a right goes beyond the mere recognition of the right, and is of importance: for example, when it comes into conflict with other rights in the sense of the relative normative weight of the right, and whether and if so in which circumstances is the right absolute, qualified or derogable.[35]

There are some glimmers of deeper analysis in a small handful of cases. The *Accession Mezzanine* v. *Hungary* tribunal emphasized the distinction between property rights that were 'capable of alienation or assignment', and personal rights that were inalienable. Rights in the latter category were not capable of expropriation but could be interfered with in a manner that breaches fair and equitable treatment, such as by failure to afford lack of due process or by frustrating legitimate expectations.[36]

The *British Caribbean Bank* v. *Belize* tribunal also drew a distinction between expropriation and fair and equitable treatment with respect to property rights, noting that the protection against expropriation 'is principally focused on the property rights of the investor', whereas fair and equitable treatment 'is focused more subjectively on the intent and context of governmental action, as well as on its effects', which might be read as suggesting that an investor's enjoyment of other

[33]We performed searches for 'investor rights', 'property rights', and 'proprietary rights' on 28 February 2020 using the investorstatelawguide.com database. The search was restricted to English language documents and the following document types: Decisions on Jurisdiction or Preliminary Questions; Final Awards on Jurisdiction, Merits or Damages; Partial Awards or Decisions on the Merits; Separate Opinions; Decisions of Annulment Committee.

[34]Regarding the nature of investor rights as original or derivative see, e.g., Z. Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', (2003) 7 *British Yearbook of International Law* 151; M. Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility', (2013) 24 *European Journal of International Law* 617.

[35]In human rights law, some rights are regarded as absolute (indefeasible) and peremptory, such as the right not to be subjected to torture, and some may have greater normative force than others (such as the right to a fair trial compared with the right to property); see, e.g., noting such distinctions, A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (2012), at 200.

[36]*Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezelo v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, paras. 147–8. However, the tribunal did not give examples of what personal rights might be in the context of a foreign investment, instead referring somewhat obliquely to a 'license to practice medicine' as a type of personal right, compared with a license to operate a taxi, which is regarded in many legal systems as a property right that may be transferred: *Accession Mezzanine*, paras. 147–8. A license to practice medicine is better regarded, in Hohfeldian terms, as a privilege rather than a right. See also Douglas, *supra* note 26, at 375 (Douglas was a member of the *Accession Mezzanine* tribunal).

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standards of investment protection is something qualitatively different from expropriation, perhaps not amounting to a right.[37] Arbitrator Nikken in *Suez* v. *Argentina* (a former judge and president of the Inter-American Court of Human Rights), argued this point more strongly, opining that fair and equitable treatment, being 'a standard of conduct or behaviour of the State vis à vis foreign investment ... should not automatically translate into a source of subjective rights for investors'; rather, investment treaties 'contain a list of the States' obligations regarding their respective investments, not a declaration of rights for investors'.[38] In other words, Nikken appeared to characterize investment treaties as not granting individual *rights*, but rather as placing certain restrictions on government action, be it legislative, executive, judicial or commercial. (In Hohfeldian terms, we might describe this as providing immunities from some types of government action). These analyses are, however, a rare occurrence in investment decisions.

This absence of deeper analysis of the nature of the rights recognized is in itself problematic for the doctrinal understanding of the relationship between investor rights and competing human rights, but that is not our primary concern. For present purposes, we contend that this phenomenon is reflective of the way in which arbitrators perceive investor claims as based on investor rights. To be blunt, by depicting these claims as rights claims without concern for the justification for this depiction suggests that the existence of these rights as such is taken for granted, as a self-evident proposition. Investor claims are regarded as rights claims because in the arbitrator's mindset, they reflect a status quo ante, something that an investor held but that was taken from them or that was otherwise impaired. To be sure, in some cases the arbitrator may find that the investor has not established that they actually held the relevant right at domestic law – the title in the property was actually not theirs. Hence, perhaps, the prevalent reference to property rights – which would make much sense when questions of expropriation are involved – is less justified when other standards of treatment are at hand. But the underlying perception is important here. Investor claims are characterized as rights because they are perceived to be something that investors possess(ed) and stand to lose (or have indeed lost).

