دار نشر جامعة قطر
Qatar University Press

كلية القانون
College of Law
QATAR UNIVERSITY جامعة قطر

OPEN ACCESS

Submitted: 9/10/2021
Reviewed: 30/10/2021
Accepted: 8/11/2021

The Role of Human Rights in Investment Arbitrations: Towards a Closer Integration

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Abstract

This article examines the role of human rights in international investment arbitration. A review of the historical origins of human rights and international investment law shows that the two fields are inextricably connected and share significant similarities, particularly in terms of their norms and principles. However, their separate origins and development has also given rise to ambiguities and tensions as to how human rights considerations can be invoked in international investment arbitration and by whom. The article examines the various contexts of such invocations and analyzes human rights references in investment treaties. It argues that ambiguities and tensions are especially problematic because they carry not merely theoretical but practical implications. It shows that the trend of convergence and overlap between the two fields is growing and concludes by arguing that greater integration of human rights law into international investment law and arbitration is not only desirable but essential for the unification of public international law and addressing many of its ambiguities.

Keywords: Public International Law; Human rights; Investment law; Investment arbitrations

Cite this article as: Al Mulla J., "The Role of Human Rights in Investment Arbitrations: Towards a Closer Integration", *International Review of Law*, Volume 11, Regular Issue 2, 2022

https://doi.org/10.29117/irl.2022.0228

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دور حقوق الإنسان في التحكيم الاستثماري: نحو تكامل أوثق

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ملخص

تبحث هذه الدراسة في دور حقوق الإنسان في التحكيم الدولي للاستثمار؛ حيث يُظهر استعراض الأصول التاريخية لحقوق الإنسان وقانون الاستثمار الدولي أن المجالين مرتبطان ارتباطًا وثيقًا، ويشتركان في أوجه تشابه كبيرة، لا سيما من حيث معاييرهما ومبادئهما. ومع ذلك، فإن أصولهما وتطورهما المنفصلين قد أدى أيضًا إلى ظهور حالات غموض وتوترات حول كيفية الدفع باعتبارات حقوق الإنسان في التحكيم الدولي للاستثمار، ومن قِبَل مَن. تبحث الدراسة في السياقات المختلفة لهذه الدفوعات، وتحلل مراجع حقوق الإنسان في معاهدات الاستثمار. وتجادل بأن الغموض والتوترات تشكل إشكالية بشكل خاص؛ لأنها لا تنطوي فقط على آثار نظرية، لكنها تأثيرات عملية جوهرية. وتظهر أن اتجاه التقارب والتداخل بين المجالين في تزايد، ثم تخلص الدراسة إلى القول بأن زيادة دمج قانون حقوق الإنسان في قانون الاستثمار الدولي والتحكيم ليس فقط أمرًا مرغوبًا فيه ولكنه ضروري؛ لتوحيد القانون الدولي العام، ومعالجة العديد من الأمور الغامضة.

الكلمات المفتاحية: القانون الدولي العام، حقوق الإنسان، قانون الاستثمار، التحكيم الاستثماري

للاقتباس: الملا، جاسم. «دور حقوق الإنسان في التحكيم الاستثماري: نحو تكامل أوثق»، **المجلة الدولية للقانون**، المجلد الحادي عشر، العدد الثاني، 2022

https://doi.org/10.29117/irl.2022.0228

Introduction

As Pierre-Marie Dupuy has noted,[1] although the two fields are both prominent in the study and practice of international law, it has been generally the case that human rights law has been seen as, at best, incidental to the framing of investment treaties and to arbitral tribunals themselves. The position taken in this article is that, despite the clear commonalities between human rights and investment law, especially in terms of their normative underpinnings, their development along divergent and distinct paths has resulted in a fragmented approach to international law that has given rise not only to theoretical tensions but to serious practical implications.

Much of the scholarship on the origins, principles, and modalities of implementation of international investment law and human rights law consider them to be, as Dupuy and Viñuales put it, "wholly distinct, autonomous, or even antagonistic legal domains[2]." And yet, the history and origins of the two fields suggest a much more interlinked relationship. Customary international law pertaining to the protection of citizens overseas (i.e. aliens), and the concurrent emergence of international customary obligations on States' responsibilities for the injuries of aliens, were already under way by the second half of the 19th century. The advent of the industrial revolution led to increasing private investments by foreign persons in overseas territories, and this led to the development and consolidation of procedural rules regulating access to diplomatic protection. Today, the protections of those individuals and foreign investors are now facilitated by mechanisms established under the auspices of international law, by which investment law and human rights grant them direct access.

Several scholars, including Dupuy and others,[3] have highlighted the "significant similarities if not even the correspondence between a number of principles pertaining to the treatment of foreign investors by host states and some human rights rules and principles."An examination of the history of both fields brings to the fore many of these similarities, and in fact some have argued that human rights partially emerged out of the rights of aliens – specifically foreign investors – which were subsequently transposed and generalized into universal rights granted to all individuals. As Dupuy puts it, "it is the alien who was the first recipient of what are now fundamental human rights".

These similarities between investment protections and human rights are not just apparent but substantial. As such, many of the rights provided under investment agreements – such as Fair and Equitable Treatment[4] ('FET'), Full Protection and Security[5] ('FPS'), the prohibition against expropriation without compensation, and denial of justice – correspond to those enshrined under human rights conventions such as the Universal Declaration of Human Rights ('UDHR').[6] For example, article 17 of the UDHR provides

1 Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (OUP, 2009).

2 Pierre-Marie Dupuy, and J. E. Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress', in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds.), International Investment Law (Baden Baden: Nomos, Forthcoming, 2012).

3 Luis Tomás Montilla Fernández, *Large-Scale Land Investments in Least Developed Countries: Legal Conflicts Between Investment and Human Rights Protection,* (Springer, 2017).

4 There is no consensus over the definition of FET. For a greater discussion on the different definitions given to FET clauses in various treaties, see OECD, "Fair and Equitable Treatment Standard in International Investment Law," OECD Working Papers on International Investment, 2004/03, OECD Publishing.

5 The standard of full protection and security covers protection against physical and legal infringements of the host State directed at foreign investors. For a deeper understanding of FPS, see Zeitler, Helge Elisabeth 'Full Protection and Security' (2010) International Investment Law and Comparative Public Law, Oxford University Press 01.

6 Universal Declaration of Human Rights (UDHR) <https://www.un.org/en/universal-declaration-human-rights/> accessed 5 August 2020.

"1) Everyone has the right to own property alone as well as in association with others; 2) No one shall be arbitrarily deprived of his property." Similarly, the right to a fair trial, as enshrined under Article 14 of the ICCPR, corresponds to denial of justice as an extract of FET clauses.

Investment tribunals indeed have in the past leaned towards a fragmented approach favoring the separation of human rights and investment law.[7] Nevertheless, there is a new trend that can be sensed aiming for the harmonization of investment law and human rights, notably, after the Urbaser's[8] landmark award. In that context, this article supports Judge Simma's approach over the relevance of human rights and further explores the means to overcome this separation and fragmentation of international law.[9]

Structure of the Dissertation

This introduction has provided an overview of the shared, interconnected history and origins of international investment law and human rights law, as well as the similarities and overlaps that can be found in their norms and modalities of implementation. The second section then proceeds to examine the grounds in which Human Rights law could be incorporated in the applicable law, by examining human rights references, whether express or implied, in investment treaties – both in preambles and in substantive provisions. The chapter then explores the use of human rights law, as part of applicable international law (both under jus cogens and general principles of international law), the principle of systematic integration and the invocation of human rights as part of applicable domestic law. This chapter will be rather theoretical in its scope, making the case that there is no barrier in principle between international investment law and human rights law.

The third section is then concerned with the question of who may have standing to invoke human rights in investment arbitrations. To that end it examines human rights invocations by investors, respondent states, third parties, and tribunals, with due attention to the particularities of each context. Building on the preceding chapter, this chapter will demonstrate how the unified approach to international law that this dissertation advocates has been taking shape in practical terms.

The fourth section provides an overview of the main conclusions of the present research work. It then goes on to offer a selection of key recommendations for both academics and practitioners, notably in terms of promising avenues for future research.

To examine the various aspects of the research problem, this study adopts a combination of descriptive analytical and comparative methodologies. The comparative approach is deployed in the context of examining international investment agreements, in order to shed light on the methods used to incorporate human rights standards into those agreements.

Concurrently, the paper also employs an analytical descriptive approach to examine how human rights have been invoked by relevant arbitral awards that referenced human rights considerations, and the various possible methods for invoking human rights that may be used by the concerned parties in the arbitration.

1. The incorporation of Human Rights law in the applicable law

Human rights law plays several roles in international investment arbitration, though the influence of human rights norms in investment arbitrations depends on the method by which these norms are integrated into the arbitral process. Human rights, which are enshrined directly in investment treaties, will most extensively affect the arbitral process, but may also play a more subtle interpretive role. The applicability

7 M Toral and T Schultz, 'The State, a Perpetual Respondent in Investment Arbitration? S Unorthodox Considerations', in M. Waibel, A. Kaushal, K. H. Liz Chung, and C. Blachin, *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law, The Hague 2010) 577-6.

8 *Urbaser S. A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.

9 Bruno Simma, 'Foreign Investment arbitration: A place for human rights?' (2011) ICLQ, 60(3), pp. 573-596.

of human rights law is connected closely to the laws governing the arbitral process. In other words, the extent to which human rights norms can shape international investment disputes will depend on the extent and nature of their incorporation in the applicable law.

There are numerous grounds on which human rights can potentially be brought into consideration within an investment context. This section specifically explores the four legal grounds on which human rights law may be invoked in the law applicable in international investment arbitration. Section first considers the extent of integration of human rights law by examining references to it in investment treaties. Second, it analyses the integration of human rights law under public international law. Third, it discusses the effects of the principle of systemic integration, which stipulates that the interpretation of treaties should consider relevant rules of applicable international law, including potentially human rights law. Finally, the section considers the integration of human rights law in the arbitral process as observed in a selection of domestic laws.

1.1. References to human rights in investment treaties

The first generation of investment treaties[10] typically formulated investor rights and host State obligations without explicitly defining the balance between these rights and obligations. Such open-ended formulations were expected to attract foreign investments and, in turn, develop the host State's economy. Today, while investment treaties recognise the value of foreign investment, they are increasingly more mindful of the need to maintain a careful balance between the interests of investors and those of host States.

Accordingly, the new generation of investment treaties – whether bilateral investment treaties ('BIT') or multilateral investment treaties ('MIT') – are more likely to include direct references to human rights obligations. There are several reasons why States may favour incorporating human rights obligations in treaties. One such reason may be an attempt at mitigating the State's liability in the event of a breach of substantive protection. For example, Article 23 of the Netherlands' model BIT states that a tribunal, in determining the amount of compensation, may consider the investor's non-compliance with its obligations under the UNGPs and the OECD Guidelines for Multinational Enterprises.

This section examines the two principal methods by which human rights law may be incorporated into investment treaties, namely through including references to human rights either in the treaty's preamble or in its operative provisions. In either method, references to human rights may be express or implied.

1.1.1. References to human rights in preambles

Human rights may be incorporated into an investment treaty in the form of references in the treaty's preamble. While human rights references in preambles tend to exert a less significant effect on the arbitral process than those made in substantive treaty provisions, invocations of human rights in preambles can still represent a forceful tool.

Preambles play an important role in the process of treaty interpretation.[11] Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT)[12] states that a tribunal is under the obligation to interpret a treaty's provisions in light of the treaty's object and purpose. Article 31(2) of the VCLT expressly states that preambles are part of the interpretation process, since they are an important indicator of parties' intentions upon signing the treaty. Thus, where the preamble to an investment treaty includes references

10 For example, see Oman–United Kingdom 1997 BIT <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2122/download> Accessed 02 Nov 2021; Bulgaria - United States of America BIT (1992) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/556/download> Accessed 02 Nov 2021.

