universität wien

MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

The Increasing Role of Human Rights in Investment Arbitration:

Implications and Challenges for Investors and Investment Law

verfasst von / submitted by

Marina Stanisavljević

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2017 / Vienna 2017

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	A 992 628
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	International Legal Studies
Betreut von / Supervisor:	Univ.-Prof. i.R. Dr. Christoph Schreuer, LL.M., J.S.D.

CONTENTS

INTRODUCTION

Indeterminate rules and judicial discretion have been said to invoke the "adjudicative principle of integrity".[1] The principle assumes that judges will reach a single right answer when it comes to reconciling fundamental rights, general principles of law and procedural duties.[2] This single right answer is based on the notion that legal rules and duties are created by a single author, or as Dworkin put it, "the community personified - expressing a coherent conception of justice and fairness".[3]

The idea that legal rights and duties were all created by a single author representing the community as a whole, finds friction when one considers the relationship between international investment law and international human rights law. The interaction between these two systems, particularly the extent to which human rights law should apply to investment law, is a subject of ongoing debate. One line of argument is that the two systems are distinct, and that human rights have no role to play in investment law. This is derived from the idea that investment law is a self-contained system. An alternative view is that the two systems are intrinsically intertwined. This is partly due to their common heritage, and partly due to the fact that foreign investment has the potential to grossly affect the human rights of host state populations. Investment tribunals have approached the matter from various angles, which has produced inconsistent case law and made it difficult to pinpoint the exact role of human rights in investment disputes.

What is not disputed however, is that human rights, which were originally peripheral to investment law, have assumed a more prominent role in investment arbitration. This is evidenced by the exponential growth in the number of arbitration proceedings in the past two decades. Most of these proceedings involve investors claiming that the regulatory measures introduced by the host state interfered with their rights under the investment treaty. In an increasing number of these cases, host states have attempted to defend the claims on the basis of human rights. More recently, and more strikingly, host states have brought counterclaims against investors based on allegations that the investors violated the human rights of the host state population. Again, tribunals have given mixed

---

[1] R Dworkin, *Law's Empire* (1985), 176-276.

[2] See E U Petersmann, 'Human Rights, Constitutionalism, and 'Public Reason' in Investor-State Arbitration' in C Binder, U Kriebaum, A Reinisch & S Wittich (eds), *International Investment Law for the 21st Century* (2009) 877, 888.

[3] Dworkin, *supra note* 1, 225.

weight to such arguments, which makes it difficult to assess their relative effect. However, in an increasing number of cases, tribunals have granted *amicus curiae* participation, which indicates a growing acknowledgment that human rights are relevant to investment disputes.

This thesis examines how the role of human rights has emerged in investment arbitration and attempts to identify the likely implications that it poses for investors and investment law. Part I considers the origin and purpose of international investment law, focusing on the historic events and conditions that shaped the investment law regime, as well as the typical structure and purpose of investment treaties. The section explores how and why investment law became an apparently self-contained regime, and one that seems to have little or no regard for human rights. Part II focuses on the imbalance of international human rights obligations between the corporation and the state. It considers the few ways that corporations may be held responsible for human rights, and concludes that none of these approaches create legally binding obligations. It contrasts this to the position of the state, which has a legal obligation to respect and promote the human rights of its citizens as well as the duty to protect them from the abuse of human rights by non-state actors. The section emphasises how the lack of obligations of corporations, and the host state's dilemma in pursuing both its investment obligations and its human rights obligations has created the space for human rights to enter the investment arena.

Part III examines the various factual scenarios that may cause a host state to invoke human rights arguments in investment arbitration. It does so by drawing on cases that touch on various areas of human rights including the right to water, and the right to freedom from discrimination. The examples cover both defences and counterclaims. Part IV then considers the theoretical underpinnings for the inclusion of human rights in investment arbitration, and analyses the approach that tribunals have taken in response to the human rights arguments of host states. It particularly draws attention to the *Urbaser v Argentina* decision, as it provides one of the most recent and elaborate judicial discussions on the intersection of human rights and investment law.

Part V considers the implications that the increasing role of human rights may have for investors and discusses the possible ways that investors can address these, such as adopting the UN General

Assembly's *Principles for Responsible Contracts* ('Guiding Principles'),[4] in cases where there is an investor-state contract. It also considers what may attract investors to invest abroad, and posits that human rights compliance may be beneficial to investors in the long run. Part VI then takes the issues into its broader context, and touches upon the challenges and potentials to investment law.

The thesis ultimately argues that whilst the increasing role of human rights may put into question the underlying logic of investment law, which was originally designed to keep the host state's regulatory powers at bay, it will not radically transform it. This is because investment law already provides for the inclusion of non-investment law issues, such as human rights. Therefore, the investor's rights will remain intact, however the approach in regulating the investor-state relationship will be more balanced, and harmonised with other rules and principles of international law.

PART I: THE BACKGROUND OF INTERNATIONAL INVESTMENT LAW AND INVESTMENT TREATIES

To understand why human rights have become relevant in international investment law, it is necessary to reflect on how investment law came to be governed by the rules of international law. It is also necessary to consider the particular form and structure of investment treaties, in particular, bilateral investment treaties ('BITs'). Whilst their asymmetrical nature is representative of the historical foundations of investment law, their vagueness is conclusive that they form part of a larger system of international law, which includes human rights.

A. THE ORIGIN AND PURPOSE OF INTERNATIONAL INVESTMENT LAW

International investment law finds its origins in the law on the treatment of aliens and their property,[5] which has played an important part of international law for centuries.[6] Since as early as the Middle Ages, states have exercised diplomatic protection to pursue claims for the seizure of

---

[4] J Ruggie, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, 'Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators'', UN Doc. A/HRC/17/31/Add.3 (25 May 2011).

[5] T G Nelson, 'Human Rights Law and BIT Protection: Areas of Convergence' (2011) 12 *Journal of World Investment and Trade* 27, 28.

[6] I Brownlie, *Principles of Public International Law* (7th ed, 2008) 522; Nelson, *ibid*.

their nationals' property during war hostilities.[7] Even in times of peace, states have espoused the claims of their nationals via inter-state arbitral procedures, such as "Mixed Commissions" and "Claims Commissions'".[8] For much of the nineteenth century, treaty law protected alien property by reference to the national laws of the host state.[9] The assumption at the time was that a state's domestic laws would be adequate protection for the private property of its own population and that this protection would simply extend to alien property.[10]

However, the appearance of the Calvo doctrine in the nineteenth century,[11] as a backlash against capital-exporting states, cast serious doubt on the assumption that a state's domestic laws would provide adequate protection. Therefore, a new position emerged, which held that there was a general standard, comprising of a common set of international rules applicable to the treatment of foreign investors, and that these rules were binding on host states, independent of their domestic laws. The argument was that even where a state's domestic laws were below this general standard, it did not mean that other states were compelled to accept the standard as constituting satisfactory treatment of their own citizens (and their property) in that particular state.[12]

Yet even with this new idea of a general international standard, it still took a number of decades for the Calvo doctrine to be completely abandoned. The 1917 Communist Revolution saw the Soviet Union rely on the national treatment principle to expropriate a number of enterprises without compensation.[13] This was closely followed by a series of post-World War I claims for wartime expropriations. In the 1930s, the Mexican government, applying the Calvo doctrine, seized a number of US oil interests and refused to pay compensation. These events, which were a huge loss for many investors, led to a number of developments, including the introduction of the Hull formula,[14] which came to be the internationally accepted standard for the payment of compensation

---

[7] Nelson, *supra note* 5, 32.

[8] *Ibid*., 28 and 32.

[9] R Dolzer & C Schreuer, *Principles of International Investment Law* (2nd ed, 2012), 1.

[10] *Ibid*.

[11] *Ibid*., 1-2 explains that the Calvo doctrine is based on the assertion that the international rule permits the host state to reduce the protection of the alien's property whilst at the same time reducing the protection of its own nationals' property. Under the Calvo doctrine, foreigners are not entitled to diplomatic protection by their home states and can only assert their rights in the domestic courts of the host state.

[12] *Ibid.*, 2.

[13] *Ibid*.

[14] As cited in Nelson, *supra note* 5, 33, the Hull Formula was developed by U.S Secretary of State, Cordell Hull, who stated in 1938 that Mexico was required to make "prompt payment of just compensation to the [agrarian land owners] in accordance with the universally recognised rules of law and equity".

in expropriation,[15] as well as the emergence of an international minimum standard for the treatment of aliens and their property.

The international minimum standard represented the resistance against the power of the state to regulate in a way which adversely affected the investor's property rights. The standard was, therefore, a power shift in favour of the investor. However, on its own, the international minimum standard also did not provide adequate protection for foreign investors. Firstly, there was no independent mechanism for arbitration to allow an investor to bring a claim against the host state. Instead, the investor had to rely on diplomatic protection, which meant relying on the discretion of the home government to espouse the claim.[16] Secondly, whilst there was a general agreement that the international minimum standard existed, it was unclear what the standard actually entailed. Moreover, a number of states, including the Latin American states, still insisted on the Calvo doctrine, and therefore did not agree that the international minimum standard existed at all.[17]

The aftermath of World War II brought a series of changes, including a general push for the liberalisation of trade. The conclusion of the General Agreement on Tariffs and Trade ('GATT') in 1947 saw international trade relations move from bilateral to multilateral agreements with the aim of gradually reducing trade barriers around the world.[18] However, the GATT was predominantly concerned with trade, as were the new wave of Friendship, Commerce and Navigation ('FCN') agreements concluded by the U.S. The FCN agreements included various investor protection provisions, such as the equitable treatment clause and dispute resolution clauses. However, these provisions had limited functionality. For example, the dispute resolution clauses provided consent for the jurisdiction of the International Court of Justice ('ICJ'), but only in matters of interpretation or application of the agreement. Also, the investor still did not have standing to bring a claim against the host state before an international court or tribunal, but had to continue to rely on diplomatic protection. [19]

---

[15] *Ibid*.

[16] See K J Vandevelde, 'A Brief History of International Agreements' (2005) 12 *U.C - Davis Journal of International Law and Policy* 157, 159-160.

[17] *Ibid*., 159.

[18] *Ibid*., 162.

[19] *Ibid*., 165.

The decolonisation process of the 1950s and 1960s brought to light the potential benefit of foreign investment, and at the same time, caused a rift between the developing world and the developed world. Many developing states were concerned that free trade was simply a neo-colonialist tool pursuing the economic interests of capital-exporting states at the expense of developing states. Based on this fear, developing states expropriated a number of foreign investments during the 1960s without paying compensation.[20] Alongside this, the Latin American states were still reluctant to join the foreign investment movement, as was the Soviet bloc, which had formed its own view that state economic regulation was the preferred tool for economic development.[21]

The views of the developing states and the Soviet bloc led to a compromise in the UN General Assembly in 1974, with the adoption of the Charter of Economic Rights and Duties of States ('CERDS'). The CERDS declared that each state had the right to "nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid".[22] The phrase "compensation should be paid" meant that states were not obliged to compensate for expropriation, and so the position still lacked genuine force. This ongoing uncertainty around the payment of compensation for expropriation caused developed states to turn to treaty law as a means of protecting foreign investment.[23] Therefore, the BIT era was essentially born as a defensive reaction to the decades of events concerning uncompensated expropriation.[24] As BITs began to take shape, and as their content began to be more uniform, their popularity grew.

Although quite similar to earlier FCN agreements, BITs dealt exclusively with investment. They also had one other important difference. BITs introduced a dispute resolution clause which allowed the parties, or at least the investor, to submit an investment dispute to international arbitration, as an alternative to settling the dispute in the domestic courts of the host state.[25] Also unlike FCN agreements, disputes under BITs would not be heard by the ICJ, but by *ad hoc* arbitral tribunals, whose awards would be final and binding. In 1965, the International Centre for Settlement of

---

[20] *Ibid*., 166.

[21] *Ibid*., 167.

[22] Charter of Economic Rights and Duties of States (17 December 1984) UN Doc. A/RES/39/163, Article 2.2(c).

[23] Vandevelde, *supra note* 16, 169.

[24] *Ibid*., 171.

[25] Although the early BITs did not provide for direct investor-state arbitration, but rather allowed for the submission of the dispute to the International Court of Justice, the later BITs, such as the treaty between Chad and Italy in 1969, allowed for arbitration between the host state and the investor. See Dolzer & Schreuer, *supra note* 9, 7. See also M Jacob, 'Faith Betrayed: International Investment Law and Human Rights' in R Hofmann & C J Tams (eds), *International Investment Law and Its Others* (2012) 25, 29.

Investment Disputes Convention ('ICSID Convention') formally established a centre for the adjudication of investment disputes.[26] At last, investors had an effective mechanism for redress, which was final and enforceable, and which did not require investors to exhaust local remedies or persuade their governments to espouse the claim.

Attitudes towards foreign investment changed after the introduction of BITs. Both the economic success of the Asian states during the 1980s and the dissolution of the Soviet Union contributed to this.[27] However, it was the loss of alternatives sources of capital for developing states which ultimately saw them drop the hostility towards foreign investment and abandon the Calvo doctrine. The lack of private lending and U.S development assistance following the 1980s debt crisis,[28] meant that developing states had no choice but to turn to foreign investment. Given that the U.S had stopped investing in states with which it did not have a BIT or free trade agreement ('FTA'), meant that developing states seeking to attract foreign investment from capital-exporting states like the U.S, would need to enter into such agreements, and accept the standards provided therein.

By the 1990s, developing states had accepted that foreign investment was crucial to their economic development and began to view BITs as a key for attracting foreign investment.[29] In 1992, the Preamble of the World Bank Guidelines on the Treatment of Foreign Direct Investment recognised the benefits of foreign direct investment on the world economy and on the economies of developing states.[30] These perceptions transformed BITs from being tools for preventing developing states from expropriating without paying compensation, to tools for liberalising investment flows, and this was seen as a benefit for the entire world economy.[31]

The history of investment law focused on two things. Firstly, how to adequately protect the investor against the potentially abusive regulatory powers of the state, and secondly, how to reconcile the opposing attitudes towards foreign investment. At no point in its history, was investment law

---

[26] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 U.N.T.S 159.

[27] Vandevelde, *supra note* 16, 177.

[28] *Ibid*., 177-178.

[29] Although the correlation between investment protection and increased foreign investment is the subject of ongoing study and debate, it has been argued that the fact that foreign investors consider BITs of particular states prior to investing, is an indication that investment protection does play a role. See Dolzer & Schreuer, *supra note* 9, 23.

[30] World Bank Group, 'Guidelines on the Treatment of Foreign Direct Investment', *Legal Framework for the Treatment of Foreign Investment: Volume II: Guidelines* (1992), 35-44.

[31] Vandevelde, *supra note* 16, 183.

concerned with human rights, other than to the extent that foreign investment could benefit the economy and with it, improve the standard of living. At no point, did investment law consider the potential effects it may have on human rights, nor did the BITs ever express or make reference to the protection of human rights. Investment law, therefore, largely evolved as a self-contained system with the purpose of increasing and stabilising the rights of the investor by imposing obligations on the host state.

B. The purpose and structure of investment treaties

Given the absence of a global multilateral investment treaty,[32] and the insufficient protection afforded under customary international law, BITs have become the main source of investment protection.[33] To understand them in the context of the thesis' research question, their purpose and structure must be analysed from both the perspective of the investor and the host state.

For the investor, the BIT provides various legal rights and standards of protection for its long-term investment project. Foreign investments usually involve significant amounts of capital, over an indefinite period of time, with little or no guarantee of profit. This exposes the investor to a large business risk, particularly in host states which have an unpredictable and volatile political and economic climate. The purpose of the BIT is to lower that risk by restraining certain types of actions of the host state and guaranteeing a certain level of treatment to the investor. For example, most BITs include provisions that the investor will receive fair and equitable treatment ('FET'), full protection and security ('FPS') and the payment of prompt, adequate and effective compensation in the event of an expropriation.[34] Not only do BITs guarantee certain standards of treatment to the investor, but they also provide for consent to investor-state arbitration should a dispute relating to the investment arise.[35]

---

[32] For more information on the attempt to create the Multilateral Agreement on Investment (MAI), see Dolzer & Schreuer, *supra note* 9, 8-11.

[33] A Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11(4) *The Journal of World Investment and Trade* 539, 540.

[34] L González García, 'The Role of Human Rights in International Investment Law' (2013) 4(1) *Current Issues in Investment Treaty Law (British Institute of International and Comparative Law)* 29, 34.

[35] *Ibid*.

From the host state's perspective, the main purpose of the BIT is to attract foreign investment. A state is not obliged to enter into an investment treaty, nor does it have to admit a foreign investor.[36] The state makes these decisions based on what it considers beneficial to its own economic circumstances. However, there are a number of factors which may motivate states to enter into BITs. As already mentioned, entry into a BIT can help attract foreign investment and promote the state as investor-friendly. It can also ensure that the state's own investors receive reciprocal rights in the territory of the other contracting state. Further, BITs depoliticise disputes by removing them from the sphere of state-state arbitration and diplomatic protection. Therefore, to some extent, they assist in the maintenance of good relations between states.

The structure of BITs is very much reflective of these interests. It is also critical in understanding why human rights issues have emerged in investment arbitration. First and foremost, BITs are asymmetrical. They grant certain rights to the investor without imposing any substantive obligations.[37] At the same time, they impose a range of obligations on the host state. They also allow for the right to submit an investment dispute to arbitration, a mechanism predominantly intended for the investor's benefit. This asymmetrical nature is unsurprising when one considers that BITs were introduced to resolve the weak position of the investor in respect of the host state,[38] and to provide the investor with an adequate form of redress.

Some authors have argued that BITs are not asymmetrical, as they do not grant the investor an absolute right to property, and they ought to be seen as just one part of a wider economic policy of the state, which includes the protection of human rights[39] However, the pertaining issue is that BITs (and other investment treaties) do not contain any express reference to human rights, nor are human rights issues really considered in the negotiation of BITs.[40] Whilst the preamble of some investment treaties mentions human rights in the abstract, for example the North Atlantic Free Trade Agreement ('NAFTA')[41] indirectly refers to social welfare in its preamble,[42] this may only be helpful in

---

[36] Dolzer & Schreuer, *supra note* 9, 22.

[37] P Dumberry and G Dumas-Aubin, 'When and How Allegations of Human Rights Violations Can be Raised in Investor-State Arbitration' (2012) 13 *The Journal of Investment Law and Trade* 349, 349.

[38] Y Castillo, 'The Appeal to Human Rights in Arbitration and International Investment Agreements' (2011) 12 *Anuario Mexicano de Derecho Internacional* 47, 66.

[39] García, *supra note* 34, 34.

[40] See Jacob, *supra note* 25, 34-36.

[41] North American Free Trade Agreement (1 January 1994) 32 ILM 289, 605.

[42] *Ibid.,* Preamble, which states that the Parties resolve to "preserve their flexibility to safeguard the public welfare".

determining the object and purpose of the treaty during its interpretation. It does not create any substantive obligations on the parties.[43]

One of the possible reasons why investment treaties do not make reference to human rights, is that it is not in their "spirit" to deal with human rights or the tension between investment law and other areas of international law.[44] The purpose of investment treaties is not to emphasise the host state's right to regulate in the public interest nor to enhance the importance of human rights or the environment.[45] This brings us back to the notion that investment law evolved as a self-contained system, with the investor's commercial interest at its core.

However, the absence of human rights in investment treaties does not necessarily mean that human rights are not applicable to investment disputes. As stated by McLachlan, all treaties are creatures of international law,[46] and should be applied and interpreted in the context of all applicable rules of public international law. Therefore, a more convincing argument appears to be that investment treaties do not refer to human rights because they simply do not need to.[47] Human rights will apply regardless, by virtue of the harmonisation of international law. Further, the fact that negotiators of investment treaties did not refer to human rights during negotiations, does not automatically imply that they intended investment treaties to be interpreted and applied devoid of human rights.[48]

This leads us to another common feature of BITs; their inherent vagueness. The most important substantive provisions, such as the FET and FPS clauses, contain little or no guidance as to their actual scope. This makes discerning which acts of the state are in breach of FET and FPS a point of great deliberation, and one that has been largely developed by tribunals, *albeit* in divergent ways. However, the vagueness of these terms is arguably intentional. When contracts or treaties are drafted, it is common practice that parties will deliberately leave certain terms vague or undefined so as to allow for a level of flexibility in their interpretation and application. By not defining the content and scope of FET and FPS clauses, BITs introduce a dynamic component to the obligations

---

[43] Jacob, *supra note* 25, 25.