In other words, investor claims are perceived to be rights, and more so as *endowments*. This is an insight that is crucial, in our view, to explaining the differential treatment of investor claims and opposing human rights, which we will return to in Section 5 below.

4. Investment tribunals' discussion of human rights: Rights as *aspirations*

We also surveyed the same body of decided cases for mentions of the term 'human rights', and examined the context in which these references occur. Close to 30 per cent (216 out of 741) of the decisions in the database we used included some reference to the term. However, most substantive references to human rights specifically concerned *investors'* rights. There were several references in the cases to each of the following: assimilating investors' procedural rights under the relevant treaty to the right to a fair hearing and/or rights in the criminal process; analogizing the European Convention on Human Rights (ECHR) right to property with expropriation and with the protection of legitimate expectations; referring to the approaches of the European Court of Human Rights (ECtHR) to proportionality and the margin of appreciation as analytical tools; analogizing the security exception and/or necessity defence with Article 15 ECHR (permitting derogation in times of emergency); noting that Article 31(3)(c) of the Vienna Convention on the Law of Treaties would permit human rights treaties applicable between the parties to aid in the interpretation of investor rights in the investment treaty; using ECtHR practice as guidance regarding the assessment of damages to the investor and/or costs; and noting existing or contemplated parallel proceedings before the ECtHR.

[37] *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, para. 281 (finding that the impugned conduct was both an expropriation and a failure to afford fair and equitable treatment).

[38] *Suez and others v. Argentina*, ICSID Case No. ARB/03/17, Separate Opinion of Pedro Nikken, 30 July 2010, paras. 4, 19.

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Thus, it appears that investment arbitrators are far from unaware of international and regional human rights implications for investment law, and they are prepared to revert to them in the context of supporting investor rights. Importantly, however, human rights in these cases are employed as supplementary means to strengthen findings relating to investor claims.[39] That is, they are not regarded as the primary norms that in themselves establish these claims as rights in the sense of endowments – this is perceived as the operation of investment law, as has been discussed in the previous section. Rather, human rights as used in the majority of cases provide only secondary guidance and justification regarding how an investor's rights should have been respected in additional conformity with human rights obligations.

Only a few decisions touch on the human rights of host state populations that potentially compete with investor rights or conflict with them. There could be several reasons why this is the case. What is important for our purposes is that in all of these cases, in contrast to the broad acceptance of investors as bearers of human rights, host states' human rights arguments were rejected. We found little analysis that could cast a bright light on the ways in which tribunals perceive the human rights of host state populations, although we can try to deduce their perceptions from the reasoning that they have employed. In only one case (*South American Silver* v. *Bolivia*, discussed briefly below) did a tribunal reject the actual normative applicability of the human rights raised by the host state as a defence (which is clearly different from a positive claim), though not as a general matter, but for reasons related to the particular human rights in question. The most common approach taken by tribunals has been to deny that investor rights and human rights of the host state population were in fact in conflict, usually suggesting that the host state government could or should have been able to comply with both its obligations under the investment treaty and protect the human rights of its populace. These findings can be read as inferring that the host government could have pursued the promotion of the human rights of its population without detracting from the investor's rights. We deal with these cases below, generally in reverse chronological order, and explain how this approach suggests that arbitrators view investor rights in very different ways compared with to the rights of the host state population: the former as endowments of present claimants that have been lost, and the latter as aspirational gains of less visible stakeholders that require positive action by the government for their fulfilment. To be sure, this is in keeping with the mainstream doctrinal perception of economic and social rights as 'positive' rights, a perception that comes into harsh relief when contrasted with the acceptance of investor claims as rights. Moreover, it is undeniable that almost all IIAs do not provide any explicit reference to human rights, either as obligations or defences; and arbitrators are limited, in principle, though not absolutely, to the claims of the parties

In *South American Silver* v. *Bolivia*,[40] Bolivia argued that investment treaty obligations and human rights obligations should be subject to the principle of systemic integration, but in cases of conflict between human rights norms (here, Indigenous rights) and obligations of investment protection, human rights should prevail. The tribunal found that none of the human rights norms raised by Bolivia were norms of customary international law or were found in treaties that either Bolivia or the investor's home state were parties to. This dismissive approach to the relevance of Indigenous rights, regardless of whether or not the analysis is correct under international law, clearly demonstrates the gap between investor rights as reflecting solid endowments, in contrast with (some) human rights that are merely aspirational. The tribunal also found that Bolivia had not further articulated why the relevant human rights norms conflicted with the BIT or should prevail over its provisions, similar to the other cases discussed here.