11 Max Hulme, 'Preambles in Treaty Interpretation' (2016) 164 University of Pennsylvania Law Review, 1281.

12 Vienna Convention on the Law of Treaties (1969) (VCLT) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> Accessed 02 Nov 2021.

to human rights, the treaty's provisions should be interpreted consistently with those considerations. There is, however, no hard rule with regards to the role of preambles in the treaty interpretation process. Since a treaty's preamble may perform several functions – interpretive, supplementary, incorporative or binding[13] – it is the treaty's specific wording which will crucially inform whether preambular references could constitute substantive obligations subject to future disputes.

References to human rights in the preambles of investment treaties may be express or implied, and both variants will be discussed in turns.

a. Express preambular references

Preambles are often drafted as a series of secondary clauses, each of which can include express references to human rights. Preambular clauses indicate the parties' motivations and considerations when drafting a particular treaty. Clauses usually open with phrases such as 'affirming', 'considering' and 'emphasizing'. References to the UDHR are a common way of incorporating human rights in investment treaties' preambles.[14] For example, the preamble to the EU-Singapore free trade agreement (FTA) states that parties "ha[d] regard to the principles embedded in the UDHR".[15] The preamble to the Canada-Colombia FTA includes a more extensive reference, indicating that parties are "[a]ffirming their commitment to respect the values and principles of democracy and promotion and protection of human rights and fundamental freedoms as proclaimed in the Universal Declaration of Human Rights".[16] This more expansive wording may suggest that the parties intended to include human rights as direct obligations rather than mere considerations.[17]

b. Implied preambular references

Human rights may also be referred to impliedly in investment treaties' preambles. In such cases, preambular clauses refer to considerations linked to human rights, such as the protection of health, the environment and labour rights, but do not explicitly refer to human rights. The United Arab Emirates-Slovakia BIT adopts the implied preambular approach. Its preamble invokes the "Seeking to ensure that investments are consistent with and facilitative to the protection of health, safety and environment".[18]

1.1.2. References to human rights in substantive provisions

Human rights considerations can also be incorporated into the text of an investment treaty in the form of references in the treaty's operative sections. Human rights references in treaty provisions constitute direct obligations on the parties, and as such may clearly be subject to future adjudications. As is the case for the preamble, human rights invocations within the substantive provisions of an investment treaty may be either express or implied.

a. Express human rights references in substantive provisions

Several MITs and BITs impose express human rights obligations on investors operating in host States. Notably, the 'new generation' of African investment treaties are increasingly likely to feature express

13 Hulme, (fn8), 1281.

14 Fabio Giuseppe Santacroce, 'The Applicability of Human Rights Law in International Investment Disputes' (2019) 34 ICSID Review136.

15 Preamble, Free Trade Agreement between the European Union and the Republic of Singapore (2018) <https://www.mti.gov.sg/-/media/MTI/Microsites/EUSFTA/EUSFTA-Full-Text_12Oct18.pdf> Accessed 27 June 2020.

16 Preamble, Canada-Colombia Free Trade Agreement (2008) <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng> Accessed 27 June 2020.

17 See, Fabio Giuseppe Santacroce (fn10).

18 United Arab Emirates–Slovakia (2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5926/download> Accessed 02 November 2021.

references to human rights. Yet, they remain to be considered as the minority in such treaties. The Pan African Investment Code (PAIC),[19] and the Morocco-Nigeria BIT[20] exemplify this approach. Article 24 of the PAIC, for instance, enjoins investors to comply with "business ethics and Human Rights" and explicitly stipulates that investors should "support and respect the protection of several human rights obligations that are internationally recognized." The same is true for other investment treaties, such as the Morocco-Nigeria BIT, Article 18(2) of which requires investors to "uphold human rights in the host state."

The effects of such express references depend on their contexts. To date, the majority of these references are merely aspirational references. In other words, they merely urge investors to comply with human rights obligations. However, a minority of human rights references in treaty provisions operate to deny the benefits of the relevant treaty's provisions. In that context, Columbia's 2017 Model BIT exemplifies the minority. It provides that a state party may deny "the benefits of the treaty to an investor where a relevant authority has determined that the investor, directly or indirectly, committed serious human rights violations," amongst other grounds.[21]

b. Implied human rights references in operative provisions

Substantive provisions in the new generation of investment treaties also commonly include implied references to certain human rights norms. Some treaties, such as the Canada-Guinea BIT,[22] explicitly preserve the host State's rights to impose regulatory measures aimed at protecting human rights. Other treaties, such as the United Arab Emirates-Ethiopia BIT, expressly prohibit the promotion of foreign investment through the relaxation of "labor, public health, safety or environmental measures".[23] Both types of treaties imply States' rights to impose regulatory measures based on human rights protection considerations.

1.1.3. Human Rights References in Gulf Co-operation Council Member States' Investment Treaties

Despite the strong and interrelated economic ties among Gulf Co-operation Council (GCC) members states, no investment agreements have been signed by GCC members to date. Instead, investments and investors in these states have been relying heavily on the 40-year-old Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Agreement), for the settlement of their investment Investor-State disputes.[24] As a result, many intra-GCC disputes have been filed within the dispute settlement clause embedded in the OIC agreement.[25]

While there is a critical need for investment BITs or MITs between GCC members, it is important to note that their existing BITs with other State Parties do not consider human rights references, except for a very small number of BITs signed by Qatar, Bahrain and the UAE. Indeed, out of 60 BITs signed by the

19 Pan-African Investment Code (2016) <https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf> Accessed 27 June 2020.

20 Morocco-Nigeria BIT (2016) <https://www.bilaterals.org/IMG/pdf/5409.pdf> Accessed 27 June 2020.

21 Colombia Model BIT (2017) <https://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx>

22 Canada-Guinea BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5095/download> Accessed 02 November 2021.

23 Article 19, United Arab Emirates - Ethiopia (2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5947/download> Accessed 02 November 2021.

24 Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download> Accessed 02 November 2021.

25 For example, BeIN Corporation v. Kingdom of Saudi Arabia, Notice of Arbitration dated 1 October 2018; and Omar Bin Sulaiman Abdul Aziz Al Rajhi v. Sultanate of Oman, PCA Case No. 2017-32.

State of Qatar, only one BIT refers to the notion of corporate social responsibility.[26] As to those signed by the UAE and Kuwait, only a handful number of BITs reserved the right for either State party to protect "human, animal or plant life or health" as a means of imposing non-compensable regulatory measures.[27]

While the concept of introducing human rights references in investment treaties is a relatively recent development, and thus provides important context for the limited number of BITs including such references at present, the human rights-minded approaches employed in Qatar and UAE BITs do not yet rise to compelling an investment tribunal to uphold a human rights related argument. As such, direct references promoting the protection of human rights in substantive provisions remain important for safeguarding the rights of foreign investors and their nationals.

1.2. Human rights law as part of applicable international law

Arbitration is a delegation of the power to determine a dispute before a particular tribunal. When parties establish such mechanisms, they retain considerable control over the arbitral process. For instance, they may confine the scope of the arbitration to certain types of disputes, or specify which law would be applicable to the arbitral process. Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and Article 33(1) of the UNCITRAL Arbitration Rules both preserve the parties' autonomy in their choice of applicable law in investment arbitrations. Under Article 42(1) of ICSID, the choice of applicable law is left first to the contracting parties to determine – the default position being the application of both the host State's domestic law and "such rules of international law as may be applicable." Applicable law clauses vary according to the different investment treaties. For instance, the applicable law could theoretically be limited to the host State's domestic law. However, most contracting parties seek to subject disputes to the application of international law, in order to protect investors against potential ambiguities of domestic laws.[28] As a result, almost all treaties, whether expressly or impliedly, refer to international law as the law applicable to the dispute.[29]

When an investment treaty refers to international law, such an instrument cannot be read in isolation from international law. The Appellate Body of the World Trade Organisation (WTO) has reiterated consistently that "The General Agreement is not to be read in clinical isolation from public international law," despite the fact that Panels must apply WTO law exclusively.[30]

This applicability of international law can, in turn, give rise to the applicability of human rights considerations since international human rights law is an established part of public international law. Human rights can thus be incorporated in the arbitral process under the auspices of international law, either through jus cogens norms or under the general principles of international law. The sections below examine both methods of incorporating human rights considerations by way of international law.

1.2.1. Jus cogens

Some fundamental human rights norms are considered 'jus cogens'. Jus cogens are peremptory norms recognised by the international community to be fundamental values. Derogation from peremptory norms is therefore not permitted, as enshrined in Article 53 of the VCLT. Jus cogens human rights are often

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26 Argentina-Qatar BIT (2016) <http://investmentpolicyhub.unctad.org/IIA/treaty/3706> accessed 5 August 2020.

27 For Example, UAE-Colombia BIT (2017) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5728/download>; Kuwait-Canada BIT (2011) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3150/download> Accessed 5 November 2021.

28 Stephen Fietta and James Upcher, 'Public International Law, Investment Treaties and Commercial Arbitration: An emerging system of complementarity?'(2013) 29 LCIA 187.

29 Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?'(2019) Journal of International Dispute Settlement, Volume 10, Issue 3, Pages 396–422.

30 *United States –Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, 20 May 1996, 17.

intrinsically inter-linked. Many examples of peremptory norms relate to particular human rights obligations, such as the prohibitions on genocide, slavery, torture or racial discrimination.[31] Peremptory human rights are binding not only on States but also on private actors, including corporations.[32]

If an investment treaty provision is found to conflict with a peremptory norm, such norms shall prevail by virtue of their non-derogable nature. The applicability of jus cogens is thus inevitable in the international plane, regardless of the parties' autonomy in designing the arbitral process and the specific wording in a given treaty[33]. As the tribunal in *Urbaser v Argentina* explicitly states, "such norms must certainly prevail over any contrary provision of the BIT, as per the express statement in Article 53 of the VCLT".[34]

In this context, the tribunal in *Phoenix v Czech Republic*[35] discussed a hypothesis pertaining to the protection of investments under the International Center for Settlement of Investment Disputes ('ICSID') Convention.[36] It stated that an investment would not be protected under the Convention if it were inconsistent with "the most fundamental rules of protection of human rights." In other words, the ICSID protection of investments would not be granted if such investments are found to support genocide, slavery, torture or other fundamental peremptory norms, from a jurisdictional perspective. Thus, a tribunal acting on its own motion could invoke the principle of jus cogens to protect human rights, even if such protection ran contrary to the provisions of the treaty that established the said tribunal.

Jus cogens can be invoked by either party to an investment dispute, in both defence and offence.[37] For instance, a host State could rely on peremptory human rights norms to absolve itself from enforcing substantive protection of investment, while a respondent State could expropriate an investment based on allegations that the investor engages in racial discrimination. The State can thus invoke its obligation to respect and enforce jus cogens to justify its breach of an investment treaty provision. Conversely, an investor could invoke jus cogens in support of a particular claim, though arbitral tribunals have, to date, not considered jus cogens claims made by investors.[38]

1.2.2. General principles of international law

As stated above, parties to an investment treaty can choose the law applicable to investment disputes. A particular BIT or MIT could thus exclude or include the application of general principles of international law on disputes arising from the treaty. However, the applicability of international law to any case is inevitable, due to the very nature of the legal instrument giving rise to the dispute.[39] As international legal instruments, BITs and MITs are necessarily governed by international law.

Investment arbitrations are thus governed by international law even if the arbitration agreement itself is embedded in a private contract between an investor and the host State. A compelling reason for this is

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31 Predrag Zenović, 'Human Rights Enforcement via Peremptory Norms – A Challenge to State Sovereignty' (2012) RGSL Research Paper 6 <https://www.rgsl.edu.lv/uploads/research-papers-list/17/rp-6-zenovic-final.pdf> Accessed 27 June 2020; Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 European Journal of International Law, 491.

32 Markos Karavias, *Corporate Obligations under International Law* (OUP2013) 53; Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Protect, respect, and remedy: A framework for business and human rights', U.N. Doc. A/HRC/8/5, (7 April 2008) note 20.

