1. Human rights and international investment law*

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1. INTRODUCTION

Human rights related issues have played a role in various contexts of investment proceedings.¹ This chapter first reflects upon the requirements

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¹ On this issue see eg: P-M Dupuy and J E Viñuales, ‘Human Rights and Investment Disciplines: Integration in Progress’ in M Bungenberg et al. (eds), *International Investment Law* (Nomos 2015) 1739; U Kriebaum (ed), *Transnational Dispute Management: Special Issue TDM 1* (2013) – Aligning Human Rights and Investment Protection; 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 World Investment & Trade* 349; Y Radi, ‘Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox’ (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 1107; M W Sheffer, ‘Bilateral Investment Treaties: A Friend or Foe to Human Rights?’ (2011) 39 *Denver Journal of International Law and Policy* 483; A Faruque, ‘Mapping the Relationship Between Investment Protection and Human Rights’ (2010) 11 *The Journal of World Investment and Trade* 539; O De Schutter, ‘Foreign Direct Investment, Human Development and Human Rights: Framing the Issues’ (2009) 3(2) *Human Rights & International Legal Discourse* 137; P-M Dupuy et al. (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009); B Simma and T Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology’ in C Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 678; U Kriebaum, ‘Human Rights of the Population of the Host State in International Investment Arbitration’ (2009) 10 *The Journal of World Investment and Trade* 653; U Kriebaum, *Eigentumsschutz im Völkerrecht, Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (Duncker & Humblot 2008); J D Fry, ‘International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity’ (2007) 18 *Duke Journal of Comparative & International Law* 77; L Liberti, ‘Investissement et droits de l’homme’ in P Kahn and T W Wälde

for the application of human rights law in investment disputes. It then focuses on four different constellations to discuss the relationship between human rights and international investment law. First, it addresses cases involving allegations that the human rights of the investor have been violated in the context of State interference with an investment. Second, it discusses cases involving allegations that the investor's actions have violated human rights of the host State population. Third, it analyses the implications of host States amending their legislation to better comply with human rights obligations. Finally, it analyses cases where the host State invokes human rights to justify non-compliance with investment protection provisions during an economic crisis.

2. GENERAL REMARKS

Whether an investment tribunal can apply human rights law depends both on the relevant jurisdictional clause and the applicable law. The decisive factor in determining the jurisdiction of a given tribunal is the particular wording of an applicable compromissory clause contained in a relevant investment protection treaty or investment contract. These clauses vary. In some cases, jurisdiction is restricted to violations of the treaty (most often a bilateral investment treaty (BIT)) containing the jurisdiction clause. Frequently, such clauses even restrict jurisdiction to claims by investors and exclude the possibility of a host State suing an investor.² By contrast, other treaties such as the Norway/Lithuania BIT contain wider clauses covering '[a]ny dispute which may arise between an Investor of one Contracting Party and the other Contracting Party in connection with

(eds), *Les aspects nouveaux du droit des investissements internationaux* (2007 Brill) 791; U Kriebaum, 'Privatizing Human Rights, The Interface between International Investment Protection and Human Rights' in A Reinisch and U Kriebaum (eds), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (Eleven 2007) 165.

² Agreement Between the Government of Canada and the Government of the Eastern Republic of Uruguay for the Promotion and Protection of Investments (adopted 29 October 1997, entered into force 2 June 1999), art 12: 'Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a *claim by the investor* that a measure taken or not taken by the former Contracting Party *is in breach of this Agreement*, and that the investor has incurred loss or damage by reason of, or arising out of, that breach ...' (emphasis added) (Canada/Uruguay BIT).

an investment ...'.³ Such clauses would also cover disputes involving human rights violations if and to the extent that they are connected to an investment. As a result, tribunals must decide on a case-by-case basis whether and how far they can look at a particular human rights problem. In addition to the relevant jurisdictional clause, the applicable law also determines if and to what extent an investment tribunal may take human rights law into account.

Typical choice-of-law clauses include references to international law, covering treaties and customary law as well as national law.^{4,5} Human rights law may be applicable as a component of international law.⁶ This particularly applies to human rights treaties in force between a host State and an investor's home State. Where such are not in effect, it must be established that a particular human rights norm constitutes customary international law.

Human rights norms may also be applicable as an element of local law.⁷

³ Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Lithuania on the Promotion and Mutual Protection of Investments (adopted 16 June 1992, entered into force 20 December 1992), art IX (emphasis added) (Norway/Lithuania BIT).

⁴ See eg Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Argentine Republic (adopted 20 October 1992, entered into force 1 October 1994), art 10(7): 'The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable' (Netherlands/Argentina BIT).

⁵ T Begic, *Applicable Law in International Investment Disputes* (Eleven International Publishing 2005); C Schreuer, L Malintoppi, A Reinisch and A Sinclair, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009), art 42.

⁶ The Report of the Executive Directors on the ICSID Convention reads as follows in para 40: '... The term "international law" shall be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice'. This reference to Article 38 of the Statute of the ICJ shows that ICSID tribunals are to apply the full range of sources of international law. Schreuer, Malintoppi, Reinisch, Sinclair (n 5), 169–203; E Gaillard and Y Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in ICSID Choice of Law Process' (2003) 18 *ICSID Review – Foreign Investment Law Journal* 375, 348, 397.

⁷ Dupuy et al. (eds) (n 1), 59ff.

A further possibility for taking human rights into consideration when deciding whether an investment obligation has been breached are the principles of treaty interpretation as provided for in the Vienna Convention on the Law of Treaties (VCLT).⁸ Article 31(3)(c) VCLT requires that in the interpretation of a treaty '[t]here shall be taken into account, together with the context: ... any relevant rules of international law applicable in the relations between the parties'.⁹

It is disputed whether human rights norms represent such relevant rules in the context of the interpretation of investment protection treaties. Moreover, it is not entirely clear what 'applicable in the relations between the parties' means in an investor-State arbitration context.¹⁰ In any event, human rights norms will be relevant to the interpretation of an investment protection treaty, if its preamble refers to such rules. The same applies if both States parties to a bilateral investment treaty conferring jurisdiction upon a tribunal are also parties to a particular human rights treaty.¹¹ The situation is more problematic in the context of

⁸ See on this issue Simma and Kill (n 1).

⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT 1969), art 31(3)(c).

¹⁰ See eg Simma and Kill (n 1) 678–707; T Waelde, 'Interpreting Investment Treaties: Experience and Examples' in Binder et al. (eds) (n 1) 772–75; C McLachlan, 'The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279; R Gardiner, *Treaty Interpretation* (OUP 2008) 260–75; C McLachlan, 'Investment Treaties and General International Law' (2008) 57(2) *International and Comparative Law Quarterly* 361; ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, paras 410–80 (hereafter ILC Report on Fragmentation); *Oil Platforms case (Iran v United States of America)* (Merits) [2003] ICJ Rep 19, para 41, '[m]oreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (art 31 para 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force'. But see also Separate Opinion of Judge Buergenthal, paras 22–23 and Separate Opinion of Judge Higgins, paras 45–46, '[t]he application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by ... the 1955 Treaty'.