[44] García, *supra note* 34, 32.

[45] *Ibid*., 34.

[46] C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54(2) *The International and Comparative Law Quarterly* 279, 280.

[47] García, *supra note* 34, 34.

[48] *Ibid*.

of host states. Whilst the obligations may stay the same in principle, their content may develop over time. The vagueness of treaty provisions may also be an intentional space created for the integration of investment treaties into international law.[49]

The origins of investment law and the structure of investment treaties opens the door for the discussion on why human rights have become so relevant in investment arbitration, and why it is difficult to find a place for them in the investment law system. It is clear that investment law developed to protect the private interests of the investor from the powers of the state. However, the structure of BITs suggests that human rights do have a role to play. It is just not clear how and to what extent these two systems should interact in an investment dispute.[50]

PART II: HUMAN RIGHTS OBLIGATIONS

The role of human rights in investment arbitration has not only emerged because of the imbalance of obligations between the investor and the host state under the investment treaty, but also because of the imbalance of human rights obligations between the corporation and the state under international law. This often leaves the host state with competing obligations, although sometimes this dilemma is more apparent in theory than in practice.

A. CORPORATIONS AND HUMAN RIGHTS

Part of the foreign investment debate during the 1960s and 1970s, was concerned with how much protection should be given to foreign investors. At the time, many states saw the growth in the number of multinational corporations as a potential threat to their sovereignty.[51] This is because, whilst corporations possess legal standing in the state in which they are registered or in which they do business, they do not possess international legal personality. This means that they cannot be held accountable in international law in the same way that states are held accountable.[52] Whilst various arguments as to whether corporations should be given international legal standing have been put

---

[49] *Ibid*., 35.

[50] *Ibid*.

[51] P Dumberry, 'Corporate Investors' International Legal Personality and Their Accountability for Human Rights Violations Under IIAs' in A De Mestral & C Levesque (eds), *Improving International Investment Agreements* (2013) 181, 182.

[52] *Ibid*.

forward,[53] general international law does not currently impose any international legal obligations on corporations.[54]

More importantly, international human rights treaties do not impose any obligations on corporations. For example, the UN Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') imposes obligations on states to take measures to ensure that enterprises do not discriminate against women.[55] However, it does not impose those obligations on corporations directly.[56] This means that states are the ones with the legal obligations under the human rights treaty, and they must ensure, as part of their duty to protect, that corporations within their territory do not act in a way that is in breach of the state's obligations and commitments under the human rights treaty.

Whilst some international instruments are directed at corporations, these instruments are soft-law and not legally binding on corporations.[57] The Organization for Economic Cooperation and Development ('OECD') Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is an example.[58] Whilst the subject matter of that Convention applies to corporations, it does not impose any legal obligations on corporations.[59] The OECD Guidelines for Multinational Enterprises also does not impose any legal obligations on corporations and merely provides that corporations should "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments".[60]

---

[53] See *ibid.*, 182-183.

[54] Dumberry & Dumas-Aubin, *supra note* 37, 357.

[55] Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) U.N.T.S 1249, Article 2(e).

[56] Dumberry & Dumas-Aubin, *supra note* 37, 355.

[57] For example, the International Labour Organisation's Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy (adopted November 1977) available at http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (accessed on 13 August 2017), provides guidance to corporations in relation to labour rights, and provides that corporations should respect international instruments relating to human rights and labour rights, however it does not impose any legal obligations on either states or corporation in respect of these rights. See also Dumberry & Dumas-Aubin, *supra note* 37, 355.

[58] Dumberry & Dumas-Aubin, *supra note* 37, 354.

[59] See OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997) available at http://www.oecd.org/corruption/oecdantibriberyconvention.htm (accessed on 13 August 2017).

[60] Dumberry & Dumas-Aubin, *supra note* 37, 355. See also OECD's Guidelines for Multinational Enterprises (25 May 2011) available at http://mneguidelines.oecd.org/guidelines/ (accessed on 13 August 2017), Part IV.

Yet the possibility for corporations to affect the human rights of the host state population is undeniable. This is particularly true in the privatisation of public services, which in the 1990s saw many developing states place the improvement and development of essential public services such as water, electricity and public transportation into the hands of foreign investors.[61] On the one hand, corporations were in a position to improve the human rights situation in the developing world. On the other hand, their activity in these areas also increased their potential for human rights abuse.[62] Kriebaum considers two typical scenarios where human rights abuse by the investor may occur in the context of privatised public services. One is where the privatised service supply is not in accordance with human rights standards (i.e. where individuals are not able to pay for the water supply and are thus denied a minimum quantity of water). Another scenario is where the activity (or side effect of the activity) of the investor causes damage to the environment (i.e. by causing a breakdown in the sewerage system),[63] and thereby violating the human right to health.[64]

In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights proposed the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ('Draft Norms').[65] The Draft Norms imposed direct obligations on corporations with respect to human rights, labour rights and environmental protection.[66] They received severe criticism and failed to obtain intergovernmental support. One of the main reasons for their failure was that the Draft Norms purported to include human rights obligations on all business entities, not just corporations. This was seen as a potential slippery slope, which could eventually extend human rights obligations to religious institutions, NGOs, and even individuals.[67]

---

[61] U Kriebaum, 'Privatising Human Rights – The Interface between International Investment Protection and Human Rights' in U Kriebaum & A Reinisch (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (2006) 165, 165.

[62] U Kriebaum, 'Foreign Investments and Human Rights: The Actors and Their Different Roles' (2013) 4(1) *Current Issues in Investment Treaty Law (British Institute of International and Comparative Law)* 45, 47.

[63] Kriebaum, *supra note* 61, 167.

[64] Further cases of human rights violations by corporations were included in John Ruggie's 2008 Report, which include labour rights (i.e. the abolition of child labour and the right to a safe work environment) as well as non-labour rights (i.e the right to education, privacy and freedom of movement). For an overview of further cases see J Ruggie, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse', UN Doc. A/HRC/8/5/Add.2 (23 May 2008).

[65] See J H Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1, 37.

[66] Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, (26 August 2003), adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights (Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11, at 52 (13 August 2003)). See also Dumberry & Dumas-Aubin, *supra note* 37, 356-357.

[67] Knox, *supra note* 65, 39.

The UN Special Representative, John Ruggie, said that placing the same duties on corporations that are placed on states, could undermine entrepreneurship and government responsibility. This could potentially lead to an endless amount of to and fro between the government and the corporation as to who was more responsible for human rights in a particular situation.[68] In Ruggie's view, international law had not yet reached the point where international human rights could be imposed as direct legal obligations on corporations.[69]

Nevertheless, the Draft Norms did add more fuel to the ongoing debate in international and civil society regarding business and human rights. In 2005, Ruggie was appointed by the UN Secretary General as the Special Representative on Business and Human Rights.[70] One of the key aspects of his mandate was to consider the "widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences".[71] According to Ruggie in his 2008 Report to the UN Human Rights Council, these governance gaps created a "permissive environment" in which companies could commit wrongful acts without being subject to any type of penalty or punishment.[72] The result of Ruggie's six-year mandate were the Guiding Principles,[73] which were formally endorsed by the UN Human Rights Council, and will be discussed in more detail in Part V.

Currently, there are two general approaches for ensuring that corporations doing business abroad comply with human rights. One is through soft-law instruments, such as initiatives taken by corporations to ensure that their actions meet corporate social responsibility standards. These include "codes of conduct, directives, policies, third-party and self reporting initiatives established by individual companies, groups of companies, intergovernmental organisations or civil society groups and adopted by business on a voluntary basis".[74] The initiatives are non-binding and carry

---

[68] *Ibid*., 41.

[69] Dumberry & Dumas-Aubin, *supra note* 37, 356-7.

[70] J Ruggie's first mandate required him to, *inter alia*, "identify and clarify the standards of corporate responsibility and accountability regarding human rights" and to "elaborate on state roles in regulating and adjudicating corporate activities", as cited in A Shemberg, 'From Stabilization Clauses and Human Rights to Principles for Responsible Contracts' (2013) 4(1) *Current Issues in Investment Treaty Law (British Institute of International and Comparative Law)* 61, 64.

[71] Cited in *ibid*., 65.

[72] J Ruggie, UNGA Human Rights Council, Eighth Session 'Protect, Respect and Remedy: A Framework for Business and Human Rights', UN Doc. A/HRC/8/5 (7 April 2008), para 3.

[73] Shemberg, *supra note* 70, 62.

[74] J Ruggie, 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/2005/91 (15 February 2005), para 7.

little legal force in terms of holding corporations accountable for violations of human rights. At most, they can shame companies and subsequently reduce customer approval.[75]

The second approach is through the state's duty to protect. The underlying assumption is that states are in the best position to regulate corporate activity to ensure it is in accordance with the state's human rights obligations.[76] This duty is recognised by Principle 1 of the UN Guiding Principles for Business and Human Rights,[77] which states that:

> *"States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."*[78]

Therefore, the state has the duty to take measures (including legislative, administrative, regulatory, investigatory) to protect human rights in its territory. It must also exercise due diligence to prevent third parties within its own territory, such as corporations, from breaching those rights and to prosecute them in the event that they do.[79] The state cannot contract out of these duties by, for example, entering into a contract with the foreign investor which requires the foreign investor to provide an essential public service, such as water and sewerage services.[80]

However, neither of the above two approaches is effective in protecting host state populations from the abuse of human rights by foreign investors.[81] Whilst the first approach lacks legal force, the second is unlikely to work in reality. Multinational corporations usually possess overwhelming power and financial influence over weaker states, who will not have the resources to enforce human

---

[75] Dumberry & Dumas-Aubin, *supra note* 37, 351.

[76] *Ibid*., 352.

[77] The principles were first published in March 2011 and contain the three pillars developed by Ruggie throughout his mandate. The three pillars include: 1) the state's duty to protect, 2) the company's responsibility to respect, and 3) the victim's need for access to remedy. For further details, see UN Guiding Principles for Business and Human Rights (2011) available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed on 21 July 2017).

[78] *Ibid*., 3.

[79] Dumberry & Dumas-Aubin, *supra note* 37, 352.

[80] See Kriebaum, *supra note* 61, 166.

[81] Dumberry & Dumas-Aubin, *supra note* 37, 353.

rights compliance nor be able to regulate the activity of such corporations within their territories.[82] As a result of their failure to act, host states may become complicit in human rights violations and be less inclined to raise the matter in investment arbitration. Host states may also be reluctant to enforce human rights against investors as it could make them appear unfriendly to foreign investment.[83]

When one considers that corporations do not have any international human rights obligations and yet enjoy a range of rights under investment treaties, the potential for corporations to abuse or disregard human rights is quite apparent. With it, so is the potential for host states to raise human rights arguments in arbitration proceedings. This is because, contrary to the view that domestic enforcement is the ideal mechanism for protecting human rights, states often face a dilemma when attempting to balance their human rights obligations with their investment obligations.

B. THE HOST STATE'S DILEMMA

In theory, much of the tension between investment law and human rights comes from the host state's dilemma in complying with its investment obligations and at the same time, complying with its human rights obligations. As the previous section outlined, states have the legal obligation to protect and enforce human rights within their own territories, which includes the duty to exercise due diligence to ensure that non-state actors do not violate human rights.

This positive duty is a natural reflection of the historic underpinnings of the international human rights law framework. International human rights law evolved as a result of the uneven relationship between the individual and the state, much like investment law evolved as a result of the uneven relationship between the investor and the state. It is the state that has the power to enact legislation or take measures which may directly affect the most fundamental rights and freedoms of an individual. Therefore, the emergence of human rights norms and human rights treaties was about restricting the power of the state. It is this emphasis on the state's regulatory power which makes the state the primary protector of human rights, and not the corporation.[84]

---

[82] *Ibid*.

[83] *Ibid*.

[84] J D Taillant and J Bonnitcha, 'International Investment Law and Human Rights' in M Cordonier Segger, M W Gehring, & A Newcombe (eds), *Sustainable Development in World Investment Law* (2010) 53, 70-71.

A state's international human rights obligations are implemented domestically in a variety of ways, such as through its constitution or through the passing of legislation.[85] Should a state violate an individual's human right(s), the international and regional human rights instruments allow the individual to judicially pursue its claim on an international level. However, in all regional and international judicial forums, the individual can only bring a claim against the state, not against a corporation.[86]

States must therefore ensure two things. Firstly, they must implement their international human rights obligations so as to avoid being sued by individuals and to avoid being in breach of their treaty obligations. Secondly, they must ensure that they maintain an adequate regulatory framework to prevent the violation of human rights by foreign investors. This means a framework that allows them to effectively investigate and remedy any such violations, in accordance with their duties to protect and exercise due diligence.[87]

However, the problem is that the state owes two concurrent duties; one to the individual and one to the investor. As such, it is legally responsible under both domestic and international law. In reality, this often leads to a compromise, where one duty is exercised at the expense of the other.[88] For example, if a state regulates to protect the human rights of its population, it will most likely expose itself to a claim by the investor which could result in the state paying millions in compensation and damages, which in turn is not beneficial for the state or the host state population. On the other hand, if the state refrains from acting in order to comply with its investment obligations, it could potentially be in breach of its human rights obligations. In such a case, whilst there would be no case for investment arbitration,[89] it would be at the expense of the human rights of the host state population.

This complex relationship between the investor, the state and the citizen, with the state at the centre, has led to numerous arbitration disputes. The state is engaged in a balancing act between its human

---

[85] *Ibid*.

[86] *Ibid*.

[87] *Ibid*., 72.

[88] See Kriebaum, *supra note* 61, 171, which discusses the case of *Lopez Ostra v Spain* (ECtHR), Judgment, 9 December 1994, Series A, no. 303-C. The case is not an investment law case, but is nevertheless an example of how the ECtHR found that the state had not properly balanced its interests in having a waste management facility against its duties to the population to protect the right to respect of home and private and family life.

[89] Kriebaum, *supra note* 62, 46.

rights obligations and its investment obligations. This balancing act is further complicated by the vagueness of BIT clauses, such as FET clauses, and the risks faced by the state should it fail to balance these obligations properly.

To illustrate this dilemma, the case of Argentina and its response to the 2001-2002 financial crisis serves as a good example. In an attempt to remedy the effects of the financial crisis, Argentina regulated in a way that lowered the tariffs and original contracts with various investors so that the price of water and gas could remain affordable to Argentina's low income groups.[90] This resulted in a flood of investment disputes against the host state. Investors initiated arbitration proceedings claiming that Argentina had breached the FET standard in the applicable BITs. The tribunals, in considering whether the FET standard had been breached, did not consider the meaning of "fair and equitable" in terms of the host state population. Rather, they held that the obligations owed to the host state population had no bearing on the host state's obligations to the investors.[91] The tribunals focused solely on the effect that the lowering of tariffs had on the investors and in doing so, concluded that Argentina had breached the FET standard. The awards rendered required Argentina to compensate the investors for all commercial losses resulting from its breaches.[92]

The dilemma is further complicated by the use of stabilisation clauses. The general purpose of stabilisation clauses is to protect the investor from future changes in the host state's laws that could negatively impact the investment.[93] Stabilisation clauses have the potential to negatively impact human rights of the host state population, as was highlighted in 2003 by the pipeline project involving Azerbaijan, Georgia and Turkey.[94] The Baku-Tibilisi-Ceyhan ('BTC') oil pipeline project involved a group of 11 oil companies who had entered into government agreements with Azerbaijan, Georgia and Turkey to cover the development and operation of a 1,768km pipeline for the transportation of oil from Baku to Ceyhan.[95] The agreements contained stabilisation clauses (as well as the possibility for punitive compensation payable by the host state), which exempted the BTC project from existing domestic laws and essentially created a separate legal regime for the

---

[90] Taillant & Bonnitcha, *supra note* 84, 67.

[91] *Ibid*., 68.

[92] *Ibid*.

[93] Shemberg, *supra note* 70, 61.

[94] *Ibid*.

[95] Human Rights and Business Dilemmas Forum, 'Stabilisation clauses' available at http://hrbdf.org/case_studies/stabilisation-clauses/#.WWZavYHRbqA (accessed on 12 July 2017).

project.[96] Amnesty International argued that the stabilisation clauses created a major barrier on the states' ability to pass laws in the public interest. The concern voiced by Amnesty International resulted in the adoption of a BTC Human Rights Undertaking,[97] which revised the scope of the stabilisation clauses and ensured that the three states were not obliged to compensate investors for changes in the law that concerned the human rights and environmental protection of those affected by the pipeline.[98] This event also sparked the work of Ruggie in his mandate as the UN Special Representative, as previously discussed.[99]

Despite the above, it is important to note that this dilemma is not always so apparent in practice. This is because arbitral tribunals have consistently recognised the existence of a state's *bona fide* regulatory space.[100] In particular, they have recognised that states may not be liable to pay compensation for expropriation if the measures taken were non-discriminatory, in accordance with due process, and for a *bona fide* public purpose.[101] In *Methanex Corporation v United States of America,* the tribunal found that California's ban of MTBE (methyl tertiary butyl ether), of which the investor was a major producer, did not constitute compensable expropriation.[102] The U.S had argued that the ban was necessary to prevent the substance from contaminating the drinking water supplies and from causing damage to public health and the environment.[103] The tribunal accepted this argument and held that:

> *"..a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable,…"*[104]

---

[96] *Ibid*.

[97] BTC Human Rights Undertaking (executed 22 September 2003) available at <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf> (accessed on 12 July 2017).

[98] HRBD Forum, *supra note* 95.

[99] Shemberg, *supra note* 70, 62.

[100] See Jacob, *supra note* 25, 48. See also Kriebaum, *supra note* 61, 178-185, which considers tribunals' various approaches to the "police powers" of host states in expropriation cases.

[101] *Saluka Investments B.V v The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006, 15 ICSID Report 274, para 255.

[102] *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005, Part IV, Ch. D, para 6-18.

[103] *Methanex Corporation v United States of America,* UNCITRAL*,* Amended Statement of Defense of Respondent United States of America, 5 December 2003, para 32-49.

[104] *Methanex, supra note* 102, Part IV, Ch D, para 7. However, note that the tribunal qualified this statement with "… unless specific commitments had been given by the regulating government to the then putative foreign investors contemplating the investment that the government would refrain from such regulation.".

Subsequently in *Saluka Investments v Czech Republic,* the tribunal showed support for the reasoning in *Methanex* and held that the right to *bona fide* regulation aimed at general welfare was now established in international law.[105]

As such, one should be careful not to over-emphasise the host state's dilemma in practice. If the host state regulates for a *bona fide* public purpose, in the manner that California did in *Methanex*, a tribunal is likely to accept the regulation as forming part of the host state's inherent police powers. If, however, the regulation is not for a *bona fide* public purpose, or if the regulation is made on a discriminatory basis against the investor, the host state is likely to be liable. Therefore, much of the practical significance of the dilemma will rest on whether the measures taken by the host state are for a legitimate public purpose or for a genuine protection of human rights.

Having said that, it should also be kept in mind that even if states are permitted to regulate for a *bona fide* public purpose, the exact scope of this regulatory space is still unclear. In *Suez v Argentina*, the tribunal stated that a host state's "human rights obligations and its investment treaty obligations are not inconsistent, contradictory or mutually exclusive" and that it "must respect both of them".[106] Yet the burning question is *how*. Whilst the decisions in *Methanex* and *Saluka* demonstrate that tribunals do accept *bona fide* regulation, they do not make it sufficiently clear which types of acts would fall within the non-compensable regulatory space.[107] Therefore, host states still face the problem of having to discern the line for themselves. For instance, despite the decision in *Methanex*, environmental regulation is still not a settled issue in investment arbitration.[108] In terms of regulatory acts relating to human rights, Jacob states that it is not entirely certain which human rights would fall within the regulatory space, but argues that the more elementary a human right is, the more likely that the regulation for its protection will be acceptable.[109]

---

[105] *Saluka*, *supra note* 101, states at para 255: "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.". Whilst this case did not concern human rights, it nevertheless shows that tribunals do recognise the right of states to regulate for a *bona fide* public purpose, under certain conditions, without having to pay compensation to the investor.

[106] *Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina,* ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para 262.

