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Las Cuartas Jornadas de Derecho de Aguas se realizaron en la ciudad de Lima, los días 15 y 16 de setiembre del 2016, gracias a la iniciativa del Centro de Investigación, Capacitación y Asesoría Jurídica (CICAJ) y el Instituto de Ciencias de la Naturaleza, Territorio y Energías Renovables (INTE), y fueron el escenario donde expertos nacionales e internacionales reflexionaron sobre los vínculos entre el derecho humano al agua, el derecho de las inversiones y el derecho administrativo, con especial énfasis en los avances y los desafíos para la protección del derecho humano al agua.

Este volumen compila artículos arbitrados que fueron presentados en las Cuartas Jornadas de Derecho de Aguas. Están organizados en tres secciones: «Derecho humano al agua, inversiones y derecho administrativo», «Conflictos por el agua y arbitrajes internacionales» y «Evolución y propuestas». Esperamos que este libro contribuya a la reflexión sobre la relación entre el derecho humano al agua y el derecho de las inversiones desde una perspectiva de gestión del agua más equitativa, eficiente y sostenible.

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EL DERECHO HUMANO AL AGUA, EL DERECHO DE LAS INVERSIONES Y EL DERECHO ADMINISTRATIVO
CUARTAS JORNADAS DE DERECHO DE AGUAS
ARMANDO GUEVARA GIL / PATRICIA URTEAGA / FRIDA SEGURA
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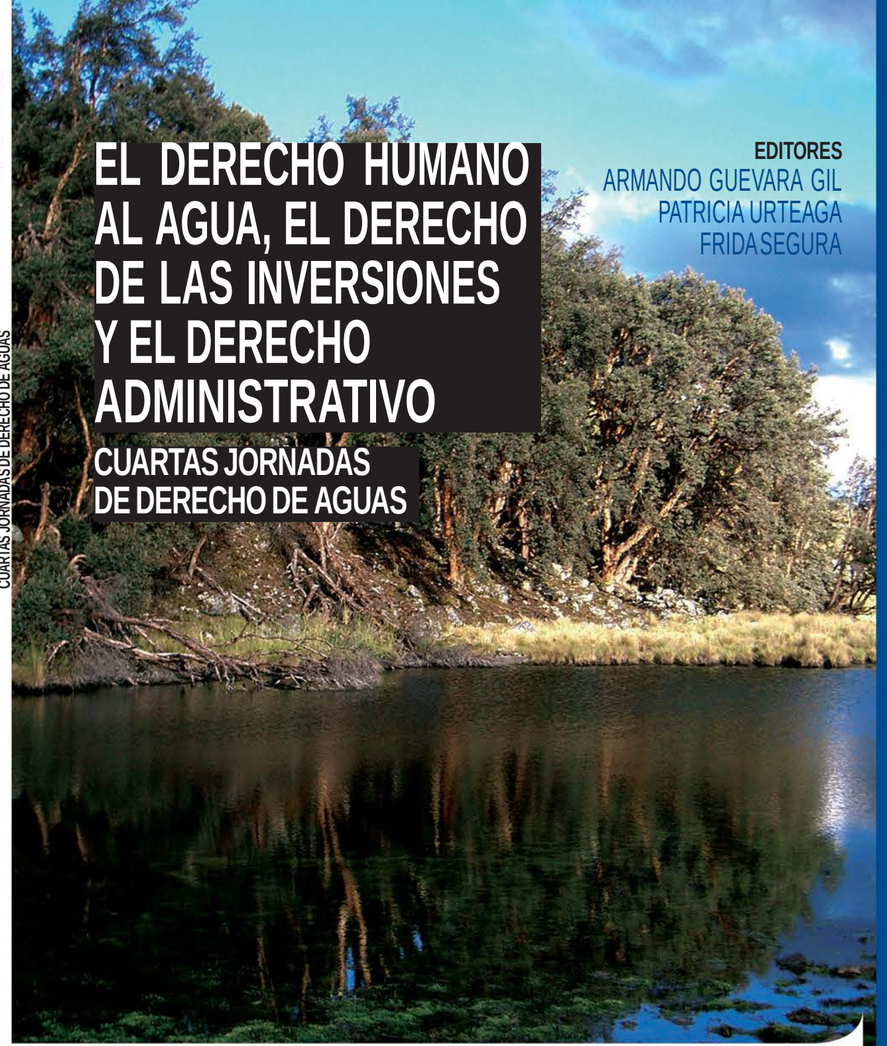

EL DERECHO HUMANO AL AGUA, EL DERECHO DE LAS INVERSIONES Y EL DERECHO ADMINISTRATIVO

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El Centro de Investigación, Capacitación y Asesoría Jurídica (CICAJ) del Departamento Académico de Derecho de la Pontificia Universidad Católica del Perú (PUCP) y el Instituto de Ciencias de la Naturaleza, Territorio y Energías Renovables (INTE), también de la PUCP, tienen el agrado de presentar a la comunidad académica y al público interesado el libro de actas de las Cuartas Jornadas de Derecho de Aguas (2016) «El Derecho Humano al Agua, el Derecho de las Inversiones y el Derecho Administrativo». Desde una perspectiva comparada e interdisciplinaria, este trabajo presenta los avances y desafíos para la protección del derecho humano al agua en el marco del derecho de las inversiones.

EL DERECHO HUMANO AL AGUA, EL DERECHO DE LAS INVERSIONES Y EL DERECHO ADMINISTRATIVO

CUARTAS JORNADAS
DE DERECHO DE AGUAS

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TERCERA SECCIÓN

EVOLUCIÓN Y PROPUESTAS

INTERNATIONAL ECONOMIC LAW MIGHT IMPROVE WATER GOVERNANCE IN PERU

*Christian Häberli**
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This book sheds new light on the well-known and often debated fragmentation between human rights and water and investment law. In this chapter we ask whether it has been exacerbated by the protection offered to foreign investors under Peru's recently signed regional trade agreements (RTAs) and under World Trade Organization (WTO) rules, two sets of rights and obligations enforceable under their specific dispute settlement procedures. Does this mean that foreign operators can negotiate water rights at the expense of local users with a government that is hungry for economic growth, foreign direct investment (FDI), and foreign exchange?

