Part III
Resolving the Failures, Utilizing the Possibilities: Two Proposals

Broad constitutional and foundational principles gain precise shape when put into context.[1] So does the external human rights commitment of the EU in the context of international investment regulation. Chapters 4 and 5 have identified the human rights failures existing in the international investment law regime, which the EU appropriates by entering the field as a new lawmaker without undertaking the necessary reforms. Investment regulation as it developed until now is a particular exclusionary regime. Some interests hardly enter the regime—neither at the implementation stage nor during investment adjudication. That is due to restricted procedural rules and the absence of sufficient relevance granted to human rights interests by the underlying substantive law. These ignored interests have little chance to influence the making of such rules. International investment law is therefore a prime example of what matters is 'who gets access to the means by which 'international law' is made.'[2]

Considering this imbalance of rights protection, this part confronts the questions of what remedies the EU must and can develop based on its constitutional mandate of human rights protection, equality and non-discrimination that should inform investment policy making. There are in particular two strategies that can bring the EU closer to the fulfillment of its external human rights commitment by targeting the root causes of the regime's imbalance. This is on one hand a comprehensive assessment of all interests affected, which has to be fed into the policy making and implementation and on the other hand a proper engagement with those individuals and communities that are likely to be affected but are being disregarded. Giving voice to the disregarded is especially important, because many of the clashes as seen Chap. 4 are the result of complex interrelations including domestic specifics or remain concealed (e.g. in private contracts and stabilization clauses). Further, strengthening the right to regulate is a necessary but not a sufficient means to ensure accessibility for all human rights at stake.

This part argues that these two strategies are already embedded in EU law. Partly, the EU is therefore under an obligation to apply this approach to EU investment

[1] Von Bogdandy (2010).

[2] Schneiderman (2016), p. 27.

policy making. Partly, the strategies proposed here go beyond legal obligation, but are legally possible. Thereby, this part demonstrates that the EU external human rights commitment can be pinned down into concrete requirements when seen in conjunction with other constitutional principles and when put into concrete context.

Chapter 2 outlined that the EU external human rights framework comprises the duty to respect which requires assessment and corresponding adjustment of policies and the duty to promote human rights externally. The latter comprises a prohibition of regression, a duty to be coherent and to actually contribute to the advancement of human rights whenever the EU decides to act in the pursuance of the latter. As it will be explained in this part, in the given context of the EU entering the international investment regime that translates into a duty of continuous assessment and adjustment of policies, which is a continuous legal obligation. Further, the EU could realize its duty to promote by engaging in the empowerment of the disregarded human rights-holders. The latter remedy is only one way of realizing the EU's obligation, which can turn into the only way of sufficing this obligation depending on the concrete circumstances. The analysis of this part adds to this framework by distilling further procedural requirements from other EU constitutional principles and substantive rights as well as applicable international human rights law. Considering the existing human rights tensions against the background this framework, brings to the fore on one hand the inconsistencies between the human rights requirements and EU action and on the other the possibilities that the EU framework provides which are far from exhausted. Resolving the inconsistencies is necessary to bring the EU action in line with its constitutional requirements. Exploring the possibilities shows that the legal environment already bears the potential for the EU to design and develop legal mechanisms and institutions that can cure some of the most prevalent inequalities perpetuated by the current global investment regime.

This part sets out to do both by presenting two proposals for bringing the EU investment policy in line with is constitutional human rights commitments. Instead of relying on the facilitation of *amicus curiae* interventions or carving out domestic policy space (which are, as identified in Part II, not sufficient for solving the major inequalities of the international investment regime), this part explores whether other mechanisms that are embedded in other EU law requirements and that already exists in EU trade agreements can be harnessed to grant access to underrepresented but affected people and their interests to the making and implementation stages of investment agreements. These mechanisms are human rights impact assessments (HRIA) that are conducted prior the conclusion of investment agreements and *ex post* civil society meetings and domestic advisory groups that are being established by the Sustainable Development chapters (SD chapters) in EU trade agreements to monitor and evaluate the latter. There are other strategies that might also work for bringing the EU as an actor in international investment regulation in compliance with its human rights commitments. There might also be other mechanisms to pursue the strategies proposed here. It is likely that a combination of several mechanisms and strategies yields the best results. However, this part is concerned with these two proposals to make the discussion about the external human rights commit-

ment and its legal consequences concrete and to demonstrate that a reform is possible, that it can even be built on existing mechanisms and that an ambitious approach can have substantial emancipatory and empowering effects for those previously disregarded. This, in turn, should show that the hands of the EU might be less tied than expected and that—in light of what is possible—the burden for justifying inaction might weigh heavier.

However, this part also demonstrates that while the legal framework provides a sufficient basis for developing these strategies, the two mechanisms analyzed here so far failed to deliver this promise in the investment context. That is because they did not sufficiently capture the link between EU obligations and the multiple threats for human rights stemming from the international investment regime (conceptual shortcomings) and because of inconsistencies in their implementation (implementational shortcomings). This part therefore analyses what parameters need to be changed in order to utilize these mechanisms for building sustainable institutions that enable marginalized local communities and individuals to participate and to contest the making and implementation of international investment regulations. Thereby the reformed versions of these institutions may balance the inequality of rights protection—that is missing at the level of investment arbitration and often at domestic level. The discussion carefully differentiates what between the parts that are required by the EU human rights framework and those that are grounded in EU law but are optional or depend on more concrete assessments. In the proposed version of both mechanisms, the major vehicle for overcoming the inequality of human rights protection are the two strategies of comprehensive assessment and empowerment of the rights-holder. As discussed in Chap. 2, these two strategies are particularly apt to respond to warranted criticisms of regulatory imperialism.

Both chapters first present the legal and theoretical framework, which should inform the two mechanisms. The framework brings together the human rights requirements established in Chap. 2, other EU constitutional and procedural principles that gain substance through the human rights framework as well as external sources (i.e. international human rights law and discourse that is applicable to the given context). Secondly, each chapter analyses the EU implementing rules and the set-up, the practice and the concept of these mechanisms while measuring them against the requirements of the previous established framework. The practice is assessed by way of looking at some test cases. The practice is reviewed against the EU implementing rules and the legal constitutional and theoretical framework. The last part links the proposals to the most prevalent human rights problems outlined in Chap. 4 and discusses the contribution they could make for solving those, especially when compared to the other proposals and reforms already adopted by the EU (and as discussed in Chap. 5). Thereby this part of the book demonstrates how the EU human rights obligations as abstract principles can be operationalized and how they can be legally measured.

References

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