¹¹ ILC Report on Fragmentation (n 10), para 472. Simma and Kill refer furthermore to the concept of *erga omnes* obligations, see Simma and Kill (n 1),

regional investment protection treaties such as the North American Free Trade Agreement (NAFTA) or the Energy Charter Treaty (ECT). The question arises whether all parties to such regional treaties must also be parties to a given human rights treaty for it to be relied upon. There is no uniform answer to this question.¹²

At any rate, human rights norms may influence the meaning of the terms and provisions of an investment treaty through treaty interpretation. They can be of importance, for example, in determining the meaning of the fair and equitable treatment standard,¹³ or a full protection and security clause,¹⁴ with regard to decisions on direct or indirect expropriation,¹⁵ or when attempting to define an international

701; B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250(6) *Recueil des Cours* 216, 221, 293–321.

¹² See ILC Report on Fragmentation (n 10), paras 470–72; J Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003, vol 2), 257–63; McLachlan, 'The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention' (n 10), 313–15; M E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009), 433 para 25.

¹³ See eg S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 *British Yearbook of International Law* 99; P Dumberry, 'The Quest to Define "Fair and Equitable Treatment" for Investors under International Law: The Case of the NAFTA Chapter 11 Pope & Talbot Awards' (2002) 3 *The Journal of World Investment and Trade* 657; C Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *The Journal of World Investment and Trade* 357; B Choudhury, 'Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law' (2005) 6 *The Journal of World Investment and Trade* 297; R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 130–60; more generally, I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008).

¹⁴ Dolzer and Schreuer (n 13), 160–65.

¹⁵ Ibid, 98–129; C McLachlan, L Shore and M Weininger, *International Investment Arbitration* (OUP 2007), 290–97. On indirect expropriation see eg V Lowe, 'Regulation or Expropriation?' (2002) 55 *Current Legal Problems* 447; R Dolzer, 'Indirect Expropriations: New Developments?' (2003) 11 *New York University Environmental Law Journal* 64; W M Reisman and R D Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2003) 74 *British Yearbook of International Law* 115; G H Sampliner, 'Arbitration of Expropriation Cases Under U.S. Investment Treaties – A Threat to Democracy or the Dog That Didn't Bark?' (2003) 18 *ICSID Review – Foreign Investment Law Journal* 1; J Paulsson and Z Douglas, 'Indirect Expropriation in Investment Treaty Arbitration' in N Horn and S Kröll (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (Kluwer Law International 2004); L Y Fortier and S L Drymer, 'Indirect Expropriation in the Law of International

minimum standard.¹⁶ Additionally, human rights considerations can find their way into investment law through the concept of ‘legitimate expectations’, which plays a role in all protection standards.

To illustrate and elaborate on these considerations, they will be examined in the context of the following four constellations:

- Constellation 1: The human rights of the investor are violated in the context of State interference with an investment.
- Constellation 2: The investor’s actions violate human rights of the host State population.
- Constellation 3: The host State amends its legislation to better comply with human rights obligations.
- Constellation 4: The host State invokes human rights to derogate from investment protection provisions during an economic crisis.

3. CONSTELLATION 1: THE HUMAN RIGHTS OF THE INVESTOR

So far, human rights have rarely been invoked by investors before investment tribunals. When they have been, some tribunals have adopted a very restrictive approach. In *Biloune v Ghana*,¹⁷ the claimant alleged that he had been subjected to expropriation, denial of justice and human

Investment: I Know It When I See It, or Caveat Investor’ (2004) 19 *ICSID Review – Foreign Investment Law Journal* 293; D Clough, ‘Regulatory Expropriations and Compensation under NAFTA’ (2005) 6 *The Journal of World Investment and Trade* 553; A Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’ (2005) 20 *ICSID Review – Foreign Investment Law Journal* 1; U Kriebaum, ‘Regulatory Takings: Balancing the Interests of the Investor and the State’ (2007) 8 *The Journal of World Investment and Trade* 717; U Kriebaum, *Eigentumsschutz im Völkerrecht, Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (n 1); U Kriebaum, ‘Expropriation’ in Bungenberg et al. (eds) (n 1).

¹⁶ A Falsafi, ‘The International Minimum Standard of Treatment of Foreign Investor’s Property: A Contingent Standard’ (2007) 30 *Suffolk Transnational Law Review* 317.

¹⁷ *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability (1994) 95 ILR 184, 203.

rights violations, as well as arbitrary detention and deportation. Ghana is obviously not a State party to the European Convention on Human Rights and at the time was a party neither to the African Charter nor the UN Covenant on Civil and Political Rights. Lacking a separate forum for his human rights related claims, Mr. Biloune turned to an investment tribunal.

Even though all human-rights-based claims were brought in addition to investment-based ones, the Tribunal declared that it lacked jurisdiction to examine the alleged violations of the investor's human rights in the context of an investment dispute.¹⁸ However, it did not exclude the possible relevance of human rights violations when considering violations of the investment contract.

Although embedded in a treaty framework more conducive to human rights-related grievances, the tribunal in *Rompetrol*¹⁹ adopted a similarly restrictive approach towards the applicability of human rights law in an investment context. Both the home State of the investor, the Netherlands, and the host State, Romania, were already parties to the European Convention on Human Rights at the time of the dispute. The jurisdictional clause in the Netherlands/Romania BIT does not limit a competent tribunal's jurisdiction to breaches of the treaty's standards, but refers to

¹⁸ 'Arrest, detention without charge and deportation'. Ibid, '... contemporary international law recognizes that all individuals ... are entitled to fundamental human rights ... which no government may violate. Nevertheless, it does not follow that this Tribunal is competent to pass upon every type of departure from the minimum standard to which foreign nationals are entitled, or that this Tribunal is authorized to deal with allegations of violations of fundamental human rights. This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes "in respect of" foreign investment. Thus, other matters ... are outside this Tribunal's jurisdiction. ... while the acts alleged to violate the international human rights of Mr. Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.'

¹⁹ *Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3) Award (6 May 2013). On the award, see U Kriebaum, 'The Rompetrol Group N.V. v. Romania' (2014) 15 *The Journal of World Investment and Trade* 1020.

‘solving disputes with respect to investments’ in general.²⁰ In principle, this wording would also cover disputes arising out of violations of investors’ rights under the ECHR. Given that Article 42(1) of the ICSID Convention refers to ‘such rules of international law as may be applicable’, the provision would permit application of the ECHR, if a violation were directly related to a legal dispute arising out of an investment. The fact that the European Court of Human Rights is competent to interpret the Convention, would not exclude other organs from determining whether it had been breached.