We try to show that economic treaties could actually contribute to improving water governance in Peru. Trade-distorting social and environmental dumping can now be addressed under the new, comprehensive treaties. This means that, regardless of the relative economic impact of different water uses, Peru can no longer trade away its international obligations by condoning "water grab" investments and violations of fundamental human rights and environmental norms. The only caveat is the unilateral smell of even well-meant standards which are "made in Washington". At the multilateral level, the WTO does not prevent self-discrimination (e.g. through incentives for foreigners only), but it ensures non-discriminatory treatment of all foreign operators. Hence traders and investors can still trust arbitrators to safeguard their legitimate interests. But neither RTAs nor the WTO will systematically protect investment treaties and contracts with "regulatory freeze" clauses in cases of serious violations of peremptory social and environmental law (so-called *ius cogens*), including water grabbing. Moreover, developing countries accepting higher standards in bilateral or mega-regional treaties can count on their developed trading partners to enforce equivalent standards in countries with competing producers.

* Weblinks: http://www.wti.org / https://www.wti.org/institute/people/44/haberli-christian

1. Introduction

Demand for fresh water is increasing everywhere. However, availability and quality are diminishing in many parts of the world. Climate change, demography, overfishing, increasing trade in "virtual water" (contained in traded agricultural goods) and other structural developments contrive to the making of a "perfect storm" for which developing countries are especially ill-equipped.

Peru is recognised as an extreme case of water scarcity where most of its people live, while water is more than abundant where human, agricultural and industrial use is lowest. Stakeholders range from urban and rural consumers without tap water to miners and manufacturers looking for the world's best and legally secure locations, and from small and often water-inefficient farmers to hi-tech cash crop producers in the Peruvian coastal desert. In addition, environmentalists claim a protected water share for nature and biodiversity.

Lawyers try to prioritise water rights according to their own, often fragmented, perspectives. Economists try to solve the conundrum with scientific allocation criteria, industrial and management policies, and market mechanisms. Technology and engineering progress increase productivity and yields — but without solving shareholder interest conflicts, financial resource constraints and safeguarding public interests. Policy-makers having to respond to different objectives and constituencies are wondering which advice to take and from whom.

Can the scholarship square the circle?

This chapter is written from a legal perspective. In the same vein as the rest of this book, it asks whether and how the right to water conflicts with the right to (foreign or national) investment: What rights? For which users? How can we assess those rights, enshrined as they are in international treaties and in constitutional law, independently of their normative value and differing enforcement possibilities?

The hypothesis here is that under specific conditions, international economic law (IEL) is a so far neglected avenue which might actually lessen policy and regulatory fragmentation and contribute to better water governance at the national level, particularly in Peru. The chapter starts with the various sources of public and private international law and discusses the various state and non-state actors involved in relevant recent cases. It concludes that even under asymmetric information and bargaining strengths trade-distorting "water grabbing" can be prevented below a *nec minus* or bottom line which is about to become enforceable in Peru as well.

2. Recent Experiences with Social and Environmental Norms in Economic Treaties

2.1. Sources of international law.

Numerous sources of international law contain principles and obligations relevant for national and international water governance, both under customary international law (for example, the prohibition of slavery — but not necessarily any kind of forced labour), globally accepted minimum standards (including peremptory

norms known as *ius cogens*, further discussed below), and international treaties. Various United Nations (UN) Conventions on the Right to Food and Water contain positive obligations, without being limited to the national level or to host states (Meshel, 2015, p. 284). The same goes for regional treaties, such as the Andean Community with its own Court of Justice. Bilateral treaties regulating water rights are mainly found between countries along international waters. Others contain obligations and mutual admonitions to maintain and improve environmental and social standards. They also reflect the "first of all do no harm" principle already found in customary international law (CIL) and in the UN Social Compact : *primum non nocere* i.e. the obligation of all states to prevent predatory behaviour abroad of their citizens and firms and, at the very least, not to lower such standards in order to improve productivity and competitiveness ("race to the bottom").

How does this work for water, particularly in a country like Peru where conflicts frequently occur at local, regional and national levels, at times with international operators? Such conflicts entail considerable costs and economic losses, as in the Santa Ana Project where a USD 71 million investment was "delayed by communities fighting to protect local water supplies from pollution" (OECD, 2015a, p. 107).

Coherence, obviously, is difficult for a multitude of international norms with widely differing objectives — even when they are adopted by the same governments, especially under widely differing dispute resolution systems. Hence the need for an overarching rules interpretation system that avoids rule conflicts as much as possible. Precisely because of this pluralism of regulatory authority, the scholarship generally agrees that adjudicators in international courts and arbitration proceedings "employ teleological interpretive approaches" (Foster, 2014, p. 360). As will be shown in Sub-Section 1, the Vienna Convention on the Law of Treaties (VCLT) contains the treaty interpretation rules mandatory for all its signatories, including international tribunals and WTO adjudicators.

This chapter looks at both types of international economic law (IEL) instruments: bilateral/regional and multilateral. The former can perhaps show a new way for better governance. The latter will perhaps not prevent it. Both can be relevant for water allocation and water disputes.

(1) Peru has concluded two Regional Trade Agreements (RTAs) with comprehensive and ambitious provisions for measures with a direct or indirect trade impact, including mandatory environmental and social provisions and new compliance procedures (Sub-Section 2).
(2) This raises the question in Sub-Section 3 whether the non-discrimination rules of the World Trade Organization (WTO) only help to ensure that foreigners shall not be treated less well than nationals? Worse, can these rules, depending on how they are interpreted, prevent non-trade considerations from overriding trade disciplines and commitments? In other words, would a WTO adjudicator protect a country trying to improve the productivity of its copper mines by waiving its own

> environmental and social standards against a complainant arguing that such measures are unfairly distorting trade? Is there a bottom line stopping traders and investors from hiring small children or causing irreversible deforestation?

Some provisions discussed here are behavioural obligations for treaty partners — i.e. host and home states — as well as for their traders and investors. These provisions, in turn, can be seen as containing private international law, applying it for instance to investment contracts between governments and foreign investors. Others introduce investor-state dispute settlement (ISDS) mechanisms. Last but not least, many treaties with developing countries comprise official development assistance (ODA) chapters which are not only binding for joint development programmes but are also mandatory guidelines for (water) governance in public-private partnerships (PPP). ODA in foreign direct investment (FDI) projects is an important element when it (co-)finances infrastructure such as irrigation channels, roads, hospitals and schools in the project area. It has also been argued that IEL treaties enjoin home and host states to abstain from condoning or supporting "water grabbing" by their investors (Cotula, 2014, pp. 8-9). In addition, home state responsibility arguably extends to their credit financing in investment projects and to their role as board members of international financial institutions (IFI) such as the World Bank (IBRD) or the Inter-American Development Bank (IDB) (Häberli and Smith, 2014, p. 207).