33 Alexander Orakhelashvili, *Peremptory Norms in International law*, (OUP2008).

34 *Urbaser S.A. v The Argentine Republic*, para. 1203.

35 *Phoenix Action, Ltd. v Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009. Para 78.

36 ICSID Convention, Regulations and Rules (2006) <https://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-English.pdf> Accessed 02 Nov 2021.

37 Susan L. Karamanian, 'The Place of Human Rights in Investor-State Arbitration' (2013) 17 Lewis & Clark Law Review 423.

38 Valentina Vadi, 'Jus Cogens in International Investment Law and Arbitration' in Maarten den Heijer and Harmen van der Wilt (eds.) *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (Springer 2015) 372.

39 Christoph H. Schreuer, *The ICSID Convention: A Commentary* (CUP, 2009).

that such contracts form an integral part of the respondent State's foreign policy.[40] In *Texaco v Libya*, the arbitrator stated that contracts entered into by foreign investors and States may be internationalised by virtue of the applicability of international law.[41] This finding was motivated by two rationales: first, that the specific nature of the contract was linked to the fact that one of the parties was a sovereign State and, second, the dispute was being resolved via international arbitration.

Consequently, human rights law can be incorporated into investment disputes via the operation of general principles of international law. In *Urbaser*, human rights were brought into play despite the absence of any express human rights reference in the treaty.[42] The tribunal held that human rights could be considered on two separate grounds under the applicable law clause in the relevant treaty: First, human rights formed part of the "general principles of international law" applicable to the dispute. Second, human rights could also be incorporated based on "other treaties in force between the Parties".[43] In this case, the tribunal upheld the admissibility of human rights solely based on the first ground. One can query why the second ground was not granted. Both contracting parties – Spain and Argentina – were State parties to the (ICESCR) and other treaties referring, either implicitly or explicitly, to human rights obligations which included the right to sanitation or water that was at stake in this dispute. Overall, the tribunal held that human rights obligations were applicable because an investment was integrated into the "legal framework of international law".[44]

There is no consensus in investment case law over the relevance of human rights under the auspices of general principles of international law. A contrary view confines the applicability of general principles of international law in investment disputes to the principles relevant to the investment law's normative environment, rather than the whole corpus of international law. The tribunal in *Pezold* rejected *amicus* submissions,[45] which argued that indigenous rights be applied to the dispute, because of the inclusion of "general rules of international law" in the applicable law of the relevant BIT.[46]

Whether 'general principles of international law' encompass all international law principles, including human rights, or are strictly confined to investment law norms, is a nuanced and debated question. In principle, the invocation of the "general principles of international law" under Article 42(1) of ICSID refers to the sources of international law as prescribed under Article 38(1) of the ICJ's statute.[47] As such, it encompasses the totality of international law. Another reason to support such a finding is that tribunals are obligated to consider other rules of international law in their interpretations of a specific treaty provision, as required by Article 31(3)c of the VCLT. However, this is not a clear-cut answer. In that context, the International Court of Justice's members were divided in the *Oil Platform* case. While the majority voted for the applicability of the international law on the use of force to the Treaty of Amity via Article 31(3)c, the dissenting judges found it irrelevant to interpret the treaty against the whole universe of international law.[48]

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40 Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration* (OUP, 2013) 235.

41 *Texaco Overseas Petroleum Company (Topco) and California Asiatic Oil Company (Calasiatic) v Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, para 32.

42 *Urbaser v Argentine Republic*.

43 Ibid. para. 1207.

44 Ibid. para. 1207.

45 Amicus submissions are unsolicited submissions received by panels from a third party to the dispute. These submissions are commonly referred to as amicus curiae submissions. Amicus curiae means "friend of the court."

46 *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No.2 of 26 June 2012.

47 Moshe Hirsch, 'Sources of International Investment Law' (2011) International Law Association Study Group on the Role of Soft Law Instruments in International Investment Law Research Paper 05-11, 13.

48 *Oil Platforms (Iran v United States)*, Judgment Merits (2003) ICJ, ICJ Rep 161, para. 41.

Moreover, it is also a matter governed by the tribunal's interpretation of the applicable law clause. Under a wide interpretation, human rights treaties and others covering the various aspects of international law, such as the UNESCO Conventions,[49] may be relevant to the arbitral process.[50] Conversely, under a narrow interpretation, the dispute would be governed by those strictly relevant to investment law.

Invoking human rights as part of general principles of international law could perform two functions in the arbitral process: The first is an interpretive function, which will be discussed in further detail in the next section on systemic integration. The second is a more pervasive role according to which human rights as part of international law govern the merits of a given dispute and could create substantive obligations, especially when negative obligations are at issue. The tribunal in *Urbaser* distinguished positive human rights obligations from negative obligations which could be invoked by a host State as a counterclaim[51]. The tribunal held that positive obligations (i.e. an obligation to provide) could not be borne by investors through the mere application of international law, as such obligations are only imposed upon States. The position differs in the case of a negative obligation (i.e. an obligation to abstain). Negative obligations apply not only to States but also private parties, including investors.[52]

1.3. The principle of systemic integration

Human rights may also be incorporated in investment disputes by virtue of the principle of systemic integration enshrined in Article 31(3)(c) of the VCLT. International treaties do not operate in a vacuum or in isolation from one another. Rights and obligations derived from a particular treaty co-exist together with the rights and obligations originating from other treaties in force between the relevant parties and the relevant rules of customary international law.[53]

Article 31(3)(c) provides that a tribunal should "take into account any relevant rules of international law applicable in relations between the parties." According to this principle, a tribunal can enrich its interpretation of a particular treaty by considering other norms of international law beyond the specific field at issue – in this case, international investment law.[54] The only condition guiding the application of the principle of systemic integration is the relevance of the rule and its applicability between the contracting parties.

Provisions contained in investment treaties are often ambiguous and open-ended. References to substantive protections and their close relation to human rights standards, in particular, may justify recourse to human rights law to interpret substantive obligations in the treaty. In *Al-Warraq*, the tribunal interpreted the notion of 'basic rights', contained in Article 10(1) of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, against the minimum guarantees of due process included under Article 14(3)(a) of the ICCPR. Similarly, the right to a fair trial guaranteed in numerous human rights treaties has been used to interpret a reference to the "departure of fundamental rules of procedures" as a ground of annulment under Article 52(1)(d) of ICSID.[55]

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49 For example, The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property <https://treaties.un.org/doc/Publication/UNTS/Volume%20823/volume-823-I-11806-English.pdf> Accessed 02 November 2021.

50 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID, Case No. ARB/84/3, Award (20/May/1992) paras.75-78, 150–159.

51 Counterclaims based on human rights are discussed further in subsequent sections.

52 See *Urbaser v Argentine Republic*, para. 1210.

53 International Law Commission, 'Report of a Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', UN Doc A/CN. 4/L. 682, para 414.

54 Ibid. para 462–72.

55 See *Tulip Real Estate and Development Netherlands B.V v Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 92.

Importantly, Article 31(3)(c) does not broaden a tribunal's jurisdiction, and the principle of systemic integration should thus not be used beyond its intended interpretative purpose.[56] In investment arbitrations, investment norms retain their prevalence over concurring norms. Tribunals must interpret these overlapping norms in a comprehensible, replicable and coherent way, without undermining the priority of investment norms.[57] Consequently, according to the principle of systemic integration, human rights law cannot be used to import external international legal sources into the normative environment of investment law. The principle of systemic integration merely allows the use of such external sources as interpretative aids to decision-making.[58]

The *Pezold* award illustrates the distinction between importing external norms and using human rights norms as guidance.[59] Although the tribunal rejected importing external norms in the arbitral process, but held that external sources of international law could inform its decision. The tribunal was guided by the jurisprudence of the Inter-American Court of Human Rights in rejecting the margin of appreciation invoked by the respondent State and assessing moral damages. The tribunal in *Mondev* went further by holding that the right to court stemmed from a different source of international law, not investment law.[60] Thus, human rights norms perform a "guidance by analogy" function in the context of substantive protections such as the FET provision enshrined in the North American Free Trade Agreement (NAFTA).

The "guidance by analogy" function of human rights norms and jurisprudence is essential to clarify the ambiguity of some substantive protections, not only in FETs but also in indirect expropriations cases.[61] Several tribunals invoked regional human rights cases in order to enrich their reasonings pertaining to indirect expropriations.[62] Tribunals did not rely solely on human rights jurisprudence to establish the definition of expropriation, but also called on the proportionality test, as enshrined by the ECtHR, to determine whether the expropriatory measure was proportional to the 'public interest' of the State.[63]

1.4. Human rights as part of applicable domestic law

While some applicable law clauses may exclude the application of international law, such exclusions would not necessarily impede the applicability of human rights law. Human rights considerations may still be invoked in the arbitral process through the prism of applicable domestic laws and policies on three inter-related grounds: The first is based on express references to human rights protections under domestic laws. The second stems from some constitutions giving primacy to international law over domestic laws. Finally, human rights consideration may be part of the host State's public policy. This section will now examine each ground in detail.

First, due to the constitutionalisation of the rights guaranteed in the UDHR, ICCPR, ICESCR, and other human rights treaties, most constitutions enshrine human rights protections that are implemented

56 Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration' (2012) 37 North Carolina Journal of International Law and Commercia Regulation 1107; James Crawford, *Brownlie's Principles of Public International Law* (9th edn., OUP, 2019) 383.

57 Crawford, *Brownlie's Principles*, 383.

58 Silvia Steninger, '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 35.

59 *Pezold v Republic of Zimbabwe*, Award.

60 *Mondev International Ltd v United States of America*, ICSID Case No. ARB (AF)/99/2, Final Award, 11 October 2002, para. 116.

61 James D Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' Duke Journal of Comparative & International Law, Vol 18:77, p. 83.

62 Such as the ACtHR & ECtHR.

63 Tribunals' invocations of human rights jurisprudence, such as proportionality test, will be discussed in detail in further sections.

subsequently into national laws.[64] For instance, the second chapter of the South African constitution refers to the right to water or sanitation,[65] and this right is implanted under the Water Services Act, which imposes obligations on the water services industry to safeguard this right.[66] Other human rights that may be enshrined in national constitutions include the elimination of racial discrimination or access to justice. Against this background, host States and investors could invoke such constitutional rights in light of the existing link between the right and the applicable law.

Second, even if the specific human rights protection is not grounded in the constitution or domestic law, some States prioritise international law over their domestic laws. Under the host State's hierarchy of sources of law, international treaty norms and international customary law may prevail over domestic law provisions. Therefore, international human rights law as an integral part of international law may be applicable under the domestic law of individual States.[67]

Third, human rights may also be given effect in arbitration as a part of the host States' national policy. Arbitrators are obliged to make enforceable awards compliant with the requirements of enforcement and recognition under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is uncontroversial that certain human rights protections form an integral part of States' international and transnational public policy.[68] According to the International Law Association (ILA)'s resolution concerning public policy considerations as a bar to the enforcement of arbitral awards, international public policy "can be broken down into three categories: i) fundamental principles; ii) *lois de police*, and iii) international obligations".[69] As a result, the ILA's Committee on International Commercial Arbitration held that 'fundamental principles' included human rights protections, including those against discrimination, slavery and genocide.[70] Consequently, a tribunal could, on its own initiative, invoke a violation of a fundamental human rights protection, since the latter could constitute a contravention of certain States' public policy.[71] This is motivated by the fact that compliance with States' international and transnational public policies is essential to the enforcement and recognition of awards that are not linked to the ICSID Convention.[72]

2. Who May Invoke Human Rights in International Investment Arbitrations?

In the pages above, we examined the applicability of human rights in investment arbitration and how they are invoked. This section examines who may bring such rights into play and what the challenges to human rights invocations are; it will analyse the circumstances wherein parties, whether directly or indirectly, may invoke human rights norms in the course of proceedings. The following subsections will examine human rights invocations under four different aspects: First, the investors' challenges and

64 Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 European Journal of International Law 749.