Nevertheless, the Tribunal expressed a general refusal to decide ‘any issue under the ECHR whether the issue in question lies in the past or is still open’.²¹ The Tribunal saw ‘its function [as] solely to decide, as between TRG and Romania, “*legal dispute[s] arising directly out of an investment*” and to do so in accordance with “*such rules of law as may be agreed by the parties*”’.²² These were understood to be essentially limited to the BIT, together with the appropriate rules for its interpretation.²³ Despite the Tribunal’s refusal to issue an opinion on a violation of the Convention in the context of the investment dispute, it did not rule out the possibility of resorting to the ECHR for interpretative purposes.²⁴

Other tribunals have chosen a different approach and integrated human rights into their reasoning. In *Micula v Romania*,²⁵ a natural person’s right to a nationality under Article 15 of the Universal Declaration of Human Rights (UDHR) was taken into account. The Tribunal was faced with the question of whether a nationality which was properly obtained could fade away by lack of an ongoing effective link. In its decision on

²⁰ Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Kingdom of the Netherlands and the Government of Romania (Netherlands/Romania BIT) (adopted 27 October 1983, entered into force 1 February 1995), art 8(1).

²¹ *Rompetrol Group NV v Romania* (n 19), para 170.

²² *Idem* (original italics, notes omitted).

²³ *Idem*.

²⁴ *Ibid*, para 172.

²⁵ *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania* (ICSID Case No ARB/05/20) Decision on Jurisdiction (24 September 2008) (*Micula v Romania*).

jurisdiction, the Tribunal mentioned the 'right to a nationality' under the UDHR²⁶ as one of several grounds for upholding it.²⁷

The *Al-Warraq v Indonesia* case concerned the bailout of a bank. Indonesian courts found the investor guilty of contributing to the bank's collapse and convicted him of corruption and money laundering in absentia without providing him with the possibility of participating in the criminal proceedings. Finding that a denial of justice and a violation of the fair and equitable treatment standard had occurred, the Tribunal took Article 14 ICCPR into account, which guarantees a fair trial in criminal proceedings.²⁸

From a legitimacy perspective on international investment law, it is of utmost importance that international law be viewed as a coherent system of norms and not as fragmented into various branches. Systemic integration of the various branches of international law, as opposed to applying international investment law in isolation, bears the potential to solve many of the problems which arise in the context of the interaction between various international non-investment obligations and international investment law itself.²⁹ Consequently, whenever the breadth of a jurisdictional clause permits, human rights claims, which arise directly out of an investment should be considered by tribunals.

²⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 15(1) 'Everyone has a right to a nationality', art 15(2) 'No one shall be arbitrarily deprived of his nationality'.

²⁷ *Micula v Romania* (n 25), para 88.

²⁸ *Hesham Talaat M Al-Warraq v Indonesia*, Final Award (15 December 2014), paras 556–605.

²⁹ On the issue of fragmentation of international law, see ILC Report on Fragmentation (n 10); UN General Assembly, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law' UN GAOR 55th Session UN Doc A/CN.4/L.702 (2006). See also M Hirsch, 'Interactions between Investment and Non-Investment Obligations' in P Muchlinski et al. (eds), *Oxford Handbook of International Investment Law* (OUP 2008); C Schreuer and U Kriebaum, 'From Individual to Community Interest in International Investment Law' in U Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011).

4. THE HUMAN RIGHTS OF THE HOST STATE POPULATION

4.1 Constellation 2: The Investor's Actions Violate the Human Rights of the Host State Population

There are many ways in which an investor might abuse human rights. If not corrected by the host State, such failure may constitute a human rights violation of its own.³⁰ For instance, human rights-sensitive situations could arise in the context of security measures taken for the purpose of protecting installations, employment issues causing allegations of forced labour, or the defective performance of water supply contracts.

In situations where States act as co-perpetrators of human rights violations, or simply passive bystanders that tolerate human rights abuses by investors and fail to interfere with their operations, neither an investor, who committed human rights abuse, nor a State, that failed to prevent it, are likely to invoke human rights. As a result, investor-State dispute settlement (ISDS) cannot serve as a substitute for Corporate Social Responsibility or proper human rights protection by the host State.

In the famous *Ogoni* case against Nigeria³¹ before the African Commission on Human Rights, the State was found to have acted as a co-perpetrator. The African Commission came to the conclusion that Nigeria and private actors, namely an oil consortium that included Shell, had violated human rights, including the right to life.³²

³⁰ O De Schutter, *International Human Rights Law* (CUP 2010), 365ff; for an overview of cases posted on the Business and Human Rights Resource Center web page from February 2005 to December 2007, see John 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' (23 May 2003) UN Doc A/HRC/8/5/Add.2; see further eg, *John Doe I v Unocal*, 395 F Supp 3d 932 (9 Cir 2002) (US Court of Appeals); *Wiwa v Royal Dutch Petroleum Co*, 226 F Supp 3d 88 (2d Cir 2000); African Commission on Human and Peoples' Rights, 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights Communication 155/96 (13 to 27 October 2001).

³¹ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (n 30).

³² *Ibid*, para 67, the African Commission on Human Rights states, '[g]iven the wide spread violations perpetrated by the Government of Nigeria and by

In situations where States intervene to rectify what would have otherwise constituted a human rights violation, tribunals have two options in terms of how to approach the situation. The first option involves the ‘clean hands’ principle: Some treaties provide that investments must be made ‘in accordance with Host State law’.^{33,34} Thus,

private actors (be it following its clear blessing or not), the most fundamental of all human rights, the right to life has been violated’.

³³ See eg Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (Germany/Philippines BIT) (adopted 18 April 1997, entered into force 1 February 2000), art 1: ‘For the purpose of this Agreement: 1. the term “investment” shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State ...’. Agreement between the Government of the People’s Republic of Bulgaria and the Government of the People’s Republic of China concerning the Reciprocal Encouragement and Protection of Investments (Bulgaria/China BIT) (adopted 27 June 1989, entered into force 21 August 1994) art 1(1): ‘The term “investments” means property values and rights made as investment in accordance with the laws and regulations of the Contracting State accepting the investment in its territory’. Agreement between the Government of the Republic of Italy and the Government of the People’s Republic of Bangladesh on the Promotion and Protection of Investments (Bangladesh/Italy BIT) (adopted 20 March 1990, entered into force 20 September 1994) art 1(1): ‘The term “investment” shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other in conformity with the laws and regulations of the latter’. Agreement for the Promotion and Reciprocal Protection of Investments (Spain/Ecuador BIT) (adopted 26 June 1996, entered into force 18 June 1997), art 2: ‘Each Contracting Party ... will admit Investment according to its legal provisions. The present Article will also apply to investments made before its entry into force by investors of a Contracting Party in accordance with the laws of the other Contracting Party in the territory of the latter ...’, art 3: ‘... Each Contracting Party shall protect in its territory the investments made, in accordance with its legislation ...’ (courtesy translation from Spanish). Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia (Netherlands/Bolivia BIT) (adopted 10 March 1992, entered into force 1 November 1994, terminated 1 November 2009), art 2: ‘Either Contracting Party shall, within the framework of its law and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments’.