It should be pointed out that the legal developments described hereafter are trade-and investment-related and therefore go beyond the classic exclusively human, social and environmental rights law instruments and guidelines for corporate social responsibility (CSR). Both avenues — RTA and WTO — are not without their own problems: RTAs, especially those with the USA or the EU as a partner, seem to show a way out of fragmentation but retain a flavour of unilateralism (Sub-Section 2). The overarching non-discrimination rules of the WTO may actually block even well-intentioned attempts to prevent a "race to the bottom" on the back of trade liberalisation (Sub-Section 3).

The difficult search for scientific allocation methods and, even more, for a regulatory bridge between water and investment rights is far from being concluded (Section 3). Legally binding rulings under international economic treaties are still outstanding, and the USA and the EU as the two main "treaty drivers" are yet to come out clearly in their use of such treaties to address trade distortions by so-called "eco-" and "socio-dumping". Hence the conclusions on a possible way forward remain necessarily tentative and inherently fragmented (Section 4).

2.2. Regional trade agreements as instruments against "regulatory freeze".
For decades, RTAs in their various forms were only about tariffs and other border measures. Similarly, bilateral investment treaties (BITs) used to basically protect foreign investor interests. Following the example of the WTO, which in 1995 established new rules and disciplines deep into the domestic policy space of its Mem-

bers, the world's largest import markets of the USA and the EU started to include chapters on trade-related aspects of investment, intellectual property protection and competition. Going beyond the WTO, they even incorporated environmental and social standards in their treaties. Moreover, despite being essentially intergovernmental treaties, these comprehensive agreements now typically comprise even ISDS, a mechanism previously "hidden" in separate BITs with little if any transparency, institutional set-up, and case law significance. Even so, where the RTAs include international investment law (IIL) provisions, they may subject the *right to invest* to local environmental and social conditions — or, on the other side, condone their waiver by investment contracts with the host state. Tamar Meshel (2015) shows that investment arbitration tribunals recognise "the interconnectedness between human rights and foreign investment protection and that the former can, and should, inform the latter" (p. 277). This would mean that investment contracts disregarding water rights are not enforceable by ISDS under a RTA with a specific reference to public international law (PIL). Nevertheless, in respect of the human right to water "arbitral tribunals have been reluctant to address these arguments on their merits or pronounce on their effects on States' investment obligations" (Meshel, 2015, p. 283).

Initially, especially labour and environmental provisions in those RTA were of limited normative value. They were either confined to the preamble, or in separate chapters excluded from the enforcement mechanisms established for trade rules. The first RTA with dispute settlement provisions allowing even for consultative participation by non-governmental advocates was the North-American Free Trade Agreement (NAFTA), albeit so far without relevant water case law. The formulation and effective implementation of more stringent rules took a long time, and the Guatemala case described hereafter is the only example where a RTA party, in fact the USA, resorted to actual litigation against a measure it considered as a trade and investment distortion in violation of a labour standard provision.

In this respect, the objective of these treaties is to avoid preferential trade distortions by way of social or environmental dumping, if necessary by the more or less judiciary dispute settlement procedures laid down in these new RTAs. How does that work in practice?

The only case actually nearing a ruling is about labour relations in Guatemala. It dates back to 30 July 2010 when the USA formally initiated consultations under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), arguing that Guatemala had breached its obligations under this agreement by failing to effectively enforce its own labour laws, through a sustained and recurring course of inaction concerning workers' right of association, the right to organize and to bargain collectively, and acceptable conditions of work. Furthermore, the US expressed concerns about labour-related violence, and initiated labour consultations between their respective Ministries of Labour. An arbitral panel was established on 9 August 2011, as well as an 18-point enforcement plan on 26 April 2013. In order to allow for the implementation of the enforcement plan, work of the arbitral panel was suspended during 34 months (in three in-

tervals) for further consultations between the parties. But on 18 September 2014, while acknowledging the important legal reforms adopted by the Government of Guatemala, US Trade Representative Michael Froman announced that the US was again proceeding with the labour enforcement case against Guatemala. A public hearing of the Arbitral Panel took place on 2 June 2015, with written submissions by eight non-governmental organizations (NGOs) and broadcast live via webstream by the Guatemalan Ministry of Economy. Further delays occurred with the resignation of a panel member in November 2015, but on 27 September 2016, the recomposed panel under the CAFTA-DR finally issued its (still confidential) "Initial Report" — six years after having been requested to do so by the United States Trade Representative (USTR).

Peru's social and environmental regulations and practices have been repeatedly criticised by different US Government agencies, trade unions and NGOs, alleging workers' rights violations, forced labour, exploitative child labour in mines and in agriculture and, more recently, illegal shipments of tropical timber. The US Government also claimed that Peru engaged in what is called a "regulatory freeze". It argued that the Humala Government offered to waive or to freeze social and environmental constraints for new investors, contrary to the terms and conditions of the United States-Peru Free Trade Agreement (PTPA). In two instances, it took concrete steps towards bringing a case under its trade agreements with Peru.