65 Section 24, Constitution of the Republic of South Africa Act 108 of 1996 provides that "Everyone has the right to have access to sufficient food and water."

66 Section 3 of the Water Services Act, 108 of 1997.

67 See Dupuy (footnote1).

68 Fabrizio Marrella, 'Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade' in Wolfgang Benedek and others (eds.), *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization* (CUP. 2007) 266.

69 Thus, International Law Association, New Delhi Conference report, 'Legal Aspects of Sustainable Development' (2002), Recommendation 1(d). <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1136&StorageFileGuid=6da5d26c-c8ee-4989-95e5-9bd1589282d3> Accessed 5 August 2020.

70 Ibid. para. 28.

71 Nadia Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap* (Routledge, 2017) 127.

72 Article V (2)(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June1958.

strategies to invoke human rights. Secondly, it will move on to human rights invocation in counterclaims brought by host States and the obstacles thereto. Thirdly, it will illustrate indirect human rights intrusion into arbitral proceedings by third parties (i.e., *amici curiae*). Finally, human rights invocations by tribunals as an interpretive aid and a useful tool to enrich their reasonings will be considered.

2.1. Human rights invocations by investors

While human rights invocations by investors remain very rare to date, this by no means indicates that human rights are irrelevant to investors. There are two possible strategies in which investors have attempted to invoke human rights in investment proceedings: The first is where a human rights violation is invoked as a separate cause of action, while the second is where an investor invokes a human rights violation which is interrelated to another substantive obligation arising from the relevant BIT. An analysis of these two strategies requires a review of jurisdictional challenges in which attempts by investors to invoke human rights are unsuccessful.

2.1.1. Admissibility and/or Jurisdictional Challenges

Each BIT has its own specific clauses and wordings. Whether a tribunal is empowered to adjudicate over human rights issues – an irrelevant issue in principle – is a matter of interpretation of the relevant arbitration agreement. For this reason, jurisdictional clauses differ from one treaty or contract to another.

In general, there are three types of jurisdiction clauses that are typically found in investment arbitration agreements. At one end of the spectrum, there are jurisdiction clauses which entitle tribunals to decide disputes that are not limited to the substantive protections granted by the treaty in question but include disputes in connection with or arising out of investments (i.e., wide jurisdiction clauses).[73] In this case, tribunals may adjudicate over other issues that arise from contracts or international law.[74] For instance, the tribunal in *Metal-Tech v Uzbekistan* decided that the jurisdiction clause contained in Article 8 of Israel-Uzbekistan BIT is a broad clause which renders claims falling beyond the provisions of the BIT admissible.[75] Similarly, the tribunal in *Chevron v Ecuador* accepted the invocation of denial of justice, which stems from customary international law, as the wording of the jurisdiction clause did not limit the tribunal's jurisdiction to the treaty.[76]

Toward the middle of the spectrum, some jurisdiction clauses limit tribunals' jurisdictions to the substantive protections contained within the treaty ('limited jurisdiction clauses')[77]. Under such clauses, a tribunal lacks jurisdiction over any dispute that goes beyond the terms of the treaty. Finally, at the other end of the spectrum, there exist types of clauses which are limited to certain types of disputes (i.e., 'narrow jurisdiction clauses'), such as disputes concerning the amount of compensation in the case of expropriation.[78]

The admissibility of human rights-based or related claims is conditioned by the type of jurisdiction clause in the applicable BIT. As such, the only category of clauses permitting human rights invocations

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73 E.g. Italy's Model BIT refers to "[a]ny dispute[...] on investment;' the Russian Federation's Model BIT which covers '[d]isputes [...] in connection with an investment."

74 See Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty arbitration' (2014), 1(1) McGill Journal of Dispute Resolution, 6-8.

75 *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013.

76 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v The Republic of Ecuador*, UNCITRAL, Partial Award on the Merits, 30 March 2010, para. 166.

77 See Article 11(1) of the El Salvador-Spain BIT: "any dispute[...] concerning matters regulated by this Agreement;" see also Article 17(1) of the Japan-Cambodia BIT: "an alleged breach of any right conferred by this Agreement."

78 See August Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011), 2(1) Journal of International Dispute Settlement,115.

relating to matters that do not fall within the ambit of the BIT are wide jurisdiction clauses. However, this is not as clear-cut as some scholars seem to suggest.[79] One notable complication is the fact that under wide jurisdiction clauses only those issues which, in one way or another, affect investment can be admitted for consideration under reference to human rights.[80] Moreover, it is to be noted that some BITs already provide for human rights considerations. In arbitration under such BITs, both wide and limited jurisdiction clauses are fit for purpose since human rights considerations are within the BIT's parameters and arbitrators thus do not have to go beyond its boundaries.

2.1.2. Invocations

Human rights invocations by investors can be brought based on either a separate cause of action, or as an interrelated violation to a substantive protection. An example of the former is the situation in which an investor claims a breach of a State's human rights obligations as a free-standing claim that is unrelated to any substantive protection granted by the BIT. This strategy was followed in *Toto v Lebanon*[81] and *Biloune v Ghana*.[82] In *Biloune*, the tribunal refused to exercise jurisdiction over a denial of justice claim and a violation of human rights but accepted to adjudicate over damages of expropriation. The tribunal reasoned its decision by stating that "the arbitration agreement between the Government of Ghana and Mr. Biloune is only related to disputes "in respect of" the investment; therefore, the tribunal's competence is limited to commercial disputes. Consequently, it lacks jurisdiction over "separate cause of action" human rights claims, despite how compelling the claim is or how wrongful the alleged act is".[83] However, the tribunal did not reject the overarching admissibility of human rights claims in principle. Instead, it highlighted that, "although the alleged acts would be relevant in other investment arbitration disputes, this tribunal, under the relevant arbitration agreement, lacks jurisdiction to address a separate human rights cause of action claim".[84]

By contrast, the tribunal in *Toto v Lebanon* accepted the admissibility of a separate cause of action, namely, a denial of justice claim. In this context, the tribunal justified the admissibility of the claim based on the wide jurisdiction clause and the inclusion of 'general principles of international law' as applicable law. As a result, the tribunal accepted the notion that a claimant may rely on human rights norms that are embedded in other treaties. Despite the claimant's initial success in the form of the tribunal's decision to admit the cause of action, the claim was ultimately dismissed, the evidence presented by the claimant being found insufficient.

Although some scholars have welcomed in principle the separate cause of action strategy, this author finds it problematic in certain key respects.[85] For example, if tribunals were to accept such claims freely, such practice would undermine the significance of the 'in connection with investment or arising out of an investment' provision embedded in almost all wide jurisdiction clauses, as well as Article 25(1) of the ICSID Convention.[86] This would, in effect, make investment tribunals' jurisdictions universal rather than confined

79 See Ursula Kriebaum, 'Foreign Investments & Human Rights – The Actors and Their Different Roles', (2013) 10:1 Transnational Dispute Management 12.

80 E.g. Article 13(3) of the 1988 China-New Zealand BIT refers to "[a]ny dispute involving the amount of compensation…"

81 *Toto Costruzioni Generali S.p.A. v Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

82 *Biloune & Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989.

83 Ibid. p. 203.

84 Ibid.

85 See Balcerzak (footnote74); and Pierre-Marie Dupuy and J. E. Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress', in M. Bungenberg et al. (eds.), *International Investment Law* (Nomos, 2012).

86 Article 25(1) provides that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment".

to investment disputes. Put differently, the admissibility of separate cause of action claims is, and must be, fact-driven. In order to successfully invoke human rights as a separate cause of action, the claimant bears the burden of proving the relevance of the human rights allegations to the investment. Separate cause of action claims must be inadmissible unless the claimant establishes that a link exists between the allegation (i.e., the cause of action) and the investment, as required by the jurisdiction clause.

In the second strategy, human rights norms are invoked in support of claims related to substantive protections. For instance, a claimant could allege a breach of expropriation obligation under reference to the 'right to property' embedded in Article 17 of the UDHR. Another example is when a claimant invokes a non-discrimination provision in relation to a claim of discrimination under the auspices of international human rights law. Such claims are much more compelling, since the link between the violation, the BIT (i.e., a substantive protection), and the investment is well established. This is because such claims are similar to ordinary investment claims.[87]

Following this strategic approach, the claimant in *Roussalis v Romania* invoked the FET standard under Article 10 of the Greece-Romania BIT, together with the support of the 'right to fair trial' and 'protection of property' under the ECHR and the first additional protocol.[88] In response to this claim, the tribunal accepted the relevance of human rights claims derived from the ECHR but declined to consider such rights, arguing that the BIT in question contains more specific and stronger protections. The tribunal reached this conclusion based on Article 10 of the BIT,[89] which provides the admissibility of more preferable protections that are provided by other legal instruments.[90]

The tribunal in *Grand River v USA* followed the same approach.[91] It was faced with an FET claim that alleged violations of indigenous peoples' rights and was grounded in customary international law, human rights treaties, and several US domestic laws. The preamble to NAFTA provided for the need "to preserve [the NAFTA Parties'] flexibility to safeguard the public welfare".[92] Under reference to that provision, the tribunal undertook a thorough discussion of the scope of indigenous peoples' rights and the State's duty to consult disadvantaged groups before the enactment of any legislation that might affect them. Although the language suggested the tribunal's acceptance of human rights invocations, it nevertheless rejected the claim based on the determination that NAFTA's FET provision was qualified by the minimum standards of protection. In this context, the tribunal held that "minimum standards of protection" referred to the least amount of protection in which prior consultations with individual investors could still be maintained. Moreover, even had such a protection been sustained, the investor had failed to provide sufficient evidence of being a holder of legitimate representations.[93]

An examination of several cases in which human rights were invoked by investors suggests the trend of invoking human rights is still in its 'infancy' phase. Further development has been slowed because, although several tribunals accepted human rights claims as a matter of principle, the claims were ultimately unsuccessful. Moreover, both investors and tribunals faced considerable difficulties in the context of human rights invocations. On the one hand, the case law indicates that investors struggled to show the

87 See Dupuy, P. M. and J. E. Viñuales (footnote 2).

88 *Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011.

89 At para. 117, *Roussalis v Romania* cites Article10 of Greece-Romania BIT: "[i]f the provisions of law of either Contracting Party or obligations under international law… in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors… to a treatment more favorable than is provided for by this Agreement, such regulation shall to the extent that it is more favorable, prevail over this Agreement."

90 *Roussalis v Romania* para. 312.

91 *Grand River Enterprises Six Nations, Ltd., et al. v USA*, UNCITRAL Award, 12 January 2011, paras. 204-221.

92 NAFTA, preamble <http://idatd.cepal.org/Normativas/TLCAN/Ingles/North_American_Free_Trade_Agreement-NAFTA.pdf>, Accessed 5August 2020.

93 Ibid. para. 214-216.

connection between their human rights invocations and the effect of such human rights violations on their investments. Further, even if the primary claim was supported by a human rights violation, it would be difficult to assess the influence of the human rights at issue, since it is an integral part of the investment claim. Critically, tribunals still lack an adequately developed, unequivocal methodology for dealing with such nuanced arguments when they are presented by investors.

2.2. Human rights invocations by respondent States

Under international law, States are under the obligation to respect and protect human rights within their sovereign territories. This obligation extends to responsibility for preventing any human rights violations. Host States' interference with foreign investments can thus be assessed with reference to such duties. While State interference could be legitimate under reference to health, safety or environmental affairs, investors are also protected by international investment law against host States' unjustified interference and adverse regulatory measures. As such, this tension between the investor's protection, grounded in investment law, and the host State's duty to protect human rights, might result in recourse to arbitration. Consequently, it is to be expected that States will often make counterclaims founded on the protection of human rights as a defence strategy to justify adverse measures they have enacted. The following subsections will discuss possible barriers to a State successfully invoking human rights as a counterclaim. Such invocations are subsequently examined in more detail.