³⁴ On these clauses see eg A Carlevaris, ‘The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals’ (2008) 9 *The Journal of World Investment and Trade* 35; C Knahr, ‘Investments

human rights abuses in breach of host State law may lead to loss of investment protection. Tribunals have found that where BITs contained such clauses, investments in serious violation of host State law did not enjoy the protection of the applicable treaty.³⁵

In *Phoenix Action v Czech Republic*,³⁶ an ICSID tribunal stated obiter:

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 human rights, like investments in pursuance of torture or genocide or in support of slavery or trafficking of human organs.³⁷

“in Accordance with Host State Law” (2007) 4(5) *Transnational Dispute Management* available at <<https://www.transnational-dispute-management.com/article.asp?key=1070>>; U Kriebaum, ‘Illegal Investments’ in Christian Klaus-egger et al. (eds), *Austrian Arbitration Yearbook* (Manz’sche Verlags und Universitätsbuchhandlung 2010); R Moloo and A Khachaturian, ‘The Compliance with the Law Requirement in International Investment Law’ (2011) 34 *Fordham International Law Journal* 1473.

³⁵ See eg *Fraport AG Frankfurt Airport Services Worldwide v Philippines* (ICSID Case No ARB/03/25) Award (16 August 2007), para 401; *Inceysa Vallisoletana S L v Republic of El Salvador* (ICSID Case No ARB/03/26) Award (2 August 2006), paras 203–207, 239, 257, 339; *Alasdair Ross Anderson et al. v Costa Rica* (ICSID Case No ARB(AF)/07/3) Award (19 May 2010), paras 50, 53, 58, 59; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No ARB/07/24) Award (18 June 2010), paras 123–26, 138 (*Hamester v Ghana*); *Saba Fakes v Republic of Turkey* (ICSID Case No ARB/07/20) Award (14 July 2010), para 115; *Quiborax S A, Non Metallic Minerals S A and Allan Fosk Kaplún v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) Decision on Jurisdiction (27 September 2012), paras 255, 282; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines [II]* (ICSID Case No ARB/11/12) Award (10 December 2014), para 328; *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S A v Republic of Albania* (ICSID Case No ARB/11/24) Award (30 March 2015). But it appears that, even without a treaty provision of this kind, tribunals will refuse to afford protection to investments that are contrary to host State law. See eg *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No ARB/03/24) Award (27 August 2008), para 138 confirmed by *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No ARB/07/24) Award (18 June 2010), para 124; *SAUR International S A v Republic of Argentina* (ICSID Case No ARB/04/4) Award (6 June 2012), para 308; *Veteran Petroleum Limited (Cyprus) v Russian Federation* (PCA Case No AA 228) Final Award (18 July 2014), paras 1349–52.

³⁶ *Phoenix Action Ltd v Czech Republic* (ICSID Case No ARB/06/5) Award (15 April 2009).

³⁷ *Ibid.*, para 78.

Tribunals have generally held that investments do not enjoy protection if in violation of host State law at the time of investment.³⁸ This means that the ‘clean hands’ principle cannot operate where an investment that was initially performed legally subsequently involves practices that violate human rights.

To ensure that investment protection remains contingent upon compliance with human rights obligations throughout an investment’s lifetime, States may choose wording such as that included in Article 2(2) of the China/Malta BIT 2009: ‘Investments of either Contracting Party shall be made, and shall, for their whole duration, continuously be in line with the respective domestic laws’. Adding a reference to certain international standards, including those of human rights, could strengthen such provisions. This would render the protection of an investment conditional upon the continuous observance of human rights. Investments that were initially made legally but would subsequently involve practices that violate human rights would thus not be protected from appropriate host State measures.

For a denial of jurisdiction the reference point would have to be the legal order as it stood at the time of the investment. Violations of amended norms touching upon human rights should however be taken into consideration at the merits stage.

The second option for a tribunal to approach human rights abuses by an investor is to deny the existence of a violation of substantive standards by the host State. This option is best applied where an investor has acted in a way that triggers the duty of the host State to fulfil its human rights obligations by offering protection against private action. The award in *Biwater Gauff v Tanzania*³⁹ is an example of such an approach. The Tribunal held that terminating the applicable investment agreement due to the investor’s poor performance neither constituted a breach of contract nor amounted to a violation of the fair and equitable treatment (FET) standard. The very purpose of the contract – and its termination – was to ensure the right to water of the local population although Tanzania did not refer explicitly to the concept of human rights.

In *Biwater Gauff* a number of other measures by the State led to findings of violations of the BIT. The occupation of the claimant’s local facilities, usurpation of management control and deportation of senior managers by the State during the termination period, did amount to

³⁸ See eg *Veteran Petroleum Limited (Cyprus) v Russian Federation* (n 35), paras 1354–56.

³⁹ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (ICSID Case No ARB/05/22) Award (24 July 2008), paras 434, 814.

expropriation and violations of FET.⁴⁰ Yet, no damages were granted, given that the investment no longer had any value at the time the breaches occurred, as the legitimate termination of the contract had already been under way.⁴¹

In *Urbaser v Argentina*,⁴² Argentina explicitly relied on human rights norms to defend its interferences with investor rights. The dispute arose in the context of Argentina's financial crisis in 2001–2002. The claimant was a shareholder in a concessionaire that provided water and sewage services in the Province of Buenos Aires. The investor never invested to the extent provided for in the concession contract in the expansion of services. Urbaser argued that a number of measures adopted by the province of Buenos Aires had made a profitable operation of its concession impossible. Furthermore, it claimed that the Province had conducted renegotiations of the concession in a manner that led to its termination in 2006 because it wanted to return utility concessions to the State. Argentina argued that the investment had failed not as a consequence of its measures to cope with the financial crises ('pesification', tariff freezes) but because of the shareholders' deficient management and failure to fulfil obligations under the concession agreement.

The Tribunal took Argentina's human rights obligations into account when interpreting the FET provision of the Argentina-Spain BIT. With regard to the human right to water, it made several important findings. Concerning the compatibility of human rights and investment law obligations, the Tribunal decided that the State had to fulfil both of them simultaneously:

720. ... These are its obligations regarding the population's right to water, and its obligations towards international investors. The Argentine Republic can and should fulfil both kinds of obligations simultaneously. In so doing, the obligations resulting from the human right to water do not operate as an obstacle to the fulfilment of its obligations towards the Claimants.⁴³

It held that the Province had to guarantee the continuation of the basic water supply and that this universal basic human right was a component of the framework of the claimant's legitimate expectations.⁴⁴

⁴⁰ Ibid, para 814.

⁴¹ Ibid, para 792.

⁴² *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic* (ICSID Case No ARB/07/26) Award (8 December 2016) (*Urbaser S.A. v Argentine Republic*).

⁴³ Ibid, para 720.

⁴⁴ Ibid, paras 623–24.