(1) The PTPA contains a separate chapter on labour, with a Labor Cooperation and Capacity Building Mechanism supervised by a Labor Affairs Council.[1] It also foresees that "to establish a violation under the TPA a Party must demonstrate that the other Party has failed to comply with its terms in a manner affecting bilateral trade or investment." The Labour Chapter further provides that "neither Party will waive or otherwise derogate from the statutes and regulations that implement this obligation nor fail to effectively enforce its labor laws in a manner affecting trade or investment between the Parties." Article 17.7 provides that "No Party may have recourse to dispute settlement under this Agreement for a matter arising under this Chapter without first seeking to resolve the matter in accordance with this Article." At the end of this process, an Arbitral Panel that finds a violation can authorise trade or monetary sanctions (Art. 21.15). In 2014 the US Department of Labor confirmed that "Peru made a significant advancement in efforts to eliminate the worst forms of child labor." But it still claimed that "children in Peru continue to engage in child labor, including in agriculture, and in the worst forms of child labor, including in commercial sexual exploitation. Peruvian law does not fully comply with international standards to protect children engaged in night work and hazardous work." On 14 October 2014 the RTA Parties "reaffirmed their commitment to continue cooperating in order to guarantee full implementation of the Labor

1 See PTPA-Articles 17.2.1(a) (freedom of association) and 17.3.1(a) (enforcement of labor laws).

Chapter" and that "convening a public session is an important mechanism to promote transparency and exchange information with the public." Paul Paredes, the attorney for the Peruvian National Union of Tax Administration Workers (SINAUT), had contributed to the original petition against labour compliance under the PTPA. In its public report under the PTPA dated January 2016, the US Department of Labor renewed its claim that the Government of Peru "has failed to meet its PTPA commitment to […] the right of freedom of association and the effective recognition of the right to collective bargaining." A DOL official "pledged to keep the pressure on Peru to fix these shortcomings" and referred to the "strong labor and environmental standards" under the PTPA, as a means for "more open trade and investment" with Peru.[2]

(2) A second case, for the moment at an even earlier stage, started with a U.S. inter-agency report under the US-Peru FTA finding that significant portions of a Peruvian timber shipment to the Port of Houston were illegally harvested. In August 2015, the Office of the USTR announced that it was evaluating a potential case against Peru's environmental law changes.[3] In a high-level visit to Lima, the Obama Administration "enquired" whether such a "regulatory freeze" might violate provisions in the PTPA. On 17 August 2016, Nate Robson wrote that even after eight forestry operations lost their titles in sanctions by the Supervisory Agency for Forest and Wildlife Resources (OSINFOR), the US still demanded a meeting under the forestry annex of the FTA. According to Senate Finance Committee ranking member Ron Wyden, Peru needed to take additional actions against the illegal timber trade in order to enforce its own forestry laws: "Illegal timber costs American jobs and damages ecologically critical rainforest."[4] On 19 August 2016, the Environmental Investigation Agency (EIA) and the Sierra Club both welcomed these developments but urged Peru to take steps to improve oversight of its timber industry to ensure illegal shipments were seized before they leave port. Lisa Handy, senior policy adviser and forest campaign director for EIA criticised Peru's and the US Government's failure to enforce the "unprecedented" specific forestry provisions in the PTPA, seven years after its establishment.[5]

At this stage, nothing indicates whether and when the US Government will move to formal dispute settlement against what it considers as trade-distorting violations of the PTPA by Peru. But it seems obvious that a "regulatory freeze" might contravene social and environmental treaty provisions. Litigation procedu-

2 *World Trade Online* (1 November 2016).
3 Peruvian Government Suggests Labor Issues Could Be Part Of Larger Reform. *World Trade Online* (24 August 2016).
4 *World Trade Online* (17 August 2016).
5 Environmental Groups: Peru Timber Report A Good First Step; More Action Needed. *World Trade Online* (21 August 2016).

res foresee that "to establish a violation under the TPA a Party must demonstrate that the other Party has failed to comply with its terms in a manner affecting bilateral trade or investment." An arbitral panel finding a violation can then authorise trade or monetary sanctions.

Both cases in Guatemala and Peru indicate the sensitivity of establishing a formal link between trade, labour, and environmental issues. What is new is the close interaction, in both cases, between NGOs in both countries with their US counterparts which in turn coordinate their action with now three government agencies (Labor, State, and USTR). At the same time, the Obama Administration was well aware of these sensitivities and, at least for the time being, willing to give the new government under President Pedro Pablo Kuczynski a chance to reform its internal regulations. Whether and how this may change under the Trump Administration is unclear. What is clear, however, is that inaction even in extreme cases of socio- and eco-dumping erodes support for further trade liberalisation both in the US and in the European Parliaments. Moreover, such inaction may allow parochial domestic interests to prevail over the development objectives in Peru's trade relations.

As for the Trans-Pacific Partnership Agreement (TPPA) — if it is ratified — the possible impact of its labour and environmental provisions in Peru remains to be seen. On the one hand, it is worth noting that other TPPA countries like Vietnam, Malaysia and Brunei Darussalam had to commit to higher labour standards for their exports to the USA. The resulting "peer pressure" is likely to look for a non-distorting labour standard bottom line applying to all TPPA trade and hence to also bring new wind into these matters in Peru. On the other hand, the environmental chapter in the TPPA only mentions forestry in two sentences.[6] According to Lisa Handy from the EIA, this could indicate that government commitments to pursue resource conservation under the future megaregional trade agreement might be even less forceful than under the PTPA.[7]

2.3. Would the WTO condone "regulatory freezes"?

The big question now is whether trade and investment incentives offered to foreign operators in violation of international human rights or environmental treaties would be protected in a WTO dispute?

At the outset it appears that the WTO has few investment disciplines other than non-discrimination. The so-called *national treatment* obligation provides that foreign goods and services shall not be treated less favourably than "like" domestic goods and services — and investments.[8] But there are no injunctions on how to allocate land, or water, to investors, producers, processors, and consumers. Moreover, there are no restrictions to self-discrimination: treating foreigners better

6 TPPA-Article 20.15 ("Transition to a Low Emissions and Resilient Economy") foreseeing *Areas of cooperation* including "addressing deforestation and forest degradation" — but without provisions on water governance.

7 See footnote 8 above.

8 See GATT-Article III, and TRIMS-Article 2.

than nationals is not an issue under WTO rules.

Despite the absence of formal investment law in the WTO, basically two questions must be discussed in this context: (2.3.1.) whether the national treatment obligation only prevents discrimination of foreigners, and (2.3.2.) whether public international law (PIL)/CIL can bring in the human and environmental rights dimension otherwise lacking in economic treaties.

2.3.1. National treatment only?

The first question which should be asked here is whether any WTO rules apply in cases where governments try to promote investments, for instance by offering certain incentives to a foreign investor (or trader), such as water rights at the expense of other parties, or working conditions equivalent to forced labour. Where such offers are made for an extended period of time, the host government takes a so-called "regulatory freeze" commitment.