2.2.1. Admissibility

The first and foremost barrier is the respondent State's ability to bring counterclaims. The question as to whether a tribunal is empowered to adjudicate over a counterclaim is resolved by institutional rules coupled with the offer to arbitrate. Traditionally, investment treaties were drafted to allow investors to initiate arbitrations, thereby allowing them to bring claims against host States, without making the same provision for the host State to initiate proceedings. In brief, States do not usually have regard when it comes to their rights to bring counterclaims.

Although the ICSID Convention has contemplated the respondent's right to bring counterclaims,[94] not all offers to arbitrate provide for such rights. Even so, it is undoubtedly the case that some tribunals were convinced, on the basis of Article 46 of the ICSID Convention that it was competent to bring counterclaims and, consequently, drafted offers broadly so as to include words such as 'all' or 'any' disputes.[95] Nevertheless, it is also true that not all tribunals were satisfied by such an approach. For instance, the tribunal in *Rusoro*[96] confined the phrase 'any dispute' to investors only. In other words, it did not allow the respondent State to bring a counterclaim on the basis of Article 46. A third approach, followed by the tribunal in *Metaux v Burundi*,[97] suggests that counterclaims could be brought based on the mere incorporation of ICSID arbitration in the offer to arbitrate. In *Metaux*, the tribunal held additional consent to counterclaims to be superfluous, since the institutional rule permits for counterclaims. Due to these uncertainties, the inclusion of explicit wording in the offer to arbitrate is generally crucial to the admissibility of respondent counterclaims.

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94 See article 46 of the ICSID Convention which provides "Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

95 See, for instance, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Decision on Jurisdiction Over the Czech Republic's Counterclaim, 7 May 2004, para. 39; following the same approach, see *Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, para. 432.

96 *Rusoro Mining Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/12/5, Award, 22 August 2016, paras. 620-627.

97 *Antoine Goetz & Consorts and SA Affinage des Metaux v Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012, para. 268-271.

Secondly, even if counterclaims were admissible under the relevant offer to arbitrate, the absence of any direct obligations imposed by the treaty provisions on investors exacerbates uncertainty with regards to the claim's success.[98] Based on the approach followed in *Paushok*,[99] States ought to rely on an allegation that falls within the tribunal's jurisdiction: either a breach of a specific treaty provision, or else a breach of international or domestic law based on the boundaries of the applicable law clause. For instance, if the human rights violation was grounded in domestic law, the applicable law clause should include domestic law for the admissibility of the counterclaim.

Thirdly, States have to prove the nexus between the human rights counterclaim and the investor's claim. As required by Article 46 of ICSID, the counterclaim should arise "directly out of the subject-matter of the dispute". Whether the nexus should be in the factual or legal sense was a matter discussed in the case of *Urbaser*. According to that tribunal, they were convinced that the factual nexus between the claim and counterclaim was a sufficient connection as long as it is manifest and linked to the operation of the 'investment project'.[100]

Finally, it could be deduced that a human rights counterclaim would be admissible if the offer to arbitrate expressly provides for counterclaims, or is wide enough to encompass "all or any disputes." Such a deduction would be strengthened if it does not have any limitations to disputes related to the BIT (i.e. contains a wide jurisdiction clause). Ideally, the institutional rules should also expressly permit the admissibility of counterclaims. Lastly, the relationship between the claim and the counterclaim must also be considered.[101]

2.2.2. Counterclaims and setoffs

Under ICSID, host States are mandatory respondents. As such, they can only invoke human rights as counterclaims or setoffs. Unlike investors, the strategy followed here is a defence strategy. In this context, the right to water and the privatization of water, following the termination of several concessions, has unleashed various potential approaches to human rights justifications.[102] The following paragraphs will highlight the gradual acceptance of human rights counterclaims by tribunals, and the increasing deployment by States of human rights arguments to justify adverse measures as a strategic litigation approach.

The respondent's hesitation to employ such a strategy ultimately resulted in decisions for the claimant in both *Azurix v Argentina*[103] and *Siemens v Argentina*.[104] In *Azurix*, the termination of a water concession for the distribution of water and sewage services gave rise to a dispute between the claimant and the province of Buenos Aires. The respondent argued that the alleged measures were to protect public interests and to safeguard the right to water for its subjects. It further contended that the provisions of the BIT and human rights were incompatible with one another in this respect.[105] On this basis, Argentina argued, the conflict should be decided in favour of human rights rather than the wordings of the BIT. The tribunal

98 See Eric Brabandere, 'Human Rights Counterclaims in Investment Treaty Arbitration' (2018) Grotius Centre Working Paper Series No. 2018/078-IEL 15.

99 See *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 684. Given the tribunal's lack of jurisdiction to apply domestic law and the claim being owned to the claimant's subsidiary, it was compelled to reject the counterclaim brought by Mongolia.

100 See *Urbaser v Argentina*, para. 1151.

101 See Patrick Dumberry and Gabrielle Dumas-Aubin, 'When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration', (2012) 13, The Journal of World Investment & Trade2012, pp. 360-365.

102 Vivian Kube and E. U. Petersmann, 'Human Rights in International Investment Arbitration,' (2016), 11(1) AJWH, 81.

103 *Azurix v Argentine Republic*, ICSID Case No. ARB/01/12, Award, (14 July 2006).

104 *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 January 2007).

105 Ibid. para. 254.

acknowledged Argentina's intentions to protect its public interest. Nevertheless, it rejected the human rights-related arguments, finding that the case had not been argued sufficiently, and citing its difficulties in understanding the purported conflict between the BIT and human rights.[106] Had the State argued the right to water more robustly, the decision could have been a landmark for subsequent ones concerning Argentina's crisis and human rights.[107]

In *Siemens v Argentina,* Argentina failed once again to substantiate its human rights argumentations to claim a non-compensable expropriation. Following the *Azurix* tribunal's approach, in *Siemens* the tribunal rejected the relevance of the right to property, and held that an unsubstantiated argument "does not bear any relationship to the merits of the case".[108]

Subsequent to these unfavourable decisions, Argentina was mindful of the value of human rights defences in response to investors' claims. It consequently developed its arguments in relation to the protection of the right to water as justification for freezing water tariffs in *Suez, Vivendi Universal v Argentina.*[109] In that case, the respondent argued its right to a wide margin of appreciation due to the importance of water as an indispensable commodity for the health of its population. Moreover, it argued the relevance of the purpose of termination, in which human rights played an essential role.[110] Although the tribunal acknowledged Argentina's rightful interests in safeguarding the distribution of water, and its compliance with its human rights duties, namely the right to water, it was not convinced of Argentina's method in securing this right. Furthermore, it held that "Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive".[111] Argentina is thus under the obligation to comply with both obligations. The tribunal concluded that the respondent could have undertaken other methods to comply with both obligations.

Although Argentina argued for the harmonization of its conflicting obligations under both international human rights law and BITs, the tribunal in *SAUR International S.A. v Argentine Republic*[112] was not convinced by the argument and followed the *Suez* tribunal's approach. As a response to the expropriation claim initiated by *SAUR*, Argentina claimed that its province's decision to refuse the investor's increase of water tariffs aimed to protect the human right to water and, as such, was not an expropriatory or wrongful act (i.e., *exitus acta probat*).[113] The language of the tribunal's decision seemed to recognise States' powers to regulate, supervise and protect public interests, of which access to clean water forms an integral part. Nevertheless, it reiterated *Suez*'s determination by concluding that Argentina should observe both its obligations under the BIT and those stemming from human rights treaties.

Most recently, human rights counterclaims gained much more acknowledgement in the case of *Urbaser*, following a thorough analysis of the failure of human rights counterclaims, it found in favour of the harmonisation of investment law and human rights duties.[114] The tribunal went further in welcoming the subjection of international corporations and investments to international law by making them bearers of

106 Ibid. paras. 261 & 310.

107 Pierre Thielbörger, 'The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?' in P. M. Dupuy, F. Francioni and E. U. Petersmann, eds., *Human Rights in International Investment Law and Arbitration* (OUP 2009) 497.

108 *Siemens v Argentine Republic*, para 74-79.

109 *Suez, Sociedad General de Aguas de Barcelona, S. A. and Vivendi Universal, S. A. v Argentine Republic*, ICSID Case No. ARB/03/19, decision on liability, 30 July 2010.

110 Ibid. para. 252.

111 Ibid. para. 262.

112 *SAUR International S.A. v Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012.

113 Ibid. 328.

114 *Urbaser v Argentina*, para. 1200.

human rights obligations. In that context, it relied on Article 5(1) of the ICESCR which provides that *"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant."* However, the tribunal diverged from this path to find that the investor's obligation to provide affordable water, under the relevant case, was not grounded in international law but the applicable concession agreement. It reached such a finding by reasoning that the human right to water is an obligation to perform, which could not be imposed on any company.[115] Should the right concern a prohibition, such as freedom from slavery, the decision would have upheld the counterclaim.

To conclude, the case law demonstrates both Argentina's initial failure to develop human rights argumentations in the earlier cases and its gradual realisation of its cruciality as a litigation strategy. In parallel, tribunals' responses indicated an actual recognition of the importance of human rights' protection and its relevance to investment arbitrations. However, before *Urbaser*, the general view tended to find in favour of the separation and compatibility of States' duties stemming from human rights treaties and BITs, regardless of their overlaps. It is, therefore, possible to say that human rights counterclaims following *Urbaser*'s decision could actually prove much more influential, if the issue before the tribunal concerned a negative human rights obligation (i.e., an obligation to abstain).

2.3. Human rights invocations by non-parties

Another entry point for human rights into arbitration is through non-parties' participation in the form of *amicus curiae*. However, unlike actual human rights claims or counterclaims, the influence of *amicus* submissions is relatively insignificant because they are made by parties who hold no direct stake in the disputed fact or law. Pursuant to its literal meaning, the participation of third parties is predicated on their status as 'friends of the court.'

Based on the case law, two strategies could be cited. Firstly, it could be argued that *amicus* submissions could provide valuable support to the parties' human rights-related claim. Secondly, third parties could bring human rights argumentations for the protection of public interests, even in the absence of any human rights invocations by the parties themselves. As such, the next sections will examine the criteria for the admissibility of such arguments (as relevant to the present topic) and the relevant case law.

2.3.1. Human rights amicus briefs to support a party's claim

There are two challenges to the submission of such *amicus* briefs. First, submitting human rights-related *amicus* briefs in support of a party's claim could raise issues relating to the independence of the amicus briefs. In this context, the tribunal in *Pezold v Zimbabwe*[116] observed that Article 37(2)(a) required an implicit condition of independence because it provides that the submission should "bring a perspective, particular knowledge or insight that is different from that of the Parties." Consequently, it held that *amicus* submissions by indigenous groups in Zimbabwe ought to be rejected as it constituted an "apparent lack of independence".[117] It reached this decision based on two reasons: First, the submissions appeared to be in conflict with the claimant's position, and, secondly, they were supported by a domestic NGO whose director was supporting the host State's policy.

Nevertheless, the case law demonstrates that host State-based NGOs quite predictably and frequently submit *amicus* briefs. It is also predictable that nationals of host States act as directors or members of these NGOs.[118] Denying the admissibility of *amicus* briefs on such basis would thus diminish the value of

115 Ibid. para. 1197-1210.

116 *Pezold v Zimbabwe*, Procedural Order No.2, 26 June 2012.