[39]C.f. S. Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration', (2018) 31 *Leiden Journal of International Law* 33, at 45–9.

[40]*South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018.

In *Bear Creek* v. *Peru*,[41] the claimant's mining project was controversial and had attracted large protests by the Indigenous communities whose land was affected and who did not stand to benefit from the project. Peru eventually revoked the mining rights on the basis that it needed to quell the unrest, with the effect that the project could not continue. The tribunal found that Peru had known about community opposition to the project for some time but had made the necessary approvals, concluding that the revocation amounted to an indirect expropriation. Here too, it is evident that the tribunal's majority viewed the investor's mining concessions as an endowment lost (e.g., in determining its jurisdiction, referring to Peru's constitution and law to establish that concession rights as 'rights *in rem*'),[42] whereas the relevant Indigenous rights (such as the right to informed consultation), are viewed as something to be gained, which here was not fulfilled. In a partial dissent, Arbitrator Sands argued that the ILO Convention 169 on Indigenous and Tribal Peoples[43] was applicable law and that it should have been taken into account in terms of assessing the sufficiency of the consultation undertaken by the investor (but as no counterclaim was made, this would likely not have affected the outcome).

In *Urbaser* v. *Argentina*,[44] provincial Argentine authorities had, following the 2001 financial crisis, renegotiated and then terminated a contract for the provision of water and sewerage services. The tribunal found that it had jurisdiction to consider a counterclaim based on human rights. It agreed that private parties (i.e., the investor) were obliged to comply with human rights norms in the sense of refraining from acting in a way that destroyed the enjoyment of rights, but did not agree that, like the government, they had a positive obligation to facilitate access to water.[45] The tribunal held that Argentina should have fulfilled these obligations 'in a manner that comports with the [FET] standard'.[46] This approach, too, focuses on the forward-looking or aspirational character sometimes attributed to social rights such as the right to water – a right to something that ought to be fulfilled in the future through positive action, placing this responsibility squarely on the shoulders of the government, while viewing the investor's contract as an endowment lost, regardless of the government's positive obligations.

Indeed, as far as we are aware, all investment cases where the human rights of host state populations have been engaged to date have concerned economic, social and cultural rights. In this regard, it could be that tribunals are influenced by the framing of these rights in juxtaposition to civil and political rights in the sense of the classic (although artificial)[47] negative-positive rights dichotomy, which is based on the distinction between the rights contained in the International Covenant on Civil and Political Rights and the those found in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[48] There is almost no evidence from the decided

[41] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017.

[42] Ibid., para. 297.

[43] Indigenous and Tribal Peoples Convention, 1989 (No. 169), signed 27 June 1989, in force 5 September 1991.

[44] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award, 8 December 2016.

[45] Ibid., paras. 1205–10.

[46] Ibid., para. 622. However, Argentina was held liable for only one act in breach of FET; most of the claims were dismissed, and the tribunal held that any breach was justified by the defence of necessity.

[47] The debate over the nature of social and economic rights as mainly 'positive' rights, and the implications for judicial review, is longstanding. See, e.g., R. Hirschl, '"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order', (2000) 22 *Human Rights Quarterly* 1060; Y. Shany, 'Stuck in a Moment in Time: The International Justiciability of Economic, Social and Cultural Rights', in D. Barak-Erez and A. Gross (eds.), *Exploring Social Rights* (2007), 77.

[48] Art. 2 ICESCR provides: 'Each State Party … undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant …', whereas Art. 2 ICCPR provides: 'Each State Party … undertakes to respect and to ensure the rights recognized in the present Covenant' and 'undertakes … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

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cases that investment tribunals have expressly considered this dichotomy,[49] but the general literature does support the idea that positive/negative framing may have cognitive effects on judicial decision-making.[50] In only one case (*Urbaser*, discussed above) does a tribunal discuss the nature of obligations under the ICESCR, noting that one of the General Comments of the Committee on Economic, Social and Cultural Rights provides that the right to an adequate standard of living and the right to the highest attainable standard of health under the ICESCR[51] 'imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible'.[52] Finding that the investor itself had no such duty as a matter of international law, the tribunal stated: 'The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake.'[53]