The academic scholarship is unanimously averse to regulatory freeze clauses in investment contracts. In reality, things are more complicated.[9]

(1) In investment arbitration, the notions of *legitimate expectations* and of *fair and equitable treatment* seem to go a long way to protect even rogue investors. In its Model Bilateral Investment Treaty dated 2012 the US Government made a first attempt to address this issue.[10] Case law has only partly addressed the problem.[11] The CIL limits of good faith were tested in the NAFTA arbitration panel in *Glamis Gold*[12], supporting an earlier finding in the often-cited 1926 Neer arbitration whereby a state would only violate its "fair and equitable treatment" obligation towards the investor if its actions amounted to inter alia "an outrage to bad faith and to wilful neglect of duty."[13] Meshel (2015, p. 289) contends that for the expropriation claim involving public interest and the right to water in *Azurix Corp. v. Argentine Republic*, "reliance on human

9 For a more complete discussion of the following summary, see Häberli and Smith (2014, p. 211).

10 2012 U.S. Model Bilateral Investment Treaty, Annex A&B. Retrieved from https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

11 For relevant awards see (i) Técnicas Medioambientales Tecmed S.A. v. The United Mexican States, ICSID arbitration, Case ARB(AF)/00/2, Award (20 May 2003), (ii) Azurix Corp. v. Argentine Republic, and a comprehensive review of these issues, both referred to in Waste Management, Inc. v. United Mexican States, Final Award (30 April 2004). Retrieved from https://www.italaw.com/cases/documents/1161.

12 Glamis Gold, Ltd v. The United States of America, ICSID, Award (8 June 2003), paras. 21-24. Retrieved from https://www.italaw.com/cases/documents/505. This finding on the limits of *fair and equitable treatment* was severely curtailed in the NAFTA case Merrill and Ring Forestry L. P. v. The Government of Canada Award (31 March 2010), paras. 195-219. "No general rule of customary international law can thus be found which applies the Neer standard, beyond the strict confines of *personal safety, denial of justice and due process* [emphasis added]" (para. 204). Retrieved from https://www.italaw.com/cases/669

13 LFH Neer and Pauline Neer (USA) v. United Mexican States, 4 RIAA 60 (1926). Retrieved from http://legal.un.org/riaa/cases/vol_IV/60-66.pdf

right jurisprudence was limited to the interpretation of the investor's property rights and whether these were violated by Argentina's regulatory actions, and was not used to evaluate Argentina's human right to water defence."

(2) Similarly, in the WTO, let's assume that another government claims a WTO rules violation, arguing that these "freeze" commitments are in fact prohibited investment incentives or export subsidies. This would actually raise the question whether there are WTO limits to export-oriented investment promotion, not limited to national investors, and regardless of the specific circumstances in which such incentives are granted. Would an adjudicator then accept a complaint against host state promises to not increase (or to lower) social and environmental standards? What happens if a home state tries to protect its investors against "expropriation" by a successor government withdrawing such incentives, tax holidays, or preferential water rates?

A scientifically robust answer to these questions is hardly possible. Given the "export bias" implied in the WTO agenda (Kaufmann and Grosz, 2008, p. 106) there are legitimate doubts as to its capacity to ensure the sustainability of environmental and social policies and to prevent eco- and socio-dumping. A clarification can only be obtained by the WTO Membership, through negotiation (1), rules interpretation (2), exceptions (3), waivers (4), or litigation (5).

(1) Since the WTO's inception in 1995 there has never been a negotiation on such issues. In all PIL treaties, national sovereignty over natural resources comes first. Especially developing countries have consistently refused to address the trade and labour connection in the WTO. The possibility of a negative trade liberalisation impact on the environment, or on climate change mitigation, is very rarely alluded to in the WTO Committee on Trade and Environment.

(2) The exclusive authority to adopt a rules interpretation (or to propose amendments) for a decision aiming at more coherent water governance lies with the WTO Ministerial Conference or with the General Council.[14] The possibility seems remote to obtain such a decision before the shortcomings of the present rules become abundantly clear.

(3) The exceptions enshrined since 1947 in Article XX of the GATT allow deviating from any WTO rule based on environmental and social norms.[15] So far, however, there is no relevant case. Moreover, in only four cases a

14 WTO-Agreement, Articles IX:2 and X.

15 GATT-Article XX *inter alia* provides that countries can take any measure "necessary to protect human, animal or plant life or health" — subject to the requirement "that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

respondent invoked PIL to justify a WTO rules violation under the public morals exception (art. XX, a) — to no avail.

(4) MFN: only in extreme cases the WTO rules guaranteeing market access irrespective of origin can be suspended; the only example so far was the waiver allowing WTO Members to prohibit imports of "blood diamonds" from conflict areas (Petersmann, 2009, p. 81). Mary Footer (2010, p. 274) suggested that this waiver has the "exceptive character" of a decision which provides a remedy (against nullification and impairment of benefits) even in the absence of a right.[16]

(5) Litigation: none of the environment-related Panel and AB rulings are directly relevant here, applying for instance to "water grab" issues.

2.3.2. A role for public and for customary international law?

The second question then is whether WTO panels and the Appellate Body (AB) will take PIL and CIL into account when interpreting WTO rules in a case about water, as prescribed by the already mentioned VCLT. Indeed, the VCLT is quite clear when it provides the general rules and the supplementary means of treaty interpretation: Article 31 paragraph 1 foresees in relevant parts that a "treaty shall be interpreted in *good faith* [emphasis added] in accordance with the *ordinary meaning* [emphasis added] to be given to the terms of the treaty in their *context* [emphasis added] and in the light of its object and purpose." And for good measure, paragraph 3(c) specifies that the term *context* includes "*any relevant rules of international law* [emphasis added] applicable in the relations between the parties." As for interpretation in WTO litigation procedures, Article 3.2 of the DSU specifies that this is to take place "in accordance with customary rules of interpretation of public international law."

The problem which cannot be discussed in detail here is that few if any international standards and rules explicitly *mandate* countries to differentiate imports according to their production and processing methods. For reasons good or bad, WTO adjudicators — including the AB itself (when given a choice and assuming they saw the conflict) — have consistently and without a single exception preferred deference to WTO law over deference to "Vienna" and thus taken a dogmatic way out of interpretation quandaries, most notoriously in the *EC — Seals* case (Häberli, 2014). It should also be recognised that, unlike for issues such as slavery or animal welfare, water as both a public good and used for the production of merchandise like timber or asparagus is less likely to find protection under international treaty law.