[107] Jacob, *supra note* 25, 48.

[108] *Ibid*.

[109] *Ibid*.

Therefore, whilst the host state dilemma exists in theory, it only poses a problem in practice if the host state has not regulated for a *bona fide* public purpose, or if the regulation is applied in a discriminatory manner or without due process. No international court or tribunal has found that the obligations owed to investors override the rights of citizens.[110] Therefore, much of the debate is about how the host state has regulated to protect human rights, and whether it has in fact regulated for the purpose of protecting human rights. Nevertheless, the lack of certainty from tribunals as to which acts constitute *bona fide* regulation and which do not, means that host states still face a problem in distinguishing which types of public welfare interests they can regulate for without stepping outside the non-compensable regulatory space.

PART III: THE INVOCATION OF HUMAN RIGHTS BY HOST STATES

As the previous chapter alluded, host states do not always regulate with the sole purpose of protecting human rights. States may regulate for a number of reasons, only one of which may be the protection of human rights. In some cases, states may not regulate for the protection of human rights at all, and yet they may still invoke human rights arguments in arbitration proceedings, although in such cases the arguments constitute a mere pretext. Importantly, states are not precluded from raising human rights arguments in investment disputes. The extent to which those arguments are genuine and the extent to which the regulation was made for a legitimate public purpose, will have bearing on how the tribunal will approach the argument. However, regardless of what the cause may be, and whether or not the argument is genuine, it is clear that host states are placing more emphasis on human rights issues in arbitration proceedings.

Procedurally, host states have raised human rights arguments as part of their defence. It is rare for a host state to sue an investor on the basis of a violation of human rights, or at all. Whilst there have been a few cases where host states have pursued claims against investors,[111] these are not in the context of human rights. The reason for the lack of claims initiated by host states in the context of human rights may be jurisdictional (i.e. that the tribunal does not have jurisdiction under the BIT to hear a claim brought by a host state), although in theory, Article 36 of the ICSID Convention provides the possibility for such a claim.[112] Further on jurisdiction, issues of human rights may not

---

[110] See Nelson, *supra note* 5, 27.

[111] Kriebaum, *supra note* 62, 52.

[112] *Ibid*.

form part of the type of dispute that the parties have consented to submit to arbitration. Another reason may be that the host state is complicit in the commission of the human rights violation.[113] Despite these obstacles, a few cases have recently arisen where the host state has brought a counterclaim against the investor.[114] The most relevant is *Urbaser v Argentina*, where the host state alleged that the investor had breached the human right to water. The arguments made by Argentina and the reasoning of the tribunal could pave the way for more host state counterclaims in the future.

Factually, a number of scenarios exist which could lead a host state to invoke human rights arguments in arbitration proceedings. These arguments could form part of a claim, a defence or a counterclaim. The following sub-sections consider the most typical factual scenarios by looking at previous case law, whilst Part IV will consider the response of tribunals to such arguments.

A. Investor fails to perform under the contract

The investor enters into an investment contract or concession contract with the host state, normally to provide a public utility service, such as water and sewerage services. The investor fails to perform under the contract (either as a result of the measures introduced by the host state or for other reasons) and the contract is terminated by the host state for non-performance or for poor performance. This leads the investor to bring a claim against the host state for a breach of the applicable BIT standards, most commonly a breach of the FET clause. Host states have defended such claims on the basis that the investor's failure to perform under the contract led to (or could potentially lead to) a human rights violation. To use the example of water and sewerage services, the host state would argue that the investor's failure to provide the necessary services denies (or could potentially deny) the population access to drinking water, which would be a breach of the international human right to water.[115]

---

[113] *Ibid*.

[114] See for example *Burlington Resources Inc. v Republic of Ecuador,* ICSID Case No. ARB/08/5, Award, 7 February 2017; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016; *Sypridon Roussalis v Romania,* ICSID Case No. ARB/06/1, Award, 7 December 2011; *Antoine Goetz & Others and S.A Affinage des Metaux v Republic of Burundi,* ICSID Case No. ARB/01/2, Award, 21 June 2012.

[115] States will generally invoke the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11 (20 January 2003). For example, see *Urbaser, supra note* 114, para 1163-1164.

This was the case in both *Biwater Gauff v Tanzania* and *Urbaser v Argentina*, *albeit* the latter was by way of counterclaim. In *Biwater*, the host state terminated the investment contract due to the alleged failure of the investor to meet specific performance requirements regarding a project designed for the operation and management of the Dar es Salaam water system.[116] The project was part of Tanzania's long term effort to address the serious public health and economic effects of its poor water and sewerage conditions.[117] The investor had installed fewer water connections than promised and had not taken certain steps to protect the poorest and most vulnerable of the host state population.[118] In response to the ICSID claim brought by the investor, Tanzania argued that the failure of the investor to properly perform the contract was a potential danger to public health. Given that it no longer had the sufficient funds and that its investment was "not going anywhere",[119] this had created a real threat to public health, and as such, the host state had every right to be free from Biwater's control and to re-take possession of its assets as soon as possible.[120] It argued that if the investor's failure to perform was left unattended it would breach the right to water for the host state's citizens. However, Tanzania did not expressly argue the right to water as a human right, but indirectly invoked human rights by framing its argument in terms of the dangers to public health.

In *Urbaser*, a similar factual scenario arose. However in this case, the host state explicitly invoked human rights as an argument against the investor, and even went so far as to submit that the human right to water was an international obligation not only applicable to the state but also to the investor.[121] Argentina had entered into a concession contract with the investors for the provision of water and sewerage services to the province of Buenos Aires. The concession contract ran into deadlock following the financial crisis in Argentina, beginning in 2001 and resulting in the adoption of numerous state emergency measures in 2002. In 2006, Argentina declared the concession contract terminated, and the investors filed a request for arbitration with ICSID.[122] The investors alleged that numerous obstructions had been put in place by Argentinian authorities which rendered the operation of the investment extremely difficult. The investors claimed that Argentina had

---

[116] Business and Human Rights Resource Centre, 'Biwater-Tanzania arbitration' (18 February 2014) available at https://business-humanrights.org/en/biwater-tanzania-arbitration (accessed on 15 July 2017).

[117] *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para 97.

[118] Kriebaum, *supra note* 62, 51.

[119] *Biwater Gauff* Award, *supra note* 117, para 429.

[120] *Ibid*., para 436.

[121] *Urbaser, supra note* 114, para 1157.

[122] *Ibid*., para 1, 34.

violated a series of provisions of the Spain-Argentina BIT, including the clauses on FET, expropriation and the non-application of discriminatory and unjustified measures.[123] As part of its counterclaim, Argentina argued that the concession was undermined by the investors' failure to perform their obligations and that this failure was a violation of the international human right to water.[124] Argentina submitted that the investors had assumed their investment obligations under the concession contract. These obligations gave rise to *bona fide* expectations that the investments would be made and that they would make it possible to guarantee the human right to water and sanitation.[125] According to Argentina, failure to meet those obligations did not just amount to a breach of contract but also a breach of the most basic of human rights, namely the right to health and environment.[126]

Both *Biwater* and *Urbaser* demonstrate the way in which a host state can invoke human rights as a justification for the termination of an investment contract. Although in *Biwater*, the argument was much less direct. In essence, these arguments are an exercise of the state's duty to protect its citizens from the human rights violations of non-state actors, as discussed in Part II.

B. Host state regulates in support of human rights

This is one of the most typical cases brought before investment tribunals. The host state regulates in a way that adversely affects the investor's property rights, and then in its defence, argues that the adjustment to the regulatory framework was in support of human rights and the host state's international commitment and obligation to human rights. The case law in this area covers a range of human rights, including the right to water and the environment, as well as indigenous rights and the promotion of racial equality.

In water supply cases, usually involving Argentina as the respondent,[127] human rights have been argued as a defence, but in a half-hearted way.[128] Because the arguments were not sufficiently

---

[123] *Ibid*., para 34, 559, 951, 1012, 1055.

[124] *Ibid*., para 36.

[125] *Ibid*., para 1156.

[126] *Ibid*.

[127] For example see *Azurix Corp. v The Argentine Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006; 14 ICSID Reports 374.

[128] Kriebaum, *supra note* 62, 50.

grounded, the tribunal did not give them much consideration in relation to the merits of the case.[129] In *Azurix v Argentina*, the host state had taken regulatory measures which were contrary to the tariff regime agreed with the investor, and which prevented the rendering of higher water bills. In effect, the measures encouraged the population to not pay their water bills.[130] In its defence to the allegations of expropriation, Argentina argued that its intention in introducing the measures was to protect the public interest and the right to water.[131] It argued that in determining whether there was an expropriation, the tribunal should consider the government's intention.[132] It further submitted that when a conflict arises between a BIT and a human rights treaty, the conflict must be resolved in favour of human rights because the consumers' public interest, namely the right to affordable water, must prevail over the private interests of the investor.[133] Similarly, in *Suez v Argentina,* the host state argued that the human rights obligation to make water safe and available entitled the host state to take the measures that it did, including the imposition of a price freeze.[134]

States have also invoked human rights as a defence in situations where changes to the regulatory framework were in support of eliminating racial discrimination. In *Piero Foresti v South Africa*, the host state adopted new legislation to overcome the negative legacy of the apartheid regime. The legislation in question, the Mineral and Petroleum Resources Development Act (South Africa) ('MPRDA'), extinguished the investors' mineral rights without providing adequate compensation. The legislation was part of South Africa's Black Economic Empowerment policy which among other things, required equity in mining companies to be partly owned by historically disadvantaged persons.[135] The investors claimed that South Africa had breached various provisions of its BIT with Luxembourg and Italy.[136] South Africa argued that the alleged expropriation of mineral rights was undertaken for a number of important public purposes, including the improvement of the negative

---

[129] P M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in E U Petersmann, F Francioni, & P M Dupuy (eds), *Human Rights in International Investment Law and Arbitration* (2009) 45, 54-55.

[130] *Azurix, supra note* 127, para 283, 349.

[131] *Ibid*., para 278.

[132] *Ibid*.

[133] *Ibid.,* para 254.

[134] C Booth, 'Is there a Place for Human Rights Considerations in International Arbitration?' (2009) 24 *ICSID Review - Foreign Investment Law Journal* 109, 113.

[135] Herbert Smith Freehills, 'South Africa terminates its bilateral investment treaty with Spain: Second BIT terminated, as part of South Africa's planned review of its investment treaties' (21 August 2013) available at http://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties/ (accessed on 14 July 2017).

[136] Kriebaum, *supra note* 62, 52.

social effects caused by the apartheid regime.[137] The question was whether the aim of eliminating the historical racial inequality under the apartheid regime could justify interferences with the investor's rights.[138] Unfortunately for the purposes of this thesis, the case was settled without a decision on the merits.

Nevertheless, *Piero Foresti* demonstrates the cultural diversity of human rights issues, and how human rights obligations can vary depending on the host state in question. A state with a particular history relating to human rights may have its own unique policies on how those rights are to be protected and addressed today. The apartheid regime and its consequences are specific to South Africa, and the state has a duty to protect its citizens from the regime's lasting negative effects. Yet in exercising this duty to protect, South Africa was faced with an investment arbitration claim. Unsurprisingly, following the settlement of *Piero Foresti*, South Africa engaged in a radical review of its BITs, which resulted in the state terminating its BIT with Luxembourg and Belgium, as well as with a number of other states.[139]

States have also extended human rights arguments to situations concerning the rights of indigenous communities to practice their religion. This was the case in *Glamis Gold Ltd. v United States*.[140] The host state had introduced a series of protective measures for indigenous tribes in response to environmental and cultural concerns regarding the impact of the investor's mining project.[141] In doing so, the host state had restricted the investment of Glamis Gold, a Canadian mining company. The U.S argued that the suspension of the mining project was based on the cultural impact that the project had on the Quechan Indian community and the fact that part of the project sealed off the path used by the Indian community during its religious practice.[142] In its submissions it noted that the U.S Advisory Council on Historic Preservation had concluded that the investor's mine "would

---

[137] *Piero Foresti, Laura de Carli & Others v The Republic of South Africa,* ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010, para 69.

[138] Kriebaum, *supra note* 62, 52.

[139] Freehills, *supra note* 135.

[140] *Glamis Gold, Ltd. v The United States of America,* UNCITRAL, Award, 8 June 2009, 48 ILM (2009) 1038.

[141] E Whitsitt & D Vis-Dunbar, 'Glamis Gold Ltd. v. United States of America: Tribunal sets a high bar for establishing breach of "Fair and Equitable Treatment" under NAFTA' (15 July 2009) *Investment Treaty News, International Institute for Sustainable Development,* available at https://www.iisd.org/itn/2009/07/14/glamis-gold-ltd-v-united-states-of-america-tribunal-sets-a-high-bar-for-establishing-breach-of-fair-and-equitable-treatment-under-nafta/ (accessed on 14 July 2017).

[142] Castillo, *supra note* 38, 75.

result in irreparable degradation of the sacred and historic values" of the land.[143] It therefore submitted that the legislative measures were in fact protection of the sacred sites of the Indian community. Whilst it did not refer directly to the social and cultural rights of the Quechan Indians, the U.S did emphasise that it was required to protect and conserve the community's sacred site.[144]

Further, the U.S had consulted with representatives of the Quechan Indian Tribe and put forward the points raised during those consultations in its submissions. A major point made by the Indian representatives was that the area was of paramount significance to the Indian community and its religious practice,[145] and emphasised the rights of the First Amendment in protecting the freedom to exercise religion and thus to protect the community's holy sites. By allowing the mining to occur, the Indian community's rights under the First Amendment to practice their religion would be violated.[146]

C. Investor's actions not in accordance with host state law

Another possible scenario for host states to invoke human rights in investment arbitration is by arguing that the investor's actions were not in accordance with host state laws (such as labour laws or environmental laws) and thus the investor is not protected under the investment treaty. This is possible when the BIT in question requires that the investment be in accordance with host state law.[147] Many BITs will define "investment" as being made in accordance with host state law.[148] Therefore, should the investment not be in accordance with host state law, the investor may be prevented from invoking protection under the BIT.[149] The host state could argue that the definition of "investment" is not met and that the BIT does not apply. Depending on the wording of the BIT, the host state could also argue that the tribunal does not have jurisdiction.[150] It could very well be

---

[143] *Glamis Gold, supra note* 140, para 28.

[144] Castillo, *supra note* 38, 75.

[145] *Glamis Gold, supra note* 140, para 111.

[146] *Ibid.,* para 114.

[147] If the BIT also requires that the investment be made in accordance with the rules of international law, the host state can use this to argue that human rights ought to be taken into account as they form part of the rules of international law.

[148] See for example, Germany-Philippines BIT, Ukraine-Lithuania BIT and the Israel-Czech Republic BIT.

[149] Kriebaum, *supra note* 62, 49. See for example, *Fraport v Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 and *Inceysa Vallisoletana S.L. v Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, 2 August 2006.

[150] For example, the Germany-Philippines BIT defines "investment" as assets "accepted in accordance with the respective laws and regulations of either Contracting State". For a discussion on investor non-compliance with host state law and international public policy, see Dolzer & Schreuer, *supra note* 9, 92-97.

that these types of clauses become an important window for host states against investors committing human rights violations.[151]

However, there is a division of opinion as to what the term "in accordance with host state law" actually means. One view is that it only applies to the establishment of the investment.[152] Another view is that the clause could potentially extend to the subsequent operation of the investment. If the latter were to apply, the host state would have more room to invoke human rights arguments.

If the investment treaty does not have such a clause, the host state could still argue that the investment is not protected because it is not in accordance with international public policy, such as the principles of good faith and the rule of law. This was the case in *Plama v Bulgaria*,[153] where despite there being no such clause in the Energy Charter Treaty ('ECT'),[154] the tribunal found that the rule of law was a fundamental aim of the ECT and that the principle of good faith which derived from both Bulgarian and international law applied, therefore the investor could not claim the substantive rights under the ECT due to its fraudulent conduct.[155] Again however, this may only apply to the establishment of the investment and not its subsequent performance.

Generally speaking, tribunals have found that illegal investments, or investments contrary to the most fundamental rules of human rights, are not protected by investment treaties, regardless of whether there is a clause to that effect in the investment treaty.[156] In *Phoenix Action v Czech Republic*, the tribunal stated:

> *"To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of*

---

[151] Kriebaum, *supra note* 62, 49.

[152] See Dolzer & Schreuer, *supra note* 9, 92-97.

[153] *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 August 2008.

[154] *Energy Charter Treaty* (16 April 1998) 2080 U.N.T.S 95.

[155] See Dolzer & Schreuer, *supra note* 9, 93, citing *Plama, supra note* 153, para 146.

[156] In *Gustav F W Hamester GmbH & Co KG v Ghana,* ICSID Case No. ARB/07/24, Award, 18 June 2010, the Tribunal held at para 123 that "An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law." Importantly, the Tribunal added that "[t]hese are general principles that exist independently of specific language to this effect in the Treaty". See also J Levine, 'The interaction of international investment arbitration and the rights of indigenous peoples' in F Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (2013), 148.

human rights, like investments in pursuance of torture or genocide or in support of slavery or trafficking of human organs."[157]

However, this statement seems to suggest that the tribunal only considered the application of human rights norms that have attained *jus cogens* status, and so arguably it would not include the rights previously discussed, such as the right to water, health, the environment and the rights of indigenous peoples.

As the above cases indicate, states may invoke, and have invoked, human rights arguments in a variety of ways. Such arguments have included human rights relating to water supply, indigenous peoples and freedom from racial discrimination. These areas are by no means exhaustive. Whether the arguments are successful in defending the investor's claim is another matter and will largely depend on the strength and legitimacy of the arguments, the wording of the relevant BIT clauses, as well as the tribunal's attitude towards human rights in investment law. If the tribunal does decide to consider human rights, it will usually do so by applying human rights as an interpretative aid, or as part of the applicable law.

PART IV: INVESTMENT TRIBUNALS' APPROACH TO HUMAN RIGHTS ARGUMENTS

The attitudes and reactions of investment tribunals to the increasing role of human rights and the growing tendency of host states to invoke human rights arguments as defences and counterclaims has varied. The essence of the problem is how to reconcile the two systems of law without encroaching on the investor's rights in a way that essentially reverts investment law back to its root problems. On the other hand, how to integrate and promote the global effort for human rights protection.

Generally speaking, investment tribunals have been reluctant to examine human rights arguments and many arbitral awards have indicated the preference of tribunals to dismiss the arguments on a procedural basis without much consideration as to their substance.[158] In some cases, tribunals have held that they do not have the competence to decide on alleged human rights violations and

---

[157] *Phoenix Action, Ltd. v The Czech Republic,* ICSID Case No. ARB/06/5, Award, 15 April 2009, para 78.

[158] C Schreuer & C Reiner, 'Human Rights and International Investment Arbitration' in E U Petersmann, F Francioni & P M Dupuy (eds), *Human Rights in International Investment Law and Arbitration* (2009), 89.

dismissed the case on lack of jurisdiction.[159] In others cases, they specifically ignored the potential impact of the investment on third party stakeholders. This was even the case where the host state had attempted to bring in third party rights and host state obligations to defend the claim.[160]

There are a number of possible reasons why tribunals do not wish to consider human rights arguments in investment arbitration. One is the structural difference between international human rights law and international investment law. International human rights law exhibits more features of public international law, whilst international investment law is more commercially oriented and focuses on the private law aspects of the relations between the host state and the investor.[161] It comprises of specifically negotiated agreements, including promise-based and reliance-based obligations. This is something that the international human rights system lacks.[162] Even though both systems are about adjusting the relationship with the state, the commercial and contractual nature of investment law, has led tribunals to place more emphasis on the specific obligations negotiated in the investment agreement.[163]

Similarly, investment tribunals are of a more private law character, as opposed to permanent human rights courts such as the Inter-American Human Rights Court and the European Court of Human Rights ('ECtHR'). This private law character inclines tribunals to emphasise the private-commercial aspects of the dispute rather than to look at public policy issues such as human rights.[164] This inclination may also be part of the wider depoliticising strategy of investment law. Investment tribunals wish to preserve their legitimacy, and so are reluctant to adjudicate on divergent issues of international law. Unfortunately, international human rights law still carries numerous legal and ideological controversies,[165] and is far from being a settled and coherent system of international law, evidenced by the fact that many states still object to granting jurisdiction to international human

---

[159] See for example, *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana,* Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184 at 203, as cited in Kriebaum, *supra note* 61, 187. Although this case involved an investor invoking human rights against the host state, it nevertheless illustrates the reluctance of some tribunals to consider human rights arguments in investment disputes. However, this case was decided in 1989 and therefore does not necessarily reflect the current approach.