624. ... [The] Respondent rightly recalls that the Province had to guarantee the continuation of the basic water supply to millions of Argentines. The protection of this *universal basic human right* constitutes the *framework* within which Claimants should frame their *expectations*.⁴⁵

Given the major impact of the emergency measures on the investment, the Tribunal found the measures viewed in isolation would have been in breach of the FET standard.⁴⁶ However, since the investment had already been struggling, it found the emergency measures were not the cause of the failure to meet the obligations under the concession. Therefore, it decided that the emergency measures *per se* did not cause a violation of the FET standard.⁴⁷ Furthermore, it found that the state of necessity defence was available to Argentina. The authorities only breached the FET provision of the BIT by engaging the investor in doomed renegotiations of the concession contract.⁴⁸ But since the concession had no future due to the failure of claimants to make the necessary investments, the Tribunal did not award any damages.⁴⁹

The *Urbaser* Tribunal went even one step further. Argentina had brought a counterclaim arguing that the concessionaire's failure to provide the necessary investment for the expansion of the network violated the investor's commitments and its obligations under international law based on the human right to water.⁵⁰

The Tribunal accepted jurisdiction for the counterclaim. It said *obiter* that investors can violate the human right to water by destroying access to water. Therefore, they have an obligation to abstain from such acts.⁵¹ However, the Tribunal found that the question of destruction of access did not arise in the instant case;⁵² rather the problem was one of an omission to establish connections.

The Tribunal based this finding of an 'obligation to abstain' on Article 30 of the Universal Declaration of Human Rights,⁵³ Article 5 of the

⁴⁵ Ibid, para 624 (emphasis added).

⁴⁶ Ibid, para 680.

⁴⁷ Ibid, paras 680–83.

⁴⁸ Ibid, paras 843–47.

⁴⁹ Ibid, paras 846, 847.

⁵⁰ Ibid, para 36.

⁵¹ Ibid, para 1210.

⁵² Idem.

⁵³ Art 30 of the Universal Declaration on Human Rights (n 26): 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'.

Covenant on Economic, Social and Cultural Rights,⁵⁴ and on Principle 8 of the International Labour Office's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (1977 as amended 2006^{55,56}).

Article 30 of the Universal Declaration of Human Rights as well as Article 5 of the Covenant on Economic, Social and Cultural Rights prevent reliance on rights contained in the Universal Declaration of Human Rights or the Covenant, respectively, to destroy other rights contained in the respective instrument.⁵⁷ However, they do not forestall reliance on another treaty. Specifically, they do not prevent an investor from relying on a BIT. The International Labour Office's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy is a soft law document that does not create binding obligations for corporations under international law. Therefore, it is doubtful whether these provisions can be used as a basis to establish a human rights obligation for investors to abstain from interfering with a population's right to water.

With regard to the issue at stake, namely a potential obligation under international law to create water connections and expand the network, the Tribunal found that under current international law there was no positive obligation for investors to provide access to water based on international human rights law. The acceptance of the bid and the concession contract

⁵⁴ Art 5 of the Covenant on Economic, Social and Cultural Rights: '1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant. 2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent', UN General Assembly Resolution 2200A (XXI) (1966).

⁵⁵ Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions, available at <http://www.ilo.org/wcmsp5/groups/public/-ed_emp/-emp_ent/-multi/documents/publication/wcms_094386.pdf>.

⁵⁶ *Urbaser S.A. v Argentine Republic* (n 42), paras 1196–99.

⁵⁷ E Guntrip, 'Urbaser v Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?', *EJIL Talk* (10 February 2017); on Article 5(1) CESCR, see B Saul, D Kinley and J Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (OUP 2014), 263ff.

could not create such an obligation under international law.⁵⁸ Therefore, the counterclaim failed on the merits.

As a result, the case serves as an example for a tribunal finding that measures undertaken by a State to protect its local population against human rights violations caused by an investor's conduct did not violate investment protection standards.

The *Urbaser* case has demonstrated that in cases where the jurisdictional clause and the applicable law allow for it, a tribunal may be prepared to accept jurisdiction for counterclaims based on human rights abuses by investors. The exact extent of the obligations incumbent upon the investors in this regard needs further analysis. It could for example be explored whether a successful counterclaim could be based on contractual obligations of the investor designed to implement the State's human rights obligations. For this purpose a wide jurisdictional clause covering any dispute arising out of an investment would be required and the contract would have to be part of the applicable law.

4.2 Constellation 3: The Host State Amends its Legislation to Better Comply with Human Rights Obligations

A further situation where human rights obligations may justify interference with investors' rights is the amendment of legislation to better comply with human rights obligations. Such legislation may relate to workers' rights, social security law, improvement of water resource-protection, or similar issues.

In a study published in 2014,⁵⁹ Cadel and Jensen demonstrate that of all ICSID decisions taken, 47% were associated with the conduct of ministries or agencies, while only 9% were the result of legislative acts. The study concludes:

Given the low rate of disputes involving legislative branch activity, arguments that investor-state arbitration may encroach on the legitimate prerogatives of domestic governments appear to be overstated. Instead, democratic legislatures should embrace investor-state arbitration as an additional check on executive behavior.⁶⁰

⁵⁸ *Urbaser S.A. v Argentine Republic* (n 42), para 1212.

⁵⁹ J Cadel and N M Jensen, 'Which Host Country Government Actors are Most Involved in Disputes with Foreign Investors?' (2014) 120 *Columbia FDI Perspectives* available at <<http://ccsi.columbia.edu/files/2013/10/No-120-Cadel-and-Jensen-FINAL-WEBSITE-version.pdf>>.

⁶⁰ *Idem*.

This perspective is reinforced by the fact that all NAFTA cases that did directly challenge legislative and regulatory acts have failed, resulting in the investor's defeat. Although those cases did concern such issues as a ban on a gasoline additive for the purpose of preserving a drinking water supply,⁶¹ required rehabilitation of mines to protect the environment and Native American rights,⁶² or the ban of a pesticide due to health and environmental effects,⁶³ human rights were not explicitly invoked by the respondent States in these cases.

In the *Foresti*⁶⁴ case, however, South Africa did invoke human rights by reference to the UN Convention against racial discrimination, as a justification for its interference with investor rights resulting from affirmative action policies aimed at overcoming the apartheid legacy. The case was, however, settled without a decision on the human rights issue.

*Clayton/Bilcon v Canada*⁶⁵ is a case that does not, strictly speaking, primarily concern human rights, but rather environmental issues. Still, it illustrates how tribunals may very carefully distinguish between legislative choices aimed at increasing domestic standards on the one hand and administrative bodies surprisingly modifying the implementation of legislation on the other. In that case the Tribunal found a violation of the minimum standard of treatment (the FET standard) in Article 1105 NAFTA and the national treatment standard of Article 1102 NAFTA. The case concerned a controversy over a proposed quarry and marine terminal project in the province of Nova Scotia. It turned on the decision of a Joint Review Panel (JRP), established pursuant to local environmental legislation that was tasked with providing a recommendation on whether or not to approve the quarry project. The claimants alleged that local officials

⁶¹ *Methanex v United States of America* (UNCITRAL Rules) Award (3 August 2005).

⁶² *Glamis Gold Ltd v United States of America* (UNCITRAL Rules) Award (8 June 2009).

⁶³ *Chemtura v Government of Canada* (UNCITRAL Rules) Award (2 August 2010).