16 Kimberley Process Certification Scheme for Rough Diamonds. General Council Waiver Decision of 15 December 2006, WTO Document WT/L/676 dated 19 December 2006. The waiver has been extended until 31 December 2018 by a decision of the General Council dated 11 December 2012, even though Zimbabwe had expressed concerns about "coercive measures taken by the US that have led to low prices for diamonds from Zimbabwe." See WTO Document WT/L/876 dated 14 December 2012.

Whether this deference to WTO law was in all cases justified cannot be discussed here. Actually, the "splendid isolation" of the WTO was even intended by the negotiators of the dispute settlement provisions of the GATT 1947 and 1994 who might have feared encroachment of non-trade rules into the carefully crafted balance of rights and obligations under the multilateral trading system. Article 3 of the Understanding on the Settlement of Disputes (DSU) emphasises the importance of dispute settlement when it states that it "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with *customary rules of interpretation of public international law* [emphasis added]." But the same article adds in paragraph 2 that "[r]ecommendations and rulings of the DSB *cannot add to or diminish the rights and obligations* [emphasis added] provided in the covered agreements."

Does this mean the answer to the second question is that PIL can never trump WTO law in a judicial ruling — unless the rules are changed, or waived, by the competent regulatory authority i.e. the General Council?

My contention, absent a rules negotiation, interpretation, exception, exemption or revision, is that in a case of gross human or environmental rights violations, a WTO adjudicator may yet find that relevant PIL provisions can justify exceptions to the non-discrimination rules of the WTO. Basically, any WTO Member must be allowed to stop trade in goods and services produced in violation of *mandatory* PIL, also called *ius cogens*.

Indeed, Article 53 VCLT foresees that no treaty can conflict "with a peremptory norm of general international law." This means that even without a widely recognised definition of *ius cogens* there is a bottom line which adjudicators have to define and then apply to specific cases. The Appellate Body has never excluded that under VCLT-Article 31 *ius cogens* violations could justify import bans in a WTO dispute.

For social norms, Jeroen Denkers (2008, p. 210) suggests in his doctoral thesis that under WTO law a violation of such norms would not be sufficient to justify *eo ipso* import bans as countermeasures in response to labour rights violations. He argues that governments are entitled under PIL to impose countermeasures against another State only in cases of large scale violations of clearly peremptory labour standards.

The Myanmar forced labour case is the only one which extended to the first steps of WTO dispute settlement. On 21 October 1998 a WTO Panel was established at the request of the EU and Japan against the US in respect of a prohibition, by the State of Massachusetts, of government procurement contracts for companies doing business in or with Myanmar. This purchase prohibition by Massachusetts was based on allegedly massive human rights violations. This case was also the only one where an international quasi-mandatory injunction was adopted in order to secure adherence to its labour standards laid down in its conventions. Based on Article 33 of the International Labour Organization (ILO) Constitution, the International Labour Conference as its supreme body "invited" its tripartite members to "take appropriate measures to ensure that the said Milcember cannot

take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations."[17]

When a Federal court in the US struck down the Massachusetts state law on constitutional grounds, the WTO case was suspended *sine die* — without the adjudicators having to determine the relation between WTO law and labour standard violations by a reference to the meaning of *ius cogens* for the interpretation of WTO rules.

Such a scenario is hardly realistic for Peru today, probably even less for environmental complaints in the field of water. For the time being, international (tripartite) pressure by the US, with the cooperation of Peruvian labour interests, might lead to a prohibition of regulatory freezes. What matters for our analysis, however, is that these examples show possible limits under IEL for investment promotion at the expense of social or environmental interests. Trade disciplines in modern RTAs are no longer confined to classic forms of trade distortions by various types of subsidies, local content requirements and tax holidays. Such distortions can also arise, and be prosecuted without WTO rules necessarily protecting an offender, with socio- and eco-dumping measures, albeit only in the most serious cases falling under *ius cogens*.

3. A New Bridge Between Water and Investment Rights?

All *Jornadas de Derecho de Agua* have extensively if not exclusively dealt with water conflicts and regulatory responses, mainly at country levels but also under an international human rights perspective.[18] This Fourth Edition had as an overarching theme the fragmentation between the *right to water* and the *right to investment* (*trayectorias y perspectivas*).

What have we learnt? Of course, the dichotomy between human rights and economic law reflects pluralism of legal sources and policy fragmentation at the national level. Water rights, watershed payments, and land tenure, are often lacking coherence in similar ways. Allocation of water between urban and rural consumers is especially complex. Water for farming between small and poor but less efficient food crop producers and export-oriented cash crop farms would require additional consideration, and funding for infrastructure, especially in poor areas. This has also been highlighted by OECD (2015b):

> Poor infrastructure can leave people feeling dissatisfied with the state of their environment. This is particularly evident in Peru, where only 62% of individuals report that they are satisfied with the quality of the air, and 61% with

17 ILC Resolution 88 concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, Art.1(b)(i). Adopted on 14 June 2000 by 257 votes in favour, 41 against, with 31 abstentions.

18 Examples from Peru at the Segundas Jornadas de Derecho de Aguas were presented e.g. by Augusto Castro, Ana Leyva and Yury Pinto Ortiz (ANA). In the *Actas de las III Jornadas de Derecho de Aguas* see, for example, the contributions by Marcia Estefanía Fernández (OEFA), Iván Lucich (Sunass), Augusto Navarro Coquis, Jorge Luis Prieto Mayta and Iván Ortiz Sánchez.

> the quality of the water. This places Peru at the bottom of the 15 benchmark countries (along with Chile in terms of air quality). Poor infrastructure and water quality contribute to environmental degradation, becoming a negative externality for Peruvians and a threat to future access to other non-renewable natural resources in the coming years. (p. 120)

Since all water users base their claims on national and international legal sources, the specific question in this chapter is whether the economic treaty rights dimension can serve as a bridge between water and investment rights.

The general pattern still is that international trade and investment agreements and contracts overprotect and underregulate (foreign) investment. This also explains why academia and politics have often neglected the role of this particular branch of international law at the intersection of water conflicts. In the most recent treaties with the US as a partner (and to a lesser extent also with the EU) these provisions have become more comprehensive. In effect, they now enjoin a non-trade distorting use of water (and human) resources. For the first time, the trade-distorting effects of eco- and socio-dumping can be addressed under this new generation of economic treaties which Peru has subscribed to.