[160] See for example, *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para 103-104.

[161] M Hirsche, 'Investment Tribunals and Human Rights: Divergent Paths' in E U Petersmann, F Francioni & P M Dupuy (eds), *Human Rights in International Investment Law and Arbitration* (2009) 97, 113.

[162] *Ibid*.

[163] Schreuer & Reiner, *supra note* 158, 89.

[164] Hirsche, *supra note* 161, 113.

[165] *Ibid*.

rights adjudicatory bodies. Further, even though most UN member states have adopted national constitutions for the protection of human rights, the constitutions, practices and traditions of states still differ in this area.[166] This may explain why investment tribunals, whose jurisdiction is based on the consent between the parties, are hesitant to directly address human rights issues.[167]

Another reason has less to do with the attitude towards human rights, and more to do with the arguments submitted by the host state in the proceedings. An investment tribunal is only bound to consider the arguments put forward by the parties,[168] and not other theories or arguments of academic or public interest, regardless of their relevance or significance. This is because the tribunal's jurisdiction is entirely defined by the agreement between the parties to the dispute.[169] Considering arguments not raised by the parties could potentially result in an annulment of the arbitral award for "failure to state reasons" or "manifest excess of powers".[170] As such, arbitrators are generally reluctant to go beyond the arguments and issues raised by the parties in their submissions. If a host state has failed to argue human rights, or has not properly grounded its human rights argument, the tribunal's unwillingness to consider human rights may be purely jurisdictional. For example, the tribunal in *Azurix* did not consider the substance of Argentina's human rights arguments because Argentina had not sufficiently elaborated them.[171] Had Argentina made a more explicit reference to the relevant human rights instruments, such as General Comment No. 15 (Right to Water), perhaps the tribunal may have given human rights more consideration. Therefore, the failure to consider human rights arguments may have a lot to do with how the host state has presented its case.

Nevertheless, tribunals are not turning a blind eye to human rights. This is because to deny the intersection of the two legal systems is to consider investment law in a vacuum, which goes against the very essence of international law and its customary rules of treaty interpretation. On a more

---

[166] E U Petersmann, 'Human Rights, Trade and Investment Law and Adjudication: The Judicial Task of Administering Justice' (2013) 4(1) *Current Issues in Investment Treaty Law (British Institute of International and Comparative Law)* 3, 5.

[167] Hirsche, *supra note* 161, 113.

[168] Article 48(3) of the ICSID Convention, *supra note* 26, provides that "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based".

[169] J Dahlquist, 'Beside the Point - on *obiter dicta* in investment treaty arbitration' (2016) 32(4) *Arbitration International* 629, 640.

[170] See Article 52 of the ICSID Convention, *supra note* 26, and Article V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

[171] *Azurix*, *supra note* 127, para 254.

legal-philosophical level, it would go against Dworkin's principle of integrity. As the following sub-section demonstrates, international law, which includes investment law, is set up to harmonise the various systems and rules, not to diverge them.

A. THEORETICAL UNDERPINNINGS FOR THE INCLUSION OF HUMAN RIGHTS

The jurisdiction of ICSID is set out in Article 25 of the ICSID Convention which provides that ICSID arbitration is limited to "any legal dispute arising directly out of an investment". However, the ILC has expressed that "the jurisdiction of most international tribunals is limited to particular types of disputes or disputes arising under particular treaties. A limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties".[172]

Investment law is distinct from WTO law, in the sense that the ICSID Convention and BITs are not as restrictive as the WTO's Dispute Settlement Understanding which restricts the applicable law to the specific WTO agreements.[173] There is no such provision in the ICSID Convention or in any BIT. In fact, Article 42 of the ICSID Convention provides that the tribunal shall take into account "such rules of international law as may be applicable". Therefore, investment law arguably provides a broader and more flexible framework of procedural and substantive law, allowing arbitrators and parties more space to incorporate non-investment law.[174]

There are two main ways that human rights can be included in investment arbitration. One is through the rules of interpretation under Article 31(3)(c) of the Vienna Convention on the Law of Treaties ('VCLT'). The other is to apply human rights as the applicable substantive law under Article 42 of the ICSID Convention. Whilst the methods are conceptually distinct, there is a fine line between the two, which may cause overlap in practice.[175] The two major cases considered in this section, *Hesham T. M. Al Warraq v Republic of Indonesia* and *Grand River Enterprises v United States of America,* both involve investors invoking human rights against the host state. They

---

[172] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc. A/CN.4/L.682 (13 April 2006), para 45. See also A Van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' (2008) 27 *Finnish Yearbook of International Law* 91, 93.

[173] Van Aaken, *ibid.*

[174] *Ibid*.

[175] *Ibid*., 100.

are therefore not factually relevant to the research question of the thesis, and care should be taken to not consider them in that respect. However, the reasoning in both cases provides a clear and invaluable illustration of the methods tribunals may use to incorporate human rights into investment disputes, regardless of which party invokes them.

i. Interpretation under Article 31(3)(c) of the VCLT

Investment treaties, like any other treaties, must be interpreted in accordance with the principles of international law.[176] The VCLT contains the general rules of treaty interpretation, widely acknowledged as being the customary international rules of treaty interpretation. Specifically, Article 31(3)(c) of the VCLT requires that in the interpretation of a treaty, "there shall be taken into account, together with the context… any relevant rules of international law applicable in the relations between the parties".[177] Therefore, provided that human rights constitute "relevant rules of international law applicable in the relations between the parties",[178] they may be used as an aid to interpret the terms of the investment treaty. It should be borne in mind that the use of Article 31(3)(c) to incorporate human rights only applies in terms of the interpretation of the treaty, and not the application of its substantive provisions.

In *Hesham T. M. Al Warraq v Republic of Indonesia*, the difference between incorporating human rights through interpretation versus through the applicable law, was well illustrated. The investors claimed that the term "basic rights" under Article 10 of the Organisation of Islamic Cooperation Investment Agreement ('IOC'), referred to the fundamental rights from the International Covenant on Civil and Political Rights ('ICCPR').[179] The investors had alleged that the host state had breached their right to a fair trial and due process, in contravention with Article 14 of the ICCPR. They sought to include Article 14 into the IOC on the basis of Article 31(3)(c).[180]

---

[176] B Simma & T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder, U Kriebaum, A Reinisch & S Wittich (eds), *International Investment Law for the 21st Century* (2009) 678, 691.

[177] Vienna Convention on the Law of Treaties (23 May 1969) 1155 U.N.T.S 331, Article 31(3)(c).

[178] See Simma & Kill, *supra note* 176*,* 695-697 for a discussion of each of the elements that need to be met to qualify as "relevant rules of international law applicable in the relations between the parties".

[179] International Covenant on Civil and Political Rights (16 December 1966) 99 U.N.T.S 171.

[180] *Hesham T. M. Al Warraq v Republic of Indonesia,* UNCITRAL, Final Award, 15 December 2014, para 518-522.

The tribunal interpreted the meaning of "basic rights" using Article 31(1) of the VCLT. It held that the object and purpose of the IOC was investment promotion and protection. It found that the investors had considered the term "basic rights" on a stand-alone basis and not in accordance with Article 10 of the IOC as a whole. When the tribunal considered Article 10 as a whole, it found that the article referred to measures regarding ownership of property. It therefore held that "basic rights" in that context referred to basic property rights and not fundamental rights as set out in Article 14 of ICCPR. The tribunal rejected the investors' claim that a right to a free trial (derived from the ICCPR) was guaranteed under Article 10 of the IOC.[181] This was distinct from the investors' other argument that the treatment of the host state was in contravention of the ICCPR and therefore in breach of the FET clause (discussed below).

In accordance with this approach, the tribunals' interpretation of BITs should take into account any relevant rules of international law, including customary international law and also the obligations of host states under other treaties.[182] This could include treaties relating to human rights, environmental protection and indigenous rights. The ILC has highlighted that international law is not a random collection of norms, but a legal system whose "rules and principles act in relation to and should be interpreted against the background of other rules and principles".[183]

Incorporating human rights through Article 31(3)(c) would be in accordance with the "presumption of compliance", which has often been used by the ICJ as a method of resolving issues in treaty interpretation.[184] The presumption is that treaties are intended to produce effects in accordance with existing rules of law, and not in violation of them.[185] Parties to an investment treaty would not have intended that their agreement offend the existing rules of international law.[186] This means that if a tribunal is faced with two conflicting interpretations of a term in the investment treaty, one which is in compliance with human rights and one which is not, the tribunal should adopt the interpretation that is in compliance with human rights.[187]

---

[181] *Ibid.,* para 518-522.

[182] S P Subedi, *International Investment Law: Reconciling Policy and Principle* (2008), 154-155.

[183] International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf (accessed on 9 August 2017), para 1.

[184] See Simma & Kill, *supra note* 176, 686.

[185] *Ibid*.

[186] Levine, *supra note* 156, 124.

[187] *Ibid*., 125.

However, tribunals have not been enthusiastic to rely on Article 31(3)(c). In *Grand River Enterprises v United States*, the NAFTA tribunal acknowledged the pertinence of Article 31 in interpreting NAFTA but did not apply Article 31(3)(c).[188] The claimants had argued that the "minimum standard of treatment" as it appeared in Article 1131 of NAFTA included the rights of indigenous peoples under customary international law. This was rejected by the tribunal which concluded that the term "minimum standard of treatment" did not incorporate other legal protections that may be provided to investors under "other sources of law". It held that the obligation under Article 31(3)(c) is to take into account other rules of international law but this did not mean importing legal elements from other treaties.[189] It further held that "[t]his is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA"[190]. The tribunal therefore did not take human rights obligations into account at all in either the interpretation or application of NAFTA.[191]

The reasoning in *Grand River Enterprises* is peculiar, as it ignores the wording of Article 1131 and leads one to question the very relevance of the provision. If Article 1131 provides that disputes shall be settled in accordance with "applicable rules of international law", one would think that the human rights obligations of Canada and the U.S are highly relevant to the dispute and would be the very rules of international law that Article 1131 intends to incorporate.[192] The tribunal however, dismissed these obligations without even elaborating on the types of rules of international law it would consider applicable and relevant to the dispute.

There are a number of reasons why tribunals are reluctant to rely on Article 31(3)(c) in investment arbitration. Firstly, interpreting investment treaties in light of other rules of international law may lead tribunals to adjudicate on issues which are outside their jurisdiction and competence.[193] Secondly, the vagueness of Article 31(3)(c) leaves tribunals with little guidance as to when and how the provision is to be used.[194] In the *Oil Platforms* case, Judge Higgins stated that treaty

---

[188] García, *supra note* 34, 37.

[189] *Grand River Enterprises Six Nations, Ltd., et al. v United States of America,* UNCITRAL, Award, 12 January 2011, para 72.

[190] *Ibid.*

[191] Garcia, *supra note* 34, 36.

[192] *Ibid*.

[193] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America),* Separate Opinion of Judge Higgins, (2003) 42 ILM 1387, para 49, as cited in *ibid*., 37.

[194] McLachlan, *supra note* 46, 281.

interpretation should not be used to displace the applicable law, and the ICJ was heavily criticised for using Article 31(3)(c) as a "peg on which to hang the whole corpus of international law".[195] This is also part of the general concern that treaty interpretation should not go so far as to modify the treaty. Nevertheless, there is a general proposition that Article 31(3)(c) is an expression of the "systemic integration" of international law.[196] The ILC stated that "the normative environment cannot be ignored and that when interpreting the treaties, the principle of integration should be borne in mind".[197] This means that the task is not to decide whether it applies and in what circumstance, but to apply it so that it serves the principle of integration and promotes greater coherence in international law.[198]

Another possible explanation for this general reluctance is that tribunals usually view the invocation of human rights arguments by host states as an excuse for wrongful conduct.[199] This may have been the concern of tribunals in the Argentinian water cases, where Argentina had attempted to use the "right to water" and the "state of necessity" doctrine to exonerate itself from State responsibility. Granting weight to such arguments, could undermine the very essence of investment law, which seeks to restrain the powers of the state. However, despite what may or may not be the underlying intention of the host state, the tribunal is bound to consider the submissions before it, and is required to interpret the investment treaty in accordance with the VCLT. The fact that a host state may or may not be using a human rights argument as an excuse, has no bearing on the task of the tribunal, which is to interpret and apply the rules of international law to the dispute.

ii. Applicable law under Article 42 of the ICSID Convention

The ILC's Report on Fragmentation states that Article 31(3)(c) requires "the integration into the process of legal reasoning - including the reasoning by courts and tribunals - of a sense of coherence and meaningfulness".[200] The reference to "the process of legal reasoning" is considered appropriate so long as it is confined to the legal reasoning involved in treaty interpretation. However, if the reference goes beyond that of treaty interpretation, then the inclusion of external

---

[195] *Oil Platforms, supra note* 193, para 49 as cited in Garcia, *supra note* 34, 37.

[196] McLachlan, *supra note* 46, 280.

[197] ILC Report, *supra note* 172, para 419.

[198] McLachlan, *supra note* 46, 281.

[199] Garcia, *supra note* 34, 37.

[200] ILC Report, *supra note* 172, para 419. See also Simma & Kill, *supra note* 176, 693.

rules must be based on some other source, not the VCLT.[201] This is where the ICSID Convention comes into play, bringing the principle of integration beyond the confines of treaty interpretation.

The ICSID Convention specifically leaves open the possibility for the direct inclusion of non-investment law, such as human rights law, in investment disputes. Article 42 of the ICSID Convention provides that if the parties to a dispute have not agreed on the applicable law, "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable". Therefore, the ICSID Convention clearly calls for the application of international law outside the bounds of investment law.[202]

Tribunals have also acknowledged the need for recognising the diverse specialised regimes of international law. In *AAPL v Sri Lanka*, the tribunal stated that the BIT is:

> *"…not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature."*[203]

Moreover, BITs often provide clauses that specifically state that tribunals should consider and apply the rules of international law. For example, NAFTA provides that the tribunal shall decide the issues in dispute "in accordance with this Agreement and applicable rules of international law".[204]

In *Al Warraq*, the investors further submitted that the FET clause in the IOC incorporated Article 14 of the ICCPR which provides for the right to a free trial.[205] The investors alleged that the treatment of the host state violated the ICCPR and therefore was a breach of the FET clause. The tribunal

---

[201] Simma & Kill, *supra note* 176, 694.

[202] Van Aaken, *supra note* 172, 93.

[203] *Asian Agricultural Products Ltd. v Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Award, 27 June 1990; 4 ICSID Reports 250; 30 ILM (1991) 577, para 21.

[204] NAFTA, *supra note* 41, Article 1131.

[205] *Al Warraq, supra note* 180, para 556-605.

found that the ICCPR is widely regarded as being part of general international law.[206] It held that the most significant feature of the ICCPR is that it is a universal instrument which contains legally binding obligations for the states that are party to it. The tribunal concluded that the investors did not receive fair and equitable treatment as provided for in the ICCPR.[207] The tribunal therefore accepted that Indonesia's obligations under the ICCPR formed part of the substantive application of the FET clause. In other words, the application of fair and equitable treatment included the application of the rights enshrined in the ICCPR. Whilst this case concerned the human rights of the investor, not the human rights of the host state population, it nevertheless demonstrates the tribunal's clear inclusion of the host state's human rights obligations as the applicable law under the FET clause.

One cannot help but wonder that if the tribunal was prepared to incorporate the human rights obligations of the host state under the ICCPR as part of the standard of treatment under the FET clause, so as to afford protection to the investor, that it would not do the same in terms of the host state's obligations to its own population. When considering the application of FET clauses, tribunals ought to ask, whether it is fair and equitable for an investor to make a profit when it has come to light that the making of that profit has led to, or will lead to, human rights violations.[208] Put differently, is it *not* fair and equitable for a host state to regulate in protection of the human rights of its population and comply with its international obligations? In essence, the use of Article 42 to deal with host state arguments, could become a positive way for enabling the human rights protection of host state populations in investment arbitration.

B. Response to host state arguments

To understand the operative effect of the above two methods, this section considers the ways in which tribunals have responded to host state arguments in the cases described in Part III, as well as a few other leading cases.

---

[206] *Ibid.,* para 558.

[207] *Ibid.,* para 621.

[208] Taillant & Bonnitcha, *supra note* 84, 67.

i. Host state defences

In the case of *Metalclad v Mexico,* the tribunal focused solely on the investor's rights, even though the host state had attempted to bring in third party rights and state obligations as part of its defence. The tribunal held that the investor had suffered indirect expropriation on the basis that it had been denied an expected economic benefit.[209] Any potential impact of the investment and the environmental concerns raised by the host state, were ignored by the tribunal.[210]

On the other hand, in *Biwater*, the tribunal found that the measures undertaken by the host state to protect the host state population against human rights violations of the investor were not in violation of investment protection standards.[211] The tribunal found that because there was a potential for the investment to collapse at any moment, or for its employees to go on strike, and given the seriousness of the issue at hand (i.e. the provision of water to the population), the host state acted within its margin of appreciation under international law.[212] It noted that the investor's failure to perform constituted a real threat to public welfare and health. Importantly, it held that water and sanitation services were of vital importance and that Tanzania had a moral (and perhaps a legal) obligation to protect such services in the case of a crisis.[213]

However, the tribunal still found that Tanzania's other acts, and their cumulative effect, constituted expropriation and a breach of the FET clause.[214] It held that despite the investor's poor performance, the investor still had the right to proper performance of the contractual termination process. Tanzania's public statements at the time had interfered with this contractual termination process, and because of its failure to comply with the termination process, the tribunal found that Tanzania had breached the FET clause.[215] This case illustrates that a tribunal may allow the host state to terminate a contract based on the investor's poor performance, when failure to perform the contract may violate the human right to water. However, the way in which the host state applies the measure may still be discriminatory and thus constitute a breach of investment protection

---

[209] *Metalclad, supra note* 160*,* para 103-104.

[210] Taillant & Bonnitcha, *supra note* 84, 66.

[211] Kriebaum, *supra note* 62, 52.

[212] *Biwater Gauff, supra note* 117, para 435.

[213] *Ibid.,* para 434.

[214] Kriebaum, *supra note* 62, 52.

[215] *Biwater Gauff*, *supra note* 117, para 627-628.

standards.[216] This brings us back to the earlier discussion, and the argument that tribunals will uphold *bona fide* regulation, so long as the application of the measures is non-discriminatory and in accordance with due process.

In *Glamis Gold,* the tribunal found in favour of the host state. It held that the protective measures introduced by the U.S in favour of the right of indigenous communities was not in flagrant breach of any provision of the investment treaty.[217] Specifically, it held that the acts of the U.S. fell short of expropriation and did not violate the FET clause.[218] Whilst the decision was not directly based on the arguments relating to the indigenous rights of the Quechan Indian community, it was nevertheless a significant case for human rights, because the tribunal allowed *amicus curiae* participation for the members of the Quechan Indian community.[219] In its submission, the *amici* stated that the rights of the Quechan Indian community were protected by the ICCPR, as well as the ILO's Convention on Indigenous and Tribal Peoples ('ILO Convention') and the Inter-American Convention on Human Rights.[220] This potentially creates a window for host states seeking to invoke protective measures for their indigenous communities. In such cases, the ILO Convention or the ICCPR could serve as reference points for assessing the scope and reach of FET and expropriation.[221]

Similarly, in *Piero Foresti*, the tribunal granted *amicus curiae* participation to a number of non-disputing parties.[222] These parties were granted permission to submit their own interpretation of the MPRDA in light of the host state's constitutional and human rights obligations.[223] Although the case settled before a decision on the merits was rendered, the involvement of *amicus curiae* in the proceedings was considered to be an innovative step by an ICSID tribunal, as it was the first time

---

[216] Kriebaum, *supra note* 62, 52.

[217] *Glamis Gold, supra note* 140, para 24.

[218] *Ibid*., para 830.

[219] *Glamis Gold, Ltd. v The United States of America,* UNCITRAL*,* Decision on Application and Submission by Quechan Indian Nation, 16 September 2005, para 13.