⁶⁴ *Pietro Foresti, Laura De Carli, and Others v Republic of South Africa* (ICSID Case No ARB(AF)/07/01) Award (4 August 2010). For more information on the case see an article by the claimants' lawyers: M Coleman and K Williams, 'South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: A Fragmented Meeting?' (2008) 9 *Business Law International* 56; *Agri South Africa and Annis Mohr Van Rooyen v The Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) (6 March 2009) (South African High Court).

⁶⁵ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* (PCA Case No 2009-04) Award on Jurisdiction and Liability (17 March 2015).

had encouraged them to pursue an investment that landed them in a regulatory review process that was expensive and ‘in retrospect unwinnable from the outset’.⁶⁶ Although the majority of the Tribunal recognized a series of faults and shortcomings in the approach taken by the JRP with respect to its mandate, it emphasized that the outcome would have been different had the legislator chosen to set more demanding environmental standards. It stated that ‘the majority of the present Tribunal agrees with the concern of our colleague that a NAFTA tribunal must be sensitive to the need to avoid “regulatory chill”, including with respect to protection of the environment’⁶⁷ and ‘... under NAFTA, lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish ...’.⁶⁸ This award demonstrates that tribunals are careful not to unduly restrict the host State’s liberty to regulate. Such caution with regard to legislation certainly is not limited to environmental issues but also extends to questions of human rights.

To remove all doubt, it has become common practice to explicitly guarantee the right to regulate in investment protection treaties. Such guarantees do, of course, also cover regulatory acts aimed at improving implementation of human rights treaties. All of the texts negotiated by the European Commission contain such provisions. The same is true for all texts negotiated by Canada and the US, subsequent to the amendment of their model BITs in 2004.

These texts include the right to regulate within their definitions of expropriation. Accordingly, non-discriminatory measures of general application taken by a party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation, if they are necessary and proportionate.

For greater certainty, except in the rare circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, a non-discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation.⁶⁹

⁶⁶ Ibid, para 453.

⁶⁷ Ibid, para 737.

⁶⁸ Ibid, para 738.

⁶⁹ The texts are largely identical; the example was taken from the EU-Singapore Free Trade Agreement, annex 9-A Expropriation, available at <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3247>>.

The fact that the clause does not explicitly mention human rights is not an obstacle to its pertinent application, given that the listed examples of legitimate public policy objectives are not exhaustive. The choice of the words ‘such as’, removes any doubt that the implementation of human rights obligations constitutes a legitimate public policy objective and is, in principle, covered by the clause.

With a view to FET, there are only two requirements, namely ‘stability’ and ‘legitimate expectations’, that may pose problems in the context of legislative amendments that implement human rights obligations. In recent years, tribunals have become more restrictive when considering the stability aspect of fair and equitable treatment and have stressed the need for States to maintain their regulatory space.⁷⁰ Tribunals have stated that ‘the host State’s right to regulate domestic matters in the public interest has to be taken into consideration’. Moreover, a balance between the investor’s rights and the host State’s public interests had to be established.⁷¹

The recent Comprehensive Economic and Trade Agreement (CETA) text goes one step further and exhaustively lists all measures that trigger a violation of the FET standard: denial of justice, fundamental breaches

⁷⁰ See eg *Enron Corporation and Ponderosa Assets L P v Argentine Republic* (ICSID Case No ARB/01/3) Award (22 May 2007), para 261; *Parkerings v Lithuania* (ICSID Case No ARB/05/8) Award (11 September 2007), paras 327–38; *BG Group Plc v Republic of Argentina* Final Award (24 December 2007), para 298; *Plama v Bulgaria* (n 35), paras 177, 219; *Continental Casualty v Republic of Argentina* (ICSID Case No ARB/03/9) Award (5 September 2008), paras 258–61; *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Hungary* (ICSID Case No ARB/07/22) Award (23 September 2010), paras 9.3.27–9.3.29; *Impregilo v Republic of Argentina* (ICSID Case No ARB/07/17) Award (21 June 2011), paras 290–91; *El Paso Energy International Company v Republic of Argentina* (ICSID Case No ARB/03/15) Award (31 October 2011), paras 344–52, 365–74; *Mobil Investments Canada Inc & Murphy Oil Corporation v Canada* (ICSID Case No ARB(AF)/07/4) Decision on Liability and on Principles of Quantum (22 May 2012), para 153; *Ulysseas v Ecuador* (UNCITRAL Rules) Final Award (12 June 2012), paras 245–49.

⁷¹ See eg *Total S A v Republic of Argentina* (ICSID Case No ARB/04/01) Decision on Liability (27 December 2010), paras 123, 309. See also *Saluka Investments BV (The Netherlands) v Czech Republic* Partial Award (17 March 2006), para 306; *BG Group Plc v Argentina* (n 70), para 298; *Plama v Bulgaria* (n 35), para 177; *Lemire v Ukraine* (ICSID Case No ARB/06/18) Decision on Jurisdiction and Liability (14 January 2010), para 273; *El Paso Energy International Company v Republic of Argentina* (n 70), para 358.

of due process, manifest arbitrariness, targeted discrimination, and abusive treatment such as coercion, duress and harassment.⁷²

Interestingly, the definition does not include stability and merely permits tribunals to take investors' legitimate expectations into account under specific circumstances. Therefore, as a general rule, legislative measures seeking to improve implementation of human rights obligations will not lead to violations of the FET standard. It is very unlikely that a tribunal applying this text would consider bona fide regulatory measures that are designed to improve the human rights of the host State population as being in violation of an investment protection treaty.

What might be more problematic, are specific promises by States to investors which create legitimate expectations that might be relevant under the FET standard as well as with regard to expropriations. Such promises could be found in stabilization clauses in investment contracts or expressed unilaterally by an administration. Similar issues may arise where statutes guarantee a certain legal situation for a specific period of time.

Conflicts in this constellation can only be resolved, if States act with the necessary care when providing certain assurances. Pertinent problems are not generated by the BIT system or by investor-State arbitration itself, but rather emanate from such promises. Consequently, solutions may only be found at the origin of the issue. One approach to solve such issues would be the introduction of human rights impact assessments, taking place before States promise certain regulatory conditions.⁷³

4.3 Constellation 4: Human Rights are Invoked to Derogate from Investment Protection Provisions during Economic Crises

In *CMS*⁷⁴ and *Suez*,⁷⁵ Argentina attempted to invoke human rights as a defence in a situation of economic crisis which resulted in widespread unemployment and poverty. It contended that since the economic and

⁷² Comprehensive Economic and Trade Agreement (adopted 30 October 2016), art 8.10.2 (CETA).

⁷³ On such a proposal see B Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 *International and Comparative Law Quarterly* 573, 594–96.

⁷⁴ *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No ARB/01/8) Award (12 May 2005).

⁷⁵ *Suez, Sociedad General de Aguas de Barcelona S A, and InterAgua Servicios Integrales del Agua S A v Argentina* (ICSID Case No ARB/03/17) Decision on Liability (30 July 2010).

social crisis affected human rights, an investment treaty could not prevail.⁷⁶

One line of argument was that human rights norms were hierarchically superior to guarantees contained in investment protection treaties and should therefore prevail. The other argument was based on a state of necessity allowing for derogation from investment protection provisions. Rather than entering into the debate about the interaction between specific emergency clauses in BITs and the customary international law defence of necessity, the following will illustrate how tribunals have dealt with necessity and human rights arguments.