In respect of the WTO as the anti-discrimination bulwark of the multilateral rules framework, it is less clear how social and environmental concerns can be considered for better water governance. No rules have changed or been reinterpreted since 1995. In litigation, the AB's call for a "holistic approach" pursuant to the customary rules laid down in Article 31 VCLT is yet to find a concrete case where other PIL or CIL rules provisions will supersede WTO rules. [19] Even so, it seems that the "splendid isolation" of trade rules will not systematically protect operators benefitting from investment contracts and treaties with regulatory freeze clauses. The same goes for incentives granted in violation of traditional water rights or international norms of a general or a specific nature in the field of water governance. Of course, it may not be easy to find a complainant acting, as it were, against its own investors or "water grabbers." Perhaps the prospect of a WTO no longer protecting "rogue" investors may remind home states of their international responsibilities as host states, as ODA providers and as IFI board members.

Four other international "bridges" at least indirectly support more governance at the crossroad of economic operators and human rights.

(1) The Alliance for Water Stewardship (AWS) is a voluntary framework for major water users to work collaboratively and transparently for sustainable water management within a specific water catchment. AWS comprises

19 "Interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components" [AB Report in EC — Chicken Cuts, WTO Document WT/DS269/AB/R (12 September 2005), paras. 175-176. See also AB Report in US — Continued Zeroing, WTO Document WT/DS350/AB/R (4 February 2009), para. 268].

certification through credible third-party processes, accreditation of specialist service providers to support and assess implementation of the AWS Standard, capacity-building to increase uptake and implementation of AWS water stewardship, and multi-stakeholder governance. The programme in Peru started with a project for the asparagus value chain stakeholders from the production sites in La Libertad to international retailers like Marks & Spencer (UK) and Coop (Switzerland); the Geneva-based Société Générale de Surveillance (SGS) is involved with production, inspection and certification services.[20] An interesting feature of this project is the active participation of the Centro de Investigación (CIUP) in Lima/PUCP. The qualification of CIUP for this monitoring role was acquired through some of many other research and policy formulation programmes in this field: on the relation between agricultural productivity and oligopsonic market power, the regional potential for artisanal fisheries, and the impact of economic rents generated by the extractive industries on interpersonal equity at the departmental level.[21]

(2) The objective of the Extractive Industries Transparency Initiative (EITI) is to promote public awareness about how countries manage their oil, gas and mineral resources. The main instrument for that purpose is a comprehensive notification scheme creating fully accessible transparency of financial flows from miners to governments. Colombia is listed as a member country compliant with the 2011 EITI rules, whereas Peru figures in the "suspended" category.[22]

(3) A recent private scheme is the Better Gold Initiative (BGI). It is based on the premise that artisanal and small-scale mining involves particularly vulnerable communities. At the same time, especially small (and often illegal) gold mines are often those with the biggest negative impact on the environment and agricultural production. The purpose of BGI is to certify small gold mines that respect human rights and the environment, and to enhance the miners' livelihoods. The Swiss-sponsored programme started in Peru in 2013. In April 2017 it was extended by the presidents of Peru and Switzerland.[23]

(4) The Voluntary Principles on Security and Human Rights are the only human rights guidelines designed specifically for extractive sector companies. Adopted in 2000, they associate governments, various companies and

20 Information available at the AWS website http://www.allianceforwaterstewardship.org/. For the AWS Standard and its development process see http://a4ws.org/our-work/aws-system/

21 The PUCP/CIUP website with more project information and publications is at http://www.up-.edu.pe/investigacion-centros/ciup. For the asparagus project, detailed information is available (in Spanish) at http://cooperacionsuizaenperu.org.pe/images/documentos/seco/fs_secompetitivo/fs-cadenaesparragos.pdf.

22 The EITI *Global standard for the good governance of oil, gas and mineral resources* is available at https://eiti.org/. According to EITI regulations, a "suspended" country can apply at any time to have the suspension lifted.

23 Information available on the BGI-Website for Peru: http://www.iniciativaororesponsable.org/

> NGOs for maintaining the safety and security of mining operations within an operating framework that encourages respect for human rights. At the Annual Plenary Meeting in Bogotá (21 April 2016), the decisions adopted addressed (i) the strengthening of the role of civil society, (ii) a comprehensive assessment of the human rights risks associated with security, with a particular focus on complicity, and (iii) systems for reporting and investigating allegations of human rights abuses. Participating governments include Colombia but not Peru; companies include Glencore, and among the international NGOs there is Human Rights Watch.[24]

Obviously, none of these "bridges" are guarantees for better water governance. Some do not directly deal with water either. However, the increasing stakeholder interaction at the national level will definitely benefit from rules and procedures agreed to by Peru in its international treaties, contracts, and voluntary principles.

A word of caution appears appropriate at this stage. The complexity of the Water Rights issues could only be hinted at in this chapter. Even the international aspects for agriculture cannot be addressed in a few pages: for instance, should water for cash crops such as table grapes and pisco, asparagus and onions — often irrigated with ground water — count as "water grab" from poor food crop producers and consumers, as argued by Chartres (2012, p. 162) for large-scale investments leading to "virtual water" exports at the expense of nearby food crop farmers? How to account for the economic, social and environmental implications of "virtual water" in cash crops exported across continents?[25] How to produce, price, and allocate drinking water on the Peruvian coast with no regular rainfalls? Should the regulatory activities of the Superintendencia Nacional de Servicios de Saneamiento (SUNASS) be funded by the regulated entities (small public agencies with low business income, no participation by users along the value chain) or, as discussed by OECD in a way ensuring independence and autonomy in the implementation of the allocated budget (OECD 2015b, pp. 31, 52 and 86)? And — to revert to mining — do local jobs in copper towns count against human, animal and plant health impairments and food safety concerns of urban consumers of Peruvian produce in areas with extractive industries, both legal and illegal? According to Nirel and Pasquini (2010, pp. 3-4), copper is non-biodegradable. It has numerous sources in waters, in addition to natural levels originating from rocks, weathering and atmospheric deposition. A practical methodology to discriminate between the potential origins of copper pollution, namely agricultural and urban sources, is still lacking. There is no internationally recognised standard for maximum copper residue limits in order to select suitable management tools in mining operations, agricultural practices and treatment of rooftop and road runoffs. One aspect highlighted by OECD is that mining, finance, energy and water, and telecommunications represent less than 4% of total employment: "The mining sector

24 Retrieved from http://www.voluntaryprinciples.org/

25 For a good discussion of the economics of *virtual water* see Hoekstra and Chapagain (2007, p. 36).

alone accounts for less than 1.5% of total employment" (OECD, 2015a, p. 103).