[220] See *Glamis Gold, Ltd. v The United States of America,* UNCITRAL*,* Submission of Non-Disputing Party Quechan Indian Nation, 16 October 2006, 4-5.

[221] Van Aaken, *supra note* 172, 109.

[222] The non-disputing parties included the Centre for Applied Legal Studies, the Center for International Environment Law, the International Centre for the Legal Protection of Human Rights, the Legal Resources Centre and the International Commission of Jurists. See *Piero Foresti, Laura de Carli & Others v The Republic of South Africa,* ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009.

[223] Booth, *supra note* 134, 113.

that ICSID had ordered the disputing parties to disclose information to non-disputing public interest organisations.[224]

ii. Host state counterclaims - Urbaser v Argentina

It is rare for a host state to bring a counterclaim against an investor, and even more so on the basis of an alleged human rights violation by the investor in the territory of the host state. One of the main reasons for a lack of host state counterclaims has been the question of consent and jurisdiction to hear such claims. Theoretically however, a counterclaim is possible under both the ICSID Convention and the UNCITRAL Rules.[225] Article 46 of the ICSID Convention states:

> *"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."*

Therefore, ICSID specifically provides for counterclaims.[226] Moreover, it refers to "a party", indicating that either the investor or the host state could bring a counterclaim. The article's reference to the "jurisdiction of the centre" is reference to Article 25 of the ICSID Convention, which provides that the tribunal will have jurisdiction over "any legal dispute arising directly out of an investment". However, much of the issue surrounding consent and jurisdiction over counterclaims is due to the particular wording found in BITs, which can provide either a broad or narrow consent to arbitration.[227] However, as long as the subject matter of the dispute meets the requirements of Article 25, and the consent provisions of the applicable BIT, it can be the subject of a counterclaim.[228] Tribunal decisions have varied, with some finding that the investor's consent to

---

[224] *Ibid*. See also Whitsitt & Vis-Dunbar, *supra note* 141.

[225] UNCITRAL Arbitration Rules (1976) UN Doc. A/RES/31/98; 15 ILM 701, Article 21.3 provides that "In its Statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.".

[226] See in general, P Lalive & L Halonen, 'On The Availability of Counterclaims in Investment Treaty Arbitration' (2011) *Czech Yearbook of International Law* 141.

[227] See *Saluka Investments B.V v The Czech Republic,* UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, para 39, where the tribunal found that the Czech Republic-Netherlands BIT provided the jurisdictional basis for the counterclaim brought by the Czech Republic.

[228] Lalive & Halonen, *supra note* 226, 144.

ICSID arbitration was sufficient to imply jurisdiction for counterclaims, without the need to locate the corresponding consent clause in the BIT.[229] In other cases, such as *Spyridon Roussalis v Romania*, the tribunal found that the Greece-Romania BIT granted jurisdiction over disputes concerning the obligations of the host state, and not over the obligations of the investor. This meant that there was no consent to counterclaims of the host state, and the counterclaim was rejected.[230]

Therefore, the approach to host state counterclaims has varied between tribunals. Some will take into account the provisions of the BIT, others will find that the ICSID Article 46 is sufficient to allow counterclaims to be heard. In *Urbaser*, the tribunal made an unprecedented move in granting jurisdiction for a host state's counterclaim which was based on the allegation of the investor's breach of human rights. Although the counterclaim failed on the merits, the tribunal's reasoning has created a new window for host states to invoke their human rights obligations.

In *Urbaser*, the investors argued that the host state did not have the right under the applicable Spain-Argentina BIT to bring a counterclaim. They stated that it would run counter to the object and purpose of treaty arbitration, which is to grant investors a one-sided right to quasi-judicial review of national regulatory action.[231] The investors got around Article 46 of the ICSID Convention by basing their argument on *Roussalis*, which held that it is not enough to look at the wording of Article 46 to establish consent, but that reference must also be had to the applicable BIT. They argued that the scope of the investor's offer to accept arbitration did not include counterclaims.[232] Further, they submitted that the counterclaim, which was based on the claim that that the failure of the investment affected basic human rights, including the health and environment of thousands of people, was not based on any violation of the BIT. Rather it was based on a breach of Argentine law, the Concession's Regulatory Framework and international law. According to the investors, this fell outside the scope of the BIT as it did not concern a dispute arising directly out of an investment, and therefore the tribunal did not have jurisdiction.[233]

---

[229] See in general *Goetz, supra note* 114, and J E Kalicki, 'Counterclaims by States in Investment Arbitration' (14 January 2013), *Investment Treaty News, International Institute for Sustainable Development*, available at https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/ (accessed on 21 July 2017).

[230] See *Roussalis, supra note* 114, para 859-876.

[231] *Urbaser, supra note* 114, para 1120.

[232] *Ibid*., para 1122-1125.

[233] *Ibid*., para 1128.

Argentina argued its right to bring a counterclaim based on Article 46 of the ICSID Convention and that the subject matter of the counterclaim was directly related to the investors' claim. It argued that the counterclaim was based on the direct damage suffered by Argentina as a result of the investors' failure to properly administer the Concession, which was mainly due to their failure to undertake the investment they had agreed to undertake.[234] It argued that based on Article X(5) of the BIT, the applicable law clause,[235] the counterclaim was to be decided on the basis of Argentine law, and the general principles of international law. In response to the investors' assertion that the BIT provides asymmetrical obligations on the host state, Argentina submitted that the BIT expressly provides that the investor must act in accordance with the laws of the host state in order to receive protection under the BIT.[236]

The tribunal first held that the investors' assertion that the BIT was asymmetrical, was incorrect, given that the BIT's consent clause, found in Article X, was neutral as to the identity of the claimant.[237] The tribunal allowed the counterclaim by stating that the principal claim of the investors and the host state's counterclaim were based on the same investment, which was sufficient to adopt the tribunal's jurisdiction over the counterclaim. The host state's claim that the investors had failed to provide the necessary investment which caused a violation of the fundamental right to water, was the very purpose of the investment itself. Therefore, the two were inextricably linked, and the reasonable administration of justice would call for both claims to be heard in one proceeding.[238]

Importantly, on the point of jurisdiction, the tribunal considered the investors' argument that any claim brought before the tribunal on the basis of a human rights violation is outside the tribunal's competence. The tribunal held that this argument was "…not sufficient to go so far as to excluding on a simple *prima facie* basis any such claim as if it could not imply a dispute relating to an investment".[239] This indicates the tribunal's acknowledgement that a violation of human rights

---

[234] *Ibid*., para 1137.

[235] Spain-Argentina BIT, Article X(5) states that "The arbitral tribunal shall make its decision on the basis of this Agreement and, where appropriate, on the basis of other treaties in force between the Parties, the domestic law of the Party in whose territory the investment was made, including its norms of private international law, and the general principles of international law.".

[236] *Urbaser, supra note* 114*,* para 1140.

[237] *Ibid*., para 1143.

[238] *Ibid*., para 1151.

[239] *Ibid*., para 1154.

could relate to an investment, and as such, could relate to an investment dispute over which the tribunal has jurisdiction.

In terms of the merits of the counterclaim, Argentina argued that the investors' most important obligation during the Concession was to guarantee the access to water and thus to comply with a fundamental human right. It disagreed with the investors that Argentina, as the host state, was the sole guarantor of human rights, and submitted that the rules of international law were also binding on the investors as private companies.[240] Unlike in its previous water supply cases, Argentina specifically referred to a number of human rights instruments, including the Universal Declaration of Human Rights (1948) ('UN Declaration'), which it argued is a part of customary international law. It submitted that Article 29 of the UN Declaration provides that everyone has duties to the community, including businesses and companies.[241] It referred to the International Covenant on Economic, Social and Cultural Rights (1966) ('ICESCR') and its acknowledgement that everyone is entitled to an adequate standard of living.[242] It argued that the right to water is a fundamental human right, to which society as a whole must contribute and to which companies have agreed to adopt as part of their corporate social responsibility.[243] Argentina also specifically referred to the ILO's Tripartite Declaration of Principles Concerning Multilateral Enterprises and Social Policy, which acknowledges that the rules in the Declaration are applicable to companies. Finally, it made reference to General Comment No. 15, which emphasises the supply of affordable water.[244]

In light of the above international human rights instruments, Argentina also submitted, by referring to the *Goetz* decision, that the BIT is not to be considered on a stand-alone basis, but in conjunction with all relevant rights and obligations of Argentina under international law.[245] In response, the investors did not directly address the human rights allegations or Argentina's reference to the various international human rights instruments. They simply denied the allegations by asserting that the BIT did not impose any obligations on the investors and did not subject the investors to either Argentinian law or international law.[246]

---

[240] *Ibid*., para 1157.

[241] *Ibid*., para 1158-1159.

[242] *Ibid.,* para 1160.

[243] *Ibid*., para 1161.

[244] *Ibid*., para 1162 and 1164.

[245] *Ibid*., para 1158.

[246] *Ibid*., para 1167-1168.

In its decision on the merits, the tribunal analysed two key points; 1) the applicable law under the BIT, and 2) the BIT's relation to international law and human rights. In regard to the first point, the tribunal found that there was nothing in the BIT to suggest that the host state had no rights under the BIT. The tribunal interpreted the word "and" in the applicable law clause as referring to an additional basis on which a dispute can be determined, such as another treaty in force between the parties, the host state's law, or the "general principles of international law".[247] It further held that the term "general principles of international law" would be meaningless if the BIT was to be construed as an isolated set of rules of international law for the sole purpose of protecting the investor.[248] The tribunal also pointed out that the BIT framework allowed for the inclusion of external rules by way of Article VII(1).[249] The article provides that a source of international law that is external to the BIT can provide more favourable rights and that the parties and their investors shall be subject to whichever terms are more favourable. It therefore concluded that the BIT does not contain a set of rules which are to be construed in isolation and without reference to external rules of international law.[250]

In regards to the second point, and the relationship between the BIT and human rights, the tribunal was reluctant to accept that the duty to guarantee the human right to water was borne solely by the state and not private companies. It highlighted the most-favoured-nation clause of Article VII of the BIT to illustrate that the parties had envisaged that the investor may be capable of being subject to international law obligations.[251] It highlighted the importance of corporate social responsibility as a standard of international law applying to companies engaged in international commerce. It stated that it can no longer be held that companies are immune from becoming subjects of international law.[252] The tribunal then went on to address the human rights instruments referred to by Argentina. In its analysis, it stated that the provisions concerning the right to water could not be fulfilled unless it was also accepted that companies played a part in their realisation. For example, to ensure that

---

[247] *Ibid*., para 1188.

[248] *Ibid*., para 1189.

[249] Article VII(1) states that "Where a matter is governed by this Agreement and also by another international agreement to which both Parties are a party or by general international law, the Parties and their investors shall be subject to whichever terms are more favourable.".

[250] *Urbaser*, *supra note* 114, para 1192.

[251] *Ibid*., para 1194. The tribunal held at para 1194 that Article VII of the BIT envisaged a possible scenario where the investor may be able to invoke certain rights under international law. The reasoning was that if the BIT imagined the investor having rights under international law, then by inference, one could not reject the possibility that the investor could also be subject to international law obligations.

[252] *Ibid*., para 1196.

everyone can enjoy the rights in the UN Declaration, it must also be ensured that no other individual or entity can act in a way that violates or disregards those rights.[253] It adopted similar reasoning for the rights set out in the ICESCR and the ILO's Tripartite Declaration.[254]

The tribunal retained the idea that the BIT did not operate in a vacuum but that it had to be interpreted and applied in harmony with other rules of international law, including human rights.[255] It noted that this was reflected in the wording of Article X(5) of the BIT, as well as Article 42(1) of the ICSID Convention. It held that Article 42(1) provided no restriction as to what "rules" of international law could be applied, meaning that human rights rules could also be incorporated.[256]

The tribunal held that the right to water and sanitation is a recognised international human right which imposes obligations on states to provide and protect the right in their jurisdictions.[257] However, the question is whether the investors were also bound based on international law to provide the host state population with drinking water and sanitation services. This is where the tribunal highlights Argentina's failure to properly delineate its counterclaim. Argentina did not go so far as to say that the obligation extended to the investors based on international law, but rather that the obligation extended to the investors based on the the Concession. Its reliance on the Concession essentially meant that Argentina's cause of action was not based on international law but on the Concession contract itself.

Neither the BIT nor the Concession had the effect of extending to the investor the obligation to perform services to comply with the population's right to access water and sewerage services. The tribunal held that in order for such an obligation to become part of the BIT, it must exist in another treaty or it must be a general principle of international law.[258]

It further held that the human right to water is an obligation for the state, and does not oblige the performance of any party providing the contractually required service. For such an obligation to be applicable to the investor, there would need to be a contract or similar commercial relationship, in

---

[253] *Ibid*.

[254] *Ibid*., para 1197, 1198.

[255] *Ibid*., para 1200.

[256] *Ibid*., para 1202.

[257] *Ibid*., para 1205.

[258] *Ibid*., para 1207.

which case, the obligation to perform on the investor would be grounded in domestic law and not in international law. In such a case, the obligation would not be part of the state's obligation, but would be distinct from the state's obligation.[259]

The tribunal held that the duty to protect rests with the state and that the state is required to establish accountability mechanisms to ensure its implementation. Therefore, a state accepting an investment for the provision of water services relies on the BIT as a method of the investor's participation in the state's own realisation of its human rights obligations under international law. Again, the investor is not obliged under international law to ensure the population has access to water, rather this right (and its corresponding obligations) forms part of the regulatory environment under which the investor is admitted to operate based on the BIT and the host state's law.[260]

Finally, the tribunal considered how the human right to water formed part of the regulatory framework. It held that whilst the investors had been assigned to contribute to the enforcement of the population's right to water, this did not mean that they had corresponding obligations based in international law. The investors had no human rights obligations to provide access to water prior to entering into the Concession, and the Concession could not have had the effect that the obligations arising out of the contract, were obligations based on international law. Importantly, the tribunal held that the BIT's reference to general principles of international law cannot go so far as creating obligations on companies that did not exist prior to the investment.[261]

The tribunal therefore acknowledged that the investors had human rights obligations, however those obligations were not based on the Concession. Argentina's counterclaim failed on the basis that the the investors did not have a positive obligation for the right to water in the Concession. However, the decision in *Urbaser* is still groundbreaking. It demonstrates the tribunal's willingness to consider and grant jurisdiction for host state counterclaims, as well as its acknowledgement that counterclaims based on human rights violations are not *prima facie* irrelevant in an investment dispute. By carefully considering Argentina's argument, and pointing out its flaws, the decision also opens up a number of possibilities for host states to fine-tune their submissions in the future in respect of human rights counterclaims. Finally, the case illustrates that a tribunal will consider

---

[259] *Ibid*., para 1210.

[260] *Ibid*., para 1209.

[261] *Ibid*., para 1212.

human rights issues when they are specifically raised, sufficiently elaborated, and where their pursuance is not simply a pretext.

Therefore, the approach of tribunals to human rights arguments has varied, and often depended on the structure and content of the host state's argument. Most tribunals have acknowledged the theoretical underpinnings for the inclusion of human rights arguments in investment arbitration, such as the interpretation method via Article 31(3)(c) of the VCLT and the applicable law method via Article 42 of the ICSID Convention, with a number of tribunals alluding to the need to harmonise investment law with other rules of international law. Most recently, tribunals have considered the possibility of host state counterclaims, in which they have acknowledged that human rights violations could be relevant to the particular investment dispute at hand.

Whilst the exact scope and landscape of the inclusion of human rights issues is still unclear, the window is certainly opening for host states. Their ability to assert their duty to protect and to bring their human rights obligations into an investment dispute is something that was perhaps unforeseeable in the earlier days of BITs. One should therefore analyse what this could mean for investors and investment law.

PART V: IMPLICATIONS FOR INVESTORS

The landscape of investment arbitration is shifting, and investors should be aware of the potential consequences. This section considers the likely implications and the possible ways in which investors can respond to these changes.

States are likely to continue wielding human rights arguments in investment arbitration. They will continue to use soft-law human rights instruments to defend investment claims and attempt to bring corporations as close to accountability for human rights as possible. With the *Urbaser* decision, there is also a growing potential for host state counterclaims.

Additionally, there is increasing international pressure for the creation of instruments to make corporations directly accountable for human rights violations. In March 2017, the UN Human Rights Council placed the idea of a treaty for transnational corporations and human rights back on

its agenda. The intergovernmental working group presented its report to the Council on 9 March 2017 in Geneva, which has paved the way for further talks in October 2017, where the possibility for a first draft of the treaty will be discussed. The event signals the ongoing concern of states, civil society and affected communities regarding the lack of legally binding rules on corporations in respect of human rights.[262]

The increase in transparency of investment arbitration proceedings is also likely to exert more pressure on tribunals to place weight on human rights issues.[263] As mentioned, *Piero Foresti* was the first case where a tribunal ordered the parties to disclose information to non-disputing public interest organisations.[264] Similarly, the recent inclination of tribunals to grant *amicus curiae* participation shows the general shift towards considering the implications of foreign investment on human rights. The involvement of international actors, such as NGOs, is also likely to place a spotlight on investors who could be violating human rights, and push for further developments in transparency, investor accountability and *amicus curiae* participation.[265]

A. WHAT ATTRACTS FOREIGN INVESTORS?

It is important to first consider what actually attracts corporations to invest abroad. For some time it was believed that foreign direct investment was opposed to respecting human rights, and that large corporations would usually invest in states that had bleak human rights conditions. Poor human rights conditions usually meant an inexpensive labour force, and in more repressive states, a lower risk of civilian uprisings.[266] It also meant a greater desire for imported capital over environmental regulation or public welfare concerns. For example, in the 1990s, Indonesia's Former President Suharto enforced lower wages and suppressed unions in order to attract more foreign investment.[267]

---

[262] Friends of the Earth International, 'UN Treaty on transnational corporations and human rights progressing' (13 March 2017) available at http://www.foei.org/news/un-treaty-transnational-corporations-human-rights-progressing (accessed on 12 July 2017).

[263] See Levine, *supra note* 156, 125.

[264] Booth, *supra note* 134, 113.

[265] M Jacob, 'International Investment Agreements and Human Rights' (2010) *INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010,* 43-44.

[266] S L Blanton & R G Blanton, 'What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment' (2007) 69(1) *The Journal of Politics* 143, 143.

[267] *Ibid*., 145.

However, this assumption is somewhat too simplistic, as it does not consider the potential benefits that respect for human rights may have for foreign investors. A state that has high quality human capital, where the workforce is skilled and educated, may in the long-term be a much more favourable location for an investment.[268] A state which respects human rights is likely to be more open to foreign investment, politically more stable, and economically more efficient. [269] Therefore there is no reason to assume that investors do not have an interest in respecting the human rights of host state populations. Recalling that the underlying purpose of international investment law is to protect the investor from the powers of the state, and to reduce the risk that comes with a host state's political and economic instability, a state with favourable human rights conditions is more likely to be politically and economically stable.

Investors also have a strong interest in avoiding the "audience costs" associated with human rights violations.[270] Thousands of NGOs are placing the spotlight on some of the world's largest corporations, and this spotlight could potentially damage the reputation and even market value of many corporations.[271] In 2000, Apple and Kodak relocated from Myanmar after the State of Massachusetts sought to sanction Myanmar for its abusive human rights practices.[272] Investor responsiveness to the spotlight was also evident in the BTC Project, which saw Amnesty International pressure the parties into concluding the BTC Human Rights Undertaking, as discussed in Part II.[273]

Therefore, the increasing role of human rights is not necessarily detrimental to the investor. In fact, if investors were to ignore human rights, it could potentially lead to more investment disputes down the track. Thus it is in the investor's interest to ensure that human rights issues are not neglected, but accounted for at every stage of the investment project.

---

[268] *Ibid*., 146.

[269] *Ibid*., 143.

[270] *Ibid*., 144.

[271] *Ibid*., 145.

[272] *Ibid*.

[273] BTC Human Rights Undertaking, *supra note* 97.

B. CHALLENGES FOR INVESTORS

i. Redrafting BITs to incorporate human rights obligations

The long talked about possibility of imposing obligations on investors in BITs is unlikely to occur with respect to human rights. This is primarily because the underlying purpose of BITs is to protect the investor. It is also due to the current lack of human rights obligations imposed on corporations in international law. Without a parallel international law instrument acknowledging corporations as having legal personality, or imposing such obligations directly on investors, it is unlikely that BITs will succeed to do anything of the sort. Further, if this were to happen, it would most likely discourage foreign investment in states with poor human rights records.