117 Ibid. para. 51.

118 S. Schadendorf, 'Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations', 2013, TDM, Vol. 10 Issue 1, p.10.

such a mechanism to support the tribunal's findings. Moreover, the arbitral case law, in this regard, has never questioned the independence of submissions brought to assert host States' measures.[119] For example, the tribunal in *Lilly* accepted a submission by an entity to which one of the parties had a membership.[120]

Secondly, it should also be noted that arbitral tribunals are under the obligation to ensure the efficiency and fairness of the arbitral process. As contemplated by Article 37(2) of ICSID, the submissions should not "unduly burden" or "unfairly prejudice either party." As such, supporting a party's human rights claim by third parties' submission could raise questions of burdening the other party. This is because the purpose of the submission could shift from assisting the tribunal to countering one of the parties' claim and supporting the other. Such a development would 'unduly burden' the other party, which might lead to the rejection of the submission.[121]

Third parties' submissions typically side with one party against the other. Thus, in *UPS v Canada*,[122] the claimants sought to hold Canada liable for a breach of FET standards enshrined by Article 1105 of NAFTA. They argued that the host State had breached human and labour rights due to their failure to respect collective bargaining rights of postal workers, which led to an unfair competition by lowering the costs of the workforce in the absence of such bargaining rights. The host State responded that there was no customary rule prohibiting such facts. Amongst other arguments, the Canadian Council and the Canadian Union of postal workers surprisingly petitioned to argue against the claimants by arguing the inappropriateness of upholding human rights violations without the presence of the concerned parties who would not benefit from the award's outcome.[123] In other words, they argued *forum non conveniens*.[124] Although the tribunal followed the submission's assertions by rejecting labour rights-related claims, the award did not directly respond to any of the arguments stressed by the petitioners. Instead, the tribunal was satisfied by the brief of the submission.

In contrast, the tribunal in *Biwater v Tanzania* acknowledged that the submissions presented by five NGOs had been "useful and had informed its judgement over the case".[125] In that case, the petitioners backed up Tanzania in its justification of terminating the concession of water contract with the investor due to the harmful implications for its population as a result of water shortages. The submissions asserted the significant impact of the award on human rights and sustainability due to the relationship between basic human rights (i.e., the right to water) and the services provided by the investor. As such, they argued that investments operating in such sectors should bear the "highest level of responsibility to meet their duties and obligations".[126]

Similarly, in *Suez* the tribunal accepted five NGOs' joint submissions which argued the relevance of human rights and their submission's relevance to the dispute. They sided with the host State by arguing the appropriateness of its measures to freeze water tariffs that aimed to fulfil its international human rights obligations, as claimed by Argentina. In particular, they asserted that due to the applicability of

119 Ibid.

120 *Lilly and Company v The Government of Canada,* UNCITRAL, ICSID Case No. UNCT/14/2, Procedural Order No. 4, 23 February 2016.

121 G. Born and S. Forrest, 'Amicus Curiae Participation in Investment Arbitration', (2019) ICSID Review, Vol. 34, No. 3, pp. 626–665.

122 *United Parcel Service of America Inc. v Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001.

123 Ibid.

124 Forum non conveniens means: A court's discretionary power to decline to exercise its jurisdiction where another court may more conveniently hear a case.

125 *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 359.

126 *Ibid.* para. 380.

Article 31(3), human rights could supersede investment law in the event of 1) a conflict of norms or 2) circumstances of necessity.[127] Following the tribunal's acknowledgement on the *amici*'s role in developing Argentina's arguments, which involved the human right to water as a defence strategy, it responded to the *amici*'s argument by stating that the obligations, under human rights law and investment law, were "by no means mutually exclusive".[128] This is the only tribunal to respond directly to arguments presented by a third party in its award.[129] Notably, this is because the *amici*'s arguments were aligned with those of the host State's defence: The applicability of human rights and its displacement of the investment law's obligations when they are in conflict.

2.3.2. Human rights argumentations for the protection of public interests

According to Article 37(2)b of ICSID arbitration rules, the admissibility of *amicus* submissions ought to be "within the subject matter of the dispute". This is to avoid the unwarranted broadening of the subject matter of the dispute. As highlighted by the *UPS* tribunal, petitions ought not to alter the subject matter of the dispute.[130] Rather, an *amicus* brief is supposed to perform its ordinary role of assisting the tribunal. As such, human rights considerations brought by petitioners would struggle in admitting such arguments, especially where neither party has claimed such rights.

In a very restrictive interpretation of this requirement, the tribunal in *Pezold* rejected a submission that aimed to link the putative rights of indigenous communities to 'indigenous people' rights under international law. The claimant argued that the tribunal would have to decide whether the communities in this case were protected under human rights law as 'indigenous people' for the purposes of the admissibility of the submission. As a result, the tribunal declined to grant the submission by deeming it "a matter outside of the scope of the dispute, as it is presently constituted"[131]

Any attempt by non-parties to broaden the subject matter of the dispute would be readily challengeable based on the requirement set out in Article 37(2) b. Therefore, human rights-related submissions should be dressed in a way that is linked to the *ratio materiae* of the dispute. In this context, two cases could be cited in which third parties have managed to argue for the protection of human rights through cases involving an environmental aspect. In both cases, this noteworthy result is due to the blurry line between international environmental law and human rights law.[132]

Methanex v US was the first case to accept *amicus curiae* in Investor/State disputes. The case concerned the ban of the gasoline additive MTBE in the State of California due to its repercussions on human health and the environment as a whole. As a result, three NGOs submitted a joint *amicus* brief arguing that the State's ban of MTBE was justified on the basis of compliance with obligations under international law. In particular, they asserted that States are under the obligation to protect the human right to health, water and life.[133] Although the tribunal had accepted the submissions and referred to their admissibility in the award, it nevertheless did not address any of the human rights argumentations.

Similarly, human rights argumentations were brought by non-parties in *Pac Rim v El Salvador*,[134] despite the parties' silence with regards to such arguments. The investment was involved in the mining sector in

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127 *Suez v Argentina*, decision on award, 9 April 2015, para. 27.

128 *Suez v Argentina*, decision on liability, 30 July 2010, para 260.

129 See, S. Schadendorf, (footnote 108).

130 *United Parcel Service of America Inc. v Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, para. 60.

131 *Pezold* para. 60.

132 Puneet Pathak, 'Human Rights Approach to Environmental Protection', (2014) 7(1) OIDA International Journal of Sustainable Development 17.

133 *Methanex Corporation v United States of America*, UNCITRAL, Amicus Submission by Bluewater Network and Others, 9 Mar 2004, para. 18.

134 *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No. ARB/09/12, *amicus curiae* Brief by the Center for International Environmental Law, 20 May 2011, p. 14.

various fields in El Salvador. Although the concessions were granted, the government issued measures to the contrary following several protests spurred on by the population's concerns over the impact of such activities on water supplies. As a result, the claimant initiated a claim for several breaches of CAFTA which subsequently led several NGOs to submit *amicus* briefs. The *amici* submission shared a thorough analysis of the potential impact on human rights, and several environmental issues affecting water supplies, as a result of mining explorations. Moreover, they highlighted the consequences of the investor's lobbying which included violence, political instability and various human rights violations. Thus, the *amici* argued, "Pac Rim has abused the arbitral process" and the "Tribunal should not sanction this abuse".[135]

Similar to the petitioner's approach used in *UPS*, the NGOs sought to argue against the tribunal's jurisdiction by asserting that the 'genuine opponent' in this case were the communities and not the government. Therefore, the tribunal would constitute an abuse of process since ICSID's jurisdiction concerns governments as respondents rather than communities who could only participate as third parties without holding any rights as actual parties. Although the submission presented detailed arguments not only concerning human rights but also in relation to the tribunal's jurisdiction, none of the human rights-related arguments were dealt with in the award. Instead, the tribunal merely focused on questions of jurisdiction which aligned with the respondent's arguments.

It is undoubtedly true that *amici* briefs could provide support to human rights argumentations presented by the parties. They could also draw the tribunal's attention to the possible human rights implications of a given case.[136] However, their influence on the tribunal's award remains ambiguous.[137] In almost all the cases discussed above, the tribunals were satisfied by the mere reference to the admissibility of *amicus curiae*: a matter of followed procedure. Exceptionally, one arbitration valued *amici*'s participation and pronounced its usefulness in reaching its decision (*Suez*); and in the other, it rejected certain claims which were defended by the host State and supported by petitioners. In the first case, the award lacks detailed analysis of how the submission had informed the decision, while in the other it could be argued that the host State's defence, rather than the *amici*, was responsible for the tribunal's determination.

2.4. Human rights by Tribunals

Human rights could also play an ancillary role in determining investment law disputes through the principle of systemic integration. As the case law demonstrates, investment arbitrations are not immune from human rights jurisprudence, especially in the context of expropriation. Notably, this is due to the similarities between the protection of the right to property, as enshrined under many human rights conventions, and the notion of expropriation in investment law.

As a starting point, the tribunal in *Tecmed v Mexico* made clear that "disputes are to be resolved by resorting to the sources described in Article 38 of the Statute of the International Court of Justice".[138] As part of the sources of international law, other 'judicial decisions' are supplementary sources which justify an investment tribunal's resort to human rights jurisprudence. Another entry point for human rights intervention in investor/State arbitrations is via the application of Article 31(3)c to reconcile the fragmentation of international law's principles.

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135 Ibid.

136 James Harrison, 'Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?', In Dupuy P. M., Petersmann E. U., and Francioni F. (eds.) *Human Rights in International Investment Law and Arbitration*. (OUP 2009) <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199578184.001.0001/acprof-9780199578184-chapter-17>

137 Vivian Kube, *EU Human Rights, International Investment Law and Participation Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection,* (Springer 2019) p. 187.

138 *Tecnicas Medioambientales Tecmed, S.A. v United Mexican States* (Case No. ARB (AF)/00/2), Award, 29 May 2003, paras. 116–122.

In its determination of an expropriation claim, the tribunal in *Saipem v Bangladesh* asserted that rights stemming from judicial decisions are objects capable of being expropriated by citing several arbitral decisions as well as human rights jurisprudence.[139] Moreover, the tribunal in *Tecmed v Mexico* cited various ECtHR decisions as authority in its interpretation of "indirect expropriation", as well as the legality and limits of the host State's differential treatments between nationals and foreigners. The same is also true in *Lauder v Czech Republic*. The tribunal followed the ECtHR decision in *Mellacher v Austria*[140] by distinguishing between expropriations and indirect expropriations. It held that the latter occurs when the investor is deprived of his rights to "use, let or sell his property".[141]

Moreover, the *Tecmed* decision was the first to introduce a proportionality test – a test originating from ECtHR's jurisprudence–to investment arbitrations.[142] The test follows a three steps approach: 1) the suitability of the measure in pursuing a public interest; 2) the necessity of the measure; 3) the balance between the purpose of the measure and its impact on investments' protections. However, it should be noted that the test has not been strictly followed, nor has it led to a uniform line of subsequent decisions. For example, while the tribunal in *Tecmed* had merely made a critical review of the proportionality of the measure in pursuing the host State's public interest; without analysing the first two limbs of the test, the tribunal in *Occidental v Ecuador* examined the appropriateness of the measure and its necessity without analysing its suitability for fulfilling the aim the government is trying to achieve.[143]

The test has been shown to provide useful guidance and a perfect tool to allow tribunals to second guess the proportionality between the benefits of the host State's measures in fulfilling its intended purpose (i.e. protecting a public interest) and their impact on the investment's protections.[144] For example, after the application of the test, the tribunal in *Azurix v Argentina* highlighted that human rights jurisprudence provides "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation".[145]

Human rights jurisprudence could also be relevant in the quantification of damages owed to the investor. The tribunal in *Quiborax v Venezuela* cited ECtHR decisions as authority for its findings on the quantification of damages as of the date following the award rather than the date of the expropriatory act.[146] The same court's jurisprudence was the tribunal's authority in awarding monetary compensations for moral damages.[147]

In an exceptional case, the tribunal in *Bear Creek Mining Corporation v Republic of Peru* acknowledged human rights in mitigating the amount of compensation owed to the investor.[148] *Bear Creek Mining* concerned

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139 *Saipem SpA v Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paras. 130-132.

140 *Mellacher and Others v Austria* [1989] ECtHR App 10522/83, 11011/84, 11070/84, 24.

141 *Lauder v Czech Republic*, UNCITRAL, Award, 3 September 2001, para. 200.