One recent issue here are the cadmium levels in cocoa beans, which according to Hugo Alfredo Huamaní Yupanqui et al. (2012, p. 311) are found even in organic cocoa in Ecuador, Peru and Venezuela. In her field research at 174 locations in Peru and Venezuela, Jayne Crozier (2012) found the highest total concentrations of cadmium in beans and in the soils of Northern and Central Peru, but no higher incidences at locations near mining or industrial activities. Mike Adams (2014) reported on high levels of toxic cadmium found by two UK-based laboratories in popular cacao powders. Codex alimentarius is discussing lower maximum residue levels (MRL) for cadmium; in May 2014 the EC followed advice by its scientific advisory body EFSA and adopted maximum levels of exposure to cadmium in foods such as chocolate and infant formula which were only 10% of the levels discussed in the relevant Codex Committee.[26] Further research may shed light on this important question which could raise difficult water arbitration issues between indigenous farming communities and local miners.

The following conclusions can therefore only suggest more questions, without pretending to be scientifically robust findings of a solid analytical and empirical enquiry.

4. Fragmented Conclusions

Like other countries, Peru has signed commercial treaties for securing market access abroad and improving the investment climate at home. Like other governments, it attracts foreign investors with manifold incentives such as subsidies, tax holidays, and special dispute settlement procedures. At times, very favourable water rights, quantities and qualities, are offered to foreign or national investors for export-oriented, growth-promising and job-creating projects. These incentives may conflict with demands and rights to water of local investors, small farmers, processors and consumers. In their study on West America, Ghimire and Griffin confirmed that ill-defined water rights constitute a significant barrier for water transfers even in developed countries (2014, pp. 971-972).

In such situations, mine workers, landless farmers or slum dwellers have few alternatives to buying expensive water which previously might have been free. Governments facing such conflicts have few options other than water quotas, fiscal and social policies. In poor countries, they may even resort to "regulatory freezes" and offer contracts to foreign investors in which they commit to lower, or not to increase, social and environmental standards.

As shown in this book and in the previous *Jornadas de Derecho de Aguas*, solutions are hard to come by, both at the national level and when looking at sources of international law in the field of human, social and labour rights, environment and water.

26 Technical Centre for Agricultural and Rural Cooperation - CTA (ACP-EU). (20 July 2014). New maximum levels set for cadmium in food products.

A new and perhaps surprising bridge in this policy quandary of national and international fragmentation may be found in some of the more recent trade and investment agreements with Peru as a party. A new generation of treaties, and the investment contracts for which they guarantee judiciary protection, is increasingly more comprehensive and includes not only market access guarantees but also mandatory social and environmental standards, including sustainable water use principles.

The purpose and key in these treaties is to avoid all kinds of trade distortions. Dumping prohibitions are not primarily reflecting social or environmental concerns but equal treatment considerations. This idea of a "level-playing field" limits policy space and arbitrary decisions for both rich and poor governments, and for home and host investor states. But it also prevents governments from engaging in a "race to the bottom" at the expense of the environment and of their workers.

Both RTA and WTO avenues presented in this chapter have downsides. The now concerted efforts of US agencies (trade, labour and foreign affairs) and NGOs both in the USA and in Peru can be criticised for their basically unilateral standards "made in Washington." (This of course might change under a Trump administration — but not necessarily in the sense of a more concerted approach). This unilateralism occurs especially where international human rights conventions and social and environmental standards are not mandatory and directly applicable. In such cases a WTO adjudicator will find it difficult to deny the right of each Member to treat its indentured workers, its indigenous communities, its seal babies and its sea turtles as it sees fit. Moreover, the new enforcement procedures presented in this chapter require complainants, and advocates. Hence they are hardly available for the protection of "useless" (and downstream) water resources. Finally, an import ban for goods and services produced under trade-distorting practices may be enforceable under the new RTA rules and procedures. But when such a ban implies discriminatory treatment of "like" products and processes, it may fail in WTO litigation instigated by a government whose concern is employment at any cost to workers' health or to the environment. Under present rules and case law, WTO-compatibility even of malpractices violating peremptory human rights and environmental norms (*ius cogens*) remains unclear.

The following four conclusions are fragmentary by necessity:

(1) Better water governance in Peru is a necessity. This is especially so in situations and regions of extreme poverty where drinking water prices and unemployment are highest. Water never flowed freely, but it flows even less free in times of globalisation. International demand for good and cheap Peruvian water in the Andes and along the coast comes from gold bearers and from asparagus eaters on the other side of the world.

(2) WTO and other trade agreements improve the opportunities for efficient water use, and for "virtual water" trade. Only peremptory law or *ius cogens*

violations could justify import bans in a WTO dispute — but there is no case law, and no universally accepted definition of *ius cogens*.

(3) Present international trade and investment rules fail to address the right to water and to prevent "aqua-dumping" and "water grabbing" with negative impacts at the national and household levels. Public interest clauses limiting water grab should be built into investment treaties and contracts, preventing regulatory freezes and allowing for minimum water supplies to indigenous communities and poor urban consumers by way of transfer pricing.

(4) These shortcomings can be said to violate the obligations of investor home and host states in respect of the right to water laid down in the human rights treaties all governments have subscribed to (*primum non nocere* or "first of all do no harm"). There is a need for social and environmental bottom lines: *ius cogens* (cogent law) is to be recognised as an instrument preventing a "race to the bottom" between water users: large-scale ground water consumption is simply not sustainable.

Most important for a good functioning of the bridge mechanisms in Peru's new economic treaties is stakeholder and regulator interaction at the national level. More research and better policy coordination is thus required both at national and international levels.

The right to water and the right to invest remain strange bedfellows. Given that they both drink from the same source, there seems to be no alternative to better and comprehensive water governance, including through new treaty provisions with effective rules enforcement procedures.

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