What is more probable is that states will begin redrafting their BITs to specifically include the host state's human rights obligations. This is particularly likely for states that have been respondents in investment disputes involving issues of public welfare and human rights, and where the awards rendered against them included damages in the high millions.[274] In light of the *Urbaser* decision, host states may also begin to draft BIT provisions to expressly include their right to bring counterclaims. The idea of bringing BITs in line with modern day human rights may be seen as a positive step in avoiding the uncertainty that currently lurks around the topic, and eventually provide a more coherent and transparent system. There are a number of ways in which BITs and other investment treaties may be amended to include the host state's human rights obligations.

Firstly, there may be changes to the preamble, which plays an important part in the interpretation of the treaty.[275] The preamble could include a reference to the parties aim to further human rights and economic development. Additionally, the preamble could state that the treaty is not an isolated regime and that the parties recognise other norms and values of international law which also form part of the treaty, including human rights.[276] The preamble could also explicitly refer to the responsibility of corporations to respect human rights. Although the text of the preamble does not have the same effect as a substantive provision of the treaty, its may still have interpretative value

---

[274] For example, Argentina in the water supply cases discussed.

[275] VCLT, *supra note* 177, Article 31(2) states that the "context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble…".

[276] Jacob, *supra note* 265, 34.

and may lead tribunals to adopt a more balanced approach in the application of particular treaty clauses, such as the FET clause. Dumberry & Dumas-Aubin argue that a tribunal is likely to take a different approach when interpreting an FET clause in a treaty whose preamble refers to human rights as opposed to an FET clause whose treaty preamble does not.[277]

In this context, a useful example is Norway's Draft Model BIT (2015),[278] which introduces a number of express references to human rights. The preamble reaffirms the parties' "commitment to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights".[279] Therefore, the emphasis is not just on human rights in the abstract but also the international obligations of the states under the UN Declaration. The substantive provisions of the draft also provide space for human rights.[280] For example, both the MFN and national treatment clauses contain a footnote which provides that government measures designed to protect *inter alia* "human rights, labour rights, safety and the environment" and which may have "a different effect on an investment or investor of another Party" are not inconsistent with the MFN and national treatment clauses.[281] The expropriation clause also provides for exceptions relating to human rights.[282]

This may not be an innovative step, given that the state's right to regulate in the public interest already exists, as discussed in Part III. However, the Norwegian Draft Model BIT (2015) does make specific reference to human rights, which distinguishes it from traditional BITs that simply referred to "public welfare", indicating the recent desire of some states to place more emphasis on human rights and human rights obligations in investment treaties.

---

[277] Dumberry & Dumas-Aubin, 'How to Impose Human Rights Obligations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITS' (2012) 4 *Yb International Investment Law and Politics* 569, 579.

[278] The draft builds on the previous Norwegian Draft Model BIT of 2007, which was abandoned due to public criticism. For general information on the previous draft, see D Vis-Dunbar, 'Norway shelves its draft model bilateral investment treaty' (8 June 2009), *Investment Treaty News, International Institute for Sustainable Development,* available at https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/ (accessed on 4 August 2017).

[279] 'Draft Agreement between the Kingdom of Norway and ... for the Promotion and Protection of Investments' (May 2015) available at https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf (accessed on 4 August 2017), Preamble.

[280] B Choudhury, '2015: The Year of Reorienting International Investment Law' (2016) 20(3) *ASIL Insights* available at https://www.asil.org/insights/volume/20/issue/3/2015-year-reorienting-international-investment-law#_edn11 (accessed on 4 August 2017).

[281] Norway Draft Model BIT (2015), *supra note* 279, Article 3 and 4.

[282] *Ibid*., Article 6.

Alternatively, or additionally, BITs may amend the definition of "investment" so that it only includes investments made in accordance with the law of the host state.[283] The Indian Model BIT (2015) defines "investment" in this way, and goes one step further by stating that the investment must be "constituted, organised and operated" in accordance with host state law.[284] As such, it is not just the establishment of the investment that must be in accordance with host state law, but also its operation. Further, the Indian Model BIT provides that investors and their investments shall be subject to and comply with the law of the host state, which includes "law relating to human rights".[285] Again, this demonstrates the recent desire of states to specifically include human rights into investment treaties, shifting the focus from investment protection to the state's ability to regulate.

However, the redrafting or amendment of BITs takes time and so the likely effect on investors will not be immediate. Most BITs remain in force for a period of ten years or more, and even after their termination, the investors may still retain their rights under sunset clauses, in some cases up to twenty years.[286] Also, the likelihood of states amending the provisions to include human rights obligations as discussed above, will very much depend on the political intentions of the parties involved.[287] Recalling that a majority of BITs are concluded between developed and developing states, one can presume that the relative bargaining power of the parties will also be a determining factor in this sense.

ii. Changes to state foreign investment policies

The most notable situation of BIT reform is that undertaken by South Africa following the *Piero Foresti* settlement. South Africa's perceived exposure to investment arbitration as a result of its Black Empowerment Policy, led the state to reassess its approach to investment treaties.[288] In 2012,

---

[283] Jacob, *supra note* 265, 34.

[284] 'Model Text for the Indian Bilateral Investment Treaty' (December 2015) available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed on 4 August 2017), Article 1.6.

[285] *Ibid.*, Article 12.1.

[286] Jacob, *supra note* 265, 33, citing the German Model BIT (2008) which provides for a sunset clause of twenty years from the date of termination.

[287] *Ibid.*

[288] E Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31(1) *ICSID Review* 167, 167.

South Africa terminated its BITs with Belgium–Luxembourg, Spain, Germany, Switzerland, the Netherlands and Denmark.[289]

Whilst South Africa's more recent BITs, such as the one concluded with Ethiopia do not include any changes in terms of investor's rights,[290] the introduction of the Promotion and Protection of the Investment Bill ('the Bill'), basically sees South Africa getting rid of investor-state arbitration altogether. The Bill aims to balance the rights of investors with the rights and obligations of the host state, and only allows for the possibility of state-state arbitration, and only once all local remedies have been exhausted.[291] This essentially reverts the investor back to diplomatic protection as a means of redress,[292] which as discussed, is not a satisfactory mechanism due to its reliance on the investor's home government to espouse the claim.

The Bill is an attempt by South Africa to create an environment in which it can regulate in accordance with its Black Empowerment Policy without the fear that the measures taken will impede on the investment and possibly amount to an expropriation or FET claim by the investor.[293] The preamble of the Bill expresses South Africa's commitment to an open and transparent environment for foreign investment, as well as recognising the need to protect and promote the rights enshrined in its Constitution and its Bill of Rights, and the importance that investment plays in the development and well-being of the people of South Africa.[294] Under the right to regulate, the Bill expressly provides that South Africa retains its right to regulate, *inter alia,* to redress inequalities, preserve cultural heritage, achieve socio-economic rights, and protect health and the environment.[295]

---

[289] Norton Rose Fulbright, 'South Africa's Changing Approach to Investment Protection' (April 2015) available at http://www.nortonrosefulbright.com/knowledge/publications/127737/south-africas-changing-approach-to-investment-protection (accessed on 21 July 2017).

[290] See for example Schlemmer, *supra note* 288, 173.

[291] *Ibid.,* 191-192.

[292] *Ibid*., 192.

[293] *Ibid*.

[294] Promotion and Protection of Investment Bill (Republic of South Africa) (1 November 2013) available at http://www.gov.za/sites/www.gov.za/files/36995_gen1087.pdf (accessed on 19 July 2017).

[295] As cited in K Singh & B Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016), 63.

iii. Investment agreements with the host state

Another likely implication is the potential changes in investor-state concession contracts. This could see host states playing a greater role and pushing to improve contractual provisions so as to allow for more sensitivity for human rights, particularly in the context of privatisation projects dealing with essential services such as water.[296]

During the negotiation of such contracts, host states may seek to insert provisions that will provide for the sharing of costs for the fulfilment of relevant human rights obligations.[297] Host states may also consider taking steps in their regulatory framework during negotiations and prior to admitting the investment.[298] In the negotiation phase, host states may insist on a guarantee from the investor for the stable quality of water and stable water prices. They may also insist on public input during the negotiation process, or throughout the life of the investment project. Host states may also attempt to negotiate a safety net in cases of emergency, so that if there is a water shortage or a critical drop in water quality, they are able to regulate to protect the right to water for their citizens.[299]

Following privatisation, investors may be subject to closer monitoring by the host state and also be required to disseminate information of their activities to the public.[300] Therefore, whilst investors may not become directly subject to human rights obligations, the host state's monitoring and compliance could put investors in a tight hold to ensure their activities are not violating human rights.

The likelihood of investors being affected by this will firstly depend on whether there is a contract in place, as today many investments are made without a contract between the investor and the host state. If there is a contract in place, it will then depend on the position of the host state in respect of the investor. In situations where the state is a weak developing state, it is less likely that it will have the negotiating power to insert the terms it wants into the contract, particularly if the investor is a

---

[296] Kriebaum, *supra note* 61, 189.

[297] *Ibid*.

[298] P Thielborger, 'The Human Right to Water v. Investor Rights' in E U Petersmann, F Francioni & P M Dupuy (eds), *Human Rights in International Investment Law and Arbitration* (2009) 487, 509.

[299] *Ibid*., 504.

[300] *Ibid*.

multi-billion dollar company with the ability to import capital into the developing state. In such cases, the investor will most likely only agree to a contract that it considers favourable.[301] Therefore, all the scenarios and implications considered in this Part must be taken with a grain of salt in respect of two things: 1) the host state's desire to attract foreign investment, and 2) the host state's bargaining power.

iv. A potential for host state counterclaims

The increased likelihood of host state counterclaims comes with the *Urbaser* decision. Some have argued that the permission to bring counterclaims, could be viewed as encouraging counterclaims.[302] The *Urbaser* decision also illustrated the tribunal's readiness to consider non-investment law instruments as they apply to investment disputes, such as the various human rights instruments cited by the tribunal at the instigation of the host state's counterclaim.[303]

Although the counterclaim in *Urbaser* failed on the merits, in *Burlington Resources Inc v The Republic of Ecuador*,[304] another recent case concerning counterclaims, the host state succeeded in its counterclaim which alleged that the investor had breached Ecuadorian environmental law. The ICSID tribunal awarded US$41.7 million against the investor.[305] Whilst Ecuador did not directly argue the application of international human rights in its counterclaim, it did submit that the Ecuadorian Constitutions of 1978 and 1998 had enshrined the collective right to a healthy environment, free from contamination.[306]

Most notable in *Burlington* was the tribunal's in-depth analysis of Ecuadorian environmental law. The tribunal stated at the outset that it was undisputed that Ecuadorian law applied to the environmental counterclaim.[307] It then adopted a somewhat questionable interpretation of Article

---

[301] *Ibid*., 487.

[302] A Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) *Lewis & Clark Law Review* 461, 478.

[303] Herbert Smith Freehills, 'Urbaser v Argentina and Burlington v Ecuador: Investment arbitration is not over the counterclaims yet' (14 March 2017) available at http://hsfnotes.com/arbitration/2017/03/14/urbaser-v-argentina-and-burlington-v-ecuador-investment-arbitration-is-not-over-the-counterclaims-yet/ (accessed on 19 July 2017).

[304] *Burlington*, *supra note* 114.

[305] *Burlington Resources Inc. v Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, 7 February 2017, para 1075.

[306] *Ibid.,* para 163.

[307] *Burlington, supra note* 114, para 72.

42(1) of the ICSID Convention, stating that the second leg of the provision, gave the tribunal discretion on whether to apply municipal or international law. It stated that international law under Article 42(1) "may be applicable", and therefore was not mandatory. The tribunal then concluded that it would apply Ecuadorian environmental law to the environmental counterclaims.[308]

Both counterclaim decisions are indicative of the tribunal's readiness to consider non-investment law, such as the human right to water, and the right to a healthy environment (*albeit* the latter was derived from host state law), in an investment dispute. This indicates the growing need for investors to look beyond investment law as the only applicable regime to their investments, and to ensure they consider both international human rights law as well as the domestic legal systems of the host state when performing their activities. The counterclaims in both *Urbaser* and *Burlington*, although different in fact and argument, are essentially based on similar foundations; the clash between the investor's insistence to consider investment law as a self-contained system, and the host state's endeavour to balance the duties it owes to both the investor and its citizens.

However, counterclaims are not an automatic right in investment arbitration, and host states will still face various obstacles when attempting to bring a counterclaim. For example, the counterclaim may not fall within the scope of the parties' consent to submit the dispute to arbitration. Further, the lack of connection between the counterclaim and the investment dispute may prevent the tribunal from hearing the counterclaim on a jurisdictional basis.[309]

Yet investors should not overlook the fact that there is nothing fundamentally preventing the host state from bringing a counterclaim against the investor.[310] If a counterclaim is brought, it may create a number of problems for the investor. Firstly, the counterclaim will significantly prolong the proceedings and increase costs for the investor, which may or may not be recoverable from the host state. Secondly, as was the case in *Burlington*, the investor may eventually lose if it has failed to comply with host state law. Thirdly, even if the counterclaim does not succeed in its entirety, it can still be used to offset the damages against the investor. In other words, the investor's claim may still

---

[308] *Ibid*., para 74.

[309] H Bubrowski 'Balancing IIA Arbitration Through The Use of Counterclaims' in A De Mestral & C Levesque (eds) *Improving International Investment Agreements* (2013) 212, 221-229.

[310] See Lalive & Halonen, *supra note* 226, 142.

succeed, but based on the allegations raised in the counterclaim, the tribunal may assess the compensation payable to the investor in proportion to the investor's violation of human rights.[311]

v. Amicus curiae participation

Investors must bear in mind the emerging trend over the past decade for non-disputing parties to apply for *amicus curiae* participation in arbitration proceedings where issues of public interest are being raised. In the majority of these cases, the tribunals have permitted participation.[312] The increase in allowing non-disputing parties to make submissions in the proceedings is due to the public pressure and criticism towards investment law being too asymmetrical and in favour of the investor.[313] The previously mentioned cases of *Biwater*, *Glamis Gold* and *Piero Foresti* all saw the tribunals allow *amicus curiae* participation.

The use of *amicus curiae* in investment arbitration causes a number of concerns for investors, including impartiality, confidentiality and costs. Whilst the purpose of *amicus curiae* is to provide a human element to investment arbitration, they are often seen as supporting the host state's approach. This may cause the tribunal to feel more compelled to accept the host state's argument, or at least, to accord it more weight.[314] In *Methanex Corporation v United States of America*, one of the first cases to allow *amicus curiae* submissions,[315] the tribunal noted the potential risk and stated that "any *amicus* submissions are more likely to run counter to the claimant's position and eventually to support the respondent's case".[316] Therefore, in an attempt to bring a more balanced approach to arbitration, *amicus curiae* submissions may in fact tip the scales in favour of the host state. There is

---

[311] Dumberry & Dumas-Aubin, *supra note* 277, 594.

[312] C Cross & C Schliemann-Radbruch, 'When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations' (2013) 6(2) *LDR* 67, 80. However, in *Bernhard von Pezold and Others v Republic of Zimbabwe*, the tribunal denied *amicus curiae* participation to the European Centre for Constitutional and Human Rights (ECCHR) and four indigenous Zimbabwean communities ('the Petitioners'), finding that the Petitioners did not have a significant interest in the proceedings, and that their *amicus curiae* submissions would address matters not within the subject matter of the dispute (*Bernhard von Pezold and Others v Republic of Zimbabwe,* ICSID Case No. ARB/10/15, Procedural Order No. 5, 3 April 2013, para 60-61).

[313] E Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29(1) *Berkley Journal of International Law* 200, 208.

[314] A Saravanan & S R Subramanian, 'The Participation of Amicus Curiae in Investment Treaty Arbitration' (2016) 5(4) *Journal of Civil & Legal Sciences* 201, 205.

[315] Levine, *supra note* 313, 209.

[316] *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae', 15 January 2001, para 50, as cited in Saravan & Subramanian, *supra note* 314, 209.

also the concern that many public interests groups participating as *amicus curiae* in arbitral proceedings may be influenced and funded by host states, thus increasing the potential for bias.[317]

Further, as with counterclaims, the participation of *amicus curiae* will significantly increase both the costs and duration of the proceedings. Should the tribunal accept the submissions of the *amici*, the expenses of these submissions will be borne by the parties. Additionally, where parties are required to respond and analyse the *amicus* briefs, this will add further costs and delay.[318]

Despite the issues of costs and delay, tribunals appear to be granting *amicus curiae* participation with relative ease. Of particular concern to the investor is the extent to which tribunals are allowing the participation of third parties that are not directly affected by the outcome of the dispute. In *Methanex* the tribunal granted participation under the UNCITRAL Rules which allow the tribunal to "conduct the arbitration in such manner as it considers appropriate".[319] The tribunal held this as sufficient to grant *amicus curiae* participation, stating that the case concerned a matter of public interest, including the provision of public services and matters of human health, and that the *amicus* could bring a new perspective on these issues.[320] This shows the generally open approach that tribunals have towards *amicus curiae* participation. In *Biwater*, the tribunal relied on Rule 37(2) of the ICSID Rules to grant the NGOs the right to submit briefs.[321] Rule 37(2), specifically grants the tribunal discretion to allow a non-disputing party to participate in the proceedings, but requires it to consider a number of factors.[322] Both *Methanex* and *Biwater* allowed third party NGOs to participate in the proceedings. This is different to *Gold Glamis*, where the right was granted to an indigenous community, namely the Quechan Indian Nation, which had a direct interest in the dispute, given that they would be directly affected by the outcome of the proceedings. Investors must therefore be aware that they could face *amicus curiae* submissions from both directly affected

---

[317] For examples of cases where *amici* were influenced by the disputing respondent party, see Cross, *supra note* 312, 83.

[318] Saravanan & Subramanian, *supra note* 314, 205.

[319] UNCITRAL Rules, *supra note* 225, Article 15.1.

[320] As cited in Levine, *supra note* 313, 210.

[321] *Ibid*., 211. See also *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007, para 46-50.

[322] Under Rule 37(2), the factors a tribunal is required to consider, *inter alia* include: "(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; and (c) the non-disputing party has a significant interest in the proceeding".

groups, as well as NGOs who merely have an interest in the thematic aspects of the issues in dispute.[323]

vi. Legitimate expectations

A further challenge that investors may face is the application of the principle of "legitimate expectations", particularly in terms of FET clauses. One of the most classic arguments brought by investors in arbitration is that the host state had breached the FET clause by violating the investor's legitimate expectations that the legal regime of the host state would not change.

The increasing role of human rights in investment arbitration, and the increasing likelihood of tribunals accepting to hear such arguments, is likely to affect the application of legitimate expectations.[324] Investors may no longer be able to claim with certainty, that their expectations that the host state would not regulate in accordance with its human rights obligations is legitimate. If one considers the tribunal's wording in *Saluka*, which in many ways defined the approach to legitimate expectations, it held that the definition of legitimate and reasonable expectations is that the host state did not act in a way that is "manifestly inconsistent, non-transparent, unreasonable, or discriminatory".[325] This will be a high threshold for a in investor to meet in cases with similar factual scenarios to that of *Piero Foresti.* In that case, South Africa's constitution, which was in force prior to the South Africa-Italy BIT, specifically allowed for measures to be taken to address the post-apartheid inequalities within the host state.[326] Furthermore, the elimination of racial discrimination is an obligation specifically included for in the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'),[327] an instrument that both South Africa and Italy are parties to. Therefore, it could hardly be said that South Africa's implementation of the Black Empowerment Policy was "manifestly inconsistent, non-transparent, unreasonable or discriminatory" in order to qualify as breaching the legitimate expectations of the investor.[328]

---

[323] Levine, *supra note* 313, 215.

[324] A Wythes, 'Investor–State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?' (2010) 23 *Leiden Journal of International Law* 241, 246.

[325] *Saluka*, *supra note* 101, para 309. See also *ibid*., 247.

[326] Wythes, *supra note* 324, 250.

[327] International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 U.N.T.S 195.

[328] *Ibid*., 251.