In *EDF* v. *Argentina*,[54] Argentina argued that the emergency measures it took due to its 2001–2002 economic crisis, such as the 'pesification' of concession contracts in the energy sector, were done to protect (unspecified) human rights. The tribunal observed that once the crisis had abated, there was no need to continue the emergency measures in order to protect human rights, and the government should have reverted to the previous position. The tribunal did not comment directly on the relevance of protecting human rights during the time of the emergency. The vagueness of the arguments in this case make it difficult to draw conclusions relating to the question at hand, but we would contend that it reflects a view whereby the aspiration to fulfil human rights (as gains to the host population) can *take precedence* over the protection of investor rights perceived as endowments only temporarily and in exceptional circumstances. In ordinary times, the duty of progressive realization of social rights – though not referred to as such – as a forward-looking aspiration, is not seen to be in conflict with the preservation of investor endowments.

In two related cases involving water concessions,[55] Argentina argued that its human rights obligations to assure its population the right to water prevailed over its investment obligations as derived from BITs, but was unsuccessful in persuading the tribunal on this issue. The tribunals, in almost identically worded decisions, concluded that:

> Argentina is subject to both international obligations, i.e. human rights and treaty obligations, and must respect both of them. Under the circumstances of this case, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus ... Argentina could have respected both types of obligations.[56]

This, in our analysis, represents (however implicitly), a view that governments have an obligation to promote the progressive attainment of human rights, without incurring any loss to the investor's right understood as an endowment – as opposed to a view that would consider both sides of the equation as losses.

[49]For example, in all the cases reviewed there are no references to the term 'progressive realization' in the cases, which one might expect tribunals to discuss if they were cognisant of the positive rights–negative rights distinction.

[50]E. Zamir and D. Teichman, *Behavioral Law and Economics* (2018), at 190–1.

[51]Arts. 11 and 12, ICESCR.

[52]Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003, para. 45.

[53]*Urbaser*, para. 1210.

[54]*EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012.

[55]*Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010.

[56]Ibid., paras. 240 and 263 respectively.

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For the sake of completeness, it bears mentioning that in several cases, it appears that Argentina had raised but not developed its human rights arguments before the tribunal. In these cases, a human rights argument was briefly mentioned but not dealt with in the decision, meaning that it cannot contribute meaningfully to our analysis. In *Mobil* v. *Argentina*, Argentina argued that its human rights obligations were relevant to interpreting its investment obligations,[57] whereas the claimant contended that there were no relevant human rights obligations at issue.[58] The issue was not discussed further by the tribunal. In *Siemens* v. *Argentina*, Argentina argued that a finding in favour of the claimant would breach human rights law, but did not develop the point further.[59] And in *Azurix* v. *Argentina*, Argentina argued that a conflict between a BIT and human rights treaties must be resolved in favour of human rights, but the tribunal ruled that 'The matter has not been fully argued and the Tribunal fails to understand the incompatibility in the specifics of the instant case.'[60]

In sum, although, the body of tribunal decisions relating to the human rights of host state populations is undeveloped and lacks explicit theoretical discussion of the status of such rights vis-à-vis investor rights, we argue that a common thread can be identified: the perception that human rights are something to be realized in future, primarily through positive government actions. This suggests, in our view, a psychological explanation: the framing of human rights as aspirations, in contrast to investor rights as endowments.

5. The loss–gain frame: Investor rights, human rights and cognitive psychology

Our analysis so far has demonstrated that the lens of ISDS decisions – also as a reflection of the IIAs themselves, and human rights law – places investor claims and the human rights of non-investors in the host state in very different positions. To be sure, the normative priority of certain rights or interests over others depends on the normative structure of the regime, and, unlike investors, host state citizens generally lack standing in investor-state arbitrations. However, arbitrators have by and large, albeit without sufficient theoretical grounding,[61] considered investor claims to be based on investor rights, often construed as property rights. This translates into a perception of such rights as *ex ante* endowments that risk being (or more accurately, have been) lost or otherwise impaired because of governmental action.[62] In contrast, arbitrators have, in the small pool of cases that have raised the issue, considered the human rights of host state populations as aspirational. They may exist in theory, but they have not yet been realized, and certainly not in full. Although they may be gained in the future, or could have been gained, with sufficient positive government action, this is usually understood to be disconnected from the negative obligations towards the investor and their investment, which is seen as an endowment.[63]