142 The tribunal cited *Pressos Compañía Naviera and Others v Belgium* [1995] ECtHR App 17849/91, 19 and *James and Others v UK* [1986] ECtHR App. 8793/79, 19–20.

143 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No. ARB/06/11, Award, (5 October 2012), paras. 426-452.

144 R. Prabhash, 'Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law' (2014) 3 (3) CJICL 853.

145 *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 311–312.

146 *Quiborax et al. v Bolivia*, ICSID Case No. ARB/06/2, Award on merits, 16 September 2015, para. 378.

147 Ibid. para. 558.

148 Sonia Anwar-Ahmed Martinez 'Bridging the Gap: Using Business and Human Rights Arbitration to Drive Investor Accountability for Business-related Human Rights Harm in Foreign Investment.' International Bar Association Legal Policy and Research Unit (2019) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=7E06F4B4-F8EC-446E-BE88-C013C861AEDC, accessed 5 August 2020>

a revoked mining concession in the construction of a silver mine as a result of various protests. As a consequence, the claimant claimed for $522M as discounted cash flow which amounts to the investment's value. Although the tribunal found in favour of the investor by holding the host State liable for an indirect expropriation, the tribunal reduced the amount of compensation to $18M. The tribunal reached such a decision based on the investor's lack of chances in obtaining a "social license to operate" from indigenous communities.[149] Although it is true that the social license is not a legal requirement, it undoubtedly represents the local communities' views which encompass environmental and cultural considerations.

Arbitrators' *ex officio* reliance on human rights is not limited to the jurisprudence of specialised courts, but extends also to treaties and norms. In *Micula v Romania*, the principle of systemic integration was the tribunal's basis for being mindful of the UDHR, since it was interpreting a BIT: a legal instrument between two States. As the case concerned an investor's nationality, it reiterated that "everyone has the right to nationality and no one should be deprived of his nationality." as enshrined under Article 15 of the UDHR.[150]

The findings detailed above are evidence of the fundamental unity of human rights and investment law. It is, however, true that almost all the cases did not apply human rights standards, as they were not deemed applicable. The tribunals nevertheless relied on human rights jurisprudence to inform their judgements over cases, not only in expropriations but also in assessing damages. This is undoubtedly due to the relevance and resemblance between these two separates fields of international law.

3. Conclusion

Over the last two decades, investment tribunals have been encountering various human rights argumentations, not only by respondent states and investors, but also by third parties. Such overlaps are unsurprising in light of the shared origins of both fields of international law and the resemblance between their respective norms. It is also a reflection of the fact that both fields provide direct access to international mechanisms for the protection of private individuals.[151]

As this paper has argued, there are no fundamental contradictions or barriers between investment law and human rights. With the fragmentation of international law remaining a controversial issue, the second chapter of this paper explored the means for achieving a harmonized approach. Such an integration process, the paper has argued, could take place by deploying all various angles and routes offered under the applicable law. Thus, human rights could pierce the self-contained system of investment law not only through the inclusion of direct human rights references in investment treaties, general principles of international law and the principle of systemic integration, but also by way of domestic laws.

Although the African region and other States are shifting towards a new generation of BITs containing direct references to human rights obligations on investors,[152] the contents of such obligations remain unclear as they refer to human rights in broad terms. The mere reference to human rights is not sufficient to eliminate the ambiguities surrounding such obligations, given the applicable human rights obligations on corporations are unclear. However, this does not make them superfluous, as they constitute an unequivocal basis for tribunals to adjudicate over human rights counterclaims to hold an investor liable.

The integration of human rights norms in investment arbitrations has gradually shifted from playing a minimal role into a more pervasive one, notably after the Urbaser case. Nevertheless, the role remains relatively marginal, as the Host State's argument in that case was not fully upheld despite the tribunal's

149 *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, paras. 595-655.

150 *Micula et al. v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 86-89.

151 Moshe Hirsch, 'The Sociology of International Investment Law' in Douglas, Z., Pauwelyn, J., & Viñuales, J. (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice*, (OUP 2014).

152 For a detailed discussion over human rights references, see p. 8.

acknowledgment of human rights' role in investment law. In light of this, whereas turning a 'no' directly into a 'yes' might be too great a leap, a 'maybe' in between can plausibly render such a transition possible.

As this paper and the case law have demonstrated, given the gradual acceptance of human rights invocations by all parties concerned, the general reluctance of tribunals to acknowledge the relevance of human rights in the arbitral process may shift. However, the case law still lacks a crystal-clear award fully upholding a human rights-related argumentation – which would consolidate the unification of both prominent fields of international law and, in the process, form a *jurisprudence constante*.

As to the examination of the case law undertaken in the context of counterclaims, such claims have not yet been upheld by the arbitral tribunals. The general view is that tribunals are inclined towards the separation of investment treaty obligations and human rights. In other words, States should comply with both obligations, even when a State's interference was motivated by the protection of human rights. As such, human rights references in investment treaties are a must for human rights accountability.

Most importantly, jurisdictional clauses will determine the admissibility of human rights arguments in the arbitral process. However, while wide jurisdiction clauses were the only kind facilitating human rights interferences, this might not be the case for all investment agreements. Thus, to safeguard the relativity of human rights arguments and their admissibility, the inclusion of human rights references in investment agreements is a key factor for bridging the gap between the two fields of international law. Yet, the enforcement of human rights responsibilities on investors remains voluntarily based, chiefly reliant on the hortative language used in investment agreements. It remains unclear whether such references will carry any influence on the investment protections enjoyed by a non-compliant investor. Consequently, it would be quite beneficial for investors' human rights responsibilities to be drafted using obligative language. Finally, the incorporation of the UNGPs in investment treaties will provide valuable guidance on the parameters of human rights applicable obligations on foreign investments.

4. Recommendations

While the present article has pointed out several important entry points for human rights invocation in the arbitral process, the inclusion of human rights references in substantive provisions remains imperative for a successful human rights argumentation. A human rights related argument requires a clear path for it to be upheld, especially in the absence of an arbitral award clearly upholding a human rights invocation. This section identifies and highlights some of the key areas that need to be addressed for a greater integration of human rights in the context of investment law and arbitrations.

Using an obligative than hortative language in human rights references

While it is true that the new generation of BITs refers to human rights obligations, they are nevertheless referred to in aspirational language such as 'should'. Moreover, the vast majority of the so-called 'new generation' treaties refer to mere Corporate Social Responsibilities rather than imposing actual human rights obligations, such as the Morocco-Nigeria BIT which explicitly refers to human rights obligations. The Argentina-Qatar BIT exemplifies the non-mandatory language used in recent BITs. Article 12 of this BIT states that the investor should "make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices".[153]

The aspirational character of such references means that they merely encourage greater corporate social responsibility. As such, the hortative language diminishes the effectiveness of holding investors liable for human rights violations or broader social responsibilities. In this context, it is questionable whether such references would carry concrete legal consequences in cases of non-compliance.[154]

153 Argentina-Qatar BIT (2016) <http://investmentpolicyhub.unctad.org/IIA/treaty/3706> Accessed 5 August 2020.

154 Yulia Levashova, 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States Through International Investment Law' (2018) 14 (2) Utrecht Law Review 40.

Including Human Rights References in GCC Member States' Investment Treaties

Human rights references do not strictly operate as a liability on States. Instead, they might be considered key provisions for allowing such state parties to impose non compensable regulatory measures for environmental, animal or public health protections. Nevertheless, Bahrain, Saudi Arabia and Oman have never contemplated human rights references–in the form of direct or implied references–in their investment agreements, whether in the substantive provisions or the preambles.

In terms of the BITs signed by Qatar, Kuwait and the UAE, an examination of the few treaties that do mention human rights suggests there is a need for a much more hortative language to be adopted in the context of such invocations. Moreover, while it is true that Kuwait and UAE's BITs refer to human rights strictly as a means of safeguarding the environment and public health, treaties directly promoting the protection of human rights need to be much more explicit and precise in their human rights references, in order to facilitate successful human rights-related argumentations.

A good strategy to follow in this context is thus to include human rights references in a treaty's denial of benefits clauses — in other words, by denying the benefits of investment protections granted under a given treaty in case of the infringement of human rights principles. This approach is notably adopted in the Columbian model BIT, which provides that a state party may deny "the benefits of the treaty to an investor where a relevant authority has determined that the investor, directly or indirectly, committed serious human rights violations," amongst other grounds.

The incorporation of the UNGP in investment treaties

The UNGP[155] and the OECD guidelines on multinational enterprises are the two main international instruments addressing human rights-related corporate responsibilities. The UNGP constitutes an international agreement over the role of human rights in the conduct of businesses. It contains a sufficient body of substantive law which articulates a framework for corporations to respect human rights and remedy those affected, and the States' duty to protect human rights. In that context, Principle 9 of the UNGP encourages States to "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts".[156] In other words, the UNGP is not silent on the incorporation of human rights obligations on investors in investment treaties. However, it should be noted that the UNGP is a soft law and, as such, a non-binding international instrument.

The incorporation of the UNGPs in investment treaties would make soft law binding. In that context it would provide investment tribunals with valuable clarity over the human rights standards that ought to be followed and respected by private entities.[157] For example, Principle 12 refers to the specific obligations applicable to corporations, which include those embedded in "the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work." Moreover, Principle 13 encourages corporations to "avoid" and to "mitigate adverse human rights impacts." Furthermore, the UNGPs require private entities to undertake due diligences to detect human rights infringements. As discussed earlier, the Netherlands Model BIT is the only treaty referring to such instrument to date. Nevertheless, it is certainly the case that far greater progress remains both desirable and possible.

155 See UN Office of the High Commissioner for Human Rights, *Guiding Principles of Business and Human Rights,* (2011) <https://www.ohchr.org/Documents/Publications/ GuidingPrinciplesBusinessHR_EN.pdf>, Accessed 27 July 2020.

156 Ibid.

157 Krajewski, 'Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice' (2018) UNFAUEN pp. 1-13.

References

Books

Balcerzak, F., *Investor-State Arbitration and Human Rights* (Brill, 2017).

Bernaz, N., *Business and Human Rights: History, Law and Policy:Bridging the Accountability Gap* (Routledge 2017).

Fernández, L., *Large-Scale Land Investments in Least Developed Countries: Legal Conflicts between Investment and Human Rights Protection* (Springer, 2017).

Crawford, J., *Brownlie's Principles of Public International Law* (9th edn., OUP 2012).

Karavias, M., *Corporate Obligations under International Law* (OUP 2013).

Kjos, H., *Applicable Law in Investor–State Arbitration* (OUP 2013).

Schreuer, C., *The ICSID Convention: A Commentary* (CUP 2009).

Orakhelashvili, A., *Peremptory Norms in International* law (OUP 2008).

Kube, V., *EU Human Rights, International Investment Law and Participation Operationalizing the EU Foreign Policy Objective to Global Human Rights Protection* (Springer 2019).

1. Contributions to edited books

Binder, C. 'Investment, Development and Indigenous People' in Schill, S. Tams, C. and Hofmann, R. (eds.) *International Investment Law and Development: Bridging the Gap* (Edward Elgar 2015).

Dupuy, P., 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.) *Human Rights in International Investment Law and Arbitration* (OUP 2009).

Dupuy P. and Viñuales J. E, 'Human Rights and Investment Disciplines: Integration in Progress', in M. Bungenberg et al. (eds.), *International Investment Law* (Nomos, 2012).

Marrella, F., 'Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade' in Benedek, W. and others (eds.), *Economic Globalisation and Human Rights: EIUC Studies on Human Rights and Democratization* (CUP 2007).

Thielbörger, P., 'The Human Right to Water versus Investor Rights: Double-Dilemma or Pseudo-Conflict?' Dupuy P., Petersmann E., and Francioni F. (eds.) *Human Rights in International Investment Law and Arbitration* (OUP 2009).

Vadi, V., 'Jus Cogens in International Investment Law and Arbitration' in Heijer M and van der Wilt H. (eds.) *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (Springer 2015).