Investors should be careful to not rely on the principle of legitimate expectations when dealing with a host state that has a unique human rights history, such as South Africa. They should also pay heed to the principle of compliance in treaty interpretation. An investor cannot legitimately expect that the host state and the investor's home state would enter into a BIT which would allow them both to breach the obligations they owe under another treaty. Similarly, they cannot legitimately expect that a host state will not honour its own obligations under international human rights law.[329]

C. How can investors respond?

The difficulty in determining how investors should respond to the increasing role of human rights, is that the topic of human rights lacks the clarity that most businesses require to operate. Which human rights should the investor address in its investment project, and how should they be addressed? These questions do not have straightforward answers. Yet foreign investment is a commercial activity, and all commercial activities require a degree of legal precision to ensure that the business risk is mitigated. The more vague a commercial relationship is, particularly in terms of the legal obligations of the parties, the more likely it will lead to a dispute. Referring to human rights obligations of the host state, or human rights in general, may be too vague and abstract for investors. Therefore, the usefulness of the following suggestions is dependent on the extent to which they can overcome the above issue, if at all.

i. The evolution and context of human rights obligations

Investors must be aware that human rights compliance is a priority in most states today, and so the likelihood that human rights will be on a host state's public policy agenda is quite high.[330] The long-term nature of an investment project could also see changes in a host state's human rights obligations, or at least, changes to the demands of the host state population.[331] A particular human rights issue that was not relevant at the start of an investment, could become relevant down the track, as a result of social, economic and political shifts within a state. Therefore, investors must ensure that they factor in the evolving nature of human rights into their investment planning and

---

[329] Simma & Kill, *supra note* 176, 705.

[330] B Simma, 'Foreign Investment Arbitration: A place for human rights?' (2011) 60 *International and Comparative Law Quarterly* 573, 578.

[331] *Ibid*., 579.

investment activities.[332] This means conducting annual human rights impact assessments during the course of the investment, and consulting with public interest groups and NGOs on a regular basis. It also means not relying too heavily on the legitimate expectations principle.

The UN Guiding Principles for Business and Human Rights ('UNGP') provides a list of foundational and operational principles for states and businesses in terms of the UN's "Protect, Respect and Remedy" framework.[333] The UNGP's widespread acceptance since its endorsement makes it a useful tool and reference point for investors.[334] The UNGP refers to "human rights" as including, at a minimum, the rights contained in the UN Declaration, the ICCPR and the ICESCR, as well as the ILO's Declaration on Fundamental Principles and Rights at Work.[335] Whilst this narrows down the question as to which human rights should be considered by investors, it is still relatively wide and ambitious. It could also place an unrealistic burden on small and medium sized investors who would be required to conduct due diligence on all potential human rights obligations contained in these instruments.[336]

Investors must therefore focus their attention on the context of their investment. In practice, depending on the industry in which an investment is based, some human rights may be at a greater risk than others.[337] For example, investments designed to provide essential public services such as water, have a higher risk of affecting the host state population's right right to water, and therefore the investor should closely consider General Comment No. 15 and its obligations. Similarly, mining investments could encroach on indigenous rights. Investors must have a clear idea of the specific groups and persons that their operations may impact, particularly those groups that are more vulnerable, such as indigenous communities, women, disabled persons, and ethnic minorities etc.[338] This may also involve considering additional standards, including those contained in international

---

[332] Guiding Principles, *supra note* 4, 13.

[333] UNGP, *supra note* 77.

[334] In 2011, a number of large multinational investors signed the 'Investor Statement in Support of the Guiding Principles on Business and Human Rights' (May 2011) available at https://business-humanrights.org/sites/default/files/media/documents/ruggie/investor-statement-re-guiding-principles-2011-may-20.pdf (accessed on 11 August 2017). See Australian Human Rights Commission and Ernst & Young Australia, 'Human Rights in Investment: The Value of Considering Human Rights in ESG Due Diligence' (2017) available at www.humanrights.gov.au/about/publications (accessed on 31 July 2017), 11.

[335] *Ibid*.

[336] N Lavranos, 'Marrying the Beast and the Beauty' in R Hofmann & C J Tams (eds) *International Investment Law and Its Others* (2012) 113, 115.

[337] UNGP, *supra note* 77, 14.

[338] *Ibid*., 20.

instruments which specifically deal with marginalised groups, such as ICERD and CEDAW. Understanding the particular context of the investment and its industry is vital in determining the likely human rights impact of the investment activities.[339]

Therefore, investors must carry out an assessment of the human rights context prior to the investment. This may involve identifying the individuals or groups that may be affected, recording the relevant human rights standards, and determining how the proposed investment activities could have an adverse impact on the individuals or groups identified.[340] To undertake this process, investors may have to seek expert advice from particular public interest groups, human rights lawyers and NGOs.

ii. The host state's legal framework and human rights history

Part of understanding the context of the human rights impact involves considering the constitutional and legislative framework of the host state, particularly if a host state has a unique historic background. Not all constitutions are the same, and not all constitutions refer to human rights in the same way. Constitutions may refer to the same human right but in different ways. The constitutions of Belgium and South Africa explicitly provide for the protection of the individual's right to water, whilst the constitution of Germany does not. Nevertheless, Germany may protect the right to water through the invocation of the human right to dignity, or in other indirect ways.[341] Whilst this may seem unhelpful to an investor in the sense that, any host state could potentially derive the protection of a particular human right through the invocation of more general rights, it may still help investors to identify which human rights are specifically emphasised in a particular host state. This usually means that the state will regulate to protect that right, or that there is a greater risk of that right being violated.

The investor should also have a list of all the human rights treaties to which the host state is a party. This will help it to determine the host state's international obligations, and remove any unreasonable expectations that it may otherwise have. The investor should particularly consider the treaties to which both its home state and the host state are parties. These treaties will have bearing

---

[339] *Ibid*., 19.

[340] *Ibid*.

[341] Petersmann, *supra note* 2, 881.

on the interpretation of the BIT via the principle of compliance, and therefore affect the legitimacy of an investor's expectations.

A number of jurisdictions have also started to introduce human rights reporting obligations on companies. The UK Modern Slavery Act is one example, which places a greater degree of scrutiny on businesses, including foreign companies dong business in the UK.[342] The Act requires companies with a turnover of £36m or more to produce a statement each year on their website outlining the steps taken by the company to ensure there is no slavery or trafficking in any part of its business activities.[343] An investor must be mindful of such legislation and set up its own internal mechanisms for complying with such requirements. Therefore, understanding the legal framework of the host state is important for the investor in contextualising the human rights risk and ensuring compliance with host state laws. Again, this may involve obtaining expert advice from the host state's domestic lawyers.

iii. Responsible investor-state contracting

If the investment includes an investor-state contract, a prudent investor should address the potential human rights risks during the negotiation phase of the contract. In this context, the Guiding Principles serve as a useful tool, and could also be used in conjunction with a "human rights audit".[344]

The Guiding Principles are a list of ten principles, accompanied by detailed recommendations and checklists.[345] The aim of the principles is to help investors and states integrate human rights risks into the negotiation of contracts.[346] The Guiding Principles aim to serve both parties; the investor and the state. They address both the state's duty to protect human rights, as well as the investor's

---

[342] Freshfields Bruckhaus Deringer, 'Human rights and the general counsel' (July 2017) available at http://businessandsociety.freshfields.com/humanrights (accessed on 1 Aug 2017).

[343] The Guardian, 'The UK's new slavery laws explained: what do they mean for business?' (14 December 2015) available at https://www.theguardian.com/sustainable-business/2015/dec/14/modern-slavery-act-explained-business-responsibility-supply-chain (accessed on 7 August 2017). See also Modern Slavery Act 2015 (UK), available at http://www.legislation.gov.uk/ukpga/2015/30/contents (accessed on 10 August 2017) Part 6, Section 54.

[344] For an explanation of the 'human rights audit' see Simma, *supra note* 330, 594-596.

[345] For a summary of the ten principles, see Guiding Principles, *supra note* 4, 1-2.

[346] OHCHR, 'Principles for Responsible Contracts: Integrating the management of human rights risks into State-investor contracts: Guidance for Negotiators' (2015) available at http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf (accessed on 19 July 2017), 3.

responsibility to respect human rights.[347] A guide that serves both parties is likely to be a more useful tool and lead to a more positive result in negotiation.

According to the Guiding Principles, an investor may need to engage human rights experts to assist it to make informed decisions on how to allocate responsibility with the host state for the prevention and remedy of negative human rights impacts. This includes understanding the legal and financial ramifications associated with all different options proposed by the state.[348] As such, the investor's negotiation team may be comprised of financial, legal and technical expertise so that the investor is properly and independently informed about the cost implications associated with every human rights option and risk.[349]

In respect of stabilisation clauses, if they are used, they must be carefully drafted so that they do not restrain the capacity of the state to *bona fide* regulate in order to meet its human rights obligations.[350] In this sense, the use of freezing clauses is considered unsatisfactory, particularly if the freezing clauses create exemptions for investors from future laws relating to human health, labour and environment. In a clear reflection of the concerns raised over the BTC Project, stabilisation clauses must not impose penalties on the host state in the event that it introduces new laws or regulations that are implemented on a non-discriminatory basis and which reflect internationally recognised standards relating to various areas of human rights.[351]

On their own, the Guiding Principles do little to solve the legal imprecision of human rights in investment contracts. However, when considered in conjunction with other suggestions one could argue that they do provide a benefit for the investor, at least as a "blueprint" on which to base its contractual decision-making with the host state.

Additionally, Simma proposes that an investor engage in a "human rights audit" at the pre-contractual stage. A human rights audit would be similar to the social responsibility review that most corporations already conduct. It would involve a legal analysis of the host state's police

---

[347] Guiding Principles, *supra note* 4, 27 and 28.
[348] *Ibid*., 8.
[349] *Ibid*.
[350] *Ibid*., 12.
[351] *Ibid*.

powers within its constitutional framework and determine the scope of these police powers, along with any specific human rights commitments of the host state.[352] It would therefore be tailored to the particular state in question. Importantly, the audit would be a voluntarily exercise done in conjunction with the host state, and would include a promise by the host state to provide the investor with continued access to the host state's human rights reports from various treaty bodies. Simma explains that an audit would provide a clearer landscape for the investor in terms of its legitimate expectations, and also a better understanding of the possible regulatory measures that a host state may take in order to comply with its human rights obligations.[353]

The above suggestions may appear quite burdensome, and are likely to cause delays and increase costs for the investor. However, the alternative could lead to even bigger problems. It could include a failed or expropriated investment. It could include exposure to a host state counterclaim, or it could simply increase the likelihood of long, costly and unpredictable arbitration proceedings. Therefore, investors should bear these alternatives in mind when weighing up the costs and benefits of due diligence.

PART VI: CHALLENGES AND POTENTIALS FOR INVESTMENT LAW

This thesis will conclude by examining the broader context of the increasing role of human rights in investment arbitration, namely the challenges and potentials to investment law. The challenges predominantly concern the view that an over-inclusion of human rights will unravel decades of progress in investment law and essentially place the power back into the hands of the state. On the other hand, the inclusion of human rights could bring benefit to the whole of international law, via the systemic integration of two relatively compatible systems. This in turn, can improve the legitimacy and integrity of investment law and international law in general.

A. Threat to the underlying logic of investment law

A major concern is that the inclusion of human rights may give back to states the very power that investment law initially wanted to curtail. As such, the question is whether the underlying logic of

---

[352] Simma, *supra note* 330, 594.

[353] *Ibid*., 595.

investment law can also support human rights arguments. There are similarities between the two systems, such as their shared desire to protect the right to property, and to regulate the powers of the state. However, these similarities do not necessarily mean that the systems can be reconciled, nor that they should be merged. The continuing search for uniformity in international human rights law, still presents a significant obstacle to its integration with investment law. Various legal cultures and constitutional traditions still exist. Whilst there is general agreement among states on the existence of human rights, the way in which they are interpreted, protected and implemented still varies between states. Investment law on the other hand, has evolved into a much more stable system (*albeit* not entirely without its problems and inconsistencies) with clear dispute resolution mechanisms and effective enforcement procedures.

Therefore, if the human rights system itself is still not a settled body of law, incorporating it into the investment law system may arguable affect the consistency and coherency of the latter. More specifically, the various approaches to individual human rights by various states would mean that each state would have the power to determine how it applies human rights according to its own legal system, and this could mean that the investor is once again subject to the regulatory hand of the state.

This is further complicated by reliance on the "applicable law" clauses. The application of domestic laws and the consideration of the international obligations of the host state, essentially puts investment law back in the arms of the state. It is the state that passes domestic laws and enters into treaties, and the investor has no say in this. If a state can interpret and apply human rights norms in various ways according to its constitutional and legislative objectives, this ultimately leaves the investor with very little predictability and protection. However, in terms of the applicable law, one could argue that so long as the host state's laws are an implementation of its international obligations, the investor is not simply subject to the domestic laws of the host state, but rather to the operation of international law within the domestic legal system.

Nevertheless, allowing the host state to regulate in terms of its human rights obligations, considering their unlimited scope and diverging domestic practices, could create a situation where the regulatory powers of the host state become endless. As Kriebaum explains, if the state is given broad police powers which allow it to *bona fide* regulate without being required to pay

compensation to the investor (as was discussed in *Saluka*), most expropriation clauses in BITs would lose their effect, and the concept of indirect expropriation would diminish. In such cases, only the most formal and discriminatory expropriations would constitute compensable expropriation.[354]

On the other hand, if one considers the example of South Africa's recent changes to its BIT framework, it could be argued that the failure to account for human rights in investment law can also lead to the reversion of investment law to its early days of diplomatic protection. As previously mentioned, the underlying reason for South Africa's changes, was its concern that it could not regulate in accordance with its constitutional principles and post-apartheid policy.

As such, the concern that the inclusion of human rights may grant more power to the state is real only insofar as one considers human rights to be an incoherent system. However, one cannot overlook the fact that the same concerns and implications may arise by ignoring or downplaying the state's power to regulate for the public benefit.

B. Competency of investment tribunals

The competency of arbitral tribunals to deal with human rights issues poses another challenge. The *ad hoc* nature of investment tribunals, as well as the background and expertise of most arbitrators, which is commercial law, is that they are considered to be insensitive to human rights issues or that they lack the knowledge and expertise to deal with international human rights law.[355] There is the additional concern that an increase in the role of human rights will lead tribunals to deal with host state laws, something they are also not competent to address. However, some tribunals have already proclaimed their competence in dealing with host state laws which may or may not incorporate international human rights. For example, the tribunal in *Burlington* accepted with relative ease its task to consider and apply Ecuador's environmental laws to the host state's counterclaim. Therefore, tribunals may self-proclaim their competence in dealing with both human rights law and the domestic laws of the state which may or may not implement those human rights laws.

---

[354] Kriebaum, *supra note* 61, 182.

[355] Dumberry & Dumas-Aubin, *supra note* 277, 598.

The perception that arbitrators with a commercial law background do not have the expertise to deal with human rights issues is also a bit of an oversimplification. Investment disputes most frequently involve an assessment of fair and equitable treatment. Therefore arbitrators are often required to determine what constitutes "fair" and "equitable". Firstly, the protection of human rights should always be considered as a relevant consideration in any objective assessment of what is "fair" and "equitable" in international law.[356] Secondly, the concept of human rights rests on the principles of equal treatment, fairness, and the monitoring of abusive of power (by the state). Therefore, one cannot say that arbitrators do not delve into the very principles of justice and fairness, which the human rights system is based on, and that they would thus not be competent to deal with such issues.

C. SYSTEMIC INTEGRATION TO ENHANCE COMPLIANCE AND LEGITIMACY

The inclusion of human rights may help address the so-called legitimacy crisis of investment law.[357] The crisis stems from the perceived imbalance of investment treaties and the substantive and procedural biases of the investment law system. The substantive biases include the lack of investor obligations in investment treaties as well as the vague and indeterminate standards of investment protection, which have led to unpredictability and incoherence. This is coupled with the lack of attention afforded to the host state's non-investment obligations and its right to regulate in respect of human rights, creating an overall perception that human rights are marginalised by investment law.[358] This is also problematic when one considers the fact that arbitrators are provided with a jurisdiction to determine the legality of sovereign acts and to award public funds to investors in cases where government regulation is in breach of investment standards.[359] Essentially, arbitrators have the power to make states liable in millions of dollars for the effects of their regulatory acts. On the other hand, the perceived procedural biases include the lack of an appellate body, the *ad hoc* nature of tribunals and the lack of recourse to the domestic legal system.[360]

---

[356] Simma & Kill, *supra note* 176, 704.

[357] For a discussion on the "legitimacy crisis" of international investment law, see C Brower & S Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2008-2009) 9 *Chicago Journal of International Law* 471.

[358] Al Faruque, *supra note* 33, 544.

[359] *Ibid*., 545.

[360] *Ibid*.

This lack of legitimacy and coherence that exists in investment law is often perceived as creating a negative impact on human rights conditions in host states.[361] Either because the host state is prevented from regulating for the benefit of its population, or because the host state is in violation of the investment protection standards and ends up having to pay millions in public funds to the investor. For developing states, this is not a step forward in improving the living standard and economic development of its citizens.

The inclusion of human rights into investment law, via the methods discussed in this thesis, could help resolve the perceived legitimacy crisis. By taking human rights into account when dealing with investment disputes, not only will it be of benefit to the victims of human rights, but it will also smooth out the relationship between the investor and the host state who are constantly at odds with one another.[362] The possibility for a host state to bring a counterclaim against the investor has the potential to balance out the current asymmetry of investment treaties, and also allow a state to more vigorously defend its actions. As Bjorklund describes, counterclaims allow the host state an opportunity to win a case, and not just to "not lose".[363] Further, they allow for the assessment of an investment in a broader context, not just in terms of the host state's conduct but also in terms of the investor's conduct. Counterclaims may successfully highlight the private-law issues which exist in investment law, and potentially deter investor's from engaging in undesirable conduct. This would be a positive step in terms of improving corporate governance and making it more possible to hold investors accountable for their actions.[364]

The ILC stated that the relationship between the rights and obligations under one treaty and the rights and obligations under other treaties or customary international law can only be approached through systematic integration, which is "a process of reasoning that makes them appear as parts of some coherent and meaningful whole".[365] Another potential of the inclusion of human rights in investment law is that it can lead to a systematic integration of international law rules. When two sets of rules intersect, they must be reconciled. This reconciliation must have some regard to the overall picture, one that is greater than both individual systems. Through this broader picture, the

---

[361] *Ibid*., 544.

[362] Petersmann, *supra note* 2, 887.

[363] Bjorklund, *supra note* 302, 476.

[364] *Ibid*., 476 and 477.

[365] ILC Report, *supra note* 172, para 414. See also Al Faruque, *supra note* 33, 544.

reconciliation will involve a harmonising approach, more likely to give the whole system meaning and legitimacy. A fragmented approach, will not assist legitimacy at the intersection, as one set of rules will always be applied at the expense of the other.

Any judicial decision must be based on the underlying principle of justice, and ought to be perceived by the public as being made in pursuit of justice.[366] This does not only apply to judicial decision-making but also to the role of governments, who the citizens perceive as regulating and legislating in the pursuit of justice for all. If arbitrators were to adjudicate investment disputes in accordance with the principles of justice and international law, which includes the observance of human rights, and if they were to see their tasks as serving the international community as a whole,[367] there would be a greater likelihood of preventing investment disputes or at least, of settling them more amicably. Further, arbitrators could be perceived by civil society as "exemplars of public reason",[368] which is more likely to increase their democratic legitimacy and the legitimacy of international law as a whole.

CONCLUSION

The underlying logic of investment law is purportedly inconsistent with the international human rights system. Investment law developed as a means of regulating the relationship between the investor and the state. Its aim was to curtail the powers of the state so that it could not regulate in ways which would adversely affect the investor's property rights. This aim was to be achieved through a common set of international investment protection standards, and via the introduction of investor-state arbitration as an enforceable mechanism of redress for investors.

However, the road to attaining the investment law system we have today, was neither simple nor smooth. Much of the development during the last century revolved around reconciling the opposing views of investment law around the world, and reaching a general consensus on what the appropriate standard of investment protection should be. In the end, what got investment law over the line was the view that it formed an essential part of trade liberalisation, and that it was a major contributor to the world economy, including the economy of developing states.

---

[366] Simma & Kill, *supra note* 176, 893.

[367] *Ibid*., 888.