Thus, in its simplest form, the question of investor rights that compete with non-investor human rights in ISDS has taken on a basic structure of investor loss versus non-investor gain. Moreover, in terms of probability, the loss - the alleged violation of investor rights – is certain (if the existence of the investment has been established) because it has already occurred. The contrasting gain, however – the fulfilment of human rights – is depicted and framed as uncertain, a possibility whose realization is contingent on a variety of factors such as positive governmental

[57]*Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, paras. 304, 312.

[58]Ibid., para. 308.

[59]*Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para. 79.

[60]*Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 254, 261. See also, e.g., *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, 3 November 2008: Argentina makes these arguments (at para. 136) but they are not discussed by the tribunal.

[61]Section 2 above.

[62]Section 3 above.

[63]Section 4 above.

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intervention. The circumstances of the particular dispute with the investor are only one factor among many, that arbitrators prefer to distinguish from the human rights questions entirely.

On both sides of the equation, this calculus may be factually and legally flawed. Investor claims do not always constitute endowments, whereas human rights often do, in the sense that they are enjoyed by their holders. What is important for present purposes, however, is that this is the frame of analysis that has emerged from actual arbitral decisions. It is within this loss–gain framework that arbitrators have so far made their decisions and justified them. They have also created this framework, through their interpretive decisions regarding investor rights and non-investor human rights, designing their own 'choice architecture', similar to what negotiators sometimes do.[64] One might wonder whether these normative design preferences are intentional or otherwise, and whether they have sociological explanations.[65] Our limited concern here, however, is to show how this loss–gain frame sets human rights at a structural decision-making disadvantage in ISDS.

The necessary starting point for this claim is prospect theory,[66] one of the most important theories of human decision-making. In contrast with standard rational choice, exemplified by expected utility theory and the Coase Theorem,[67] prospect theory considers that people make decisions on the basis of perceived gains and losses rather than final states of wealth, however defined. Moreover, as substantiated by robust experimental research, under conditions of uncertainty and risk, people perceive losses as greater than objectively equivalent gains, or more precisely, 'the disutility generated by a loss is greater than the utility produced by a similar gain', and hence, 'people are generally loss averse'.[68] This is the underlying intuition for two important cognitive concepts that relate strongly to our analysis of ISDS in the present context.

The first is the endowment effect, according to which 'individuals tend to place a higher value on objects and entitlements they already have, compared with objects and entitlements they do not'.[69] The second is framing effects, that arise when alternative descriptions of the same decision problem lead to different preferences,[70] often as a result of loss aversion. When a choice between a certain outcome and a probabilistic one is framed in positive gainful terms (e.g., the number of people saved by one vaccine in an epidemic disease crisis, when the effect of one vaccine is certain and that of another is potentially greater but uncertain), people will avoid the riskier option. When the same decision is framed as potential losses (how many people will die due to the disease if one vaccine is administered and not the other), people will prefer the riskier one. This is the classical illustration of this cognitive phenomenon in Kahneman and Tversky's 'Asian disease' experiment.[71] Both endowment effects and framing effects have provided fertile ground for discussion of decision making in legal contexts, including decisions by judges and arbitrators.[72]

Against this background, we apply this theory, while based on empirical observations on real decision-making displayed through our survey of the decided investment cases, to suggest a cognitive explanation for the negative record of ISDS in taking into account the human rights

[64]See T. Broude and S. Moses, 'The Behavioral Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the Trade in Services Agreement (TiSA) Negotiations', in P. Sauvé and M. Roy (eds.), *Research Handbook on Trade in Services* (2016), 385.

[65]See Hirsch, *supra* note 6.

[66]See Kahneman and Tversky, *supra* note 5.

[67]R. H. Coase, 'The Problem of Social Cost', (1960) 3 *Journal of Law and Economics* 1.

[68]Zamir and Teichman, *supra* note 50, at 43; see also E. Zamir, 'Loss Aversion and the Law', (2012) 65 *Vanderbilt Law Review* 829.

[69]Zamir and Teichman, ibid., at 50. See also R. Korobkin, 'Wrestling with the Endowment Effect, or How to do Law and Economics without the Coase Theorem', in E. Zamir and D. Teichman (eds.), *The Oxford Handbook of Behavioral Economics and the Law* (2014), at 300.

[70]A. Tversky and D. Kahneman, 'Rational Choice and the Framing of Decisions', (1986) 59 *Journal of Business* S251.

[71]A. Tversky and D. Kahneman, 'The Framing of Decisions and the Psychology of Choice', (1981) 211 *Science* 453.

[72]For a masterly overview regarding law in general see Zamir and Teichman, *supra* note 50; focusing on international law applications, see A. van Aaken, 'Behavioral Law and Economics', (2014) 55 *Harvard International Law Journal* 421; T. Broude, 'Behavioral International Law', (2015) 163 *University of Pennsylvania Law Review* 1099.

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of host-state populations. Theoretical applications such as ours take research scenarios in which a divergence from perfect rationality is noted on the basis of general empirical evidence, and then apply the ramifications to a different legal rule or institution and set of circumstances.[73] As the legal construction of investor claims by arbitrators frames the former as rights in the nature of endowments, while the legal construction of opposing human rights frames them as aspirational gains, arbitrators may be susceptible to a cognitive tendency that attaches greater relative value to the loss of an endowment than to the potential gain. We emphasize the relativity involved – what is at stake in the decision-maker's mind is not the final position of the investor and the final position of, say, the First Nations people on whose land the investor received a mining concession. Rather, it is the arbitrators' perception of relative (certain) loss to the investor pitted against the perception of relative (uncertain) gain to the affected people. This is largely the result of the endowment effect and the implicit framing of the problem.

Moreover, as already noted, in an *ex post* arbitration, at least in all those that have been surveyed, it would appear that the loss to the investor is perceived as a certainty (again, once arbitrators have found that a legally defined investment indeed existed in accordance with the applicable investment agreement), whereas the human rights gains to the non-investors are a potentiality, subject to risk and uncertainty. This is a relatively complex framing in its asymmetries, but it is conceivable that the arbitrator would in this frame have a tendency to value the certain loss as greater than the uncertain gain. We reiterate that this decision-making frame has been established by the decision-makers themselves, i.e., the arbitrators. Thus underlying, implicit cognitive biases in favour of investors may be in play, at the sociological level.[74] This does not, however, negate the argument because it suggests that arbitrators may (if only subliminally) consider it more justifiable to discount non-investors' human rights within a loss–gain frame, whether of their own construction or as a consequence of the formal legal framework of IIAs.

One potential objection to our approach is that we go beyond classical prospect theory insights, as the scenario we discuss is not one in which individuals weigh their choices with respect to their own losses or gains. Rather, arbitrators are assessing the relative value of the losses and gains of others, and one might also note that the losses are of one party (*in casu*, the investor) and the gains to another (the non-investors). Although the basic and well-known Prospect Theory framework relates to the assessment of gains and losses to the self, there is experimental basis for the contention that endowment effects and framing effects exist also in scenarios such as these – that is, when decisions or evaluations are made on behalf of others, even when these others occupy differential positions, and also in legal settings. Thus, in a seminal analysis of cognitive biases and heuristics in judicial decision-making (which is comparable to arbitration in this regard), an experimental study of federal US judges' assessment of settlement offers showed them to be subject to framing effects relating to the losses and gains of others. More judges thought that plaintiffs should accept an offer (the settlement offer being a certain gain, compared to the uncertain gain of a possible litigation win), than thought that defendants should accept the same settlement deal (the offer representing a certain loss to the defendant, with continued litigation leading to an uncertain loss).[75] Another empirical study in the area of bankruptcy law found that judges tended to be pro-debtor in cases that 'pit a highly risk-averse party (the debtor or unsecured creditors) against a risk-neutral or relatively less risk-averse party (secured creditors)'.[76] Neither of these studies goes hand-in-glove with the investor rights versus human rights scenarios discussed here, but they do demonstrate that endowment effects and framing effects may apply also in respect of decisions made by one person concerning other people.

[73]Broude, ibid., at 1132.

[74]As per Hirsch, *supra* note 6.

[75]C. Guthrie, J. J. Rachlinski and A. J. Wistrich, 'Inside the Judicial Mind', (2001) 86 *Cornell Law Review* 777.

[76]K. Sharfman, 'Judicial Valuation Behavior: Some Evidence from Bankruptcy', (2005) 32 *Florida State University Law Review* 387, at 391.

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Another point to contemplate is that arbitrators may not actually be considering the population of the host state as a party or actor whose interests and rights are to be taken into account. Rather, they see the host state government as representing its population. This conflation may create a distance that makes the preference in the valuation of the investor's rights even stronger (and as we have seen in Section 4, permits arbitrators to shift the issue of responsibility to give effect to the relevant human rights onto the host state government).

Finally, it is important to note that although we have presented this cognitive framework as pitting investor losses against non-investor gains, this presentation is not a reflection of the current doctrinal analysis undertaken by tribunals. We acknowledge that the prevalent formal construction is of investor claims versus host state obligations, and this indeed might be a significant part of the problem, insofar as investment tribunals do not consider the interests and indeed rights of host state populations independently, let alone explicitly. We will return to some of these points in our prescriptive suggestions in our conclusion, below.

6. Conclusions: Can the loss–gain frame be reframed?

Adopting the language of rights as a framework for discussion, in this article we have investigated the attitudes adopted by ISDS tribunals towards the competing rights of investors and host state populations. We have seen that scholarly literature, as well as arbitral decisions, have a strong tendency to treat investor claims as investor rights, often as property rights, although the theoretical grounding for this proposition is only partial at best. In contrast, human rights are largely treated by ISDS tribunals as supplements to investor rights, and only in a few cases have the human rights of non-investors been addressed. Moreover, we have shown that investor rights are by and large framed by tribunals as endowments that have been lost (insofar as there is an evidential basis for the investment claim itself), while the competing human rights of host-state populations are considered to be aspirational and potential gains. On this basis, we have suggested that this loss–gain frame triggers certain cognitive effects that set human rights considerations at a structural disadvantage vis-à-vis investor rights: endowment effects and framing effects.

We consider this state of affairs undesirable in several respects. It is important to clarify not only the characterization of investor claims as rights, but the nature of these rights and the extent to which they are defeasible when they compete with other rights and interests. Greater specification of the nature of investor rights can be of great importance to the human rights of non-investors: for example, if the rights of the former are recognized as relative and derogable in the face of the competing rights of the latter.

No less importantly, we find the loss–gain frame that has been developed – perhaps unwittingly – by tribunals in the few relevant cases, and the structural disadvantage in which it places the human rights of host state populations, as highly problematic in times in which the legitimacy of the ISDS system rests, to a substantive degree, on its ability to take into account not only the interests of investors, but also the concerns of other stakeholders.

In conclusion, we make some brief suggestions towards how this frame could be dismantled, or at least weakened. First, the perception that human rights of non-investors are prospective gains, even when economic and social rights are at stake, is not aligned with progressive understandings of human rights. Tribunals should take as a reference point not the current human rights situation of potentially harmed populations, but rather the situation in which international human rights standards would expect them to be. Second, tribunals should establish an interpretative, rebuttable presumption that the host state is taking due steps to protect and promote human rights, especially in the areas of economic and social rights. While this might appear to merely strengthen state positions against investor claims, we contend that it would more particularly strengthen the position of human rights, by reframing them as endowments. Both of these approaches would go some way towards rectifying the certain loss – uncertain gain framework. Third, tribunals should

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consider the rights of host state populations regardless of the host state's litigation strategy, thereby overcoming the ingrained dyadic characterization of the interests at stake. This can be achieved through procedural methods such as amicus briefs or third-party participation by non-state representatives, but notwithstanding such mechanisms, this approach should be adopted by tribunals themselves, *ex proprio motu*. A fourth approach would be to rely on techniques such as proportionality analysis that would provide a more transparent and coherent analytical structure to reconcile the investor's losses with the losses (or foregone gains) to the human rights of non-investors in host states, while recognizing the need for circumspection and deference with respect to deploying this method of review in the ISDS context.[77] These are all issues worthy of further contemplation and, where possible and helpful, of empirical research.

[77] As to which see C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015), 128–68 (advocating for an institutionally sensitive approach to the use of proportionality analysis and arguing that its final balancing stage of is inapposite to ISDS).

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