In *CMS*,⁷⁷ Argentina argued that the economic and social crisis affecting the country compromised basic human rights, and that in such a situation no investment treaty could prevail in violation of such constitutionally recognized rights.⁷⁸

Instead of debating hierarchy, the Tribunal denied a conflict between human and investor rights on the facts of the particular case. It concluded that the disputed issues did not affect fundamental human rights:

121. In this case, the Tribunal does not find any such collision. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties.

Additionally, Argentina relied on Article 25 of the International Law Commission (ILC) Articles on State Responsibility⁷⁹ in arguing that the

⁷⁶ *CMS Gas Transmission Company v Republic of Argentina* (n 74), para 114.

⁷⁷ *Ibid*, paras 114, 121.

⁷⁸ *Ibid*, para 114, '[i]n respect of the legal regime of treaties in Argentina, the Respondent argues that while treaties override the law they are not above the Constitution and must accord with constitutional public law. Only some basic treaties on human rights have been recognized by a 1994 constitutional amendment as having constitutional standing and, therefore, in the Respondent's view, stand above ordinary treaties such as investment treaties. It is further argued that, as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights'.

⁷⁹ Articles on the Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its 53rd Session, GAOR 56th Session Supp 10 UN Doc A/56/10 chap V (2001).

measures adopted were designed to safeguard essential economic interests. Argentina further invoked Article XI of the applicable BIT ('Emergency Clause'), which permitted measures 'necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests'.⁸⁰ The Tribunal concluded that Article 25(2)(b) of the ILC Articles on State Responsibility excludes a plea of necessity where the State itself has contributed to it. By reference to the interpretation of the term 'contribute' in the ILC Commentary as 'sufficiently substantial and not merely incidental or peripheral',⁸¹ the Tribunal found that 'government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter'.⁸² As a result, the Tribunal held that Argentina's defences could not be justified.

The *Suez*⁸³ cases concerned foreign shareholders in water and sewage concessions. Argentina prohibited an increase of prices in order to compensate for the precipitous decline in the value of the Argentine Peso caused by the economic crisis. The Tribunal held Argentina liable for breaching its fair and equitable treatment obligations under the applicable BIT. In the context of deliberations on the necessity defence, the Tribunal noted that Argentina had argued that its human rights obligations would trump obligations emanating from the relevant BIT and rejected the argument. Instead, it held that Argentina was obliged to respect both sets of obligations at the same time:

240. ... Argentina has suggested that its human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and the existence of the human right to water also implicitly gives Argentina

⁸⁰ Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (Argentina/United States BIT) (adopted 14 November 1992, entered into force 20 October 1994), art XI.

⁸¹ *CMS Gas Transmission Company v Republic of Argentina* (n 74), para 328.

⁸² *Ibid*, para 329.

⁸³ *Suez, Sociedad General de Aguas de Barcelona S A, and InterAgua Servicios Integrales del Agua S A v Republic of Argentina* (n 75); *AWG Group Ltd v Republic of Argentina* Decision on Liability (30 July 2010); *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal S A v Argentine Republic* (ICSID Case No ARB/03/19) Decision on Liability (30 July 2010).

the authority to take actions in disregard of its BIT obligations. The Tribunal does not find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligations, and must respect both of them. Under the circumstances of this case, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as was discussed above, Argentina could have respected both types of obligations.⁸⁴

The *amici* in *Suez* suggested to the Tribunal that '[h]uman rights law could displace investment law in two situations examined in this section, namely a situation of conflict of norms and a situation of necessity'.⁸⁵ This argument was based on the *ius cogens* status of certain human rights norms such as the right to life. As Diane Desierto has convincingly demonstrated, the hierarchy of norms approach causes more problems than it solves. Not only is it impossible to prove that all the human rights invoked would qualify as *ius cogens*, but the results of such a qualification would also not be helpful to the State invoking the argument. To fulfil the requirements of Article 53 VCLT,⁸⁶ one would have to establish that the applicable investment protection treaty was contrary to *ius cogens* at the time of its conclusion. The consequence of this argument would be that the investment protection treaty would be void *ab initio*.

⁸⁴ *Suez, Sociedad General de Aguas de Barcelona S A, and InterAgua Servicios Integrales del Agua S A v Republic of Argentina* (n 75), para 240 (original italics); in a similar wording *AWG Group Ltd v Republic of Argentina* (n 83), para 240; *Suez, Sociedad General de Aguas de Barcelona S A and Vivendi Universal S A v Republic of Argentina* (n 83), para 250.

⁸⁵ *Suez, Sociedad General de Aguas de Barcelona, S A and Vivendi Universal, S A v Republic of Argentina* (ICSID Case No ARB/03/19) Amicus Curiae Submission by Centro de Estudios Legales y Sociales (CELS), Asociación Civil por la Igualdad y la Justicia (ACIJ), Consumidores Libres Cooperativa Ltda. De Provisión de servicios de Acción Comunitaria, Unión de Usuarios y Consumidores and Center for International Environmental Law (CIEL) (4 April 2007), 26 available at <http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf>.

⁸⁶ VCLT 1969 (n 9), art 53, 'Treaties conflicting with a peremptory norm of general international law ("jus cogens"). A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

This, in turn, would lead to an obligation of the host State to eliminate the consequences of any act performed in reliance on the treaty.⁸⁷

An additional line of defence pursued by Argentina in both the *Suez* and *CMS* cases was the argument that actions affecting investments had been taken out of necessity in order to safeguard essential interests of the State.⁸⁸ By reference to Article 25(1)(a) of the ILC Articles on State Responsibility, the Tribunal held that its requirements were not fulfilled, specifically that the measures taken were not the only means available⁸⁹ to safeguard these essential interests.

260. *The first condition for the defense of necessity: Only way to safeguard an essential interest.* The provision of water and sewage services to the metropolitan area of Buenos Aires certainly was vital to the health and well-being of nearly ten million people and was therefore an essential interest of the Argentine State. On the other hand, the Tribunal is not convinced that the only way that Argentina could satisfy that essential interest was by adopting measures that would subsequently violate the treaty rights of the Claimants' investments to fair and equitable treatment. As discussed above, Argentina could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Buenos Aires and at the same time respected its obligations of fair and equitable treatment. The two were by no means mutually exclusive. Thus the Tribunal finds that Argentina has not satisfied the first condition for the defense of necessity.⁹⁰

Therefore, the Tribunal also explicitly rejected the hierarchy argument, holding that safeguarding the water rights of a population and providing

⁸⁷ D A Desierto, 'Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment during Economic Crises' (2013) 10(1) *Transnational Dispute Management*, 37 ff available at <<https://www.transnational-dispute-management.com/article.asp?key=1930>>.

⁸⁸ *Suez, Sociedad General de Aguas de Barcelona S A, and InterAgua Servicios Integrales del Agua S A v Republic of Argentina* (n 75), para 230; *AWG Group Ltd v Republic of Argentina* (n 83), para 250; *Suez, Sociedad General de Aguas de Barcelona S A and Vivendi Universal S A v Republic of Argentina* (n 83), para 250.

⁸⁹ On the 'only way' criterion see eg A Reinisch, 'Necessity in International Investment Law – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on *CMS v Argentina* and *LG&E v Argentina*' (2007) 81 *The Journal of World Investment and Trade* 199.

⁹⁰ *Suez, Sociedad General de Aguas de Barcelona S A, and InterAgua Servicios Integrales del Agua S A v Republic of Argentina* (n 75), para 238; *AWG Group Ltd v Republic of Argentina* (n 83), para 260; *Suez, Sociedad General de Aguas de Barcelona S A and Vivendi Universal S A v Republic of Argentina* (n 83), para 260.

fair and equitable treatment to investors were not mutually exclusive and could have been achieved by Argentina at the same time.⁹¹

As a result, the Tribunal found that Argentina was indeed obliged to observe both its human rights and BIT obligations. The State could not simply assert human rights obligations in order to justify setting aside investment obligations altogether. In addition, similar to *CMS*, the Tribunal in *Suez* rejected Argentina's necessity defence, holding that the State had contributed to the emergency situation it had faced from 2001 to 2003 and therefore did not fulfil the 'lack of contribution' requirement envisaged by Article 25(2)(b) of the ILC Articles on State Responsibility.⁹²

Interestingly, with a view to that same Article, the Tribunal in *LG&E* reached exactly the opposite conclusion. As Michael Waibel⁹³ has pointed out, the non-contribution requirement is difficult to apply in 'a global economy where domestic and international factors interact'.⁹⁴ Neither award analysed the requirement of contribution in depth.⁹⁵

The 'only way' criterion is also often problematic: the problem is to prove that an uncompensated interference with a particular investor's rights was the only way to solve an economic crisis.⁹⁶ Illiquidity of the State as such was not invoked in any of the cases discussed.

The Tribunal in *Urbaser v Argentina*⁹⁷ noted with regard to the only way criterion that two perspectives have to be taken into consideration to decide on the fulfilment of this requirement: that of the State and its population as a whole and the perspective of the investors engaged in

⁹¹ *Suez, Sociedad General de Aguas de Barcelona S A, and InterAgua Servicios Integrales del Agua S A v Republic of Argentina* (n 75), para 240; *AWG Group Ltd v Republic of Argentina* (n 83), para 262; *Suez, Sociedad General de Aguas de Barcelona S A and Vivendi Universal S A v Republic of Argentina* (n 83), para 262.

⁹² *Suez, Sociedad General de Aguas de Barcelona S A, and InterAgua Servicios Integrales del Agua S A v Republic of Argentina* (n 75), paras 241–43; *AWG Group Ltd v Republic of Argentina* (n 83), paras 263–65; *Suez, Sociedad General de Aguas de Barcelona S A and Vivendi Universal S A v Republic of Argentina* (n 83), paras 263–65.

⁹³ M Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E' (2007) 20(3) *Leiden Journal of International Law* 637, 642.

⁹⁴ *CMS Gas Transmission Company v Republic of Argentina* (n 74), para 328.

⁹⁵ Waibel (n 93), 642; Reinisch (n 89), 203.

⁹⁶ Reinisch (n 89), 200.

⁹⁷ *Urbaser S.A. v Argentine Republic* (n 42).

performing contracts.⁹⁸ It found that Argentina had made more than a *prima facie* showing that the measures were the only ones available to the Government during the crisis.⁹⁹ It found that the claimant's proposals of alternative means were all impossible to implement at the time of the crisis and the emergency.¹⁰⁰ Therefore, the Tribunal found that the state of necessity defence was available to Argentina.¹⁰¹ The Tribunal decided that the authorities had only breached the FET provision of the BIT by engaging the investor in doomed renegotiations of the concession contract.¹⁰² But since at that time the concession had no future because of the failure of claimants to make the necessary investments, the Tribunal did not award any damages.¹⁰³

As of now, the case law on the necessity defence is very inconsistent. It is doubtful whether the defence can serve as a meaningful solution to such grievances in the context of economic crises, given that States need some – but not unlimited – leeway and economic crises are precisely the times when foreign investors require protection the most.

5. CONCLUSION

There are several ways in which tribunals in investor-State disputes may take international human rights law into account. How much weight a tribunal may lend to human rights related considerations will depend on the relevant jurisdictional clause, the applicable law and possibilities for their consideration via treaty interpretation. Not least, the latter will be influenced by the object and purpose of the relevant treaty.

These considerations will be crucial in deciding whether a tribunal possesses the power to hold that a human rights violation has arisen out of an interference with an investment, or whether it may merely take human rights into consideration when interpreting substantive standards of an investment protection treaty.

'In accordance with host state law' clauses in investment protection treaties can serve as an important tool for tribunals to deny investment protection to investors who directly commit human rights abuses. Even if investors cannot be held accountable by individuals for violations of

⁹⁸ Ibid, paras 716–32.

⁹⁹ Ibid, para 717.

¹⁰⁰ Ibid, paras 724–31.

¹⁰¹ Ibid, para 718.

¹⁰² Ibid, paras 843–47.

¹⁰³ Ibid, paras 846–47.

human rights before investment tribunals, denial of investment protection could serve as deterrent in this regard. The common treaty formula on compliance with host State law could be supplemented with an express reference to human rights and the statement that investments must remain in accordance with human rights standards throughout their lifetime.

The case law also shows that measures undertaken by a State to protect its local population against human rights violations caused by an investor's conduct will not violate investment protection standards. In the *Urbaser* case, the tribunal was even prepared to accept jurisdiction for counterclaims based on human rights abuses by investors. The exact source and extent of the obligations incumbent upon the investors in this regard needs further analysis. In the presence of a wide jurisdictional clause covering any dispute arising out of an investment and where contracts are part of the applicable law, it could be explored whether contractual obligations of the investor which implement the State's human rights obligations could form a successful basis for a counterclaim.

States that endeavour to improve the implementation of their human rights obligations by introducing general regulations will not normally be obliged to compensate. Exceptions may apply where a State has entered into specific undertakings. As a result, States are best advised to resort to human rights impact assessments before providing specific promises in contracts or laws.

Investment tribunals have all found that obligations under investment law and human rights law could and have to be met at the same time. They did not accept a hierarchy between human rights and investor rights. Furthermore, they did not frame the potential tensions of human rights and investor rights as a normative conflict. Rather, they opted for a systemic integration of human rights obligations into investment law and found that both obligations apply in parallel and can be met at the same time.

How human rights-related considerations should influence investment protection during periods of economic crises presents a question that needs further fine-tuning. Neither a hierarchy of norms nor the current understanding of the state of necessity offer predictable outcomes to investors or States. It is during times of economic emergency that investors as well as the population of the host State require protection the most. Hence, a very careful balancing of interests is required.