[368] Petersmann, *supra note* 2, 892.

But did investment protection go too far? Did the concern for protecting the investor overlook the need for protecting the citizen? The problem is that throughout its history, investment law did not take into account issues relating to human rights. It evolved on a more private law, commercial basis and thus purportedly became a self-contained system. There was little or no thought given to the fact that investment law could have adverse effects on the human rights of host state populations.

It is therefore unsurprising that human rights have coming knocking on the door of investment arbitration, and that host states are increasingly using human rights as both a shield and a sword. This is not only a result of the asymmetric nature of BITs and their inherent vagueness. It is also a result of the host state's inability to strike a proper balance between its human rights obligations and its investment obligations, and the lack of guidance from investment tribunals on how it should do so.

This thesis considered the various ways that human rights arguments have been incorporated by hosts states in investment arbitration. If one considers the recent tendency in permitting host state counterclaims and *amicus curiae* participation, this trend is only likely to continue. But are these really *changes* to investment law or are they simply developments that the system was already designed to include? Investment law is hardly a self-contained system if one considers the many windows that exist for the inclusion of non-investment law issues, such as the "applicable law" clauses and the use of Article 31(3)(c) of the VCLT in the interpretation of investment treaties.

Whilst the precise role of human rights in investment arbitration remains unclear, it nevertheless has created a new reality for investors, which they must address. Investors should consider the benefits of human rights protection in the host state where they conduct their business. Many large corporations have the potential to improve the human rights conditions of host states, and with it to ensure the success and longevity of their investment. However, this cannot be achieved if investors consider human rights to be outside the investment law framework. It is only through the inclusion and management of human rights in the investment project, that human rights compliance will increase, and that the potential for investment disputes will decrease.

Various areas of international law cannot be considered in a vacuum. Instead, they must be looked at as part of a larger, unified system. A “meaningful whole”. The legitimacy crisis of investment law has developed because of the view that it is a self-contained regime with specialised rules. Whilst it may be true that investment law developed more quickly than human rights law, and that it provides more effective methods of redress and enforcement, this does not mean it is devoid of human rights or other non-investment law issues. It is a system of law and like all systems of law, it must be based on principles of justice and integrity, which can only come through harmonisation. Therefore, the consideration of human rights should not be seen as a threat to investment law, but rather as a step in achieving its growth and permanence in the international legal framework.

BIBLIOGRAPHY

A. BOOKS

- Baetens, F., (ed), *Investment Law Within International Law: Integrationist Perspectives* (2013), Cambridge University Press
- Binder, C., Kriebaum, U., Reinisch, A., & Wittich, S., (eds), *International Investment Law for the 21st Century: Essays In Honour of Christoph Schreuer* (2009), Oxford University Press
- Brownlie, I., *Principles of Public International Law* (7th ed, 2008), Oxford University Press
- Cordonier Segger, M., Gehring, M. W., & Newcombe, A., (eds), *Sustainable Development in World Investment Law* (2010), Kluwer Law International
- De Mestral, A., & Levesque, C., (eds), *Improving International Investment Agreements* (2013), Routledge
- Dolzer, R., & Schreuer, C., *Principles of International Investment Law* (2nd ed, 2012), Oxford University Press
- Dworkin, R., *Law's Empire* (1985), Harvard University Press
- Hofmann, R., & Tams, C. J., (eds), *International Investment Law and Its Others* (2012), Nomos
- Kriebaum, U., & Reinisch, A., (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (2007), Eleven International Publishing
- Petersmann, E. U., Francioni, F., & Dupuy, P. M., (eds), *Human Rights in International Investment Law and Arbitration* (2009), Oxford University Press
- Singh, K., & Ilge, B., (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016), Both Ends, Madyham & SOMO
- Subedi, S. P., *International Investment Law: Reconciling Policy and Principle* (2008), Hart Publishing

B. ARTICLES/REPORTS

- Al Faruque, A., 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11(4) *The Journal of World Investment and Trade* 539
- Bjorklund, A. K., 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) *Lewis and Clark Law Review* 461
- Blanton, S. L., & Blanton, R. G., 'What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment' (2007) 69(1) *The Journal of Politics* 143

- Booth, C., 'Is there a Place for Human Rights Considerations in International Arbitration?' (2009) 24 *ICSID Review - Foreign Investment Law Journal* 109
- Brower, C., & Schill, S., 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2008-2009) 9 *Chicago Journal of International Law* 471
- Cross, C., & Schliemann-Radbruch, C., 'When Investment Arbitration Curbs Domestic Regulatory Space: Consistent Solutions through Amicus Curiae Submissions by Regional Organisations' (2013) 6(2) *LDR* 67
- Dahlquist, J., 'Beside the Point - on *obiter dicta* in investment treaty arbitration' (2016) 32(4) *Arbitration International* 629
- Dumberry, P., & Dumas-Aubin, G., 'How to Impose Human Rights Obligations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITS' (2012) 4 *Yb International Investment Law and Politics* 569
- Dumberry, P., & Dumas-Aubin, G., 'When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration' (2012) 13 *The Journal of Investment Law and Trade* 349
- González García, L., 'The Role of Human Rights in International Investment Law' (2013) 4(1) *Current Issues in Investment Treaty Law (British Institute of International and Comparative Law)* 29
- Jacob, M., 'International Investment Agreements and Human Rights' (2010) *INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development 03/2010*
- Knox, J. H., 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1
- Kriebaum, U., 'Foreign Investments and Human Rights: The Actors and Their Different Roles' (2013) 4(1) *Current Issues in Investment Treaty Law (British Institute of International and Comparative Law)* 45
- Lalive, P., & Halonen, L., 'On the Availability of Counterclaims in Investment Treaty Arbitration' (2011) *Czech Yearbook of International Law* 141
- Levine, E., 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29(1) *Berkley Journal of International Law* 200
- McLachlan, C., 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) *The International and Comparative Law Quarterly* 279
- Nelson, T. G., 'Human Rights Law and BIT Protection: Areas of Convergence' (2011) 12 *Journal of World Investment and Trade* 27

- Petersmann, E. U., 'Human Rights, Trade and Investment Law and Adjudication: The Judicial Task of Administering Justice' (2013) 4(1) *Current Issues in Investment Treaty Law (British Institute of International and Comparative Law)* 3
- Saravanan, A., & Subramanian, S. R., 'The Participation of Amicus Curiae in Investment Treaty Arbitration' (2016) 5(4) *Journal of Civil & Legal Sciences* 201
- Schlemmer, E., 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31(1) *ICSID Review* 167
- Shemberg, A., 'From Stabilization Clauses and Human Rights to Principles for Responsible Contracts' (2013) 4(1) *Current Issues in Investment Treaty Law (British Institute of International and Comparative Law)* 61
- Simma, B., 'Foreign Investment Arbitration: A place for human rights?' (2011) 60 *International and Comparative Law Quarterly* 573
- Van Aaken, A., 'Fragmentation of International Law: The Case of International Investment Protection' (2008) 27 *Finnish Yearbook of International Law* 91
- Vandevelde, K. J., 'A Brief History of International Agreements' (2005) 12 *U.C - Davis Journal of International Law and Policy* 157
- Wythes, A., 'Investor–State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?' (2010) 23 *Leiden Journal of International Law* 241
- World Bank Group, 'Guidelines on the Treatment of Foreign Direct Investment', *Legal Framework for the Treatment of Foreign Investment: Volume II: Guidelines* (1992) 35-44

C. TREATIES, CONVENTIONS, DECLARATIONS, RESOLUTIONS AND RULES

- 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968)
- 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 U.N.T.S 159
- Charter of Economic Rights and Duties of States (17 December 1984) A/RES/39/163
- Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) U.N.T.S 1249
- Czech Republic-Netherlands BIT (1 October 1992)
- Draft Agreement between the Kingdom of Norway and … for the Promotion and Protection of Investments (May 2015), available at https://www.regjeringen.no/contentassets/

e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf (accessed on 4 August 2017)

- Energy Charter Treaty (16 April 1998) 2080 U.N.T.S 95
- Germany-Philippines BIT (1 February 2000)
- International Covenant on Civil and Political Rights (16 December 1966) 99 U.N.T.S 171
- International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 U.N.T.S 3
- International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 U.N.T.S 195
- ILO, Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy (adopted November 1977) available at http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (accessed on 13 August 2017)
- ILO, Declaration on Fundamental Principles and Rights at Work (adopted June 1988) available at http://www.ilo.org/declaration/info/publications/WCMS_467653/lang--en/index.htm (accessed on 13 August 2017)
- Israel-Czech Republic BIT (16 March 1999)
- Model Text for the Indian Bilateral Investment Treaty (December 2015) available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (accessed on 4 August 2017)
- North American Free Trade Agreement (1 January 1994) 32 ILM 289, 605
- Spain-Argentina BIT (28 September 1992)
- Ukraine-Lithuania BIT (6 March 1995)
- UNCITRAL Arbitration Rules (1976) UN Doc. A/RES/31/98; 15 ILM 701
- UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (20 January 2003) UN Doc. E/C.12/2002/11
- UN Guiding Principles for Business and Human Rights (2011) available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed on 21 July 2017)
- UN Sub-Commission on the Promotion and Protection of Human Rights (13 August 2003) Res. 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11
- Universal Declaration of Human Rights (10 December 1948) 217 A (III)
- Vienna Convention on the Law of Treaties (23 May 1969) 1155 U.N.T.S 331

D. CASE LAW

i. European Court of Human Rights

- *Lopez Ostra v Spain* (ECtHR), Judgment, 9 December 1994, Series A, no. 303-C

ii. International Court of Justice

- *Case Concerning Oil Platforms* (Islamic Republic of Iran v United States of America), Separate Opinion of Judge Higgins, (2003) 42 ILM 1387

iii. ICSID

- *Antoine Goetz & Others and S.A Affinage des Metaux v Republic of Burundi,* ICSID Case No. ARB/01/2, Award, 21 June 2012
- *Asian Agricultural Products Ltd. v Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Award, 27 June 1990; 4 ICSID Reports 250; 30 ILM (1991) 577
- *Azurix Corp. v The Argentine Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006; 14 ICSID Reports 374
- *Bernhard von Pezold and Others v Republic of Zimbabwe,* ICSID Case No. ARB/10/15, Procedural Order No. 5, 3 April 2013
- *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, 2 February 2007
- *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008
- *Burlington Resources Inc. v Republic of Ecuador,* ICSID Case No. ARB/08/5, Award, 7 February 2017
- *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007
- *Gustav F W Hamester GmbH & Co KG v Ghana,* ICSID Case No. ARB/07/24, Award, 18 June 2010
- *Inceysa Vallisoletana S.L. v Republic of El Salvador,* ICSID Case No. ARB/03/26, Award, 2 August 2006
- *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000
- *Phoenix Action, Ltd. v The Czech Republic,* ICSID Case No. ARB/06/5, Award, 15 April 2009
- *Piero Foresti, Laura de Carli & Others v The Republic of South Africa,* ICSID Case No. ARB(AF)/07/01, Letter Regarding Non-Disputing Parties, 5 October 2009

- *Piero Foresti, Laura de Carli & Others v The Republic of South Africa,* ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010
- *Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 August 2008
- *Spyridon Roussalis v Romania,* ICSID Case No. ARB/06/1, Award, 7 December 2011
- *Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina,* ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010
- *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016

iv. *UNCITRAL*

- *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana,* UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184
- *Glamis Gold, Ltd. v The United States of America,* UNCITRAL, US Statement of Defence, 8 April 2005
- *Glamis Gold, Ltd. v The United States of America,* UNCITRAL, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005
- *Glamis Gold, Ltd. v The United States of America,* UNCITRAL, Submission of Non-Disputing Party Quechan Indian Nation, 16 October 2006
- *Glamis Gold, Ltd. v The United States of America,* UNCITRAL, Award, 8 June 2009, 48 ILM (2009) 1038
- *Grand River Enterprises Six Nations, Ltd., et al. v United States of America,* UNCITRAL, Award, 12 January 2011
- *Hesham T. M. Al Warraq v Republic of Indonesia,* UNCITRAL, Final Award, 15 December 2014
- *Methanex Corporation v United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae', 15 January 2001
- *Methanex Corporation v United States of America,* UNCITRAL, Amended Statement of Defense of Respondent United States of America, 5 December 2003
- *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005
- *Saluka Investments B.V v The Czech Republic,* UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004
- *Saluka Investments B.V v The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006, 15 ICSID Report 274

E. UN Documents and Reports

- Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Respect to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003)
- International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf (accessed on 9 August 2017)
- International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc. A/CN.4/L.682 (13 April 2006)
- OHCHR, 'Principles for Responsible Contracts: Integrating the management of human rights risks into State-investor contracts: Guidance for Negotiators' (2015) available at http://www.ohchr.org/Documents/Publications/Principles_ResponsibleContracts_HR_PUB_15_1_EN.pdf (accessed on 19 July 2017)
- Ruggie, J., 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse', UN Doc. A/HRC/8/5/Add.2 (23 May 2008)
- Ruggie, J., 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, 'Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators'', UN Doc. A/HRC/17/31/Add.3 (25 May 2011)
- Ruggie, J., 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights', U.N. Doc. E/CN.4/2005/91 (15 February 2005)
- Ruggie, J., UNGA Human Rights Council, Eight session 'Protect, Respect and Remedy: a Framework for Business and Human Rights', UN Doc. A/HRC/8/5 (7 April 2008)

F. Legislation

- Modern Slavery Act 2015 (UK) available at http://www.legislation.gov.uk/ukpga/2015/30/contents (accessed on 10 August 2017)

• Promotion and Protection of Investment Bill (Republic of South Africa) (1 November 2013) available at http://www.gov.za/sites/www.gov.za/files/36995_gen1087.pdf (accessed on 19 July 2017)

G. OTHER

• 'Investor Statement in Support of the Guiding Principles on Business and Human Rights' (May 2011) available at https://business-humanrights.org/sites/default/files/media/documents/ruggie/investor-statement-re-guiding-principles-2011-may-20.pdf (accessed on 11 August 2017)
• OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (21 November 1997) available at http://www.oecd.org/corruption/oecdantibriberyconvention.htm (accessed on 13 August 2017)
• OECD *Guidelines for Multinational Enterprises* (25 May 2011) available at http://mneguidelines.oecd.org/guidelines/ (accessed on 13 August 2017)

H. ONLINE PUBLICATIONS

• Australian Human Rights Commission and Ernst & Young Australia, 'Human Rights in Investment: The Value of Considering Human Rights in ESG Due Diligence' (2017) available at www.humanrights.gov.au/about/publications (accessed on 31 July 2017)
• BTC Human Rights Undertaking (22 September 2003) available at <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf> (accessed on 12 July 2017)
• Business and Human Rights Resource Centre, 'Biwater-Tanzania arbitration' (18 February 2014) available at https://business-humanrights.org/en/biwater-tanzania-arbitration (accessed on 15 July 2017)
• Choudhury, B., '2015: The Year of Reorienting International Investment Law' (2016) 20(3) *ASIL Insights* available at https://www.asil.org/insights/volume/20/issue/3/2015-year-reorienting-international-investment-law#_edn11 (accessed on 4 August 2017)
• Freshfields Bruckhaus Deringer, 'Human rights and the general counsel' (July 2017) available at http://businessandsociety.freshfields.com/humanrights (accessed on 1 Aug 2017)
• Friends of the Earth International, 'UN Treaty on transnational corporations and human rights progressing' (13 March 2017) available at http://www.foei.org/news/un-treaty-transnational-corporations-human-rights-progressing (accessed on 12 July 2017)

- The Guardian, 'The UK's new slavery laws explained: what do they mean for business?' (14 December 2015) available at https://www.theguardian.com/sustainable-business/2015/dec/14/modern-slavery-act-explained-business-responsibility-supply-chain (accessed on 7 August 2017)
- Herbert Smith Freehills, 'South Africa terminates its bilateral investment treaty with Spain: Second BIT terminated, as part of South Africa's planned review of its investment treaties' (21 August 2013) available at http://hsfnotes.com/arbitration/2013/08/21/south-africa-terminates-its-bilateral-investment-treaty-with-spain-second-bit-terminated-as-part-of-south-africas-planned-review-of-its-investment-treaties/ (accessed on 14 July 2017)
- Herbert Smith Freehills, 'Urbaser v Argentina and Burlington v Ecuador: Investment arbitration is not over the counterclaims yet' (14 March 2017) available at http://hsfnotes.com/arbitration/2017/03/14/urbaser-v-argentina-and-burlington-v-ecuador-investment-arbitration-is-not-over-the-counterclaims-yet/ (accessed on 19 July 2017)
- Human Rights and Business Dilemmas Forum, 'Stabilisation Clauses' available at http://hrbdf.org/case_studies/stabilisation-clauses/#.WWZavYHRbqA (accessed on 12 July 2017)
- Kalicki, J. E., 'Counterclaims by States in Investment Arbitration' (14 January 2013) *Investment Treaty News, International Institute for Sustainable Development,* available at https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/ (accessed on 21 July 2017)
- Norton Rose Fulbright, 'South Africa's Changing Approach to Investment Protection' (April 2015) available at http://www.nortonrosefulbright.com/knowledge/publications/127737/south-africas-changing-approach-to-investment-protection (accessed on 21 July 2017)
- Vis-Dunbar, D., 'Norway shelves its draft model bilateral investment treaty' (8 June 2009) *Investment Treaty News, International Institute for Sustainable Development*, available at https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/ (accessed on 4 August 2017)
- Whitsitt, E., & Vis-Dunbar, D., 'Glamis Gold Ltd. v. United States of America: Tribunal sets a high bar for establishing breach of "Fair and Equitable Treatment" under NAFTA' (15 July 2009) *Investment Treaty News, International Institute for Sustainable Development,* available at https://www.iisd.org/itn/2009/07/14/glamis-gold-ltd-v-united-states-of-america-tribunal-sets-a-high-bar-for-establishing-breach-of-fair-and-equitable-treatment-under-nafta/ (accessed on 14 July 2017)

ABSTRACT

This thesis analyses the increasing role of human rights in investment arbitration and the likely implications it may have on investors and investment law. The first two chapters explore how the historical and structural aspects of investment law and investment treaties, as well as the accountability gap of corporations, has contributed to a rise in human rights arguments by host states. The thesis draws on previous case law to illustrate the various ways in which host states have attempted to rely on human rights arguments in arbitration proceedings, and the approaches taken by tribunals in response to such arguments. In doing so, it highlights the theoretical underpinnings for the inclusion of human rights in investment law, and considers the growing potential for host state counterclaims and *amicus curiae* participation. The final two chapters address the challenges and potentials for investors and investment law. The thesis ultimately argues that, whilst human rights may threaten the logic of investment law, this is counteracted by the benefits of systemic integration, which can increase the legitimacy of international law in civil society and lead to stronger human rights compliance.

ABSTRAKT

Diese Arbeit analysiert die zunehmende Rolle der Menschenrechte bei Investitionsschiedsverfahren und ihre möglichen Auswirkungen auf Investoren und das Investitionsrecht. Die ersten beiden Kapitel untersuchen, wie historische und strukturelle Aspekte von Investitionsrecht und Investitionsabkommen sowie die Rechenschaftslücke von Unternehmen zu einem Anstieg von Menschenrechtsargumenten in Aufnahmestaaten beigetragen haben. Die Arbeit bezieht sich auf vergangenes Fallrecht, um die unterschiedlichen Wege zu verdeutlichen, auf welchen Aufnahmestaaten versucht haben, sich in Schiedsverfahren auf Menschenrechte zu stützen, sowie die Haltungen von Tribunalen, die als Antwort auf derartige Argumente eingenommen wurden. Dabei werden die theoretischen Grundlagen für die Einbeziehung von Menschenrechten in das Investitionsrecht hervorgehoben und das wachsende Potential staatlicher Gegenansprüche und einer *amicus curiae*-Beteiligung erwogen. Die beiden letzten Kapitel befassen sich mit den Herausforderungen und dem Potential für Investoren und das Investitionsrecht. Das Hauptargument dieser Arbeit lautet letztendlich, dass die Vorteile systemischer Integration, welche die Legitimität des Völkerrechts in der Zivilgesellschaft erhöhen und zu einer stärkeren Einhaltung von Menschenrechten führen kann, der potentiellen Gefährdung der Logik des Investitionsrechts durch die Menschenrechte entgegenwirken.