Toral M. and Schultz T., 'The State, a Perpetual Respondent in Investment Arbitration? S Unorthodox Considerations', in M. Waibel, A. Kaushal, K. H. Liz Chung, and C. Blachin. *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law, The Hague 2010) 577-6.

Harrison, J. 'Human Rights Arguments in Amicus Curiae Submissions: Promoting Social Justice?', In Dupuy P. M., Petersmann E. U., and Francioni F. (eds.) *Human Rights in International Investment Law and Arbitration* (OUP2009).

M. Hirsch, 'The Sociology of International Investment Law' in Douglas, Z., Pauwelyn, J., & Viñuales, J. (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014).

2. Journal Articles

Simma, B., 'Foreign Investment arbitration: a place for human rights?' (2011) International & Comparative Law Quarterly, 60(3), pp. 573-596.

Zeitler, H., 'Full Protection and Security' (2010) International Investment Law and Comparative Public Law, Oxford Univresity Press 01.

Bianchi, A., 'Human Rights and the Magic of Jus Cogens' (2008) 19 European Journal of International Law 491.

Born G. and Forrest S., 'Amicus Curiae Participation in Investment Arbitration', (2019) ICSID Review, Vol. 34, No. 3, pp. 626–665.

Atanasova D., 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?', (2019) Journal of International Dispute Settlement, Volume 10, Issue 3, Pages 396–422.

Brabandere E., 'Human Rights Counterclaims in Investment Treaty Arbitration', (2018) Grotius Centre Working Paper Series No. 2018/078-IEL 15.

Dumberry P. and Dumas Aubin G., 'When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration', (2012) 13 Brill/Nijhoff, The Journal of World Investment & Trade, pp. 360-365.

Fietta S. and Upcher J., 'Public International Law, Investment Treaties and Commercial Arbitration: An emerging system of complementarity?' (2013) 29 London Court of International Arbitration 187.

Fry, J., 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' Duke Journal of Comparative & International Law, Vol 18:77, p.83.

Gardbaum, S., 'Human Rights as International Constitutional Rights' (2008) 19 European Journal of International Law 749.

Hirsch, M., 'Sources of International Investment Law' (2011) International Law Association Study Group on the Role of Soft Law Instruments in International Investment Law Research Paper 05-11.

Hulme, M., 'Preambles in Treaty Interpretation' (2016) 164 University of Pennsylvania Law Review 1281.

Karamanian, S., 'The Place of Human Rights in Investor-State Arbitration' (2013) 17 Lewis & Clark Law Review 423.

Kube, V. and Petersmann E. U., 'Human Rights in International Investment Arbitration' (2016) 11(1) AJWH 65.

Krajewski, M., 'Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice' (2018) UNFAUEN 1-13.

Pathak, P., 'Human Rights Approach to Environmental Protection' (2014) 7(1) OIDA International Journal of Sustainable Development 17.

Prabhash. R., 'Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law' (2014) 3(3) CJICL 853.

Radi, Y., 'Realizing Human Rights in Investment Treaty Arbitration' (2012) 37 North Carolina Journal of International Law and Commercia Regulation 1107.

Reinisch, A., 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) 2(1) Journal of International Dispute Settlement 115.

Santacroce, F., 'The Applicability of Human Rights Law in International Investment Disputes' (2019) 34 ICSID Review 136.

Schadendorf, S., 'Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations' (2013) 10 (1) TDM 10.

Schreuer, C., 'Jurisdiction and Applicable Law in Investment Treaty arbitration' (2014) 1(1) McGill Journal of Dispute Resolution 6.

Steninger, S., '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 35.

Levashova, Y., 'The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States Through International Investment Law' (2018) 14(2) Utrecht Law Review 40.

Zenovic, P., 'Human Rights Enforcement Via Peremptory Norms – A Challenge to State Sovereignty' (2012) RGSL Research Paper 6 <https://www.rgsl.edu.lv/uploads/research-papers-list/17/rp-6-zenovic-final.pdf> Accessed 27 June 2020.

Martinez, S., 'Bridging the Gap: Using Business and Human Rights Arbitration to Drive Investor Accountability for Business-related Human Rights Harm in Foreign Investment.' International Bar Association Legal Policy and Research Unit (2019) <https://www.ibanet.org/Document/Default.aspx?DocumentUid=7E06F4B4-F8EC-446E-BE88-C013C861AEDC> Accessed 5 August 2020.

3. Cases

Antoine Goetz & Consorts and SA Affinage des Metaux v Burundi, ICSID Case No. ARB/01/2, Award, 21 June 2012.

Azurix Corp. v Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006.

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

Biloune & Marine Drive Complex Ltd. v Ghana Investments Centre and the Government of Ghana, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989.

Biwater Gauff (Tanzania) Limited v United Republic of Tanzania, ICSID Case No. ARB/05/22, 24 July 2008.

Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v The Republic of Ecuador, UNCITRAL, Partial Award on the Merits, 30 March 2010.

Grand River Enterprises Six Nations, Ltd., et al. v USA, UNCITRAL Award, 12 January 2011.

Inmaris Perestroika Sailing Maritime Services GmbH and Others v Ukraine, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012.

James and Others v UK [1986] ECtHR App 8793/79.

Lauder v Czech Republic, UNCITRAL, Award, 3 September 2001.

Lilly and Company v The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Procedural Order No. 4, 23 February 2016.

Micula et al. v Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008.

Mellacher and Others v Austria [1989] ECtHR App 10522/83, 11011/84, 11070/84.

Metal-Tech Ltd. v Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013.

Methanex Corporation v United States of America, UNCITRAL, Amicus Submission by Bluewater Network and Others, 9 March 2004.

Mondev International Ltd. v The United States of America, ICSID Case No. ARB (AF)/99/2, 11 October 2002.

Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012.

Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No. ARB/09/12 *amicus curiae* Brief by the Center for International Environmental Law, 20 May 2011.

Pezold and Others v Republic of Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No. 2 of 26 June 2012.

Phoenix Action, Ltd. v Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009.

Pressos Compañía Naviera and Others v Belgium [1995] ECtHR App 17849/91.

Quiborax et al. v Bolivia, ICSID Case No. ARB/06/2, Award on merits, 16 September 2015.

Roussalis v Romania, ICSID Case No. ARB/06/1, Award, 7 December 2011.

Rusoro Mining Ltd. v Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/12/5, Award, 22 August 2016.

Saipem SpA v Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.

Saluka Investments BV v The Czech Republic, UNCITRAL, Decision on Jurisdiction Over the Czech Republic's Counterclaim, 7 May 2004.

SAUR International S.A. v Argentine Republic, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012.

Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011.

Siemens A.G. v Argentine Republic, ICSID Case No. ARB/02/8, Award, 17 January 2007.

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic, ICSID Case No. ARB/03/19, decision on liability, 30 July 2010.

Técnicas Medioambientales Tecmed, S.A. v United Mexican States (Case No. ARB (AF)/00/2), Award, 29 May 2003.

Texaco Overseas Petroleum Company (Topco) and California Asiatic Oil Company (Calasiatic) v Government of the Libyan Arab Republic, Award on the Merits, 19 January 1977.

Toto Costruzioni Generali S.p.A. v Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

Tulip Real Estate and Development Netherlands B.V v Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015.

United Parcel Service of America Inc. v Government of Canada, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001.

Urbaser S. A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 December 2016.

United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/9, 20 May 1996.

Oil Platforms case *(Iran v United States)*, Judgment Merits (2003) ICJ, ICJ Rep 161.

BeIN Corporation v. Kingdom of Saudi Arabia, Notice of Arbitration dated 1 October 2018.

Omar Bin Sulaiman Abdul Aziz Al Rajhi v. Sultanate of Oman, PCA Case No. 2017-32

4. Legislations

Constitution of the Republic of South Africa Act 108 of 1996.

Water Services Act, 108 of 1997 (South Africa).

Bulgaria – United States of America BIT (1992) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/556/download> Accessed 02 Nov 2021.

Oman – United Kingdom 1997 BIT <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2122/download> Accessed 02 Nov 2021.

United Arab Emirates – Slovakia (2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5926/download> Accessed 02 November 2021.

United Arab Emirates – Ethiopia (2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5947/download> Accessed 02 November 2021.

Argentina – Qatar BIT (2016), <http://investmentpolicyhub.unctad.org/IIA/treaty/3706> Accessed 5 August 2020.

Central America – Dominican Republic-United States Free Trade Agreement (DR-CAFTA) <http://www.sice.oas.org/Trade/CAFTA/CAFTADR_e/CAFTADRin_e.asp> Accessed 27 June 2020.

Colombia Model BIT (2017) <https://www.mincit.gov.co/temas-interes/documentos/model-bit-2017.aspx> Accessed 18 August 2020.

Canada – Guinea BIT (2014) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5095/download> Accessed 02 November 2021.

UAE – Colombia BIT (2017) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5728/download>

Kuwait – Canada BIT (2011) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3150/download> Accessed 5 November 2021.

Canada – Colombia Free Trade Agreement (2008) <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng> Accessed 27 June 2020.

El Salvador – Spain BIT (1995) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1136/download> Accessed 5 August 2020.

Free Trade Agreement between the European Union and the Republic of Singapore (2018) <https://www.mti.gov.sg/-/media/MTI/Microsites/EUSFTA/EUSFTA-Full-Text_12Oct18.pdf> Accessed 27 June 2020.

ICSID Convention, Regulations and Rules (2006) <https://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-English.pdf> Accessed 5 August 2020.

The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property <https://treaties.un.org/doc/Publication/UNTS/Volume%20823/volume-823-I-11806-English.pdf> Accessed 02 November 2021.

International Covenant on Civil and Political Rights (ICCPR) <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> Accessed 27 June 2020.

Israel – Uzbekistan BIT (1994) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4998/download> Accessed 5 August 2020.

Italy Model BIT (2003) <https://www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf> Accessed 5 August 2020.

Japan – Cambodia BIT (2007) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3116/download> Accessed 27 June 2020.

Morocco – Nigeria BIT (2016) <https://www.bilaterals.org/IMG/pdf/5409.pdf > Accessed 27 June 2020.

Netherlands Model BIT (2019) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> Accessed 27 June 2020.

North American Free Trade Agreement (NAFTA) <http://idatd.cepal.org/Normativas/TLCAN/Ingles/North_American_Free_Trade_Agreement-NAFTA.pdf> Accessed 5 August 2020.

Pan-African Investment Code (2016) <https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf> Accessed 27 June 2020.

Russian Federation Model BIT (2016) <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6009/download> Accessed 27 June 2020.

Universal Declaration of Human Rights (UDHR) <https://www.un.org/en/universal-declaration-human-rights/> Accessed 5 August 2020.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf > Accessed 5 August 2020.

Vienna Convention on the Law of Treaties (1969) (VCLT) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> Accessed 02 Nov 2021.

5. Official Guidance and Reports

International Law Commission, 'Report of a Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc A/CN.4/L.682. <https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> Accessed 26 Aug 2020.

Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Protect, respect, and remedy: A framework for business and human rights', U.N. Doc. A/HRC/8/5, 7 April 2008.

UN Office of the High Commissioner for Human Rights, Guiding Principles of Business and Human Rights (2011), <https://www.ohchr.org/Documents/Publications/ GuidingPrinciplesBusinessHR_EN.pdf> Accessed 26 Aug 2020.

United Nations Conference on Trade and Development, 'Selected Recent Developments in IIA Arbitration and Human Rights', International Investment Agreements Monitor No. 2 (2009) UNCTAD/WEB/DIAE/IA/2009/7 <https://unctad.org/en/Docs/webdiaeia20097_en.pdf> Accessed 26 Aug 2020.

International Law Association, New Delhi Conference report, 'Legal Aspects of Sustainable Development' (2002) <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1136&StorageFileGuid=6da5d26c-c8ee-4989-95e5-9bd1589282d3> Accessed 5 August 2020.

OECD, "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing.