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"*The Double-Edged Sword of Human Rights Treaties as a 'Lock-In Formula' for Countries Seeking Foreign Investments: The Extent to Which Host States Can Invoke Human Rights Provisions as a Defense against Foreign Investors*"

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The Double-Edged Sword of Human Rights Treaties as a 'Lock-In Formula' for Countries Seeking Foreign Investments:

The Extent to Which Host States can Invoke Human Rights Provisions as a Defense Against Foreign Investors

For the word of God is quick, and powerful, and sharper than any two-edged sword, piercing even to the dividing asunder of soul and spirit, and of the joints and marrow, and is a discerner of the thoughts and intents of the heart.

(Hebrews 4:12-13).

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I. Introduction

I still remember when, during my oral exam for admission to the Ph.D. Program in October 2010, I was asked, by the examining commission, to orally outline my research proposal. Even before I could start explaining the issue that pushed me to pursue doctoral studies, the commission addressed me with a provocative question, namely whether my attempt to access the academic realm was by way of helping the old topic of Chinese kids, being exploited to manufacture Nike soccer balls, climbing out of the grave. My reaction encompassed, in order, the following feelings: at first, I felt offended and underestimated; then I feared that my voice would start trembling and that it would hinder my chances of admission to the Ph.D. Program; but little after, I felt attacked on a topic to which I actually dedicated time and energies during my Master of Laws, and that I honestly wished to pursue through doctoral studies. When this little sensor in my thoughts was activated, I was shaken out of my brief status of hypnosis for the question, and I started to present my actual research proposal and the reasons why I believed that an important gap in the field of investment arbitration needs to be addressed through doctoral work.

Apparently, I managed to convince the examining panel of the strength of my argument: I successfully got admitted to the Ph.D. Program, first ranked, and was awarded the State grant.

Mindful of the lesson learnt, and aware of the complex issue that this study encompasses, for the avoidance of doubt I will first point out what the following pages *do not aim to*. The present study does intend to add-up to the already extensive literature criticizing the impact of globalization, economic law and investment arbitration on human rights and their development (especially in developing countries). Even less is it the intention of the author to address those situations where foreign investors or multinational corporations are perceived, in the eyes of human rights advocates, to strategically target the country of investment to take advantage, *inter alia*, of poor human rights laws, in order to pay lower wages to their employees and make the best out of the investment.

The issue under consideration relates to the interaction, perceived by many as a tension, between two only apparently separate spheres in international law that are however thoroughly interwoven: the extensive area of human rights law, and the more peculiar one of investors' protection, which has developed incredibly fast over the last decades due to the impact of the globalization phenomenon. It is not surprising that these two realities sometimes come into interplay, in the sense that some disputes arising between investors and host States, in connection with Bilateral Investment Treaties (BITs), may be substantially grounded in issues involving human rights law.

Historically, before the development of modern foreign investment law, investors have enjoyed a minimum standard of protection under the customary international law of diplomatic protection. However, the pattern has always been that of fear, by foreign investors, to see their rights violated by the "stronger" party to the agreement, the host State.

Nowadays, however, a new concern has been emerging, namely the way trade liberalization affects human rights. Although there is no consensus about the nature of the impact of international commerce on human rights related issues, what is undeniable is the emerging practice of States to claim human rights obligations, owed to non-parties to the arbitration proceedings, as a defense against investors claiming that their rights, under the BIT, have been violated.

This study aims to address situations in which host States are accused, by investors, of violating provisions under the BIT, or under other investment treaties, through actions that governments allege being justified by the broader human rights obligations owed to their citizens.

In this context, the traditional, secular, and prevailing protection that foreign investors have always enjoyed under the auspices of diplomatic protection, and which has evolved in more and more sophisticated mechanisms, is nowadays sided by a new emerging dimension and, to some extent, challenged.

Yet, the relevant question becomes whether the defense raised by a government against an investor, based on the need to protect non-parties to the arbitration, or on provisions not always included in the BIT, can play any role in the resolution of disputes for breach of the investment treaty grounded in human rights arguments.

Another level of the analysis relates to the extent to which host States are really invoking human rights provisions as substantial argument, or whether they just refer to them as universal laws to provide justifications to their misconducts, and in a certain way, to bring back to balance the historical upward-sloping protection granted to investors.

In short, this study will not make an argument about the supremacy of human rights law over the well-established system of investor protection: rather, the research will explore if there is any room to argue that human rights arguments, that more and more underline investor-State disputes, should play any role (and to what extent) in shaping the outcome of investment proceedings.

A. Why Do Countries Commit to Human Rights Treaties?

Nowadays, the number of States parties to human rights treaties and regimes has increased dramatically.[1] More and more States have decided to submit themselves to the jurisdiction of international courts. As of April 2014, 167 States are parties to the International Covenant on Civil and Political Rights;[2] 161 States are parties to the International Covenant on Economic, Social, and Cultural Rights;[3] 108 States are parties to the International Convention on the Suppression and Punishment of the Crime of Apartheid, just to mention a few.[4] Besides the adhesion to the United Nations treaties, all over the world countries keep signing regional human rights

[1] HAADFFNER-BURTON, E. M., *International Regimes for Human Rights*, Annu. Rev. Polit. Sci., 15:267, 2012. *See also* United Nations Treaty Collection, Chapter VI – Human Rights, http://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en, last accessed on 6 April 2014.
[2] United Nations Treaty Collection, Chapter IV – Human Rights, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en, last accessed on 6 April 2014.
[3] *Ibid.*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en, last accessed on 6 April 2014.
[4] *Ibid.*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&lang=en, last accessed on 6 April 2014.

conventions. In Europe, besides all Member States being party to the European Convention on Human Rights (ECHR), the entry into force of the Lisbon Treaty has made it an obligation for the European Union itself, as subject of international law, to access the ECHR, to which the enforcing machinery of the European Court of Human Rights (ECtHR) is attached.[5] In the Americas, 70% of the American States has ratified the Inter-American Convention on Human Rights (IACHR), and almost all States have submitted to the jurisdiction of the Inter-American Commission on Human Rights to receive and examine complaints.[6] In the African Union, all countries of the Union—but one[7]--have ratified the African Charter on Human and Peoples' Rights.[8] Half of the States parties to the Union have also ratified the Protocol to the Charter on the Establishment of an African Court on Human and People's Rights, which received its first application in August 2008 and held its first public hearing in March 2012.[9]

The above described phenomenon has generated a hot debate about the possible reasons why countries decide to subject themselves to the scrutiny of international institutions designed to monitor States' conformity to human rights standards, thus taking on great sovereignty costs.[10] In fact, of all international agreements, human rights treaties are those that provide the least reciprocal benefits for their signing. According to some authors, there is an intrinsic effect in States committing to international human rights agreements, namely inevitable "collateral consequences", falling outside the scope of the treaty's legal

[5] Council of Europe Website, http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention, last accessed on 6 April 2014.
[6] Organization of American States, Multilateral Treaties, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm, last accessed on 6 April 2014. An exception is Brazil, which, as a reservation, indicates that the consent of the State is needed for the Inter-America Commission to carry out its activities.
[7] South Sudan.
[8] African Union Website, http://www.au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples'%20Rights.pdf, last accessed on 6 April 2014.
[9] African Union Website, http://www.au.int/en/sites/default/files/achpr_0.pdf, last accessed on 6 April 2014. *See also*, Quick Facts, http://www.african-court.org/en/index.php/about-the-court/quick-facts-menu, last accessed on 6 April 2014.
[10] SIMMONS, B. A., "Mobilizing for Human Rights: International Law in Domestic Politics", Cambridge, UK: Cambridge Univ. Press 2009.

framework.[11] According to Hathaway, these consequences can be identified in the way a State is perceived externally by the international community, by way of its commitment. Among the collateral consequences identified, there are also decisions by investors to "withdraw or withhold funds", or to pursue "foreign investment[s]" in the country.[12] The choice to commit can actually be a source of substantial benefit for the internal structure of a State, especially for those countries in transition to democracy, thus outweighing the burden imposed on the principle of sovereignty. In fact, the majority of transitional societies face several challenges, as for instance the need to rebuild a failed economic, social and judicial order, or to make it work properly again. Lacking any track record helping them to attract foreign capital, transitional societies have absolutely nothing to lose in showing commitment to abide by international standard, including human rights. The result is their signaling to the international community that they have at least an intention to qualify as "good international citizens", regardless of the actual result of their commitment (at least in the first place).

Through a model, Hathaway proves that human rights treaties are signed especially by newly established regimes because they long for building a reputation of commitment to international standards, and at the same time distancing themselves from the abusive prior regimes.[13] This will, in turn, brings collateral benefits and spillovers also in terms of foreign direct investments, and can create powerful incentives also for neighboring States to commit to the rule of law. For what concerns States that are not facing a democratization process, broader foreign policy goals may constitute the reasons to push them to become parties to international human rights treaties.

In analyzing the core assumptions of liberal international relation theory, along the lines of Hathaway, Moravcsik observes that the very fact that States are

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[11] HATHAWAY, O. A., *Why do Countries Commit to Human Rights Treaties?*, Journal of Conflict Resolution, Vol. 51, No. 4, August 2007 at 596-597; MORAVCSIK, ANDREW, *Taking preferences seriously: A liberal theory of international politics*, International Organization 51 (4), 1997 at 513-53; GUZMAN, ANDREW, *A compliance-based theory of international law*, California Law Review 90 (6), 2002 at 1823-87.

[12] HATHAWAY, O. A., *Why do Countries Commit to Human Rights Treaties?*, Journal of Conflict Resolution, Vol. 51, No. 4, August 2007 at 596-597.

[13] *Ibid.*

subjects of international law puts them in the position of being influenced by the "surrounding domestic and transnational society in which they are embedded". According to Moravcsik, liberal theory suggests that societal "lock-in" results in the stability of State preferences.[14]

Guzman makes an argument about reputation: he observes that customary international law has an impact on States' behavior because it leads other States to believe that "the first State has a commitment that it must honor". In case of failure of the first State to abide by its commitment, this will result in a loss of reputation because it will be interpreted by other States as an inclination to breach its international obligations.[15]

Wrapping-up the scholars' positions analyzed above, human rights treaties and the international monitoring bodies attached thereto, can be used by developing countries and emerging democracies as a sign, to the rest of the world, of their willingness to lock-in liberal policies, and to give proof of their commitment to consolidate the rule of law and democratic practices, in order to re-strike the bargain of their role in the international relations arena.

From the stand point of modern investment law, the focal subject of this study, the signal given by both transitional countries, as well as established democracies, may be relevant for those States seeking to attract foreign investments and benefit their economic flow.

From a practical perspective, governments often ratify human rights treaties as a "lock-in" formula to signal their willingness of becoming democratic, in order to make international investors more comfortable in entering into business with them, knowing that the host State committed itself to comply with the rule of law. This way, a commitment by the potential host State to the respect of fundamental rights and freedoms can be seen as a way to strike a balance between the fears of investors to face egregious or arbitrary treatment at the hands of a politically

[14] MORAVCSIK, A., *Taking preferences seriously: A liberal theory of international politics*, International Organization 51 (4), 2009 at 537.
[15] GUZMAN, A., *A compliance-based theory of international law*, California Law Review 90 (6), 2002 at 1825.

instable country--or with questionable human rights records,--and the willingness of host countries to encourage and secure foreign investments.

However, the signing of human rights treaties by host States, especially developing countries, may well become a double-edged sword towards foreign investors: if on the one hand the adherence of the host State to human rights regimes is, in the eye of the investor, an enhanced guarantee that the government will fulfill the fundamental human rights obligations and abide by international standards, and will therefore infuse confidence in the conclusion of investment agreements, on the other hand there are two different levels of the analysis to bear in mind, one having emerged only in recent times and constituting an open debate.

In particular, while human rights provisions can be invoked by the investor as a defense against the host State in case of abuse or threat to the investment, the very same provisions by which the host State is bound, can be used by the State itself as a defense against the investor in case of breach of its international obligations under the BIT, especially in the context of the safeguard of fundamental freedoms owed to its citizens. In other words, the new emerging issue that this study deems to investigate, is the extent to which human rights provisions can be invoked by host States, as a defense against investors, in case of breach of the bilateral investment agreement incurred to safeguard the right of its citizens.

This aspects of the discipline of investment law can appear odd if one considers that bilateral investment treaties, and in general the whole body of law that is today known as investment law, were born primarily as instruments of protection of investors. Particularly, the system aimed at providing foreign investors with an alternative dispute resolution forum in case of violation of their rights under the agreement. The underlying *ratio* was to lift investors from risking a biased judgment in the host State's domestic courts; or to assure the application of higher standards of international protection than those available under national law.

B. The One-Sided Nature of the Bilateral Investment Treaty Regime

Investment treaties are generally single-purposed instruments protecting foreign investors and their assets, rather than imposing on them duties or legal responsibilities. One can trace the development of the modern international investment law regime back to the failure of diplomatic protection in the context of foreign investments.[16] The concept of diplomatic protection started to emerge due to the non-availability of international remedies to nationals (individuals and corporations) under international law, in case of disputes. Originally, in order to provide its citizens and legal entities with the possibility of pursuing their claims, a State would espouse the claims of its nationals and pursue them in its own name. The downside of this mechanism, as far as foreign investments are concerned, is the requirement that the investor first exhausts all local remedies available in the host State, before being able to resort to diplomatic protection. Furthermore, it is not a right of the investor to benefit from such protection. The decision whether or not endorsing claims of its nationals lays entirely within the discretion of the State of origin, which can also discontinue the diplomatic protection at any time, without providing any sort of justification. As noted by Schreuer, also States of origin may be disadvantaged by resorting to diplomatic protection, in that its use may go from disrupting their international relationships and good neighborhood, as far as to the use of force.[17]

In can thus be argued that the natural disadvantages of resorting to diplomatic protection have brought the international community to develop a peculiar regime, then classified under the so called "body of investment law", which far from being a coherent and codified bulk of provisions, in reality is nothing more than the set of rules identified in bilateral investment agreements.

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[16] SCHREUER, C., *Investment Protection and International Relations*, A. Reinisch & U. Kriebaum (Eds.), "The Law of International Relations" – Liber Amicorum Hanspeter Neuhold, The Netherlands: Eleven International Publishing 2007 at 345-358.

[17] *See* the *Italy v. Colombia* (*Cerutti* case), Moore International Arbitrations, History, Vol. II, 1898 at 2117; *Germany, UK, Italy v. Venezuela* (*Venezuelan Preferential* case), Award of 22 February 1903, 9 RIAA 99, 1960 at 107; SILAGI, M., *Preferential Claims against Venezuela Arbitration*, *in* EPIL, Vol. III, 1997 at 1098.

Over the time, and due to its constant evolution in favor of the "weak" party to the agreement (*i.e.* the investor), the balance has shifted, and the BIT regime has been criticized for according foreign investors wide powers and rights *vis-à-vis* vulnerable host States or, more particularly, the citizens under these countries' jurisdiction.[18] The rights of the host States' citizens have further received a great deal of attention due to the frequent involvement of host States in human rights, labor and environmental abuses, in order to attract foreign direct investments through weaker regulations. Far from intending to add voice to the numerous critics against foreign investors and host States' human rights improprieties in conducting their business, this study aims at observing the situation from the opposite perspective, to understand whether host States are actually making an effort to prevent the above mentioned abuses to occur. To what extent are they allowed to do so in the context of the one-sided nature of the investment law regime?

An argument pointing out at the failure of the current generation of BITs to strike a balance of rights and responsibilities of investors, is put forward by Muchinskli, who believes that "[t]he current regime of [International Investment Agreements] contains a bias towards the imposition of obligations on host states".[19] In other words, usually BITs embed a long list of protections to be afforded to foreign investors, such has Fair and Equitable Treatment, Most-Favored-Nation, Umbrella Clauses, Non-Discrimination etc. without a corresponding set of rights for the host State (or its citizens). As observed by the United Nations Conference on Trade and Development (UNCTAD), international investment agreements "currently do not set out any obligations on the part of investors in return for the protection of the rights they are granted". One of the recommendations put forward by UNCTAD is for negotiators to include, directly into the investment agreement,

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[18] *See* SCHNEIDERMAN, D., "Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise", Cambridge: Cambridge University Press, 2008; SORNARAJAH, M., "The International Law on Foreign Investment", Cambridge: Cambridge University Press, 2010; SUBEDI, S. P., "International Investment Law: Reconciling Policy and Principle", Oxford: Hart, 2008.

[19] MUCHLINSKI, P., *Regulating Multinationals: Foreign Investment, Development and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World*, Second Columbia International Investment Conference – What's Next in International Investment Law and Policy? Improving the International Investment Law and Policy System, 31-31 October 2007 at 6.

obligations for investors to comply with host State's national laws.[20] To this end, the step to impose compliance with international human rights treaties (to the extent they have been ratified and implemented into national legislation) does not seem too far-fetched of an argument.[21] Unfortunately, these remain recommendations. As it will be shown in the following paragraphs, the state of the art is different.

[20] UNCTAD, *Investment Policy Framework for Sustainable Development*, 2012. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf, last accessed on 6 April 2014.

[21] HATHAWAY, O. A., *Why do Countries Commit to Human Rights Treaties?*, Journal of Conflict Resolution, Vol. 51, No. 4, August 2007 at 589.

II. Methodology

A. Roadmap

After a brief introduction to frame the object of the study and the underlying issues (Chapters I to III), the study will analyze the case law of investment tribunals, as well as domestic courts, and identify the instances in which host States have invoked human rights provisions as a defense against foreign investors (Chapter IV). Human rights issues have been raised by host States as a defense mainly in the context of the Argentinian crisis, as to the right to water and sanitation or reaction to widespread social unrest.[22] But other instances where human right arguments have indirectly come to interact with investment law have been identified in the field of right to assembly and the rights of Indigenous peoples.[23] The analysis of the case law will be accompanied by an overview on the international recognition of each human right underlying the dispute at issue. Subsequently, an assessment of the case law in order to identify the different perspectives under which human rights laws can be squared, if at all, with investment treaty obligations, will be presented (Chapter V). Chapter VI will be dedicated to assess the actual and potential mechanisms of adjudication and enforcement that would be best suited to tackle investment cases that raise substantive human rights issues. Finally, Chapters VII and VIII will provide some perspectives and conclusive remarks.

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[22] Over the last decade, there have been at least a dozen BIT arbitrations brought against governments in relation to disputes in this sector*: Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Republic of Argentina* (ICSID Case no. ARB/97/3); *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Republic of Argentina*; *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Republic of Argentina* (Case no. ARB/03/18); *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Republic of Argentina* (Case no. ARB/03/19); *Azurix Corp. v. Republic of Argentina* (ICSID Case no. ARB/01/12); *Aguas del Tunari S.A. v. Republic of Bolivia*; *Azurix Corp. v. Republic of Argentina* (ICSID Case no. ARB/03/30); *SAUR International v. Republic of Argentina* (ICSID Case no. ARB/04/4); *Anglian Water Group v. Republic of Argentina*, UNCITRAL arbitration filed in 2003; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case no. ARB/05/22); *Impregilo S.p.A. v. Republic of Argentina* (ICSID Case no. ARB/07/17); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Republic of Argentina* (ICSID Case no. ARB/07/26).

[23] *Continental Casualty Company v. Argentina* (ICSID Case No. ARB/03/9), Award of September 5, 2008; Counter-Memorial of Republic of Argentina in *Continental Casualty v. Republic of Argentina*; *Grand River Enterprises v. United States of America* (UNCITRAL filed in 2004), Claimant's Memorial, 10 July 2008, available at: www.state.gov/documents/organization/107684.pdf, last accessed on 6 April 2014.

B. Tools

The present study is based both on the review of main scholarly works to assess the state of affairs on the topic, as well as on empirical work, especially in the part relating to the analysis of the available case law of arbitral tribunals (under ICSID, UNCITRAL or NAFTA Rules) and national courts. In order to assess their outcome, and identify the different roles played by human rights laws in the issue at stake, the study postulates access to arbitral and national court decisions, as well as to a series of scholarly articles.

For what concerns investment arbitral decisions, the vast majority is periodically published on the websites of arbitral institutions. *Ad hoc* reports with a more in-depth analysis on the merits of such decisions are also released by arbitral institutions and can be found by consulting the relevant archives that are easily accessible through online databases such as those provided by leading Universities (*i.e.* New York University School of Law Database, to which I have personal access as NYU *alumna*). As to national courts decisions, thanks to my studies abroad in several jurisdictions and knowledge of foreign languages, I was able rely on a broad network of people from the academics and private practice, who helped me retrieve the relevant decisions, regardless the geographical location where they were issued.

For what concerns scholarly articles on the issues analyzed, databases such as ArbitrationLaw Online, the Bilateral Investment Treaties database, the Integrated Database of Trade Disputes for Latin America and the Caribbean, ASIL - Electronic Resources for International Law, HeinOnline, International Trade Law Monitor - Lex Mercatoria, American Lawyer Media's Law.com, or LexisNexis have proved to be extremely helpful.

From the stand point of the feasibility of collecting data for the purposes of carrying out the study, gathering the necessary information has not represented a particular hurdle to overcome, save considering the confidentiality of some arbitral proceedings and the unwillingness of the parties to publish their pleadings. Overall, however, the summary of the parties' arguments in the

arbitral decisions, and more in general the number of decisions publicly available to carry out the mapping of the case law has proved to be sufficient to identify the trend.

III. The Tension: Is it Really a Tension?

A. Fragmentation or Unification of Public International Law?

On 27 October 2000, after His Excellency Judge Gilbert Guillaume was appointed President of the International Court of Justice (ICJ), he gave to the General Assembly his first statement. Probably few in the room among the national delegations present that day imagined to receive such a warning. By his speech, entitled "The proliferation of international judicial bodies: The outlook for the international legal order", the then-President addressed a phenomenon that he identified as a "substantial concern", not only from a theoretical perspective, but especially from a practical perspective: the threat of "fragmentation" of the international legal order.

The October 27th speech was the official recognition, before the quintessentially international institution, of a growing concern that had occupied the minds of many scholars in recent times.[24]

What is the debate on the fragmentation of international law exactly about? What are the practical implications of the debate? What has been identified as the cause of the phenomenon is the increased number of special regimes (such as the one of investors' protection) on the one hand, and their mechanisms of control and application of the law, on the other.[25] More in general, the proliferation of

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[24] Among the most farsighted works, *see* WELLENS, K., *Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends*, 25 N.Y.I.L., 1994 at 3637; BROWNLIE, I., *Problems Concerning the Unity of International Law*, in "Le droit international à l'heure de sa codification, Etudes en l'honneur de Roberto Ago", Vol. 1, Milan, Giuffrè, 1987 at 156 *et seq.*; PEREZ GONZALEZ, M., *En torno a la tension entre lo general y lo particular end Derecho e gentes*, in "Homanaje al Profesor Alfonso Otero", Santiago de Compostela, 1981 at 665-685; DUPUY, P.M., *Sur le maintien ou la disparition de l'unité de l'ordre juridique international*, in "Harmonie et contradiction en droit international (Rencontres internationals de la Faculté des sciences juridiques, politiques et sociales de Tunis, Colloque des 11-13 avril 1996, Paris, Pedone, 1996 at 17-54. *See also* CASANOVA, O., "Unity and Pluralism in Public International Law", Martinus Nijhoff Publishers, 2001 at 272; CHARNEY, J. I., *The Proliferation of International Tribunals: Piecing Together the Puzzle*, NYJIL, Vol. 31, 1998-1999 at 679 *et seq.*, NICOLAIDIS, K. & TONG, J. L., *Diversity or Cacophony: New Sources of Norms in International Law*, Mich. JIL, Vol. 2003-2004, at 845 *et seq.*; GATTINI, A., *Un regard procédural sur la fragmentation du droit international*, RGDIP, 2006/2 at 303-336; WELLENS, K. & HUESA-VINAIXA, R., *L'influence des sources sur l'unité et la fragmentation du droit international,* Brussels, Bruylant, 2006.

[25] DUPUY, P.M., *A Doctrinal Debate in the Globalization Era: On the "Fragmentation" of International Law*, European Journal of Legal Studies, Issue 1, 2007 at 2.

international law may result in "conflicts between norms of equal authority under our current system of international law".[26] It is argued that both these developments, if confirmed, would cripple the legitimacy of the international system.

As to the increased number of special regimes, legal scholarship goes as far as to speculate about the existence of self-contained regimes,[27] conceived as departing completely from international rules and "floating freely in the legal ether".[28] The biggest concern posed by this approach is underlying belief of the ability of such legal regimes not only to be regulated by *ad hoc* rules that are in no way grounded in the traditional legal order, but also to equip themselves with special mechanisms of control and enforcement. From a practical perspective, the shortcoming is "the freed of all dependence on customary international law concerning primary norms or responsibility as a sanction for their non-execution", which would create an unsustainable legal gap. Commentators have identified such self-contained regimes first in the (although now customary) law of diplomatic relations, and subsequently in the evolving law of international trade (including investor protection); others in the European law, human rights, environmental and international economic law.[29]

As to the second concern, namely the proliferation of the mechanisms of control and implementation pointed out by the then- ICJ President in 2000, its perceived threat, from a practical perspective, is the potential development of inconsistent international jurisprudence, and the disruption of the ICJ's mandate, *inter alia*, to contribute to a consistent interpretation of international law throughout the jurisdictions of States parties (*i.e. nomofilachia* function).

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[26] SCHLEMMERR-SCHULTE, S., *Fragmentation of International Law: The Case of International Finance & Investment Law Versus Human Rights Law*, in "Global Business & Development Law Journal", Vol. 25, 2012 at 416.
[27] SIMMA, B., *Self-contained Regimes,* NYIL, Vol. 16, 1958 at 111 *et seq.*; *see also* SIMMA, B. & PULKOWSKI, D., *Of Planets and the Universe: Self-contained Regimes in International Law*, EJIL, 2006 at 483 *et seq.*.
[28] DUPUY, P.M., *A Doctrinal Debate in the Globalization Era: On the "Fragmentation" of International Law*, European Journal of Legal Studies, Issue 1, 2007 at 2.
[29] DUPUY, P.M., *L'unité de l'ordre juridique international,* Cours general de droit international public, RCADI, Vol. 297, 2002 at 432-450.

Within the debate, three groups of commentators can be identified: 1) those who believe that the problem of fragmentation exists, and is a real and tangible threat to the international legal order; 2) those who acknowledge the issue but believe that the benefits intrinsic to the system outweigh the shortcomings; and 3) those who do not see any danger, and consider the debate a mere academic creation catalyzed by some authors to gain attention among their peers.

To the first group belong authors such as Leathley, who claims that the solution to the problem would be for judges to understand their fundamental role in the development of a uniform international law system;[30] and Spelliscy, who is of the fatalistic opinion that placing trust in the judiciary is no longer conceivable after the decision on the *Tadić* case.[31]

To the second group belong authors such as Hafner, who see the phenomenon as a natural corollary to the nature of international law, which has always been fragmented;[32] Koch, who has faith that the main international law actors will not let the system degenerate because this would go against their own interest;[33] Oellers-Frahm, who sees the phenomenon as intrinsic to the difference within the legal regimes and the *milieus an inter-milieus* in which law is created, interpreted and applied;[34] Fischer-Lescano and Teubner, who frame the phenomenon of the fragmentation as inevitable, seem to consider it a mere reflection of the international community's structure;[35] Higgins, who recognizes in the *Tadić* case the emblem of fragmentation concludes that, at the moment, there is no threat;[36] Abi-Saab, who maintains that the danger of the increased number of treaties and

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[30] LEATHLEY, C., *An Institutional Hierarchy to Combat the Fragmentation of International Law*, 40 New York University Journal of International Law and Politics, 2007 at 271.
[31] SPELLISCY, S., *The proliferation of international tribunals*, Columbia Journal of Transnational Law, 2001 at 143-175, 145.
[32] HAFNER, G., *Pros and Cons Ensuing from Fragmentation of International Law*, 25 Michigan Journal of International Law, 2004 at 849-863.
[33] KOCH, C. H. JR, *Judicial Dialogue for Legal Multiculturalism*, 25 Michigan Journal of International Law, 2003 at 879.
[34] OELLERS-FRAHM, K., *Multiplication of international courts and tribunals and conflicting jurisdiction*, Max Planck Yearbook of United Nations Law, 2001 at 80-83.
[35] FISCHER-LESCANO, A. & TEUBNER, G., *Regime-Collisions*, Michigan Journal of International Law, 2004 at 999-1046, 1007.
[36] HIGGINS, R., *The ICJ, the ECJ, and the integrity of international law*, The International and Comparative Law Quarterly, 2003 at 1-20, 18.

tribunals is limited by the fact that the relevant actors are conscious of the risks, and will not let the system degenerate;[37] and Brown, among others, who resists the idea that cases different from each other can have the force of producing a judicial *revirement*, and that tribunals will manage to clarify the grounds of the deviation based on the differences in the factual background of the case, or the natural development of the law within society, over time.[38]

The third group is significant, and has probably as exponent Koskenniemmi who, *inter alia*, is one of the authors of the 2006 Report, by the International Law Commission (ILC), on the fragmentation of international law.[39] During the different stages of the drafting, the Report embraced a more positive attitude towards the phenomenon of fragmentation, compared to that envisaged by Hafner in his feasibility study.[40] Although even Koskenniemmi has acknowledged the "substantive emptiness" of the Report,[41] it is surely also thanks to the author that the gray shade on the phenomenon has been taken away from the final product. Koskenniemmi's perspective, restated in a subsequent work,[42] starts from the assumption that international law is not a legal system, but rather a blend of normative and political systems. Seen from this perspective, the fragmentation that was before confronted with the diversity of the national legal systems, loses relevance. In short, if anything needs to be blamed at all, he points the finger at legalism, which is the real responsible for the perceived loss of legitimacy of the system.

Also Simma is an authoritative member of the third group of commentators. He acknowledges that in a society in rapid development fragmentation is in ambush,

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[37] ABI-SAAB, G., *Fragmentation or unification*, New York University Journal of International Law and Politics, 1999 at 919-933.
[38] BROWN, C., *The Proliferation of International Courts and Tribunals*, Melbourne Journal of International Law, 2002 at 453-475.
[39] International Law Commission, *Report of the Study Group, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 2006.
[40] HAFNER, G., *Risks ensuing from fragmentation of international law*, Official Records of the General Assembly, Fifty-Fifth Session, Supplement No 10, UN Doc. A/55/10, 2000.
[41] *Idem*, at para. 487.
[42] KOSKENNIEMI, M., *The Fate of Public International Law: Between Technique and Politics*, 70 Modern Law Review 1, 2007.

but he places trust in the international actors and their willingness to uphold the unity of the international legal system, particularly thanks to courts' engagement in constructive dialogs through their jurisprudence.[43] Some flaws in his argumentation, however, can be identified in his assumption that the situation by him described is not subject to change, and that courts are not inclined to openly rule inconsistently with other courts.

As far as Dupuy is concerned, in one of his most recent works he analyzes the fragmentation in the specific field of human rights and international investments law, taking the position that the development of these two branches of the law "should not be deemed as substantiating the thesis of the 'fragmentation of international law'".[44] He bases his conclusion on the conviction that human rights and investment law belongs to the same legal order and have substantive points of contact.

A glimpse on the status of the literature on the topic of fragmentation of international law evidences that, although scholars' opinions vary in many aspects, the fragmentation phenomenon (not necessarily as a threat) is at least perceived as existent, and most commentators believe that tribunals play an important role in the conservation and promotion of unity.

Besides constituting one of the leading academic legal debates in the era of globalization, why is the issue of fragmentation versus unification of international law relevant to the present study?

1. *The Issue of 'Fragmentation' from the Perspective of International Investment Law and Human Rights Law*

It is a common approach to perceive the investor-protection system and the human rights law regime as two different spheres of international law. In some ways, the two regimes are not simply considered different, but even antagonistic.

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[43] SIMMA, B., *Universality of International Law from the Perspective of a Practitioner*, European Journal of International Law, 2009 at 265-297, 290.
[44] DUPUY, P. M., *Unification Rather than Fragmentation of International Law?*, in "Human Rights in International Investment Law and Arbitration", Oxford University Press 2009, at 61.

It is a shared feeling that human rights are a typical attribute of individuals, human beings. Foreign investors can of course be individuals, but most likely they are companies, or in general legal entities able to conclude international investment deals. This is probably one of the reasons why human rights norms are not so often, and only timidly, invoked in investor-State arbitrations.

There is, however, a growing trend that is worth of attention, which has developed in common law jurisdictions: the concept of "corporate personhood". Lately, the U.S. Supreme Court has been busy dealing with determining what constitutional rights corporations should be entitled to. The theory of "corporate personhood" dates back to the 1886 U.S. Supreme Court's decision asserting that companies are, at all effects, legal persons for purposes of the Fourteenth Amendment dealing with citizenship, due process and equal protection rights.[45] More recently, in 2010, in a splintered 5-4 decision, corporations were granted First Amendment free speech rights.[46] The emergence of a distinctive corporate "person" that, not only as a meaningful social-legal actor in its own right could be distinguished from its formative constituencies, but that could also enjoy the same rights of a U.S. citizen--including political speech rights--created concerns about the adverse political and social ramification of such a development.[47] This probably explains the reluctance that still pervades the human rights narrative on the relationship between actors that are not human beings.

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[45] *Santa Clara Cnty. V. S. Pac. R. R. Co.,* 118 U.S. 394, 1886.

[46] *Citizens United v. FEC*, 130 S. Ct. 876, 2010. The *Citizens United* decision has been subject to quite frequent critics: *See, e.g.*, SPEIR, I. S., *Corporations, the Original Understanding, and the Problem of Power*, 10 Geo. J.L. & Pub. Pol'y 115, 2011 at 3; POLLMAN, E., *Reconceiving Corporate Personhood*, 2-3 nn. 1-5, 1 December 2010 (unpublished manuscript). Proposals to counter the *Citizens United* decision: *See, e.g.* RIBSTEIN, L., *Abolishing Corporate Personhood*, in 'Truth on the Market', 6 November 2011. Law review articles: *See, e.g.*, EPSTEIN, R., *Citizen United v. FEC: The Constitutional Rights that Big Corporations Should Have but Do not Want*, 34 Harv. J.L. & Pub. Pol'y 2011 at 639; GARDNER, J. A., *Symposium: Privacy, Democracy, and Elections*, 19 Wm. & Mary Bill Rts. J, 2011 at 859; BRIFFAULT, R., *Symposium: Citizen United v. Federal Election Commission: Implications for the American Electoral Process*, 20 Cornell J. L. & Pub. Pol'y, 2011 at 643; YOSIFON, D. G., *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizen United*, 89 N. C. L. Rev., 2011 at 1197; BINGHAM, F., *Show Me the Money: Public Access and Accountability After Citizens United*, 52 B. C. L. Rev., 2011 at 1027; HERDMAN, C., *Citizens United: Strengthening the First Amendment in American Elections*, 39 Cap. U. L. Rev., 2011 at 723.

[47] JOHNSON, L., *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, Seattle University Law Review, Vol. 35, 2011 at 1521-1526.

From a technical perspective, private legal entities cannot be considered subjects of public international law. However, this is not seen by actors such as States or non-governmental organizations, as an obstacle to the enforcement of human rights claims, especially because of the intrinsic public nature of the services that, most of the times, investors are called to supply under the investment agreement. When human rights claims are put forward, both by investors, in instances where their right to property is hindered, or by host States, in cases of mismanagement of a public service, national or international tribunals will have to deal with them in a way or another. It cannot be denied that more and more human rights issues emerge in investor-States arbitration, coming into inter-play with international investment law. Investment disputes constitute, therefore, the forum *par excellence* for the monitoring and development of the connections between these only apparently distinct fields of international law.

For what concerns the proliferation of special regimes, should the theory of self-contained regimes prevail among scholars and practitioners, it will be difficult to overcome the already widespread approach taken by investment tribunals and their skepticism in letting provisions relating to the protection of human rights pierce the veil of investment proceedings. Should the investor-protection regime be framed within the old-fashioned "Contract Paradigm" (*see* Section III.D below), or simply as an investor-oriented special regime born out of the necessity to protect the "weaker" party to the contract, this scenario will lead to a complete departure, *inter alia*, from the core customary norms on human rights.[48]

For what concerns the second element (*i.e.* the proliferation of courts), the topic at issue would greatly benefit from a dialogue between courts focusing on distinct areas of the law. The study will explore a proposal for further proliferation (Section VI.A), addressing pros and cons of *had hoc* tribunals with a specialization in both investment and human rights law to resolve the disputes at issue.

[48] *Cf.* the decision of the German Constitutional Court on the Argentine bonds, Ref. 2 BvM 1/03, at paras. 72-73 and the customary role principle of economic emergency.

A vicious circle underlines the proliferation of public international law instruments and norms, in the context of foreign direct investment: the peculiar setting of these business deals, which are framed as private corporate transactions notwithstanding the great element of public law involved, ultimately leads the actors with more bargaining power (private corporations) to directly or indirectly influence the design of the sources of law in the first place. This study claims that, as long as investment tribunals are reluctant to consider customary law human rights arguments in investment disputes, a reform of the system is desirable. Be it through the establishment of a new body capable of considering all the aspects of public international law—including and especially human rights--as applicable *corpus* to investment disputes, or through the adaptation of the current system to take into account this fundamental need (*See* Chapter VI).

B. The Origin of the Two Regimes

From a historical perspective, it can be argued that the law on investor protection precedes the international recognition of fundamental human rights. Already at the end of the XIX century, the industrial revolution and the concurrent development of international trade, essential to accumulate capital for investments, have slowly turned into the crystallization of customary law on the protection of aliens abroad, and of further obligations compelling host States to protect aliens' property. It is here worth mentioning a short historical anecdote illustrating the close relationship between the primary norms relating to the protection of citizens abroad, and the secondary norms on State responsibility. At the dawning of the codification of the law on the responsibility of States, in the mid of the XX century, the Special Rapporteur to the International Law Commission in charge of presenting the first report on the matter, inappropriately started to address the issue of the codification of the *primary* norms on State responsibility [sic] for damages caused to aliens in their territory.[49]

In the context of the development of the industrial sector, the role of entrepreneurs coming from developed countries started to emerge, and with them an influx of

[49] *See* Yearbook of the International Law Commission, Vol. 1, 1957 at 154-172.

individuals looking for profitable investments in less developed countries. In this scenario, the first procedural norms on the access to diplomatic protection started to consolidate (*i.e.* the concept of exhaustion of local remedies), as well as further norms regulating the obligations of host States towards alien citizens, comprising a set of rules on a minimum standard of protection, which gave then raise to the concept of *acquired rights*.[50]

This brief excursus on the historical landmarks relating to the development of investor protection shows that, from a historical perspective, the concept of *alien* precedes the *individual*, and the human connotation attached thereto. This approach had its roots in the Westphalian structure of the international legal order. The symbolic meaning of the Thirty Year War has been to put an end to the hierarchical distribution of powers, with its apex in the empire and in the papacy. Instead, a model of distribution of the power among a plurality of "aggregates", whose national sovereignty would not permit a superior authority, was established. One of the core features of this new model was "sovereign equality", and the national States equipped themselves with a very limited set of rules to regulate their sovereign co-existence based on reciprocity and freedom of political, military and economic competition. Substantially, this modest set of rules was limited to guarantee communication through the protection of the diplomatic function, a minimum standard of treatment of, *inter alia*, the respective citizens abroad, and of their foreign assets and economic rights.[51]

In this context, the status of alien citizens was strictly conceived in terms of nationality of the State of origin. This is the first material difference between the two sets of protection (*i.e.* investment protection and human rights protection), in fact, in the modern human rights legal framework, individuals do not derive their identity from their link to the State of origin, activated through the legal mechanism of nationality. Rather, such identity, and the rights attached thereto, are intrinsic to their being humans.[52] The revolutionary development at the core

[50] LILLICH, R. (Ed.), "International Law of State Responsibility for Injuries to Aliens", 1983 at 412.
[51] TANZI, A., *Il modello Westfaliano di un diritto international eurocentrico*, Cosmopolis No. 1/2006.
[52] DUPUY, P. M., "Droit international public", 2008 at 217 *et seq.*.

of the international recognition of human rights is, in fact, the de-nationalization of individuals and the acknowledgment, by the international community-- and the States in the first place,-- that human rights are inherently endowed in individuals. This process, which is at the basis of the modern theory of human rights law, carries within such a great power and substantive legal consequences, especially in terms of sovereignty, that many States over the time have negated it, and still continue to violate the fundamental rights of their citizens.

Another evidence supporting the claim that the legal status of aliens has chronologically developed in that of individuals as human beings, is the considerable correspondence between the rights and protections accorded to foreign investors to safeguard their interests, and some civil and economic rights (*See* Section III.C below). In other words, the former have been transposed to the realm of the latter and been generalized to the protection of all humans, regardless their nationality. The well know *obiter dictum* of the International Court of Justice in the *Barcelona Traction* case shed the basis to consider a common origins of the two sets of rights:

> *When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations* erga omnes.[53]

The second element that distinguishes the two sets of protection is the fact that investor rights are subject to the condition of reciprocity between the State of origin and the host State. Conversely, individual human rights have an objective character, as they are not linked or dependent upon inter-State relations. Interestingly enough, the progressive changed nature of investors, from being mostly individuals, to becoming private legal entities, did not impact on the

[53] *Barcelona Traction, Light and Power Company, Limited,* Judgment, I.C.J. Reports 1970 at 3, at para. 33.

content of the regulation. The principle of nationality still governs the qualification and identification of investors as "foreign", and thus determines whether or not the investor qualifies to resort to certain mechanisms of dispute resolution typical of the investment regime. [54]

Another aspect that is worth of attention is that, while according to human rights regional conventions, individuals whose rights have been violated by the State of their nationality still need to exhaust all local remedies before being able to resort to the available regional or international human rights *fora*, in many cases for foreign investors this obligation is no longer a prerequisite. For instance, under Article 26 of the International Centre for Settlement of Investment Disputes (ICSID) Convention, subject to the consent of sovereign States to arbitration under ICSID Rules, and absent explicit agreement to the contrary, investors whose rights under the BIT have been violated no longer need to go through all stages of the local judiciary of a hostile country, or put their hope and faith in a yielding State of origin to endorse and pursue their claims in its name. They can simply directly resort to international arbitration, not just in cases where an arbitration clause has been included in the investment agreement between the host State and the investor.[55] This is true not only within the framework of the 1965 Washington Convention that established, *inter alia*, the ICSID.[56]

Furthermore, in principle, individuals who wish to resort to regional or international courts almost always have a direct link to the State of their nationality, which is the actor against which they wish to file a complaint; as far as foreign investors are concerned, the direct access to international arbitration has been granted to circumvent the shortcomings of diplomatic protection, especially

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[54] *See in general* DUPUY, P. M., *Théorie des droits de l'homme et fondements du droit international*' in "Archives de philosophie du droit", 1987.
[55] CANTEGREIL, J., *The Audacity of the* Texaco/Calasiatic Award*: René-Jean Dupuy and the Internationalization of Foreign Investment Law*, The European Journal of International Law Vol. 22 no. 2, 2011 at 453; s*ee also* DOLZER, R. & SCHREUER, C., "Principles of International Investment Law", Oxford University Press, 2008 at 156.
[56] CANTEGREIL, J., *The Audacity of the* Texaco/Calasiatic Award*: René-Jean Dupuy and the Internationalization of Foreign Investment Law*, The European Journal of International Law Vol. 22 no. 2, 2011 at 453.

in the aftermath of the *AAPL v. Sri Lanka* case.[57] In this ICSID arbitration, the BIT contained a definition of investment that included "shares, stock and debentures of companies or interests in the property of such companies".[58] AAPL was a minority shareholder in Serendib, a company registered under the laws of Sri Lanka. Following the destruction of Serendib's property by Sri Lankan security forces during a counter insurgency operation against the Tamil rebels, AAPL commenced arbitration proceedings. Neither the status of AAPL's shareholding as an investment, nor its right to put forward claims, were ever challenged. In the Final Award, the Arbitral Tribunal set forth the following, in the section relating to the *quantum* of the compensation due by Sri Lanka to the investor:

> *The undisputed "investments" effected since 1985 by AAPL in Sir Lanka are in the form of acquiring shares in Serendib Company, which has been incorporated in Sri Lanka under the domestic Companies Law. Accordingly, the Treaty provides no direct coverage with regard to Serendib's physical assets as such […], or to the tangible assets of Serendib if any ….]. The scope of the international law protection granted to the foreign investor in the present case is limited to a single item: The value of his-share-holding in the joint-venture entity (Serendib Company).*[59]

In other words, the Arbitral Tribunal held that a minority shareholder could not protect the physical or intangible assets of a local company. Back then, this was a conclusion consistent with the purpose of the investment treaty. From an international law perspective, the understanding was that "the shares in a company incorporated in a host country are not usually affected by any measures taken there. It is the company itself that is the victim".[60] Being Serendib a local company, it had no personality to benefit of the protections granted by the investment treaty. The resulting situation was that neither the investor, nor its "investment", could seek redress under the treaty. This was an emblematic case, and also thanks to it that the system evolved in the sense of according foreign

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[57] *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Final Award of 27 June 1990.
[58] Article 1(a) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka, for the Promotion and Protection of Investments, Colombo, 13 February 1980.
[59] *AAPL v. Sri Lanka*, Final Award of 27 June 1990, at para. 95.
[60] MANN, FRANCIS, *Foreign Investment in the International Court of Justice: The ELSI Case*, 86 AJIL 86, 1992, at para. 92.

investors direct access to international arbitration, to circumvent the uncertainties of diplomatic protection and their uneasy positions as foreigners.

In any event, as mentioned above, the principle of nationality keeps playing an important role in investor-State arbitrations, while from a substantive point of you, it is no longer of relevance in terms of protection of human rights, due to the likely overlap of the nationality of the individual and that of the State accused of having violated his or her fundamental rights.

C. The Content of the Two Regimes

As put forward in Section III.A herein, despite the claim, by many, that the two regimes are separated and almost antagonistic, similarities can be identified not only in the origins of the two systems, but also in their substantial content. Parallels, however, should be drawn with some caution, given the fact that numerous countries have still not recognized the customary nature of some norms relating to the protection of investments, let alone of human rights. Official proof of this reluctance emerged during the drafting of the 1993 World Bank Guidelines: several have been the attempts, by the international institution, to codify the recognized principles of customary law in economics. However, due to the difficulties in objectively ascertaining the specific norms, any attempt only led to disagreement between States.[61]

Given the uncertainties surrounding the nature of the available investor protections, as well as of some human rights provisions, and the lack of universal acceptance, any attempt to draw parallels between the specific norms of the two regimes would be speculative and far-fetched. The scope of the following paragraphs is to discern the core recognized principles underlying the main protections or rights, and analyze the conceptual grounds shared by international investment law and human rights law. Such core shared principles can be identified in non-discrimination, due diligence, procedural fairness and

[61] SHIHATA, I., "Legal Treatment of Foreign Investment: The World Bank Guidelines", 1993 at 35, 77, 394; JUILLARD, P., *L'évolution des sources du droit des investissements*, RCADI Vol. 250, 1994-VI at 13-214.

proportionality. The analysis of the principles will be accompanied by specific reference to the classic protections accorded to investors (*i.e.* National Treatment standard, Fair and Equitable Treatment (FET) standard, compensation for expropriation, Full Protection and Security, Most-Favored-Nation (MFN) clauses etc.) and some of the underlying fundamental human rights norms.

1. *Main Shared Conceptual Grounds*

As international investment law is not an identified body of law, but rather embedded in the various investment treaties negotiated between States, the nature of investment norms is general and undefined. In order to give substantial content and meaning to these norms, it is necessary to look at the decisions of the arbitral tribunals called upon interpreting them, in case of disputes arising in connection with the agreements.[62] Following Ortino's approach, investment law constitutes what could be defined as an example of "judiciary integration", in that it is the result of the transnational legal system imposing "on its Members certain principles for whose definition or implementation recourse to the judiciary is indispensable".[63] This is a premise that is valid for each principle that will be analyzed in the following paragraphs.

The primary sources to make this determination are more than enough, given the fascinating growth of foreign direct investments in the last decades, and the proliferation of investor-State disputes attached thereto. According to UNCTAD's latest available data, by the end of 2012, the International Investment Agreements (IIAs) universe consisted of more than 3,196 agreements, including 2,857 BITs and 339 "other IIAs" (*e.g.* free trade agreements or economic partnership agreements with investment provisions).[64] At the same time, at least 514 treaty-based

[62] *See* the Convention of the Settlement of Investment Disputes between States and National of other States of 18 March 1965 (ICSID Convention).
[63] ORTINO, F., "Basic Legal Instruments for the Liberalization of Trade: a Comparative Analysis of EC and WTO Law", Oxford: Hart Publishing, 2004 at 25.
[64] UNCTAD, http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/Research-and-Policy-Analysis.aspx, last accessed on 6 April 2014. *See also* UNCTAD World Investment Report 2013.

investor-state disputes were publicly known--approximately 7.7 times more than the known cases in 2001.[65]

a) Non-Discrimination

(1) Investment Law

From an investment law perspective, the principle of non-discrimination is what constitutes one of the main goals of a successful foreign direct investment. Its scope and content is fundamentally the treatment of foreign investors like domestic investors, under like circumstances.

The principle of non-discrimination is included, in one way or the other, in many BITs. This principle takes the form, *inter alia*, of National Treatment standard, the Most-Favored-Nation treatment standard, the prohibition of arbitrary and discriminatory treatment,[66] but also the Fair and Equitable Treatment standard and the set of provisions on expropriation.[67] Some examples of formulas are embedded, for instance, in article 1102(1) of the North American Free Trade

[65] *Compare* Vale Columbia Center on Sustainable International Investment, http://www.vcc.columbia.edu/content/investor-state-dispute-settlement-government-s-dilemma, last accessed on 6 April 2014, *with* UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS), Updated for the Multilateral Dialogue on Investment, 28-29 May 2013*, May 2013.
[66] ORTINO, F., *Non-Discriminatory Treatment in Investment Disputes*, in "Human Rights in International Investment Law and Arbitration", Oxford University Press, 2009 at 364.
[67] SCHREUR, C., *Protection against Arbitrary or Discriminatory Measures*, Transitional Dispute Management 2008.

Agreement (NAFTA),[68] article 10(7) of the Energy Charter Treaty (ECT),[69] or Article II(3)(b) of the U.S.-Estonia BIT,[70] just to mention a few.

With respect to trade in goods--which is regulated by the World Trade Organization (WTO) (former General Agreement on Tariffs and Trade - GATT)[71] law--the principle of "non-discrimination" has its roots in the concept of "comparative advantage", and it is conceived as an "instrument of trade liberalization to prevent inefficiencies".[72] Initially developed by Smith and Ricardo,[73] the idea of comparative advantages cannot *per se* be transposed to the realm of foreign direct investments (FDIs) in that FDIs do not deal with the trade of goods, but rather with the exchange of capital with certain rights. This simple

[68] Article 1002 NAFTA: "1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct operation, and sale or other disposition of investments."

[69] Article 10(7) of Energy Charter Treaty (ECT): "Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable".

[70] Article II(3)(b) U.S.-Estonia BIT, 16 February 1997. Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party".

[71] The GATT still exists as the WTO's umbrella treaty for trade in goods.

[72] DIEBOLD, N. F., "Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS", Cambridge University Press 2014, at 16.

[73] SMITH, A., "Wealth of Nations", 1776 and RICARDO, D., "Principle of Political Economy and Taxation", 1817. According to the authors, trade liberalization allows countries to specialize in the production and exportation of products and services that they do best, and for which they therefore enjoy a comparative advantage and, in turn, import products and services which can be produced and supplied more efficiently in another country. On the theories of absolute and comparative advantage *see e.g.* STOLL, P. T. & SCHORKOPF, F., "WTO: World Economic Order, World Trade Law", Martinus Nijhoff Publishers, 2006 at 3 *et seq.*; KREININ, M. E. & PLUMMER, M. G. *Economic Principles of International Trade*, in "The World Trade Organization : Legal, Economic and Political Analysis", Patrick F.J. Macrory, Arthur E. Appleton, Michael G. Plummer (Eds.), 2005 at 4-5; with regard to services *see e.g.* HINDLEY, B., & SMITH, A., *Comparative Advantage and trade in Services* in "The World Economy", Vol. 7, Issue 4, pages 369–390, December 1984; *in passim* CASS, R. A. & NOAM, E. M., *Economic and Politics of Trade in Services*, in "Rules for Free International Trade in Services", Daniel Friedmann & Ernst-Joachim Mestmäcker (Eds.), 1990 at 51 *et seq.*; TIETJE, C., *Stärken und Schwächen des GATS*, in "Rechtsfragen des internationalen Diesnstleistungsverkehrs", Ehlers/Wolffgang/Lechleitner (Eds.), 2006 at 11 *et seq.*.

concept is at the basis of the numerous critics to the application of the parameters of GATT/WTO jurisprudence to investment law cases.

The application of the concept of non-discrimination to FDIs has the scope of increasing the efficiency in the allocation of the resource that is scarce *par excellence*--capital--and to allow actors to better and more accurately assess risks and returns. A case-by-case negotiation of the agreement is necessary, as costs and benefits must be assessed against the public good, and this can only be done on the basis of the specific circumstances under which the investment is made. Through this procedure, the principle of non-discrimination has as ultimate result that all parties to the agreement benefit from it[74] and, in investment treaty law, it takes the forms of National Treatment and Most-Favored-Nation standards. These two concepts, in fact, serve the purpose of eliminating differential treatment based on the nationality of the investor, and are complementary to each other: on the one hand, the National Treatment standard ensures that the foreign investor is not discriminated compared to nationals of the host State; on the other hand, the Most-Favored-Nation standard is concerned with eliminating such differences compared to the nationals of third States.

Kurtz notes that, often times, the interpretation of the National Treatment standard in investor-State arbitration is inconsistent.[75] He is of the opinion that the members of investment tribunals too often draw on complex WTO case law as guideline for the implementation of similar, but not identical, legal provisions under investment treaties. This misuse of the WTO jurisprudence has had material effects on the interpretation of investors being "in like circumstances" in investor-State arbitration. In other words, the author finds that the inconsistencies in the reading of National Treatment are only apparent and suggests reforms to propel consistency in the interpretation. Such reforms go beyond the scope of the present study, but it is helpful to consider Kurtz's analysis to support the fact that,

[74] DIEBOLD, N. F., "Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS", Cambridge University Press, 2014 at 16.
[75] KURTZ, J., *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 *EJIL*, 2009 at 749.

notwithstanding the author's harsh and solidly structured critic of arbitral tribunals' findings, it is still possible to argue about the existence of a uniform nature of the National Treatment standard and, as a consequence, the principle of non-discrimination, which is the object of the present chapter.

Kurtz takes into consideration two broad categories of case law on National Treatment from its inception. The first set is *S.D. Myers v. Canada* (*S.D. Myer*),[76] *Pope & Talbot v. Canada* (*Pope & Talbot*)[77] and a few others, which endorsed competition as a condition of likeness, but more in the framework of an inquiry aimed to isolate purposeful protectionism. The second set of case law, *Occidental v. Ecuador* (*Occidental*)[78] and *Methanex v. U.S.* (*Methanex*),[79] to the contrary, opposed competitive interactions before constructing case-by-case tests. Besides the differences in the outcome of the cases, the author focuses on the different interpretive methodologies that brought the arbitrators' position to diverge in such a material way. Particularly, according to Kurtz, while the early jurisprudence of *S.D. Myers* and *Pope & Talbot* has been very cautious about the interpretive limitations in comparing treaty law with WTO law in interpreting National Treatment, the later jurisprudence of *Occidental* and *Methanex* has justified its shifted interpretation based on an incorrect reading of WTO law, giving rise to a situation of deep uncertainty about the application of the National Treatment standard.

An analysis of the specific case law and the interpretive methodologies is necessary for a better understanding of the concern. As a premise, it is necessary to set out the general framework of WTO law on National Treatment. Article III of the GATT, which still exists as the WTO's umbrella treaty for trade in goods, imposes on WTO member States to provide National Treatment standard to imports of foreign goods. In this context, the main difference underling the

[76] *SD Myers Inc. v. Canada* (UNCITRAL filed in 1998), Partial Award of 13 November 2000.
[77] *Pope & Talbot Inc. v. Canada* (UNCITRAL filed in 2000), Award on the Merits of Phase 2 of 10 April 2001.
[78] *Occidental Exploration and Production Company v. Ecuador* (UNCITRAL, LCIA Case No. UN3467), Final Award of 1 July 2004.
[79] *Methanex Corporation v. USA*, (UNCITRAL filed in 1999), Final Award of 3 August 2008.

construction of the National Treatment clause in the WTO and investment treaty regime is that the GATT was meant to provide specific guidelines in the application of the National Treatment to the trade in goods.[80] Article III(1) GATT, in particular, specifies that the scope of GATT Article III is to prevent protectionism in the use of domestic taxes and regulations, by preventing States from thwarting their tariff reduction obligations by substituting domestic--tax or regulatory–-restrictions discriminating against foreign goods. Furthermore, the National Treatment clause safeguards the value of tariff concessions set between GATT members. The ultimate goal is to ensure that government intervention in the market does not modify the conditions of competition within the State, benefitting national product over foreign competitors. From a practical perspective, however, identifying the test to determine the threshold for a tax or regulation to be protectionist under WTO law, is not straight forward.[81]

Under the WTO regime, unless two sets of products are in competition, the domestic product will be accorded protection over the foreign product. The absence of such direction in most investment treaties gives rise to a series of complex issues of interpretation, especially in terms of understanding of the National Treatment standard.[82]

Resort to a comparative approach itself is problematic, due to the structural differences between the two regimes. Particularly, one of the main differences is the absence, in the investment treaty realm, of regime-exemptions for regulatory

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[80] 1947 General Agreement on Tariffs and Trade (GATT) Article III(1): The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production" [emphasis added].

[81] For sake of completeness, although the issues falls outside the scope of the present research, according to Kurtz, the problem in identifying such threshold is linked to the assorted textual inter-relationship between the wording of the scope of Article III(I) and the separate set of obligations to guarantee national treatment on internal tax measures (through Article III(2) first and second sentences) and regulation (in Article III(4)). *See* KURTZ, J., *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EJIL, 2009 at 754.

[82] KURTZ, J., *National Treatment, Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More?*, in "New Aspects of International Investment Law", P. Kahn and T. Wälde (Eds.), 2007 at 311, 349, 351.

measures in terms of health, environment and safety (HSE) protections (Article XX GATT).[83] This circumstance makes it more difficult, within the context of the investment treaty regime, to provide justifications to correct legal mistakes in constructing a reading of the National Treatment standard.

Further to this, the WTO regime is reserved to States, while the investor-State regime, as set-out by the expression, confers standing to individual investors against a sovereign entity, within the limits of adherence to the investment treaty. To this end, political implications will affect the choice of a State to resort against another State, and in turn act as a filter against preposterous or imprudent invocation of legal rights by States. This is not the case in the investment treaty regime where investors will be merely moved by commercial imperatives in choosing whether pursuing their claims through international arbitration, without State of origin's oversight.

Another aspect ensuing from the different nature of the two regimes is asymmetric information and its consequence on the burden of proof (*i.e.* the duty to present evidence before an adjudicator), as well as standard of proof (*i.e.* the nature and *quantum* of evidence necessary to dissuade an adjudicator) on substantive questions, including National Treatment inquiries.[84]

Finally, the system of remedies is profoundly different in the two regimes. Under WTO rules, the system is "prospective", in that unilateral countermeasures are

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[83] Article XX GATT: "*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures: ... b) necessary to protect human, animal or plant life or health;... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. ...*". *Cf. European Communities Measures Affecting Asbestos and Asbestos-Containing Products*, – Report of the Panel, WT/DS135/R, 18 September 2000, at para 8.130 (rejecting the relevance of health risks in examining the physical properties of a product in a GATT Art. III(4) inquiry, as to do so would largely nullify the 'effect of Article XX(b)) with European Communities' – *Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001, at para. 115 (overturning the Panel's ruling on this point but noting that evidence relating to health risks is relevant in assessing competition between products under GATT Art. III(4) while the same evidence serves a different purpose under Article XX(b)').

[84] *See Case Concerning Oil Platforms* (Iran v. USA), ICJ Rep, 68, 2003 at paras. 30 and 39 (Separate Opinion of Judge Higgins).

available only when a State fails to correct the harmful measure "within a reasonable period of time",[85] leaving room for offender countries to practice some free riding (pending the time needed for the case to go through the entire system). To the contrary, the investment treaty regime is "retrospective", in that it provides for damages in the event of proven misconduct, and shrinks the scope of regulatory measures.[86]

(a) *S.D. Myers v. Canada*

Kurtz starts from an analysis of the early WTO jurisprudence on the National Treatment standard to dig further into the more recent case law and the alleged misuse of WTO law in the interpretation of the concept under consideration.

In *S.D. Myers v. Canada*, in order to start marketing and formalizing contracts for waste remediation services, a U.S. investor established limited operations in Canada. However, the actual processing of waste would occur in the U.S. after the waste was shipped across the border.[87] Subsequently, Canada imposed a temporary export ban on a particular kind of hazardous waste that directly affected the investor's wastes operations. In this scenario, the U.S. investor invoked Article 1102 of the NAFTA regulating the investment, to claim that Canada's ban on exports fell within the forms of discrimination under NAFTA. The test applied by the Arbitral Tribunal to determine the nature of "likeness" was the level of competition between local and foreign investors.[88] Ultimately, to make a decision about Canada's breach, the Tribunal took into consideration the country's intent to put forward some form of protectionist measure. To do so the arbitrators started exploring Article III GATT jurisprudence, but then turned their attention to the differences characterizing the two regimes: the absence, in NAFTA Chapter 11, of HSE considerations existing under Article XX GATT, allowing differential (most favorable) treatment towards national as opposed to foreign

[85] World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Legal Texts of the WTO, 1994 at Articles 19–1.
[86] SYKES, A. O., *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J Legal Studies, 2005 at 660.
[87] *SD Myers Inc. v. Canada*, Partial Award of 13 November 2000, at para. 93.
[88] *Ibid.* at paras. 250-251.

investors.[89] In the eye of the Tribunal, this absence in NAFTA justified the reading of the National Treatment standard as a discipline on intentional protectionism.[90] Particularly, the Tribunal ruled that "the assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat [domestic and foreign investors] differently in order to protect the public interest".[91]

(b) *Pope & Talbot v. Canada*

The next NAFTA case considered by Kurtz to explore the meaning of the National Treatment standard is *Pope & Talbot v. Canada*, where the Tribunal took a very similar approach. In this case, the investor, a U.S. company with a Canadian subsidiary operating softwood lumber mills in British Columbia (a covered province for the purposes of the agreement), claimed that Canada's implementation of the U.S.-Canada Softwood Lumber Agreement constituted, *inter alia*, violation of Article 1102 NAFTA relating to National Treatment. The Softwood Lumber Agreement regulated the allocation of quotas for softwood lumber exports from covered provinces in Canada to the U.S.. The investor claimed that Canada's implementation of its quotas violated the National Treatment standard under the following grounds: a) the local producers in the non-covered provinces were treated more favorably than foreign investors, as they were not subject to any quota; b) even local producers in covered provinces were treated more favorably than foreign investors, in that they received a greater quota share.[92] As in the previous case, the Arbitral Tribunal's starting point to determine the condition of "like circumstance" between American and Canadian investors was the level of competition involved,[93] along with some evidence of intentional protectionism as a condition of breach.[94] The Tribunal devoted a deal of attention

[89] *Ibid.* at para. 244.
[90] *Ibid.* at para. 250.
[91] *Ibid.*
[92] *Pope & Talbot Inc. v. Canada,* Award on the Merits of Phase 2 of 10 April 2001, at paras. 83-104.
[93] *Ibid.,* at para. 78.
[94] *Ibid.,* at para. 79 (ruling that difference in treatment must 'be justified by showing it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments').

to Canada's defense, basing its claim on previous WTO jurisprudence. Particularly, the State argued that, although the foreign investor may have been treated less favorably for being awarded less of a quota share than some local competitors, the measure did not disfavor foreign actors as a group.[95] Canada's suggested test was to "determine whether there are any Canadian owned investments that are accorded the same treatment as [*Pope & Talbot*]. Then, the size of that group of Canadian investments must be compared to the size of the group of Canadian investments receiving more favorable treatment than the investment. Unless the disadvantaged Canadian group (receiving the same treatment as [*Pope & Talbot*] is smaller than the advantaged group, no discrimination cognizable under Article 1102 would exist".[96] In other words, Canada proposed to compare the *size* of the group of allegedly disadvantaged Canadian investors, to that of those local investors who received a more favorable treatment than the investment at issue. Under a strict, diagonal approach,[97] the only requirement to prove breach of National Treatment would be to show the existence of at least one local actor receiving more favorable treatment than the foreign claimant. Canada's attempt, instead, aimed at comparing the impact of the measure between the *sizes* of two broad groups (*i.e.* foreign investors and their local competitors), to assess the disproportionate impact of the measure on foreign actors as a whole. In assessing Canada's claim of the disproportionate disadvantage reading of the "less favorable treatment" test, the Arbitral Tribunal took into consideration a wide array of WTO case law to rebut the State's claim that the "disproportionate disadvantage test" had any authority in WTO jurisprudence.[98] In analyzing the legal context of "like circumstances", the Arbitral Tribunal noted that the right comparator to assess foreign investments' treatment has to be found in companies operating in the same business sector.[99]

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[95] *Ibid.,* at paras. 43-44.
[96] *Ibid.*, at para. 44.
[97] EHRING, E.G., *De Facto Discrimination in WTO Law: National Treatment and Most-Favoured-Nation Treatment - or Equal Treatment?'*, 36 J. World Trade, 2002 at 921.
[98] *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 of 10 April 2001, at para. 70.
[99] Organization for Economic Cooperation and Development (OECD), *National Treatment for Foreign-Controlled Enterprises*, Paris 1993 at 22. The OECD Analysis declared in considering language similar to Article 1102(2): "*As regards the expression "in like situations", the comparison*

Here, the Arbitral Tribunal presented a reading of "like circumstances" that goes beyond discrimination on the basis of nationality of the investor: "[a] formulation focusing on the like circumstances question, on the other hand, will require addressing any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments".[100] Further, the Arbitral Tribunal held that the differences in treatment can be justifiable if "they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA".[101] The Tribunal's message here is that the expression "in like circumstances" can be used to safeguard HSE value if the government's policies have a specific rational in the safeguard of the public good, rather than in the discrimination of investors on the basis of nationality. In other words, not all discriminations ought to be treated as discrimination, if there is an underlying "legitimate purpose" such as HSE or public policy rational. Beyond a mere analysis of the case law, the Arbitral Tribunal also took into consideration the differences in the two systems outlined above, as the asymmetric information. Particularly, the arbitrators pointed out at the practical burdens that the investor (*i.e.* a private party) would have to face in gathering the kind of evidence necessary to sustain a claim of disproportionate disadvantage.[102] In the case at hand, Kurtz shares the Arbitral Tribunal's broader

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between foreign controlled enterprises established in a Member country and domestic enterprises in that Member country is valid only if it is made between firms operating in the same sector". This is not to say, however, that the economic sector will be determinative. The OECD declaration went on to state: "*More general considerations, such as the policy objectives of Member countries, could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of National Treatment. In any case, the key to determining whether a discriminatory measure applied to foreign-controlled enterprises constitutes an exception to National Treatment is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control*".

[100] *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 of 10 April 2001, at para. 79.

[101] *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 of 10 April 2001, at para. 78. *See also* TRUJILLO, E., *Mission Impossible: Reciprocal Differences Between Domestic Regulatory Structures and the WTO,* 40 CORNELL INT'L L. J. 201, 262 (2007) (discussing various applications of like products‖ by GATT/WTO panels throughout the years), at 244-245 (discussing the balancing test incorporated by Pope and Talbot into national treatment determinations under Chapter 11 NAFTA).

[102] *Pope & Talbot Inc. v.* Canada, Award on the Merits of Phase 2 of 10 April 2001, at paras. 71-72: The tribunal ruled that "*Canada's disproportionate disadvantage test would require the Investor to*

approach in carefully considering the structural differences between the two systems, rather than making a blind and isolated assessment of WTO jurisprudence. Kurtz praises the early case law for its understanding of the limitation of comparative analysis between the two regimes and, in the cases at issue, for the particular attention paid to the peculiarities of the investment treaty realm. Also the Tribunals in *Feldman v. Mexico*[103] and *ADF v. USA*[104] followed the same approach, broadly confirming competition as a condition of "likeness". It is not the case, however, for the later jurisprudence, which opposes competition and, according to Kurtz, does so based on an incorrect reading of and comparison with WTO law.

(c) *Occidental v. Ecuador*

In *Occidental v. Ecuador*, the investor was a U.S. company, which entered into a contract with the Ecuadorian national oil company--Petroecuador--to explore and produce oil in Ecuador.[105] Under Ecuadorian tax law, exporters were entitled to VAT refunds on the purchase of goods, as part of their export activities. Therefore, as of the entering into force of the contract, Occidental had always received refunds for VAT paid on purchases required to perform its obligations under the contract.[106] The situation changed in 2001, when the Ecuadorian tax authority denied Occidental further VAT refund in light of its new contract with Petroecuador, which provided for a compensation formula embossed as a percentage of oil production.[107] In this scenario, the investor pursued arbitration for breach of National Treatment standard pursuant to the U.S.-Ecuador BIT.[108]

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ascertain whether there are any other American owned lumber producing companies among the more than 500 softwood lumber quota holders operating in Canada. If so, the treatment accorded those companies as a whole would have to be measured and then weighted against the predominant treatment, whatever that might mean… accorded to Canadian companies operating in like circumstances. Simply to state this approach is to show how unwieldy it would be and how it would hamstring foreign owned investments seeking to vindicate their Article 1102 rights. Only in the simplest and most obvious cases of denial of national treatment could the complainant hope to make a case for recovery".

[103] *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1).

[104] *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1).

[105] *Occidental Exploration and Production Company v. Ecuador*, Final Award of 1 July 2004, at para. 1.

[106] *Ibid.,* at paras. 1-3.

[107] *Ibid.,* at paras. 26-30.

[108] Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, Washington DC, 27 August 1993.

Occidental alleged less favorable treatment, as VAT refunds were paid to local companies involved in the export of non-oil-related goods.[109] In other words, the investor attempted to direct the Arbitral Tribunal to treat the National Treatment obligation as a discipline on discrimination separated from competitive interactions between local and foreign actors. On the contrary, Ecuador claimed that the interpretation of "likeness" is limited to entities competing in the same economic sector, and further noted that when it came to VAT refunds, all oil producers were treated alike, including the State oil company, Petroecuador.[110] In this scenario, the Arbitral Tribunal did not accept to limit the functioning of the National Treatment clause to protectionist regulation and argued that the expression "in like situations" did not refer to companies in the same sector, such as oil producers, but that it encompassed all and any companies involved in exports, not limited to the oil sector:[111]

> *In fact, 'in like situations' cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which the particular activity is undertaken* [emphasis added].[112]

While restating that National Treatment is an important tool to "protect" foreign investors, the Arbitral Tribunal has failed to provide grounds to maintain the irrelevancy of competition in a National Treatment inquiry and to justify the extremely broad reading of the "in like circumstances" standard. To support its claim the Arbitral Tribunal has dig into GATT/WTO case law and came to the conclusion that "like products" is a concept that should be interpreted narrowly, and that its nature is linked to directly competitive or substitutable products.[113] According to Kurtz and other scholars,[114] however, the Arbitral Tribunal drew this

[109] *Ibid.,* at para. 168.
[110] *Ibid.,* at para. 171-172.
[111] *Ibid.,* at para. 173.
[112] *Ibid.,* at para. 173.
[113] *Ibid.,* at para. 174.
[114] *See also* ORELLANA, M., *Investment Agreements and Sustainable Development: The Non-Discrimination Standard*, Sustainable Development Law & Policy 11, No. 3, 2011: 3-8 at 35-36.

conclusion relying on selected case law[115] that, in the specific case, required a narrow reading of the term "like product" when considered in connection with the second sentence of Article III(2) GATT. Article III(2) GATT so recites:

> *The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*[116]

In turn, the text of the Note *Ad* Article III(2) GATT, introduces the term "directly competitive or substitutable products":

> *A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.*[117]

According to Kurtz, the presence of a comparator in Article III(2) GATT second sentence ("directly competitive or substitutable products") required, in the case considered by the *Occidental* Tribunal, that the comparator present in the first sentence of Article III(2) GATT be interpreted narrowly, in order to ensure efficacy of both parts of Article III(2).[118] However, as already noticed above, such a compounded textual structure is absent in the National Treatment concept embedded in most investment treaties. Therefore, it is hard to find a reason to extend the WTO jurisprudential approach to investor-State disputes. There were alternative authoritative interpretations for the Arbitral Tribunal to choose from: for instance, within the framework of the 1976 Declaration on International

[115] *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS11/AB/R, 4 October 1996 at 19-20.
[116] Article III(2) GATT.
[117] Note *Ad* Article III(2) GATT.
[118] KURTZ, J., *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EJIL, 2009 at 765.

Investment and Multinational Enterprises,[119] in 1993 the OECD has reinterpreted the concept of National Treatment and observed that:

> *As regards the expression "in like situations", the comparison between foreign controlled enterprises established in a Member country and domestic enterprises in that Member country is valid only if it is made between firms operating in the same sector. . . . More general considerations, such as the policy objectives of Member countries, could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible under the principle of National Treatment*.[120]

According to scholars, the Tribunal's reading of National Treatment is problematic, particularly because it neglects the very essence of the principle of non-discrimination by failing to secure equal access to opportunities (especially with reference to competition).[121] According to other scholars, the *Occidental* Tribunal's unbalanced reading also compromised the Government's ability to regulate in the public interest, in that it posed constraints on Ecuador's sovereign right to implement differential tax policies depending on the different growth strategies that it wished to apply across dissimilar sectors.[122]

In other words, the dangerous substantive implication of the *Occidental* award being treated as a precedent, would be that *all* foreign investors engaging in export activities in a given host State are subject to the same tax treatment, regardless of the sector in which they operate, and the nature of their business. As a result, sovereign States would be forced to provide the same tax incentives accorded to large-scale, capital-intensive sectors to small-scale foreign investors' companies, so long as they engage in export activities. In the same way, highly profitable export companies would be entitled to the same incentives accorded to small export industries, if the sovereign State had previously decided to incentivize the latter.

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[119] OECD, 1976 Declaration and Decisions on International Investment and Multinational Enterprises, DAFFE/IME, 9 November 2000 at 20, http://www.oecd.org/offcialdocuments/displaydocumentpdf?cote=daffe/ime(2000)20&doclanguage=en, last accessed on 6 April 2014.

[120] *See* PAGANI, F. & HOUDE, M. F., *Most-Favored-Nation Treatment in International Investment Law* 16, OECD, Working Paper No. 2004/2.

[121] *Ibid*.

[122] LLAMZON, A., *The Final Award in Occidental v. Ecuador*, in "The Reasons Requirement in International Investment Arbitration", Guillermo Aguilar Alvarez & Michael Reisman (Eds.), 2008 at 211, 227.

The unacceptable effect of the *Occidental* award, if taken as a point of reference for future cases, would be to prevent States from differentiating among different sectors for legitimate purposes.[123] The Arbitral Tribunal, in the case at issue, did not provide any reference to States' practice (nor could it), nor to any national or international decision based on such interpretation of the National Treatment standard. This "all-or-nothing" approach to tax regulation of foreign investments is perceived to bring to the paradoxical situation that differential tax policies for different sectors, entirely justifiable under national and international standards (especially the international law on trade), would constitute a violation of investment treaty obligations.

An alternative reading of the case, ensuing from the application of the principle of non-discrimination, considered by the author the correct lens of analysis, will be presented in Section III.C.1.a)(3) below.

(d) *Methanex Corp. v. United States*

Also *Methanex Corp. v. U.S.* is brought by the author as an example of inappropriate reference to WTO case law. The operation made by the *Methanex* Tribunal in the homonymous case is similar to that of the *Occidental* Tribunal analyzed above, with an underlying substantive difference: whilst in the *Occidental* case the Tribunal maintained the irrelevancy of competition in a National Treatment inquiry, in *Methanex*, competition is viewed as improperly broadening the operational sphere of the National Treatment standard.

Claimant, a Canadian company active in the marketing and distribution of methanol, commenced an arbitration against the United States following a ban imposed by California on the use or sale, in California, of the gasoline additive methyl tertiary butyl ether (MTBE). As a major producer of methanol, a key component of MTBE, *Methanex* was clearly damaged by the newly introduced ban. The basis for California to impose the ban was an alleged risk to human health,

[123] *See* KURTZ, J., *National Treatment Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More?*, in "New Aspects of International Investment Law", Philippe Kahn & Thomas Wälde (Eds.) 2007 at 311.

due to leaking underground MTBE storage tanks that were contaminating drinking water supplies. The ban on MTBE, however, did not affect other oxygenates such as ethanol, which remained free to be exchanged on the Californian market.

In this scenario, Methanex invoked the National Treatment standard under NAFTA to claim discrimination by California in imposing the ban. Claimant construed its argument based on the early WTO case law, particularly denoting competition between foreign and domestic investors (and their investments) as a quintessential condition of their standing "in like circumstances".[124] In Methanex's view, methanol (the disadvantaged product produced by the foreign investor) competed directly with ethanol and the other oxygenates (the advantaged products under the newly introduced regulatory regime). As a defense, the State argued that National Treatment has the simple goal of addressing discrimination based on the nationality of ownership of the investment. Therefore, the relevant comparison is with a domestic actor "that is like [the foreign investment] in all respects, but for nationality of ownership".[125]

The *Methanex* Tribunal sided with the United States, upholding domestic methanol producers as the correct comparator to Methanex, and argued that to the extent that the ban produced the same effect on domestic and foreign methanol producers, no breach of National Treatment obligation could be envisaged.[126] The Tribunal focused its attention on whether the products produced by the foreign and domestic actors have like functions, and reach the conclusion that methanol and ethanol do not compete in terms of their initial functions: while methanol constitutes a mere component of the final product MTBE, ethanol can be used directly as an oxygenate by gasoline lenders.[127] Therefore, the two products do not stand in competition.[128] This narrow reading of the National Treatment

[124] *Methanex Corporation v. USA* (UNCITRAL filed in 1999), Final Award of 3 August 2008, at Pt. IV. Chapter B, at paras. 4-6.
[125] *Ibid.,* at para. 14.
[126] *Ibid.,* at paras. 18-19.
[127] *Ibid.*
[128] *Ibid.,* at para. 29.

standard lies, in Kurtz's opinion, on "simple textual differentiations" that the Arbitral Tribunal focused on. Particularly, contrary to Article III GATT, where the term of art in international law "like products" plays a central role, Chapter 11 of NAFTA[129] does not mention such term. The *Methanex* Tribunal used the absence of the term "like products" in Chapter 11 NAFTA to maintain that the NAFTA framers intended to create "distinct regimes for trade and investment",[130] where competition probably remained "locked-in" in the former.

Kurtz criticizes the Tribunal's position by saying that the competitive relationship between foreign and domestic products in the context of GATT, does not automatically flow, as assumed by the *Methanex* Tribunal, from the presence of the term "like products". Rather, it is grounded in the global context in which the term is used, particularly Article III(1) GATT. The second ground adduced by the Tribunal to justify its narrow reading lies in the concern with the way in which competition has been interpreted in WTO case law involving Article III GATT. While earlier interpretations seemed to afford the importing or receiving State little discretion as regards the goods entitled to National Treatment,[131] a broader interpretation of "like products" would cause competition and adverse effects to be sufficient conditions for breach of Article II GATT, which, in turn, would further significantly limit regulatory discretion. To conclude, in Kurtz's opinion, arguing the existence of the competitive relationship on the sole basis of the initial function of the foreign and domestic products, is a wrong approach.[132] For sake of completeness, but outside the scope of the present research, the author proposes, as a better indicator of the existence of a competitive relationship between foreign and local products, the substitutability of such products in the eye of the end consumer, as well as their actual interchangeable function.

To summarize and conclude on the NAFTA/GATT case law, while *SD Myers* and *Pope & Talbot*'s approach has been to endorse competition as a condition of

[129] Article 1102 NAFTA.
[130] *Methanex Corporation v. USA,* Final Award of 3 August 2008, at Pt. IV. Chapter B, at para. 35.
[131] *Ibid.,* at para. 30.
[132] KURTZ, J., *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EJIL, 2009 at 768.

likeness, still paying attention to the overall goal of isolating protectionism, *Occidental* and *Methanex* oppose competitive interactions before constructing individual juridical tests and do so on the basis of improper comparison with WTO's reading of the National Treatment standard. In this context, what is relevant to the present study is not only the different outcome of the cases, but rather the jurisprudential confusion flowing from the vastly different interpretative methodologies applied by the investment tribunals so far analyzed.[133]

The more recent case *Continental Casualty Company v. Republic of Argentina*[134] confirms Kurtzt's concerns in that, despite the award being characterized by a cautious and sophisticated application of WTO case law on exceptions, the decision was preceded by a series of cases relating to the same legal issue ruling in the diametrically opposed direction, due to an improper interpretation of the relationship between customary and treaty exceptions for State conduct.[135]

The cases against Argentina did not contain a National Treatment or Most-Favored-Nation claim, and therefore will not be analyzed in this section. However, to put the issue into context, the reader should know that *Continental v. Argentina* is one of the series of cases brought by foreign investors against the Republic of Argentina in the context of the 2001-2002 financial crisis. To counter the crises, Argentina put in place a series of measures seeking to address the worsening economic situation, that included bank freezes and prohibition of international currency transfers, ended the convertibility regime with the U.S. dollar, enacted the "pesifications" of U.S. dollar deposits, rescheduled term deposits and defaults on debt obligations. These measures had a catastrophic impact on the value and security of foreign investments in Argentina, and resulted

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[133] *Ibid.*, at 770.

[134] *Continental Casualty Company v. Republic of Argentina*, (ICSID) Award of 5 September 2008, at paras 193, 199. For an analysis of this award and its interpretive methodology *see* KURTZ, J., *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, Jean Monnet Working Paper No. 06/08, 2008 at 39–54.

[135] *CMS Gas Transmission Company v. Republic of Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005, at paras. 315-352; *Enron Corporation Ponderosa Assets L.P. v. Republic of Argentina* (ICSID Case No. ARB/01/3), Award of 22 May 2007, at para. 333; *Sempra Energy International v. Republic of Argentina* (ICSID Case No. ARB/02/16), Award of 28 September 2007, at para. 376.

in the greatest number of investor-State claims filed against a single country in history, on the basis, *inter alia*, of expropriation, breach of the umbrella clause under the BIT, Fair and Equitable Treatment, Full Protection and Security etc. In its defense, Argentina argued that it was excused from all liabilities under the BIT by the customary international law defense of necessity, and that all the actions taken during the crisis were necessary to protect its essential security and internal public order. In *Continental v. Argentina*, the Arbitral Tribunal used WTO law in a manner that largely excused Argentina from liability. However, subsequent cases grounded in the same legal issues were decided by different tribunals in a diametrically opposite way. In Kurtz's opinion, this malfunction of the system is not purely theoretical: the Republic of Argentina found itself liable for a considerable amount of damages due to tribunals' legal errors on the question of liability.[136] In an extreme scenario, the inconsistent rulings and the legal uncertainty that flows from them, may result in selective egress of States parties from the ICSID system, like witnessed by Ecuador's decision to limit ICSID jurisdiction after the *Occidental* ruling.[137] Ecuador has not been the first nor the last country to withdraw from the system. The first has been Bolivia in 2007,[138] followed by Ecuador, then Venezuela in 2012.[139] Most recently, a bill was circulated in the Argentine Parliament in March 2013 arguing in favor of the denunciation from ICSID.[140]

As it will be outlined in Section III.C.1.a)(3) below, this study suggests that a simple application of the core principle of non-discrimination to the available case

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[136] *CMS Gas Transmission Company v. Republic of Argentina*, Decision of Ad Hoc Committee on the Application for Annulment of 25 September 2007, at paras. 130, 135; KURTZ, J., *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, Jean Monnet Working Paper No. 06/08, 2008 at 25-29.
[137] ICSID News Release: *Ecuador's Notification under Article 25(4) of the ICSID Convention*, 5 December 2007, detailing Ecuador's withdrawal of its consent to ICSID jurisdiction over disputes concerning investment in the petroleum, gas, and mineral sectors.
[138] ICSID News Release: *Bolivia Submits a Notice under Article 71 of the ICSID Convention*, 16 May 2007.
[139] ICSID News Release: *Venezuela Submits a Notice under Article 71 of the ICSID Convention*, 26 January 2007.
[140] A Bill dated 21 March 2012, currently under review in the Congress of Argentina puts it very succinctly. Draft available at: http://www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=1311-D-2012, last accessed on 6 April 2014.

law would bring to a unanimous conclusion and avoid dealing with the interpretative issues that likely result from drawing parallels between two intrinsically different systems: WTO/GATT and the investment treaty regime.

(e) *Cross-Border Trucking case*

Other NAFTA cases have dealt with the principle of non-discrimination. The *Cross-Border Trucking* case[141] analyzed the meaning and scope of the expression in "like circumstances". This case relates to US-Mexico cross-border trade in agriculture and agrifood, which occurs, for 80% of the trade value, by truck.[142] U.S. safety concerns, to a certain extent also driven by domestic trucking interests, had the result to delay Mexican bus and truck access up to 23 hours, acting as a *de facto* tax on agrifood trade. In fact, transportation bottleneck threatened the Mexican fresh and perishable agricultural products. After NAFTA was signed, cross-border trucking was supposed to be allowed within certain U.S. commercial zones (*i.e.* California, Arizona, New Mexico, and Texas). All the other cross-border shipments were to be made through a drayage system. However, alleging truck safety concerns, the United States ordered to interrupt Mexican truck access across the U.S. border. Back then, it was believed that the real reasons grounding U.S. course of actions was the fervent opposition by the Teamsters Union and some U.S. trucking firms. In other words, the alleged truck safety issues were considered to be an excuse to cover deeper commercial objections. Following consultations, in 1998 Mexico initiated a NAFTA Chapter 20 case against the United States, claiming breach of NAFTA. In order to address the meaning and the scope of "like circumstances", the Chapter 20 Arbitral Tribunal sought guidance from other agreements using similar language, such as those found in

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[141] *Cross-Border Trucking Services* (U.S. v. Mex.), NAFTA Ch. 20 Arb. Trib. 6 February 2001, at para. 247.

[142] This information is based on USDA estimates. The United States exports animal and horticultural products to densely populated areas in Mexico such as Mexico City and Guadalajara. In turn, Mexico exports fresh fruits and vegetables from its Northern regions (Sinaloa and Sonora) through Nogales, Arizona to the Western American States. Moreover, U.S. oilseeds and grain exports and Mexican perishable export flow through Veracruz and other Mexican gulf ports to US East coast ports. The economic and commercial concerns about cross-border trucking were raised in a letter from Mexico's secretary of the economy to all US senators, *See Mexican Letter on Cross-Border Trucking*, Inside US Trade, 3 August 2001.

the Canada-U.S. Free Trade Agreement. In this instance, the agreement set forth exceptions to the National Treatment standard in the field of service trade,[143] by providing that "the difference in treatment [should be] no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons", and that the burden of proving that the exception is satisfied should be borne by the party according different treatment.[144]

In light of the Agreement and NAFTA's liberalization goals, the Arbitral Tribunal read "in like circumstances" as an exception to the principle of non-discrimination and subject, therefore, to a narrow interpretation. Particularly, "differential treatment should be no greater than necessary for legitimate regulatory reasons such as safety, and that such different treatment be equivalent to the treatment accorded to domestic service providers".[145] Such interpretation proves to be necessary to safeguard important areas in NAFTA investment system that would otherwise go without protection due to the absence of exceptions for the safeguard of health, safety and the environment that exist for trade in goods and services under WTO/GATT.[146]

(f) *Parkerings-Compagniet AS v. Lithuania*

In the ICSID arbitration *Parkerings-Compagniet AS v. Lithuania*,[147] the investment consisted in the construction of a modern parking system for the historic city center of Vilnius, protected as World Cultural Heritage under the UNESCO Convention. In this scenario, the investor claimed that the construction and operation of other parking spaces were treated differently from the one at issue in

[143] The Cross Border Trucking Services case involved issues of services trade and investment. This may have influenced the Arbitral Tribunal's reading of the operation of the exception clause in the NAFTA services chapter. *See Cross-Border Trucking Services* (NAFTA Ch. 20 Arb. Trib.), at para. 122.
[144] *Ibid.*, at para. 250.
[145] *Ibid.*, at paras. 258-259. The Arbitral Tribunal finds it improbable that "in like circumstances" under Article 1202 and 1203 NAFTA (National Treatment and Most-Favored-Nation standards in Services) may allow a significant barrier to NAFTA trade to survive (*i.e.* a prohibition on cross-border trucking services).
[146] In this regard, NAFTA Article 1114 on Environmental Measures is rather circular in that it allows what it does not prohibit. But *see*, NAFTA Article 2103 concerning taxation.
[147] *Parkerings-Compagniet AS v. Lithuania* (ICSID Case No. ARB/05/8), Award of 11 September 2007, at paras. 371, 392. 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.

the dispute.[148] The approach of the Arbitral Tribunal in the case at issue was to compare certain economic operators on the one hand, and the policy underlying the differential treatment, on the other;[149] and ultimately read the non-discrimination standard as to implicitly incorporate an exception for measures taken to safeguard the public interest, justified by legitimate governmental policies. Again, this approach prevented unreasonable outcomes in the application of differential treatments. There is, however, an evident shortcoming in reading "like circumstances" as an exception to the principle of non-discrimination. Namely, the power of governments to enact policies oriented to safeguard HSE considerations shrinks considerably in light of BITs' economic goals, thus diminishing the "public good" to the objectives of investment liberalization. Secondly, such approach would reinforce the nature of the BIT as an instrument of protection pro investors, as opposed to an economic instrument embodying sustainable development.

Reaching a scenario of non-discrimination in foreign investments is unfortunately easier said than done. The complexity of investments, compared to the classic sale of goods, as regards the elements of the deals (*i.e.* exchange of capital versus rights) and the quasi-contractual nature of the relationship between the investor and the public counterparty, fall out of the scope of this analysis. However, it is important to keep in mind that the principle of non-discrimination plays a key role in the field of investments.

Besides National Treatment, Most-Favored-Nation, the prohibition of arbitrary and discriminatory treatment,[150] Fair and Equitable Treatment standard and the set of provisions on expropriation, another form of non-discrimination can be identified in the "performance requirements", which are interesting in the fact that they consist of provisions that are not so one-sided (investor-oriented) as usual. In fact, they impose on foreign investors obligations to perform in ways that are

[148] *Ibid.*
[149] *Ibid*.
[150] ORTINO, F., *Non-Discriminatory Treatment in Investment Disputes*, in "Human Rights in International Investment Law and Arbitration", Oxford University Press, 2009 at 364.

beneficial to the host State. Such obligations relate, for instance, to domestic equity, technology transfer, employment of nationals (affirmative action policies) etc., and are aimed at promoting local development.[151] They are also listed as a precondition for investors to benefit from subsidies.[152] It has to be noted, however, that more and more provisions of this kind are counterbalanced by regulations against "discriminatory performance requirements", which required foreign investors to meet conditions regarding local sourcing, technology transfer etc., thus re-striking the centuries-old imbalance in favor of the investor.[153]

(2) Human Rights Law

Also from a human rights perspective, non-discrimination is a key element. Sources of non-discrimination and equality can be found in the 1945 United Nations Charter,[154] the 1946 Universal Declaration of Human Rights,[155] various international covenants,[156] treaties in specific fields[157] and regional human rights conventions.[158]

The first official step to deal with episodes of discrimination was the establishment, by the United Nations, of the Sub-Commission on the Prevention of

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[151] UNCTAD, *World Investment Report 2012*, Table 6, at xxxi.
[152] Article 2.4.14 of the Policy Guideline and Section 4.9 of the policy options for IIAs of the UNCTAD, *World Investment Report 2012*, at 124 and 150.
[153] FOGARTY, EDWARD A., "States, Non-State Actors, and Global Governance: Projecting Polities", Routledge 2103 at 84.
[154] The main three provisions discussing human rights in the UN Charter are Articles 1(3), 55(c) and 56. In addition, other Articles of the Charter make it clear that human rights protection is a fundamental part of the UN's mission: the Charter states that the UN aims to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (Article 13(1)) and "promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (Article 13(1)).
[155] Of the thirty articles, some are in one way or another explicitly concerned with equality, and Articles 1, 2, 4 and 7 implicitly refer to it by emphasizing the all-inclusive scope of the Universal Declaration on Human Rights.
[156] *See* 1966 Covenant on Civil and Political Rights (ICCPR), and the 1966 Covenant on Economic, Social, and Cultural Rights (ICESCR). The principal clause on non-discrimination is found in Article 26 of the International Covenant on Civil and Political Rights. The latter also contains general and specific non-discrimination clauses, which are similar to the former (Article 2(3) and 3 ICESCR).
[157] *See* the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
[158] *See* Article 14 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the 1969 Inter-American Convention on Human Rights.

Discrimination and Protection of Human Rights. From its first meeting, the Sub-Commission did not attempt to find a legal definition of the concept but described the "prevention of discrimination" as the avoidance of any acts preventing individuals or groups of individuals to enjoy the equality of treatment that they may wish.[159] Limitations to such equality treatment may be acceptable only to the extent that the targeted individual/group is satisfied with the alternative treatment, or that such limitations are in the interest of the public good. An important development in the definition was the identification of those differential treatments that may be justified in the interest of true equality, as opposed to discrimination based on "unwanted", "unreasonable" or "invidious" distinctions, which is never justified.[160] Neither the International Covenant on Civil and Political Rights (ICCPR) nor the International Covenant on Economic, Social and Cultural Rights (ICESCR) define the term "discrimination", or indicate what, in the praxis, constitute discrimination. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[161] comes handy in defining racial discrimination as:

> *[A]ny distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on the equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*".[162]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women in the following terms:

> *[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and*

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[159] *See* UN Doc. E/CN. 4/S.R. 32-41, cited in Warwick, MCKEAN, W., "Equality and Non-Discrimination under International Law", 1983 at 83. The Sub-Commission's formula was commented upon in a memorandum of the Secretary General of the UN entitled *The Main Types and Causes of Discrimination*, UN Sales No. 49. XIV.3, at paras. 6 and 7.
[160] MCKEAN, W., "Equality and Non-Discrimination under International Law", 1983, at 82.
[161] The International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.
[162] *Ibid.,* at Article 1.

> *women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*.[163]

Notwithstanding this through definition, at least in theory, CERD and CEDAW deal only with cases of discrimination on specific grounds. At its thirty-seventh session held on 10 November 1989, the Human Rights Committee filled-in the gap by issuing Comment No. 18. In the Comment it expressed the view that the "term 'discrimination' as used in the Covenant [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[164] These definitions of discrimination present some common denominators, particularly: a) a differential treatment, b) a certain effect, and c) a certain prohibited ground.

(a) *Differential Treatment*

In terms of differential treatment, any of the words such as "distinction", "exclusion", "restriction", and "preference", are all indicative of a discriminatory purpose. Particularly, for what concerns the scope of this analysis, a report by the Committee on Economic Social and Cultural Rights noted in the case of Vietnam[165] that "preferences" suggest that it is not necessary that the action is directed against the group alleging discrimination; it can also occur through unreasonable promotion of the individual/group at the expenses of others. In the specific case, the evidence of discrimination emerged on the basis of "preferences in favor of persons from certain groups".[166] Vietnam's history of war, partition and reunification, and the complex transition from socialist to market economy have

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[163] Article 1, 1979 United Nations Convention to Eliminate All Forms of Discrimination against Women.
[164] Human Rights Committee General Comment No. 18: *Non-Discrimination*, UN Doc. A/36/40, 10 November 1989, at para. 7.
[165] Concluding observations of the Committee on Economic, Social and Cultural Rights following the report of the Socialist Republic of Viet Nam (E/1990/5/Add.10), E/C.12/1993/8 of 9 June 1993.
[166] *Ibid.*, at 11.

hindered the full implementation of the ICESCR. In this scenario, one of the aspects criticized by the Committee in its final observation was the episodes of positive discrimination against certain groups such as "children of war victims and decorated families".[167] According to the Committee, derogation from the non-discrimination principle is permissible if "the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the Covenant".[168]

Differential treatment is surely a prerequisite but it is not *per se* sufficient to make a *prima facie* case of discrimination. Sometimes, giving preference to members of certain racial groups is necessary for purposes of authenticity. For instance, the Human Rights Committee in the *20 Mauritian women*'s case found a violation of Articles 2(1) and 3 of ICCPR, but pointed out that the differential treatment grounded in gender was not *per se* conclusive.[169]

In its General Comment No. 18, the Human Rights Committee has identified the grounds under which differential treatment is justified, namely if: a) the goal is to achieve a legitimate purpose, and b) the criteria at the basis of the differentiation are reasonable and objective. To this regard, in the *Van Oord v. The Netherlands* case,[170] Mr. and Mrs. Van Oord, former Dutch nationals who subsequently acquired U.S. citizenship, brought a claim for differential treatment of their pension compared to that accorded to other former Dutch national who emigrated to other countries,[171] and was based on the violation of Article 26 of the ICCPR. Given the fact that the differential treatment was based on the different provisions contained in separate bilateral agreements that the Netherlands concluded with the United Stated and other countries, the Human Rights Committee held that in

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[167] *Ibid.*
[168] Human Rights Committee General Comment No. 18: *Non-Discrimination*, UN Doc. A/36/40, 10 November 1989, at para. 13. *See also Jacob and Jantina Hendrika van Oord v. The Netherlands,* Communication No. 658/1995, 4 November 1994 (CCPR/C/60/D/658/1995); and *Belgian Linguistics Case*.
[169] Human Rights Committee, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, Resen. 9/35 of 2 May 1978, at para. 9.2 (b) 2 (i) 8.
[170] *Jacob and Jantina Hendrika van Oord v. The Netherlands*, Communication No. 658/1995, 4 November 1994, CCPR/C/60/D/658/1995.
[171] Australia, Canada and New Zealand.

this case the differential treatment was grounded in reasonable and objective criteria (*i.e.* the different treaty arrangements) and that therefore no violation of Article 26 occurred. Fawcett and others emphasize the relativity at the basis of the concept of non-discrimination, and express the view that "the right… enjoyed must be equal in measure to the right enjoyed by somebody else".[172]

The idea that differential treatment, if based on justifiable grounds, is admissible, is a common sense notions and has been underpinned by several scholars. Professor Schachter recalls that "since the time of Plato, it has been suggested that 'equality among unequals' may be inequitable and that differential treatment may be essential for 'real equality'."[173] On the basis of this simple, yet powerful principle, it has been argued that the principle of affirmative action grounded in compensatory or distributive justice,[174] accessible in domestic legal systems, should also be adopted in international law in order to redress inequalities.[175] Some legal scholars went even further by stating that the principle of equality "forbids discriminatory distinctions but permits and sometimes requires the provision of affirmative action".[176]

In the Belgian Linguistic Case,[177] some inhabitants of the Belgian region considered by law to be Dutch-speaking (or Kraainem), filed an application with the European Court of Human Rights alleging that Belgian linguistic legislation relating to education infringed upon their rights under the European Convention.[178] In finding that Belgium was in partial breach of the Convention for preventing certain children from having access to French-language schools solely

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[172] FAWCETT, J. E. S., "The Application of the European Convention on Human Rights", 1969 at 239; *See also* DINSTEIN, Y., *Discrimination and International Human Rights*, Israel Yearbook of Human Rights, 1985 at 11 and CRAVEN, M. C. R., "The International Covenant on Economic, Social, and Cultural Rights", 1995 at 164.
[173] SCHACHTER, O., *Sharing the World's Resources*, in "International Law: A Constructive Perspective", R. Falk (Ed.), 1985 at 525, 528
[174] *See* FICUS, R. J., "The Constitutional Logic of Affirmative Action", Stephen L. Wasby, (Ed.), 1992 at 8-14; LUSTGARTEN, L., "Legal Control of Racial Discrimination" at 14 (1980).
[175] SORNARAJAH, M., "The Pursuit of Nationalized Property", 1986 at 288.
[176] MCKEAN, W., "Equality and Discrimination under International Law", 1983 at 288.
[177] *Case Relating of Certain Aspects of the Law on the Use of Languages in Education in Belgium* (hereinafter Belgian Linguistic Case), 1 Eur. H.R. Rep., 1968 at 252.
[178] Article 8 in conjunction with Article 14, and Article 2 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of March 1952.

on the basis of their parents' residency, the European Court of Human Rights ruled that "certain legal inequalities tend only to correct factual inequalities" and that the non-discrimination principle was only violated if the differential treatment had no "reasonable and objective justification", like in the case at hand.

The Permanent Court of International Justice (PCIJ) addressed the topic in its *Advisory Opinion Concerning German Settlers in Poland* where a number of colonists, who were formerly German nationals settled in territory previously belonging to Germany, faced measures of expulsion by the Polish Government from the territories that the colonists legitimately occupied under the Treaty of Versailles. In maintaining that the actions taken by Poland were contrary to international obligations, the PCIJ observed that "[t]here must be equality in fact as well as ostensible legal equality".[179] The PCIJ confirmed its position in the subsequent *Advisory Opinion concerning the Treatment of Polish Nationals in the Danzig Territory*. In this case, the PCIJ was called to interpret provisions of the 1919 Treaty of Versailles and the 1920 Convention of Paris,[180] relating to non-discrimination against Polish citizens and other persons of Polish origin or speech, which represented a substantial limitation to the Free City of Danzig sovereignty. In this context, the PCIJ noted that the Versailles Treaty was not "absolutely clear",[181] and that the Treaty could not be restrictively interpreted in favor of the sovereignty of Danzig. Particularly, the PCIJ reiterated that "[t]he prohibition against

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[179] *Advisory Opinion concerning Settlers of German Origin in Poland,* 1923 P.C.I.J. 24 (ser. B) No. 6, 10 September 1923, at para. 40.

[180] Article 104 (5) of the Treaty of Versailles read: "*The Principal Allied and Associated Powers undertake to negotiate a Treaty between the Polish Government and the Free City of Danzig, which shall come into force at the same time as the establishment of the said Free City, with the following objects: …(5) To provide against any discrimination within the Free City of Danzig to the detriment of citizens of Poland and other persons of Polish origin or speech*"; Article 33, paragraph 1, of the 1920 Treaty of Paris which corresponds to Article 30 of the drafts of October 16th and October 20th, is worded as follows: "*The Free City of Danzig undertakes to apply to racial, religious and linguistic minorities provisions similar to those which are applied by Poland on Polish territory in execution of Chapter I of the Treaty concluded at Versailles on June 28th, 1919, between Poland and the Principal Allied and Associated Powers, to provide, in particular, against any discrimination, in legislation or in the conduct of the administration, to the detriment of nationals of Poland and other persons of Polish origin or speech, in accordance with Article 104, paragraph 5, of the Treaty of Versailles. The provisions of Articles 14 to 19 of the Treaty concluded at Versailles between the Principal Allied and Associated Powers and Poland on June 28th, 1919, as also the provisions of Article 89 of the Treaty of Versailles with Germany, shall equally apply to the Free City of Danzig*".

[181] *Advisory Opinion concerning Settlers of German Origin in Poland,* 1923 P.C.I.J. 24 (ser. B) No. 6, 10 September 1923, at para. 93.

discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law".[182] Again, on the topic of discrimination and protection of minorities, in the *Advisory Opinion on the Minority Schools in Albania*,[183] the PCIJ was called upon expressing itself on Albania's decision to abolish Albanian private school for its nationals belonging to racial, religious or linguistic minorities. From Albania's perspective, after Albanian nationals belonging to the majority ceased to be entitled to have private schools, leaving private schools for minorities would have created a privilege in favor of the minority. In ruling against Albania's decision and in upholding the possibility for Albanian minorities to maintain private schools, the PCIJ observed that "[e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to obtain a result which establishes an equilibrium between different situations".[184] The former has been identified with formal equality[185] (*i.e.* provisions for equality in conventions and treaties), but the PCIJ has made clear that if there are justified grounds, formal equality might not be affected in case of actual discrimination.

From the above, one can draw that there is no concept such as absolute non-discrimination. Derogations are admissible, as long as the legitimate goal and the discriminatory measure are in a reasonable relationship of proportionality, the objective of the differential treatment is legitimate, and the means are proportionate to the legitimate objective.

(b) *Purpose / Effect*

Besides CERD and CEDAW analyzed above, two other international human rights treaties contain a definition of "discrimination". The 1958 Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation of the International Labor Organization (ILO) reads:

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[182] *Advisory Opinion on Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory*, 1932 P.C.I.J. 28 (ser. A/B) No. 44, 4 February 1932, at para. 75.
[183] *Advisory Opinion on the Minority Schools in Albania*, 1935 P.C.I.J. 19 (ser. A/B) No. 64, 6 April 1935, at para. 64.
[184] *Ibid.*, at para. 64.
[185] *Ibid*.

> *For the purpose of this Convention the term 'discrimination' includes: (a) any distinction, exclusion or preference made on the bases of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation* (emphasis added).[186]

The United Nations Educational, Scientific and Cultural Organization (UNESCO) 1966 Convention against Discrimination, in turn, recites:

> *[E]xclusion, limitation or preference which being based on race colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education* (emphasis added).[187]

All four treaties clearly point at the "effect" that the discriminatory measure carries within, to be such. All, except the ILO Convention, point both at the "purpose or effect" that the discriminatory measure should have. According to Weiwei, the particle "or" between "purpose" and "effect" can be interpreted as if the "purpose" can be deprioritized when compared with the "effect". Furthermore, according to the same author, "purpose" carries a meaning of "intention", and since it is complex to identify and prove such subjective intention, he concludes that the "purpose" of the discriminatory act is not an element of discrimination. Therefore, it is the "effect" of a certain policy to determine whether a measure is discriminatory. In its dissenting opinion in the *South West Africa*[188] cases (*Ethiopia v. South Africa*; *Liberia v. South Africa*), Judge Tanaka of the ICJ has expressed its position on the matter. After World War I, the Union of South Africa captured the ruling German colony, and South West Africa (the actual Namibia) was declared a League of Nations Mandate territory under the Treaty of Versailles, with the Union of South Africa responsible for the administration of South West Africa. In the proceedings before the ICJ, Ethiopia and Liberia, in their capacity of members of the former League of Nations, put forward allegations of breach, by the Republic of South Africa, of the League of

[186] Article 1, 1958 Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation of the International Labor Organization (C111 ILO).
[187] Article 1, 1960 UN Convention against Discrimination in Education.
[188] *South West Africa Case*, Second phase, I.C.J Report, 18 July 1966.

Nations Mandate for South West Africa, especially with regard to apartheid policies. The Government of South Africa, in turn, argued that such policies "promoted to the utmost the material and moral well-being and the social progress of the inhabitants of the territory". In the second phase the ICJ eventually ruled, by the President's casting vote,[189] that the applicants did not establish any legal right or interest in the subject matter of their claims, and, accordingly, rejected all claims.[190] In interpreting the existing international law on non-discrimination based on race, in his dissenting opinion--which can be considered a milestone in the field,--Judge Tanaka expressed the view that "a different treatment is permitted when it can be justified by the… concept of reasonableness", as opposed to arbitrariness.[191] Particularly, he argued that "[t]he arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned… The practice of apartheid is fundamentally unreasonable and unjust. The unreasonableness and injustice do not depend on the intention or motive of the Mandatory, namely its *mala fides*. Distinction on a racial basis is in itself contrary to the principle of equality which is of the character of natural law, and accordingly illegal".[192] From this statements it can be inferred that, as pointed out by Weiwei, the arbitrary nature of an action is not necessarily linked to its purpose. Rather, the violation of the principle of non-discrimination is established if there exists a simple fact of discrimination without regard to the intent of oppression on the side of the acting party.

(c) *Prohibited Grounds*

Different legal systems can address the grounds upon which discrimination is prohibited in three different ways. By stating that all persons are equal before the law, a great deal of discretion will be granted to the judiciary to actually identify the grounds on which discrimination may occur. This is the approach taken by the United States Constitution, whose Fourteen Amendment recites that no State

[189] The vote were equally divided (seven-seven).
[190] *South West Africa Case*, Second phase, I.C.J Report, 18 July 1966 at 49.
[191] Dissenting Opinion of Judge Tanaka, *South West Africa Case*, Second phase, I.C.J Report, 18 July 1966 at 304.
[192] *Ibid.,* at 304 & 312.

may "deny to any person within its jurisdiction the equal protection of the law". The extreme to this approach is for a legislator to produce an exhaustive or "rigid" list of grounds to consider an action discriminatory. This will give the judiciary little grounds for discretion, but will impose the burden of a legislative review every time that societal evolution suggests that a new ground should be added to the list of the existent ones. The United Kingdom anti-discrimination legislation, and the laws of the European Union, are an example of the embodiment of this approach. The "third way" is to identify some of the discriminatory grounds, to offer the interpreter and the judiciary some sort of guidance, and specify that the list is not exhaustive. This way the judiciary is left with some discretion to determine the standards.[193] This is the course chosen in the drafting of international human rights instruments such as the Universal Declaration on Human Rights (UDHR), the ICCPR, and the ECHR.[194]

Professor Charlesworth has analyzed the issue of the existence of a hierarchy of forms of discrimination, and came to the conclusion that discrimination on the basis of race is internationally considered more serious than other forms of discrimination.[195] In general, the principle of non-discrimination in international treaties has mainly developed in the areas of race and sex.[196]

(3) Non-Discrimination: Connecting the dots

As already pointed-out above, the principle of non-discrimination operates in different ways, depending on the specific investor-protection taken into consideration, and also among different human rights norms. For instance, when considering the National Treatment or the Most-Favored-Nation standards, it will prove to be more challenging to demonstrate when exactly two legal entities are in 'like' or 'similar' circumstances, as opposed to consider a Fair and Equitable Treatment standard, where the relevant comparative factor would simply be the

[193] FREDMAN, S., "Discrimination Law", 2001 at 68.
[194] The same approach has been adopted in the Canadian Charter of Rights and Freedoms of 17 April 1982; and the South African Constitution o 8 May 1996.
[195] CHARLESWORTH, H., *Concept of Equality in International Law*, in "Litigating Rights", Grant Huscroft & Paul Rishworth (Ed.), 2002 at 143.
[196] *Ibid*.

treatment of an investor of the nationality of the claimant.[197] Furthermore, it is more likely that Fair and Equitable Treatment cases are assessed on a case-by-case basis, giving arbitrators greater flexibility in their judgment. In the same way, the discriminatory nature of a taking might be evaluated comparing the treatment of investors of the same nationality or, when assessing human rights violation, of two nationals of the same country. Besides these natural differences in assessing and proving the principle, important parallels can be drawn from the interaction of the principle of non-discrimination in the two fields of law.

First, in light of the above analysis, and as it will be explained in the following paragraphs addressing the protections accorded to foreign investors, there is a strong parallel between the concept of "preference" as outlined in human rights jurisprudence, and a potential discriminatory situation for investors. Let's take, for instance, the interpretation of the concept of non-discrimination by the Committee on Economic Social and Cultural Rights in the case of Vietnam: as explained above, the term "preferences" has been interpreted as an action that is not necessarily directed against the group alleging discrimination, but that may be effected through unreasonable promotion of the individual/group at the expenses of others.[198] The issue at stake in this particular case was the positive discrimination in favor of children of war victims and decorated families in Vietnam. In such scenario, resources and opportunities were taken away from the societal layers to be unevenly distributed to the advantage of certain categories. Without delving into the competition and protectionism caveats already extensively analyzed above, in the same way, in *Pope & Talbot*, the Arbitral Tribunal did not buy Canada's claim to compare the size of the group of disadvantaged Canadian investors to the size of the group of Canadian investments receiving more favorable treatment than the investment at issue. As

[197] The absence of a comparative factor is perhaps the reason why the claimant in *Chemtura v. Canada* did not ground its claim for discrimination on the MFN and national treatment clause of the NAFTA but rather sought to import a FET clause from another treaty. See *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada* (*Chemtura v. Canada*), (UNCITRAL filed in 2001), Award of 2 August 2010, at paras. 231-237.

[198] Concluding observations of the Committee on Economic, Social and Cultural Rights following the report of the Socialist Republic of Viet Nam (E/1990/5/Add.10), E/C.12/1993/8 of 9 June 1993 at 12.

for the interpretation of "likeness" by the Committee on Economic, Social and Cultural Rights, the problem was the preferential treatment accorded to local investors and companies and can be, by analogy, read as a subtraction of opportunities from foreign companies to the (unjustified) advantage of local actors.

Again, in *SD Myers v. Canada* the Arbitral Tribunal interpreted the "like circumstances" concept as being material to the "sectorial activity" taken into consideration: the Canadian ban on the export of wastes would have considerably disadvantaged the U.S. investor to the benefit of the local competitors that lobbied the Canadian Environmental Minister to impose the ban. *SD Myers*'s considerable disadvantage would have in fact consisted in the company shutting down business for being able to take business away from its Canadian competitors, due to its competitive prices, extensive experience and credibility.

As to the later cases, also *Occidental* and *Methanex*, notwithstanding Kurtz's critics to the allegedly improper application of WTO law and the technical aspects on competition and protectionism typical of the WTO/GATT regime, these cases also support a claim of unification of the non-discrimination principle in the human rights and investment realms. In fact, the *Occidental* Tribunal's broad interpretation of the concept of "like situations", although divergent from previous jurisprudence, supports again a reading of the principle of non-discrimination, in the words of the Sub-Commission on the Prevention and Protection of Human Rights and the Human Rights Committee, in the sense of protecting the group of foreign investors from enjoying the equality of treatment they may wish (*i.e.* the application of the refund of VAT amounts paid on purchases required to perform its obligations under the contract), "based on… national origins".[199] What the arbitral tribunal did in *Occidental* was to acknowledge that "like situations" are not only cases where a competitive

[199] UN Doc. E/CN. 4/S.R.32-41, cited in MCKEAN, W., "Equality and Non-Discrimination under International Law", 1983 at 83. The Sub-Commission's formula was commented upon in a memorandum of the Secretary General of the UN entitled *The Main Types and Causes of Discrimination*, UN Sales No. 49. XIV.3, at paras. 6 and 7. *See also* Human Rights Committee General Comment No. 18: *Non-Discrimination*, UN Doc. A/36/40, 10 November 1989, at para. 7.

relationship between local and foreign entities operating in the same business sector exists. Rather, given that investment law is grounded in aliens' diplomatic protection, the basis for assessing a discriminatory treatment should be broader and not limited to instances where companies are in competition.

Also in *Methanex* the purpose of the non-discrimination principle is consistent with its definition from a human rights perspective. In fact, in the particular case, there was no finding of discrimination on the part of the State because Methanex could not provide evidence as to its mistreatment based on national origin. The California ban had precisely the same effect on the American investors and investments as it had on the Canadian investor, Methanex.[200]

Second, the concept of non-discrimination is a relative one, both in the field of investments, where the treatment of investors is compared to (and must not be worse than) the treatment accorded to national investors under circumstances alike, as well as in the field of human rights, where "'equality' necessarily implies the existence of some extraneous criterion by reference to which the content is determined".[201]

Third, in both fields of law derogations to the principle are admissible in light of a higher purpose. The rights of an individual or group can be assessed differently, under similar circumstances, if the differentiation is objective, reasonable and if the purpose of the differentiation is legitimate under the relevant covenants. Not all differentiations of treatment constitute discrimination.[202] For instance, as observed above, in the practice of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Human Rights, discrimination is tolerated upon a series of conditions: a) the satisfaction of the targeted individual/group with the alternative treatment, or b) that the discrimination is carried forward for public interest purposes. Similarly, in the Human Rights Committee's praxis, discrimination is allowed if a) the criteria for the alternative

[200] *Methanex Corporation v. USA*, Final Award of 3 August 2008, at Pt. IV. Chapter B, at para. 18.
[201] FAWCETT, J. E. S., "The Application of the European Convention on Human Rights", 1969 at 239.
[202] *See e.g. Jacob and Jantina Hendrika van Oord v. The Netherlands,* Communication No. 658/1995 (4 November 1994), CCPR/C/60/D/658/1995 and *Belgian Linguistics Case.*

treatment are reasonable and objective, and b) if the aim of such alternative treatment is to achieve a purpose which is legitimate under the Covenant.[203] Arbitral tribunals in investors-State disputes have also recognized that differential treatment does not necessarily in itself amount to discrimination. Particularly, as explained above (*Supra* Section III.C.1.a)(1)(b)) in *Pope & Talbot*, the arbitrators found that differential treatment accorded to different softwood lumber companies within different regions did not amount to a violation of National Treatment.[204] The Arbitral Tribunal grounded its reasoning in the possibility to derogate to the equal treatment standard to safeguard HSE value, if the Government's policies have a specific rational in the safeguard of the public good.

In the context of the possibility to apply differential treatments without derogating to the principle of non-discrimination, topic that has received a deal of attention both in scholarly works as well as in jurisprudence, it is worth to analyze the concept and praxis of "affirmative action" from the point of view of the intersection between human rights and investment law. From a human rights law perspective, affirmative action is a typical instrument of derogation to equal treatment, accepted for its legitimate objective to adopt positive steps to increase the representation of the members of historically discriminated groups on the basis of their race, color, religion, gender, sexual orientation, or national origin in areas of employment, education, and business.[205] Particularly, in the context of South Africa's Black Economic Empowerment (BEE), Historically Disadvantaged South Africans (HDSAs) have today the right to own equity in companies operating in key sectors of South African economy like, *inter alia*, mining companies. Besides employment equity schemes, measures include preferential access to public interest contracts and licenses, and policies imposing businesses to sell shares to HDSAs partners. In the context of South Africa's pursue of its

[203] Human Rights Committee General Comment No. 18: *Non-Discrimination*, UN Doc. A/36/40, 10 November 1989, at para. 13. *See also Jacob and Jantina Hendrika van Oord v. The Netherlands,* Communication No. 658/1995 (4 November 1994), CCPR/C/60/D/658/1995 and *Belgian Linguistics Case* (1968) 1EHRR 252.
[204] *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, at paras. 73-104, 10 April 2001.
[205] Stanford Encyclopedia of Philosophy, "Affirmative Action", as revised on 1 April 2009, http://plato.stanford.edu/entries/affirmative-action/, last accessed on 6 April 2014.

constitutional-based transformation agenda, it has been considered reasonable--as opposed to arbitrary--to accord preferential treatment to historically disadvantaged people compared to other South African nationals, in order to address the "legal" historical exclusion of a majority. Studies have shown that little resistance is found among white-owned corporations to broaden their recruitment pool to include qualified black people.[206] However, from an investment law perspective, affirmative action policies have caused serious controversies when they have been put in place by the Government of South Africa to remedy or re-strike the balance of past historical discrimination against black African people during Apartheid, and have been for long debated to the extent that they can be really cumbersome for commercial activities, as well as not uniformly benefit all HDSAs (therefore falling short to fulfill the "public purpose" requirement for a legal expropriation).[207]

In 2007, investors from Italy and Luxemburg initiated arbitration under ICSID Additional Facility Rules against the Government of South Africa,[208] claiming that the host country's Mining and Petroleum Resources Development Act (MPRDA), and relating affirmative action provisions, not only were cumbersome from a financial point of view, but also amounted to expropriation in that they deprived the companies of their existing mining rights, and violated the Fair and Equitable Treatment and National Treatment obligations under the Italy-South Africa and Luxembourg-South Africa BITs.[209] The background of the dispute is that several South African mining companies, owned by the claimants, were subjected to a mandatory transfer under State control, and re-licensed to miners for fixed periods of time. This process, *inter alia*, included the assessment of the companies' efforts to ameliorate social, labor and development conditions, especially towards HDSAs. Although the parties' pleadings are not publicly available, according to the summary of the parties' claim in the Arbitral Tribunal's award, in the specific

[206] KANYA, A., *The Politics of Redress: South African Style Affirmative Action*, in "The Journal of Modern African Studies" Vol. 35, No. 2, June 1997 at 231-249.
[207] ROBINSON, S., Time Europe, *Welcome to the Club - Former A.N.C. leaders Have Joined South Africa's White Corporate Élite. But Even Some Blacks Are Critical of the Deals That Made Them Rich*, 29 May 2005.
[208] *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/01).
[209] *Ibid.,* Memorial, at paras. 651-771.

case, the investors' claim was based both on expropriation as well as on breach of National Treatment, which is one of the standards embedding the non-discrimination principle.

The issue of differential treatment assumes different connotations, depending on whether it is analyzed from a human rights or investments perspective, but is, in essence, the flip of the same coin. One level of the analysis is, in fact, the differential treatment accorded to historically disadvantaged people as compared to other South African nationals; the other level is the treatment received by foreign investors, as compared to local investor, in being imposed that a certain percentage of the management of their investment has to be black, in order to be in compliance with the Government of South Africa's changed agenda. The foreign investors' argument is that the redistributive aspects of this policy are incompatible with the expropriation and Fair and Equitable Treatment provisions in most BITs. Unfortunately for this analysis, in 2010, Italy and Luxemburg settled the claim with the Government of South Africa, lifting the appointed Arbitral Tribunal from issuing a landmark decision in the context of the relationship between the Government of South Africa's obligations towards investors, and its devotion to the promotion of human rights and equality in the aftermaths of the Apartheid regime. Immediately after the settlement, South Africa launched a review of its BITs. Based on the conclusion that BITs pose risks and limitations on the ability of the Government to pursue its constitutional-based transformation agenda, South Africa terminated its BITs with Belgium and Luxembourg. This was not an isolated matter. More recently, on 23 June 2013, the Government of South Africa served a notice of termination to Spain, with regard to the BIT in place between the two countries.[210]

It is worth noting that, according to a study published by the International Institute for Sustainable Development (IISD), neither the Italian nor the Belgium-

[210] 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*, Arbitration Notes, 21 August 2013, available at: http://hsf-arbitrationnotes.com/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/, last accessed on 6 April 2014.

Luxemburg BITs contain provisions relating to the safeguard of social goals or human rights in general.[211] This gap in the regulation stands in stark contrast with the countries' constitutions, which are built around the promotion of democratic values, social justice and respect of fundamental rights of citizens.

As outlined in the sections above, the principle of non-discrimination is "deeply rooted in both human rights and investments disciplines",[212] but the jurisprudential outcome of its application, especially in the investment law realm, is often controversial and inconsistent among different arbitral tribunals. This, however, does not mean that the two regimes are irreconcilable but rather that more attention should be devoted to untangle the way through which human rights and investment law can be reconciled, through a consistent use of the non-discrimination principle. For the purposes of this study, the following paragraphs will draw from the application of the principle of non-discrimination in human rights jurisprudence to complement gaps and inconsistencies of its application in the field of investment law, and consequently restate the bridge, already existing but somehow underestimated by scholarly works, between two fields of law that only apparently have no relation to each other.

The first investment case to start with, given its controversial and highly criticized outcome, is *Occidental v. Ecuador*. In this case, the investor, *Occidental*, was successful in convincing the Arbitral Tribunal that the correct standard for a National Treatment claim encompassed a comparison with the treatment received by companies involved in the export of non-oil-related goods in Ecuador.[213] As already outlined above, the Arbitral Tribunal bought Occidental's argument, basing its decision on grounds that have been largely criticized throughout scholarly works, and that are allegedly based on an incorrect reading and application of WTO law. Without delving into a complex and technical analysis of

[211] PETERSON, L. E., *South Africa's Bilateral Investment Treaties - Implications for Development and Human Rights*, IISD, No. 26, November 2006 at 11.
[212] DUPUY, P.M. & VIÑUALES, J. E., *Human Rights and Investment Disciplines: Integration in Progress*, in "International Investment Law", M. Bungenberg, J. Griebel, S. Hobe, A., Reinisch (Eds.), Baden Baden: Nomos, 2013 at 9.
[213] *Occidental Exploration and Production Company v. Ecuador*, Final Award of 1 July 2004, at para. 168.

WTO law to disprove its application to the case at issue, the following paragraphs will analyze the case from a human rights approach. In particular, the three-fold analysis identified above at Section III.C.1.a)(2) will be applied: a) determining whether a differential treatment occurred, b) what its effect is, and c) which the grounds for discrimination are and how the measure at issue interacts with them.[214] First, for what concerns a) determining whether differential treatment occurred, Ecuador did not operate a distinction, exclusion, restriction or preference of local investors compared to foreign investors. In fact, when it came to VAT refunds, all oil producers were treated alike, including the State oil company, Petroecuador.[215] Second, as regards b) the effect of the Government of Ecuador's measure, as observed by the Arbitral Tribunal in *S.D. Myers* the term "'treatment' suggests that practical impact is required to produce a breach of Article 1102…".[216] This has been restated by the *Siemens A.G. v. Argentina* Tribunal which ruled that "the impact of the measure on the investment would be the determining factor to ascertain whether it has resulted in non-discriminatory treatment".[217] In the case at issue, all exporters, regardless their nationality, were to receive VAT reimbursement through a compensation formula embossed as a percentage of oil production. This, apparently, represents an objective measure which is not linked to a specific arbitrary purpose, but rather having a consistent effect towards any entity operating in the sector. However, when one considers the specific facts of the case and the Government's defense that other oil exporters, including the State-owned company Petroecuador, were also denied VAT refunds (trying to disprove that there was a discriminatory intention against foreign companies), an interesting point arises. Particularly, the Arbitral Tribunal never discussed the appropriateness of using a State-owned company as a comparator in a tax issue claim. In fact, payment of taxes by a fully participated state company does not, in any event, affect the State's income from the company. Therefore, the VAT refund denial does have a different effect if applied to a State-owned entity,

[214] *Supra* III.C.1.a)(2).C.
[215] *Occidental Exploration and Production Company v. Ecuador*, Final Award of 1 July 2004, at paras. 171-172.
[216] *S.D. Myers*, at para. 254.
[217] *Ibid.*, at para. 321.

as opposed to a private company. In the former case, the tax effect is neutral; in the latter, it has an economic impact and has, therefore, a differential nature. The fact that the Arbitral Tribunal ruled in favor of the foreign investor without touching upon this important aspect of the matter, makes the judgment weak, although from a substantive perspective, the Arbitral Tribunal's conclusion was correct: Ecuador's tax measure was not "neutral" from a "non-discrimination" perspective. Third, as regards c) the grounds for discriminations are outlined in the BIT which is the governing instrument. The U.S.-Ecuador BIT,[218] concluded between the two countries on 27 August 1993, identifies at Article II(1) the first ground for discrimination:

> *Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty.*[219]

The issue revolves again around the meaning of "in like situations". The provision prohibits discrimination on grounds of nationality of investments "in like situations". Many scholars have criticized the Arbitral Tribunal's creative interpretation of extending the reading of "in like circumstances" to investors also operating in sectors other than oil production and distribution, as long as other national or foreign companies were exporters.[220] According to the human rights "non-discrimination" approach, however, the measure adopted by the Government presented, in fact, a discriminatory element in its effect, because, as analyzed under b), there was at least one local investor (Petroecuador) towards which the VAT measure was more favorable than towards Occidental. It is generally accepted that the *Occidental* Tribunal based its finding on the wrong subject. Namely, it extended the pool of comparators to investors operating in other sectors, as opposed to look at the State-owned entity that Ecuador itself

[218] Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment (U.S.-Ecuador BIT), Washington DC, 27 August 1993.
[219] Id., Article II.
[220] *Occidental v. Ecuador*, Award, at para. 177.

proudly took as an example thinking to prove its point. In any case, the human rights analysis brings about the same result put forward by the investment Tribunal.

Another provision dealing with the "nationality" ground for "non-discrimination" is Article II(2)(c) of the U.S.-Ecuador BIT which recites:

> *Each Party shall ensure that any state enterprise that it maintains or establishes accords the better of national or most favored nation treatment in the sale of its goods or services in the Party's territory.*

In the case at issue here, Occidental claimed that the Government of Ecuador also breached the Most-Favored-Nation standard because in treaties concluded with Spain and Argentina, respectively, the standard of National Treatment is not qualified by the reference to "in like situations". For this reason, Occidental would be entitled to this less restrictive treatment under the Most-Favored-Nation standard.[221] Ecuador rebutted the claimant's argument, stating that under the BITs with Spain and Argentina there is no example of companies in the oil sector, or any other sector, receiving a more favorable treatment that Occidental.[222] By ruling that Ecuador was in breach of Article II(1) of the BIT, in a rather evasive way the Arbitral Tribunal believed it unnecessary to delve into the Most-Favored-Nation standard. This way the Tribunal failed to assess whether the differential treatment between Occidental and other exporters was nationality-based. The author could not retrieve any evidence that other countries received a better treatment than Occidental in the export business. To the contrary, in his Partial Dissenting Opinion in *EnCana Corporation v. Ecuador*,[223] another investment arbitration dealing with VAT refund in Ecuador, Dr. Horacio Grigera Naón found that the "oil and gas sector [adversely affected by the VAT interpretation] is exclusively and entirely composed of foreign companies, a situation that is not shared by the other non-manufacturing export sector". However, the discriminatory effect of the measure adopted by Ecuador remains, because of the

[221] *Occidental v. Ecuador*, Award, at para. 170.
[222] *Ibid.*, at para. 172.
[223] Dr. Horacio Grigera Naón Partial Dissenting Opinion in the case *EnCana Corporation v. Ecuador* (LCIA Case No. UN3481, UNCITRAL), Award of 3 February 2006, at para. 40.

effect that the tax has on a private company, as opposed to a State-owned company.

Turning the attention to *Methanex Corp. v. U.S.*, the second case where scholarly works have criticized the approach of the Arbitral Tribunal, a purely human rights analysis would again lead to the same conclusion reached by the *Methanex* Tribunal. As to the *existence of the differential treatment*, the ban on methanol was applied not only to the Canadian investor but to all national companies producing methanol. This was the comparator that the United States put forward as the appropriate one to determine the meaning of "in like circumstances". Against the United States' approach, Methanex tried to transpose the GATT "like products" and national treatment jurisprudence to support a claim that the investments at issue were "in like circumstances" under NAFTA investment chapter. The foreign investor argued that "the most accurate and widely recognized test of 'likeness' is competition",[224] and that "if two or more investors or their investments compete for the same business, they are in like circumstances"[225] for the purposes of National Treatment. In other words, Methanex has argued that since methanol and ethanol are "like products" under GATT, and they stand in a competitive relationship, producers of methanol and ethanol should be considered to be "in like circumstances" under NAFTA investment chapter. However, the *Methanex* Tribunal has correctly noted that the NAFTA drafters were aware of the meaning of the term "like product" because they used it throughout NAFTA. Therefore, had they intended a GATT approach to the NAFTA investment chapter, they would have expressly stated it.[226] From a mere investment approach, therefore, the foreign investor was not accorded differential treatment compared to local producers of methanol.

As to the *effect* of the United States Government's measure on the methanol's ban, the Arbitral Tribunal found that it had the same effect on domestic methanol

[224] *Methanex v. United States*, Part IV - Chapter B - Page 3, at para. 5.
[225] *Ibid.*, at para. 5.
[226] *Ibid.*, at para. 33.

producers (equaling 47% of the industry) as well as on Methanex.[227] In fact, even taking into consideration the argument that the ban on methanol had the *effect* of benefitting domestic producers of ethanol, a product allegedly directly substitutable with methanol, the exact same benefit would have extended to foreign producers of ethanol. Considerations to reach a different conclusion might have been: a) significant competition between methanol and ethanol, and b) a strictly segmented ownership and market structure between domestic and foreign investors (*i.e.* 95% of methanol in foreign hands and 95% ethanol in domestic hands). In this situation, which however did not reflect the facts in the case at issue, despite the existence of an identical domestic industry comparator (*i.e.* the 5% domestic methanol production), the U.S. ban on methanol would have largely favored the competing 95% domestic ethanol production. But this is mere speculation and the analysis, having a mere clarification purpose, does not affect the finding of absence of discriminatory effect in the U.S. Government's measure.

Finally, as to the *grounds for discrimination*, it has already been discussed that the nationality of the investor and the treatment accorded to other countries are the relevant grounds.[228] Paradell and Newcombe argue that nationality-based less favorable treatment may be apparent from "an objective assessment of the design of the measure or inferred where the host state is unable to justify differential treatment".[229] To this end, many NAFTA's Chapter 11 cases have been resolved by arbitral tribunals in the sense of according host States considerable room for legitimate regulatory measures, even if they result in differential treatment between domestic and foreign investors. If governments' measures are justified by a rational policy objective not based on nationality grounds (in terms of preference for domestic over foreign investors), and do not hinder NAFTA's investment liberalization objectives, arbitral tribunals have found that foreign and domestic investors are not in like circumstances and that differential treatment is

[227] *Ibid*., at para. 19.
[228] *Supra* Section III.C.1.a)(3), at 62-63.
[229] NEWCOMBE, A. P. & PARADELL, L., "Law and Practice of Investment Treaties: Standards of Treatment", Kluwer, 2009 at 174.

admissible.[230] In *Methanex*, the nationality of the investment was not material to the Government's measure, and the Arbitral Tribunal found the existence of legitimate grounds to apply different regulatory treatment to methanol and ethanol producers that justified their not being in like circumstances,[231] regardless the nationality of the investment. As to a Most-Favored-Nation treatment breach, raised by Methanex,[232] the claimant did not provide any evidence supporting a finding that the United States accorded more favorable treatment to a foreign-owned investment allegedly in like circumstances.

Looking at the principle of non-discrimination, which, as exposed above, is intrinsic and in parallel applicable to both human rights and investment cases, does it provide the same kind of protection to the two realms?

From an investment law perspective, the non-discrimination principle is embedded in provisions such as the National Treatment or the Most-Favored-Nation standards which, when applied in the praxis, need in turn to be interpreted. As it has emerged from the available case law, what creates more problems in the application of the principle is attributing a meaning to "in like situation", which is the formula through which the National Treatment standard materializes, and where scholars and practitioners have had the most divided approaches. As it has been seen, the resort to WTO/GATT jurisprudence to fill-in the gap of the definition and shape the meaning of "like situations" in investment arbitration has not always led to sound decisions, and has been criticized by

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[230] Of the cases analyzed, *see Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2, at para. 79 *(NAFTA Ch. 11 Arb. Trib. Apr. 10, 2001)*, "*A formulation focusing on the like circumstances question, on the other hand, will require addressing any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments*".

[231] *Methanex v. USA*, Final Award, Part IV, Chapter B, at para 28, "*The incontrovertible fact is that Methanex produced methanol as a feedstock for MTBE and not as a gasoline additive in its own right. Aside from the federal prohibition of the use of methanol as an oxygenate, methanol has been tried as a fuel in only limited experiments, but would require, if it were to be used, significant and expensive retro-adjustments in gasoline engines. As a result, the ethanol and methanol products cannot be said to be in competition, even assuming that this trade law criterion were to apply. Insofar as there is a binary choice, it is between MTBE and other lawful and practicable oxygenates. Methanex's alternative theory of like products fails on the facts*".

[232] *Methanex v. USA*, Submission by Claimant, 18 September 2001, Ltr. at 21-22 (citing NAFTA art. 1103).

scholars.[233] Often times the fundamental differences between the two regimes have been completely overlooked, some others the WTO/GATT case law has only selectively been referred to, preventing investment tribunals' decisions from being accurate.[234] From an analysis of the case law it emerges that over the last decade, arbitral tribunals have developed the following three-step analysis to determine whether a violation of the National Treatment standard occurred: a) identification of the correct comparator for differential treatment, b) consideration of the treatment each comparator is accorded, and c) in case of a finding of differential treatment, examination of whether the relevant subjects are "in like circumstances", or in other words, if any grounds exist to justify the differential treatment.[235] We will call this the "Investment Test".

From a human rights perspective, as shown above, the definition of the principle of non-discrimination, as embedded in the available human rights instruments,[236] is quite detailed and identifies three items that should make the practitioner or scholar able to assess whether a discrimination has occurred. We will refer to this as the "Human Rights Test".

From a practical perspective, comparing the investment jurisprudence's three-fold approach, the Investment Test, and the three elements of the principle of non-discrimination under human rights law, the Human Rights Test, this study claims that there is no difference in the kind of protection accorded.

As to the first step of the Investment Test, the choice of the comparator is necessary, given the fact that the National Treatment standard carries within a

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[233] *See* KURTZ, J., *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents*, 20 EJIL, 2009 at 749; United Nations Publications, "*Investor-state Dispute Settlement and Impact on Investment Rulemaking*", Business and Economics, 2007 at 51; NEWCOMBE, A. P. & PARADELL, L., "Law and Practice of Investment Treaties: Standards of Treatment", Kluwer, 2009 at 172.

[234] *Supra* Sections III.C.1.a)(1)(c) and III.C.1.a)(1)(d).

[235] United Nations Publications, "*Investor-state Dispute Settlement and Impact on Investment Rulemaking*", Business and Economics, 2007 at 48.

[236] The International Convention on the Elimination of All Forms of Racial Discrimination; Convention on Discrimination Against Women; the 1958 Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation of the International Labor Organization; and the United Nations Educational, Scientific and Cultural Organization (UNESCO) 1966 Convention against Discrimination.

concept of relativeness, in that to be interpreted, a comparison needs to be made between the investor claiming the standard and someone else. Comparable, looking at the definition of non-discrimination in the four relevant international human rights conventions, the common terms *distinction*, *exclusion*, *limitation*, *preference*, they also all evoke the existence of a necessary comparator for their interpretation. In fact, somebody can only be distinguished "*from somebody else*", can only be excluded "*from a group, community etc.*", can only be limited "*compared to another individual or group*", or can only be preferred "*to another individual or group*".

As to the second step in the Investment Test, an analysis of the case law shows that the following factors have been identified to assess whether a differential treatment occurred:

- *whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals;*
- *whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.*[237]

This second step of the Investment Test does nothing more than identifying or classifying the differential treatment through its "practical effect" thus including and restating the first and second elements of the Human Rights Test, namely a) the individuation of the differential treatment, and b) the study of the effect of the measure on the subject.

Finally, the third step of the Investment Test encompasses an interpretation of the term "in like circumstances" through the identification of any grounds that could justify the differential treatment. This is precisely the last element of the "Human Rights Test".

Thus, the answer to the question whether the principle of non-discrimination applied to investment and human rights queries, accords the same kind of protection, is "yes, it does". It is not the scope of the present study to test every

[237] *S.D. Myers v. US*, Second Partial Award, at para. 252.

investment tribunal's decision against the Human Rights Test. It is the opinion of the author that the common findings in the two sample cases of *Occidental* and *Methanex*, as backed by the theoretical analysis, support the theory of the substantive connection operated by the principle of non-discrimination between the investment and the human rights regime. The author agrees that arbitral tribunals utilized a wrong methodology to reach their conclusion in the *Occidental* and *Methanex* cases, but claims that the outcome, for what concerns the discrimination claim, is sound from a human rights perspective and consistent with a theory of unification of the investment and human rights disciplines.

b) Due Diligence

In broader terms, the principle of due diligence can be conceived as a "measuring instrument" to assess the level of care that a duty-bearer is expected to exercise to fulfil its duties. This way, right-holders are assured to be able to seek redress and hold accountable a duty-bearer for its actions or omissions.

(1) Investment Law

From the perspective of investment law, investor-State arbitrations may result in extremely large damage awards against the respondent State. This consideration opens-up the question of the level of due diligence arbitral tribunals expect of foreign investors or of host States, in handling investments, and what impact the due diligence standard has on the claim raised. There are therefore two levels of the analysis, or better two perspectives under which considering the issue: a) the investor as a duty-bearer on the one hand, and b) the host State as a duty-bearer on the other. When do investors or States violate their obligation of due diligence? The standard is vague and needs, as usual, to be assessed against specific case law.

Most of the early arbitral tribunals' decisions on protection owed by the host State to aliens against damages caused by private actors in its territory, identified an obligation borne by the State to provide protection against physical harm through

the police function.[238] Only some of the early decisions identified 'gross negligence' as the element to assess the State's conduct.[239] Today, however, the applicable standard, crystallized as customary law to characterize the obligation binding States, has become the due diligence principle.[240]

The notion has its origins in the 1871 Treaty of Washington by which the United States and Great Britain determined, in the context of an international conflict, the responsibility of a neutral State for damages caused by private actors, under its jurisdiction, in breach of the principles of neutrality.[241] The parties to the agreement, however, from the very beginning showed conflicting understanding of the concept.[242] Also for this reason, the *Institut de Droit International* avoided, in 1875, to refer to the principle of due diligence when codifying the duties of neutral States.[243] Subsequent codification attempts on the topic of State responsibility for failure to prevent damaging acts by private actors, also failed,[244] and remained at the stage of a draft.[245]

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[238] *See e.g. LHF Neer and Pauline Neer v. United Mexican States*, US-Mexican General Claims Commission, 4 UNRIAA 60, Decision of 15 October 1926.
[239] *See Balderas de Diaz*, US-Mexican General Claims Commission, 4 UNRIAA, Decision of 16 November 1926 at 1006-107. *See also* the cases reported by WOLF, J., *Zurechnungsfragen bei Handlunugen von Privatpersonen*, 45 Zeitschrift für ausländisches öffentlihes Recht und Völkerrecht, 1985 at 238.
[240] *See* PISILLO-MAZZESCHI, R., *The Due Diligence Rule and the Nature of the International Responsibility of States*, in "State Responsibility in International Law", Prevost R. (Ed.), 2002 at 97, 119-24.
[241] *See* BINGHAM, T., *Alabama Arbitration*, in "Max Planck Encyclopedia of Public International Law", Wolfrum, R. (Ed.), 2013.
[242] BLOMEYER-BARTENSTEIN, H., '*Due Diligence*' in "Encyclopedia of Public International Law", Bernhardt, R. (Ed.), Vol. I, 1992 at 1110-1111.
[243] Article III of *Devoir internationaux des Etats neutres*, in "Annuaire de l'Institut de Droit International", 1877 at 139: "*Lorsque l'Etat neuter a connaissance d'entreprises ou d'actes de ce genre, incompatible avec la neutralité, il est tenu de prendre les mesures nécessaires pour les empécher, et de poursuivre comme responsible les individus qui violent les devoir de la neutralité*".
[244] Article 10 of the Harvard Law School Draft of 1929, Research in International Law, Vol. II, *Responsibility of States*, 1929, 23 AJIL (Supplement) at 228. *See also* the International Law Commission (ILC) Special Rapporteur, *Draft on Responsibility of States for injuries caused in its territory to the person or property of aliens*, 13 ILC Yearbook, Vol. II, Part II, 1961 at 46: the term 'due diligence' is not mentioned but analogous wording as 'manifest negligent', 'foreseeability', and 'possibility' is used.
[245] Explanatory Note to Article 13(1) of the 1961 *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, cited in WHITEMAN, M. M., "Digest of International Law", Vol. VIII, 1967 at 739-40: "*What degree of protection is required varies with the circumstances. It is, of course, never enough as a matter of law that aliens are given the same protection as nationals… Among the factors to be taken into account… is that of the foreseeability of the risk… The means which a State has*

Nowadays, from a public law perspective, the principle of due diligence as a positive obligation to ensure rights has been mainly elaborated by the jurisprudence of the European Court of Human Rights (ECHR),[246] the interpretation of fundamental freedoms by the European Court of Justice (ECJ), and the interpretation of national constitutions in the chapters relating to civil rights.[247]

The standard has evolved over time and, in more recent investment jurisprudence, the principle of due diligence assessed from the perspective of the host State as the duty-bearer, has been elevated to customary international law:

> *[T]he requirement as to the fair and equitable treatment, full protection and security and non-discrimination treatment all underscore the general obligation of the host State to exercise due diligence in protecting foreign investment in its territories, an obligation that derives from customary international law*.[248]

The same approach has been taken several times by arbitral tribunals in other cases such as *Lauder v. Czech Republic*[249] and, more recently, in the opinion of Justice Pedro Nikken in *Suez v. Argentina*,[250] in defining the "minimum international standard" of protection.

Let's now turn to the analysis of the foreign investor as a duty-bearer, and assess how the principle of due diligence has come into play in the assessment of investors' behavior (the second level of the analysis).[251] In the *Maffezini v. Spain* award, the Arbitral Tribunal held that it:

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available to protect an alien must also be taken into account… inquiry must also be made into the question whether effective use was made of all available measures".

[246] MOWBRAY, A., "The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights", Human Rights Law in Perspective (Book 2), 2004.

[247] *See* BVerfGE 69, German Constitutional Court on the right of freedom of assembly at 315, 355.

[248] *AAPL v. Sri Lanka*, Award of 27 June 1990, at para. 639.

[249] *Ronald Lauder v. Czech Republic* (UNCITRAL filed in 1999), Award of 3 September 2001, at para. 292.

[250] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, Separate Opinion of Arbitrator Nikken, at para 19.

[251] *See e.g.* DUPUY, F., *La protection de l'attente légitime des parties au contrat, étude de droit international des investissements à la lumière du droit comparé*, Thèse co-tutelle Humboldt Universität/Université Paris II, November 2007.

> *[M]ust emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments. While it is probably true that there were shortcomings in the policies and practices that SODIGA and its sister entities pursued in the here relevant period in Spain, they cannot be deemed to relieve investors of the business risks inherent in any investment. To that extent, it is clear that Spain cannot be held responsible for the losses Mr. Maffezini may have sustained any more than would any private entity under similar circumstances*.[252]

The words of the Tribunal are straight. The treaty is not an abstract guarantee covering investors in case of bad business judgment. The consequences of an unsuccessful, or even detrimental business choice, cannot be borne by the host State.

This approach to the BIT as an instrument embossing a list of States' obligations regarding their respective investments, rather than a source of subjective rights for the investors, has been restated by arbitrator Pedro Nikken in his separate opinion in the *Suez v. Argentina* case.[253]

It is a growing trend for investment tribunals to take into consideration the level of due diligence employed by investors in targeting a certain business deal in a certain country. The attractive price of an investment in a developing country must be weighed against below average business conditions, and the expected return. The investor must do its homework and cannot point the finger against the host State for subsequent unpleasant developments. Investors are called to investigate the legal environment of the targeted State,[254] and to keep abreast of any material development.[255] Failure to do so will bring about unpleasant consequences in the adjudication phase of a potential dispute.

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[252] *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award of 13 November 2000, at para. 64.
[253] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, Separate Opinion of Arbitrator Nikken, at para 19.
[254] *See e.g. MTD Equity Sdn Bhd and MTD Chile SA v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of 5 May 2004, at paras. 242-243; *See also* TUDOR, I., "The Fair and Equitable Treatment Standard in the International Law of Foreign Investment", Oxford University Press, 2008 at 157.
[255] *See e.g. Plama Consortium Limited v. Bulgaria* (*Plama v. Bulgaria*) (ICSID Case No. ARB/03/24), Award of 27 August 2008, at paras. 220-221.

In another ICSID case already analyzed above, *Parkerings v. Lithuania*,[256] dealing with the design, construction and operation, by the investor, of an integrated park system located in a cultural heritage area, the Arbitral Tribunal entirely dismissed the investor's claim, holding, *inter alia*, that:

> *[A]n investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment* (emphasis added).[257]

In other words, the Arbitral Tribunal found that the Government of Lithuania never promised the investor, neither explicitly nor implicitly, that the legal framework of the agreement would remain unchanged. It was in the hands of the investor to negotiate safeguards in case of changes in the law, especially in light of the fact that the country was in transition at the time of the investment, and that "legislative changes, far from being unpredictable, were in fact to be regarded as likely".[258]

But investment tribunals have gone even further when witnessing investors' reckless behavior in targeting ambiguous investments and on top, being bold enough to resort to investment arbitration. An attitude of this kind has justified, in the eyes of arbitral tribunals, host States' actions against the foreign investor, as part of sovereign entities' obligations to act diligently.

In the *Genin v. Estonia* case, Mr. Genin, a U.S. national, together with Eastern Credit Ltd Inc. and AS Baltoil, the claimants, made an investment in Estonia by becoming principal shareholders in the Estonian Innovation Bank (EIB), a financial institution incorporated under the laws of Estonia. Following an annual audit, the Bank of Estonia requested EIB to provide information concerning certain information on its shareholders, including two of the claimants. In March 1997 the

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[256] *Parkerings–Compagniet AS v. Republic of Lithuania*, Award of 11 September 2007, at para. 333.
[257] Id.
[258] *Ibid.*, at para. 335.

Bank of Estonia determined that the claimants lacked qualified holding permits that would entitle them to hold stocks in EIB, as prescribed by Estonian law. Subsequently, pending the domestic administrative proceedings initiated by the claimants to challenge the Bank of Estonia's determination, in September 1997 the Bank of Estonia revoked EIB's banking license. In November 1998, a local administrative court ordered the liquidation of EIB based on its license being revoked. Application by EIB for a stay of the liquidation proceedings pending the decision on the license revocation, was rejected.[259] The Arbitral Tribunal held that:

> *[T]he decision taken by the Bank of Estonia must be considered in its proper context – a context comprised of serious and entirely reasonable misgivings regarding EIB's management, its operations, its investments and, ultimately, its soundness as a financial institution*.[260]

In the case at issue, the Government of Estonia took the only step that was acceptable and desirable under the circumstances, namely acknowledging a failed investment *ab origine*, and therefore lifting itself from the responsibility for damages suffered by the investor.

In terms of the degree of legal protection that host States have a duty to provide to foreign investors, which is embedded in the Full Protection and Security clause present in BITs, the Arbitral Tribunal in *AAPL v. Sri Lanka* held that the due diligence standard implied "reasonable measures of <u>prevention</u> which a well administered government could be expected to exercise under similar circumstances" (<u>emphasis added</u>).[261] In other words, it is generally recognized, in investment jurisprudence, that the duty to provide legal protection includes the obligation to, at least, have a legal system in place where foreign investors are

[259] *Alex Genin, Eastern Credit Ltd Inc. and AS Baltoil v. Estonia* (ICSID Case No. ARB/99/2), Award of 25 June 2001, at paras. 52-60.
[260] *Ibid.*, at para. 361.
[261] *AAPL v. Sri Lanka*, Final Award of 27 June 1990, at para. 77. *See also Case Concerning Elettronica Sicula SPA (ELSI) (*hereinafter *ELSI v. Italy)*, ICJ Reports 1989, Judgment of 20 July 1989, at para. 110.

allowed to lodge claims in case of unforeseeable damage to their property.[262] Some investment awards have gone even further and recognized a right of investors to an efficient legal system beyond the police protection context, based on the wording "protection and security" if "qualified by 'full' and not other adjective or explanation".[263] Along these line, the *Lauder* Arbitral Tribunal found in terms of an obligation, borne by the Czech Republic, to "keep its judicial system available for the claimant… to bring claims and for such claims to be properly examined and decided in accordance with the domestic and international law".[264]

(2) Human Rights Law

The principle of due diligence in the field of human rights as a positive obligation of sovereign States is very old, and its codification can be traced back to the *Magna Carta Libertarum*, whose Clause XXIX laid down the foundation of the right to due process.[265] This document imposed on England a series of obligations to respect before depriving of or denying an individual his or her freedoms and rights. The principle of due diligence has then been embedded in human rights instruments such as the International Covenant on Civil and Political Rights,[266] the Inter-American Convention of Human Rights,[267] or the European Convention of Human Rights.[268] Over time, the principle has been developed in the human rights arena through jurisprudential decisions, especially by the European Court of Human

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[262] *See also Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award of 8 December 2000, 41 ILM 896 (2002), at paras. 82, 84, 94, 95; *ELSI v. Italy*, at para. 110.
[263] *Azurix Corp. v. Republic of Argentina* (ICSID Case No. ARB/01/12), Final Award of 14 July 2006, at para. 408, supported in *Biwater Gauff (Ltd) v. United Republic of Tanzania*, ICSID Case No. ARB/02/25, Award of 24 July 2008, at para. 729; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Republic of Argentina*, Award of 20 August 2007, at para. 7.4.15.
[264] *Ronald S. Lauder v. Czech Republic*, Award of 3 September 2001, at para. 314; *see also Parkerings Compagniet A.S. v. Republic of Lithuania*, Award of 11 September 2007, at para. 360.
[265] 1215 *Magna Carta Libertarum*, Ref. c.9, available at: http://www.legislation.gov.uk/all?title=magna%20carta, last accessed on 6 April 2014. Clause XXIX: "*No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right*".
[266] ICCPR, Art. 2.2.
[267] IACHR, Art. 2.
[268] ECHR, Art. 1.

Rights (ECHR),[269] the European Court of Justice--through its interpretation of national constitutions and their civil rights chapter,[270]--and the Inter-American Court of Human Rights (IACtHR).[271] Generally, international human rights instruments set forth an obligation for member States to "adopt such legislative and other measures as may be necessary to give effect to the rights recognized",[272] or prescribe that States parties "shall secure to everyone… the right and freedoms' guaranteed therein".[273]

In *Young, James and Webster v. The United Kingdom*,[274] the applicants, British Rail's employees, had been dismissed due to their refusal to join the designated trade union pursuant to a "Closed Shop" agreement[275] stipulated by British Rails and three railway unions. In holding that British Rail violated the (negative) right of the applicants to be free of "not to associate" with the designated trade unions, the European Court of Human Rights held that:

> *Under Article 1 (art. 1) of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention"; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The*

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[269] MOWBRAY, A., "The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights", Human Rights Law in Perspective (Book 2), 2004.

[270] *See e.g.* German Constitutional Court on the right to free assembly, BVerfGE at 69, 315, 335.

[271] *Velásquez-Rodríguez v. Honduras* Case, Judgment, Inter-American Commission of Human Rights (Ser. C) No. 4, Judgment of 29 July 1988.

[272] *See e.g.* ICCPR, Ar. 2.2 and IACHR, Art. 2.

[273] ECHR, Art. 1.

[274] *Young James and Webster v. The United Kingdom*, European Court of Human Rights, Application no. 7601/76; 7806/77, Judgment of 13 August 1981; *See also A v. The United Kingdom*, Judgment of 23 September 1998, 27 EHRR 61 (concerning the prohibition of inhuman or degrading treatment).

[275] *Young James and Webster v. The United Kingdom*, at para. 13: "*In essence, a closed shop is an undertaking or workplace in which, as a result of an agreement or arrangement between one or more trade unions and one or more employers or employers' associations, employees of a certain class are in practice required to be or become members of a specified union. The employer is not under any legal obligation to consult or obtain the consent of individual employees directly before such an agreement or arrangement is put into effect. Closed shop agreements and arrangements vary considerably in both their form and their content; one distinction that is often drawn is that between the "pre-entry" shop (the employee must join the union before engaged) and the "post-entry" shop (he must join within a reasonable time after being engaged), the latter being more common*".

> *responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis.*[276]

In other words, the principle of due diligence is violated by a State when, through an overly permissible legislation, it violates private rights.

In *Tugar v. Italy*,[277] the European Commission of Human Rights added that the causal relationship between the failure to legislate and the damaging event needs to be "immediate". In this case, the plaintiff, an Iraqi national who suffered life threatening injuries for stepping on an anti-personnel mine supplied to Iraq by an Italian arm manufacturer, claimed a failure, by the Government of Italy, to protect his right to life under the European Convention, for not enacting an arm transfer licensing system. Given the inexistence of an "immediate link" between Italy's failure to legislate and the damaging event, the Commission declared the case inadmissible.

Furthermore in the human rights realm, on the occasion of the 2005 World Summit, the doctrine of Responsibility to Protect (R2P) was forged. This has been construed as a double-folded doctrine under which, on the one hand, there is a primary obligation for sovereign States to take positive actions against gross violations of human rights affecting their own population (*i.e.* genocide, war crimes, crimes against humanity, and ethnic cleansing), in case they know or should have known that their population is at grave risk.[278] On the other hand, in case the State of the interested population is "unwilling or unable" to take action to prevent violations, the positive obligation to intervene shifts to the international community, which has an obligation to put an end to unacceptable violations of peoples' fundamental rights.[279]

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[276] *Young James and Webster v. The United Kingdom*, at para. 49.
[277] *Tugar v. Italy*, European Commission of Human Rights, Application No. 2869/93, Judgment of 18 October 1995.
[278] UN General Assembly, *World Summit Outcome*, A/60/L.1, 24 October 2005, at para. 138.
[279] *Ibid.*, at para. 139; *See also* GLANVILLE, L., *The Responsibility to Protect beyond Borders*, Human Rights Law Review, 2012 at 10; ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, Ottawa: IDRC, 2001 at 17.

Rosenberg has expressed this "responsibility" in terms of "due diligence requiring States to take such reasonable measures of prevention as could be expected of States in a similar position".[280] The author argues that the sovereign State's positive obligation to prevent violations by non-State actors, as a due diligence standard, has its roots in the national law of torts and is an obligation of conduct, not of result.[281] In other words, the State will be responsible only in case that, after having taken all reasonable measures within its power to avoid the violation, such violation nonetheless occurs. Rosenberg then goes further stating that seen as a due diligence obligation, prevention is the mirror image of protection.

Also the Human Rights Committee has pinpointed this fundamental link in its General Comment No. 31 to Article 2 of the ICCPR.[282] The Article imposes on States parties a duty to "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…"[283] (emphasis added). Very important for the purposes of this analysis is para. 2 of Article 2 ICCPR by which "each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant". The Committee's commentary is that:

> *There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.*[284]

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[280] ROSENBERG, S. P., *Responsibility to Protect: A Framework for Prevention*, in "Global Responsibility to Protect", Martinus Nijhoff Publishers, Vol. 1, 2009 at 442–477.
[281] *See e.g. Restatement (Third) Torts: Liability for Harm* (preliminary draft No. 4 of 5 September 2003), at paras. 37, 39-40. In tort, duties arise most frequently from relationships of influence or care.
[282] ICCPR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 of 29 March 2004 (2187th meeting), at para. 8.
[283] Article 2(1) ICCPR..
[284] ICCPR General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 of 29 March 2004 (2187th meeting), at para. 8.

Rosenberg identifies the "seminal judgment" establishing the due diligence standard in the Inter-American Court of Human Rights case *Velásquez-Rodriguez*,[285] concerning the detention and disappearance of the plaintiff. The IACtHR found that one of the grounds to hold the Government of Honduras liable under the Inter-American Convention, was the failure of the State to exercise "due diligence to prevent violation or to respond to it as required by the Convention".[286]

The principle of due diligence in the field of human rights has also been used by the Special Rapporteur on Violence against Women, Yakin Ertürk, to set up a framework to eliminate violence against women.[287] The framework includes the principles of a) prevention, b) protection, c) punishment and d) reparations, and presents ways to strengthen prevention and redress victims of violence against women. Non-State actors are included in the framework as duty-bearers.

More recently, on 16 June 2011, the United Nations Human Rights Council endorsed the Guiding Principles[288] for the implementation of the UN "Protect,

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[285] *Velásquez-Rodríguez v. Honduras* Case, Judgment, Inter-American Commission of Human Rights (Ser. C) No. 4, Judgment of 29 July 1988.

[286] *Velásquez-Rodríguez v. Honduras* Case, Judgment, Inter-American Commission of Human Rights (Ser. C) No. 4, Judgment of 29 July 1988, at para. 172. (Finding the Government of Honduras liable for the involuntary disappearance of Angel Manfredo Velasquez Rodriguez due to the State's failure to take appropriate measures to prevent or punish private individuals who caused Mr. Rodriguez to disappear). *See also Paul and Audrey Edwards v. The United Kingdom*, European Court of Human Rights, Application No. 46477/99, Judgment of 14 March 2002 (The applicants' 30 year old son, who had a history of mental illness, had been remanded to custody for making inappropriate comments to women in the street. He was put in a cell with an inmate who had schizophrenia. A few hours later the applicants' son was killed by the second inmate. The Court found that the public authorities failed in their positive obligation to protect the life of an inmate, such obligation arising out of a duty of care owed to detainees); *Mahmut Kaya v. Turkey*, European Court of Human Rights, Application No. 22535/93, Judgment of 28 March 2000. (A medical doctor Hasan and a friend had secretly treated a member of the Kurdistan Workers Party (PKK) and three days later they were found dead. The Court found a duty to protect arising in the context of Turkey's well known crack down on members of the PKK). Similar breach of this positive obligation was also found in *Akkoc v. Turkey,* European Court of Human Rights, Application No. 22947/93 and 22948/93, Judgment of 10 October 2000, at paras. 81-82 (The Court found that the Turkish government failed in its positive obligation to protect the life of Zubeyir Akkoc, a Kurdish teacher who was at a real and immediate risk of falling victim to an unlawful attack. The Court judged the authorities to have to be aware of this risk).

[287] Special Rapporteur on Violence against Women, *The Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, UN Doc. E/CN.4/2006/61, 2006, at para. 35.

[288] Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Doc. No. A/HRC/17/31 of 21 March 2011.

Respect and Remedy" Framework,[289] which provides an authoritative global standard against the negative impact of economic activities on human rights. Particularly, the duty of States to protect within the United Nations Framework for Business and Human Rights establishes a sort of corporate responsibility against human rights abuses. Host States have an obligation to protect the investment. At the same time, the work of the UN Secretary-General Special Representative, reflected in the UN Global Compact Principles, shows that all human rights have the potential to be relevant in economic activities, and therefore, companies and investors are called to exercise due diligence in handling their business activities to become aware, prevent, and address the negative impact that their actions might have on human rights, and at the same time avoid being accomplices of human rights abuses.

(3) Due Diligence: Connecting the Dots

In light of the above analysis on how the principle of due diligence comes into play in the two realms of the law at issue, the following paragraphs will identify the relevant points of contact.

First, cases such as *AAPL v. Sri Lanka, Lauder v. Czech Republic* and *Suez v. Argentina* display an interpretation of the due diligence standard consistent with the modern international human rights law approach that a well governed State has an obligation to ensure the respect and the implementation of the fundamental rights within its territory (and beyond, if one considers the concept of Responsibility to Protect), including, under some conditions, private property rights.

Second, despite the argument that human rights instruments and investment treaties are fundamentally different because of the former protecting individuals, as opposed to the latter, promoting friendly economic relations between States,[290] a common ground where the principle of due diligence plays a bridging role is the right to property, which is a fundamental right of the investor under investment

[289] *Ibid*.
[290] GUDGEON, K. S., *United States Bilateral Investment Treaties: Comments on their Origin, Purposes and General Treatment Standards*, 4 International Tax & Business Law, 1986 at 110.

treaties, and at the same time a fundamental right under most international human rights instruments.[291]

In *AAPL v. Sri Lanka*, the Arbitral Tribunal did not grant the foreign investor the protection sought for the physical assets of its investment, because Full Protection and Security, argued the Tribunal, cannot be interpreted as creating strict liability for the host State to redress damages to the investment, without the investor proving that the damages suffered were linked to the State's lack of due diligence.[292] It is common praxis for claimants to argue in terms of an absolute standard of due diligence, equaling strict liability, using the Full Protection and Security clause under many BITs as a blank guarantee against the destruction of the investment under any circumstances. On the contrary, arbitral tribunals in *AAPL v. Sri Lanka, Lauder v. Czech Republic* and *Suez v. Argentina*, have interpreted the due diligence standard as a relative one, assessing the factual circumstances, as well as the direct link between the State's action or omission, and the damage derived to the investor. The rejection, by investment tribunals, of an absolute interpretation of the due diligence standard seems to be in contrast with the existence of an "international minimum standard" of protection outlined in many BITs to safeguard investments.[293] However, the contradiction is only apparent: even under international human rights law, which is supposed to be the branch of law that the most protects individual rights, the application of the due diligence principle requires a direct link between the action or omission of the State, and the damage.[294] International human rights courts have rejected the absolute liability

[291] SORNARAJAH, M., "The International Law on Foreign Investments", Cambridge: Cambridge University Press, 2010 at 152-156.
[292] *AAPL v. Sri Lanka*, at paras. 45-53.
[293] *George W. Hopkins v. United Mexican States*, U.S.-Mexican General Claims Commission, Decision of 3 June 1927, cited in HACKWORTH, G.H., "Digest of International Law", Vol. III, 1942 at 636: "*The citizens of a nation may enjoy many rights which are withheld from aliens, and, conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens*". *See also American Manufacturing & Trading v. Zaire* (ICSID Case No. ARB/93/1), Award of 21 February 1997, 36 IM 1531, 1997, at para. 6.06: "*It is thus an objective obligation which must not be inferior to the minimum standards of vigilance and of care required by international law*".
[294] *See e.g. Tugar v. Italy*.

standard in due diligence inquiries, even with respect to the right to life, because considered to go beyond the power of the State.[295]

By way of analogy, investors can only expect a degree of due diligence that needs to be measured against the circumstances of the case, and the country where the investment is made, unless the State's conduct is of an "egregious and shocking nature", which is a fairly high threshold to meet.[296]

Third, the *Genin v. Estonia* case is the living demonstration of the trend to consider the existence of a positive obligation for States to prevent that the actions or activities of third parties, like reckless investors, impinge on individuals' fundamental rights. But the protection accorded to foreign investors goes even further, and extends to the prevention of damage to property, which translates into an obligation, for host States, to put in place all legislative arrangements in order for investors to seek redress, as it was held in *AAPL*,[297] *Elsi*,[298] *Wena Hotels v. Egypt*,[299] *Ronald S. Lauder v. Czech Republic*,[300] and *Parkerings Compagniet A.S. v. Republic of Lithuania*.[301]

In human rights jurisprudence, the principle of due diligence expresses itself along the same lines, in the sense that it also stigmatizes States not only for their direct interference with individual's rights, but also for their failure to adjust or implement legislations aimed at protecting such rights (*see Young, James and Webster v. The United Kingdom*).[302] Furthermore, the "prevention component" is also very well established in human rights jurisprudence, if one considers the

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[295] *W. v. The United Kingdom*, European Court of Human Rights, Application No. 9749/82, Judgment of 8 July 1987.
[296] *L.F.H. Neer and Pauline Neer v United Mexican States*, U.S.-Mexican General Claims Commission, Decision of 15 October 1926, 4 UNRIAA, at para. 5; *Laura A. Mechan and Lucian Mechan Jr. v. United Mexican States*, U.S.-Mexican General Claims Commission, 4 UNRIAA, Decision of 2 April 1929, at para. 443; *Mrs. Elmer Elsworth Mead v. United Mexican States*, U.S.-Mexican General Claims Commission, 4 UNRIAA, Decision of 29 October 1930, at paras. 653-654.
[297] *AAPL v. Sri Lanka*, Final Award of 27 June 1990.
[298] *ELSI v. Italy*.
[299] *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award of 8 December 2000, 41 ILM 896 (2002).
[300] *Ronald S. Lauder v. Czech Republic*, Award of 3 September 2001.
[301] *Parkerings Compagniet A.S. v. Republic of Lithuania*, Award of 11 September 2007.
[302] *Young James and Webster v. The United Kingdom*; *See also A. v. The United Kingdom*, Judgment of 23 September 1998, 27 EHRR 61 (concerning the prohibition of inhuman or degrading treatment).

principle of Responsibility to Protect, the holding in the *Velásquez-Rodríguez v. Honduras*[303] case, or the framework developed by the Special Rapporteur for the violence against women.

To summarize, the question whether the due diligence standard applied to investment and human rights jurisprudence offers the same level of protection, the answer is again "yes, it does". Just as for the principle of non-discrimination, the above analysis shows that also the concept of due diligence constitutes a solid bridge between human rights and investments disciplines.[304]

c) Proportionality

(1) Investment Law

Frequently, investment agreements are concluded to secure long-term cross-border business deals. It is therefore not surprising that during the time in which the investment is in place, events of various nature (*i.e.* changes in the laws, changes in the composition of the host Government and its policies, financial crisis, natural calamities etc.) may occur and alter the balance of rights and obligations originally negotiated in the investment agreement. Under international law, the principle of sovereignty makes it possible for States to adopt regulations and/or put in place measures to deal with political, economic or environmental crisis within their jurisdiction. At the same time, however, the fact that the State has entered into valid and binding agreements with foreign investors, creates a tension between the sets of rights of the host State to enjoy its sovereign status, and the obligations contracted under the BIT. This is exactly the perceived tension studied throughout the present research. When this perceived tension is not resolved by means of alternative mechanisms of dispute resolution, the controversy is elevated to investment arbitration. But what can arbitrators do

[303] *Velásquez-Rodríguez v. Honduras* Case, Judgment, Inter-American Commission of Human Rights (Ser. C) No. 4, Judgment of 29 July 1988.
[304] *See also* DAVITTI, D., *On the Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence*, Human Rights Law Review 12 (3), 2012, at 421-453.

to assess the issue and re-strike the balance of the rights and obligations underlying the investment?[305]

As noted by Dworkin, juridical positions ascribable to rules apply in an all-or-nothing fashion, while others, ascribable to principles, leave a bigger room for the adjudicator to reason on the basis of middle grounds. A clash between the former, whose intrinsic characteristic is their claim of absolute validity, will therefore have the effect of pushing a tribunal to take an absolute position between them, without space to argue in terms of shaded areas.[306] A clash between principles will, conversely, give room to tribunals to differentiate the circumstances by level of degree, and to balance the principles against one another.[307]

The principle of proportionality falls within the category of "standards of review", a set of tools helping arbitrators to disentangle themselves in the jungle of antagonistic judicial positions, be the norms, principles, interests or values that they are often called to assess. It is a method of "legal interpretation and decision-making", and it is of increased value in situations where the investment agreement sets forth obligations incumbent on host States, without providing criteria justifying departures from such obligations in favor of other fundamental interests. Kingsbury and Schill argue that the application of the principle of proportionality to investor-State disputes, when it comes to evaluate the Fair and Equitable Treatment standard, or the concept of indirect expropriation, is actually more efficient than other approaches taken by the jurisprudence over the time, in that it "requires arbitrators to engage in a method of assessing the competing legal

[305] *See e.g.* KROMMENDIJK, J. & MORIJN, J., *'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration*, in "Human Rights in International Investment Law and Arbitration", Oxford University Press 2010.
[306] DWORKIN, R., "Taking Rights Seriously", Harvard University Press, 1978 at 24-26.
[307] ALEXY, R. & RIVERS, J., "A Theory of Constitutional Rights", Oxford, 2009 at 50; KINGSBURY, B. & SCHILL, S., *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, Public Law & Legal Theory Research Paper Series, Working Paper No. 09-46, September 2009 at 21-22.

claims, weighing them, considering alternatives, etc. and provide rational arguments for their decisions".[308]

Seen from the above perspective, the principle of proportionality assumes strategic importance to analyze, in rational terms, the main concepts underlying investment disputes. By way of illustration, how to assess indirect expropriation? The "I know it when I see it" approach[309] is surely not going to advance the concept of legal certainty and predictability. Likewise, how to assess the Fair and Equitable Treatment standard without risking to fall into a pattern of subjective interpretation, by arbitrators, of what constitutes fairness and equity? The devil is in the detail. Arbitral tribunals' decisions involve judicial review, and when the outcome proves to be controversial for the relevant stakeholders, such decisions suffer from legitimacy-related criticism.[310] According to Leonhardsen, the principle of proportionality has been employed because it strengthens the perception of legitimacy in the stakeholders' eyes.[311] Following the principle of proportionality, a sound approach would be, for instance, to first assess the relationship between what the investor originally expected to be a "fair" treatment under the investment agreement, then look at the competing and/or antagonistic public interest involved, and finally balance the two against one another.

Arbitral tribunals' use of proportionality analysis has mainly taken place in expropriation and Fair and Equitable Treatment cases. An analysis of the prominent case law is presented below.

(a) *Expropriation*

When expropriation is exercised by a host State for the public purpose, it is generally considered lawful under customary international law, as long as it is

[308] *Idem* at 22.
[309] FORTIER, Y. and DRYMER, S. L., *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID Rev. – For. Inv. L. J., 2004 at 293.
[310] *See e.g.* WRIGHT, S., *The Role of the Supreme Court in a Democratic Society – Judicial Activism or Restraint?*, 54 Cornell Law Review, 1968; CAPPELLETTI, M., *Repudiating Montesquieu? The Expansion and Legitimacy of 'Constitutional Justice'*, in "The Judicial Process in Comparative Perspective", Mauro Cappelletti (Ed.), Clarendon Press, 1989 at 182-211.
[311] LEONHARDSEN, E. M., *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, University of Oslo – Law Faculty, 1 August 2011 at 5.

followed by proper compensation.[312] What is of interest for this Section and the analysis of the principle of proportionality, is when the line is crossed between permissible regulation which, although affecting the property of foreign investors, does not require compensation; and the so-called "indirect expropriation", by which the investor retains title over the property, but the measure is still detrimental to the investment ("measure tantamount to expropriation"), and therefore requires compensation. In the former situation, the fact that no compensation is contemplated does not exclude that the foreign investor has suffered damages due to the host State's measure. If the expropriation was illegal, the investor is still entitled to claim damages through investment arbitration.

The principle has mainly been developed in other dispute resolution *fora*, rather than in the investment arbitration realm.[313] Originally, investment tribunals identified indirect expropriation through the sole factor of the existence of a serious and irreversible damage to the investment ("sole effect doctrine").[314] Only recently, some investment decisions have spelled out the application of the principle of proportionality, and its helpful use in balancing host States and investors' rights.

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[312] SUBEDI, S. P., "International Investment Law: Reconciling Policy and Principle", Hart 2008 at 74; SHAW, M. N., "International Law", Cambridge University Press (6th edition), 2008 at 828.

[313] *E.g.* European Court of Human Rights, some of the decisions of which will be examined hereafter.

[314] DOLZER, R., *Indirect Expropriation, New Developments?*, in "Environmental Law Journal", Vol. 11, 2002 at 65; NEWCOMBE, A., *The Boundaries of Regulatory Expropriation in International Law*, in "New Aspects of International Investment Law", P. Kahn and T.W. Wälde (Eds.), Leiden/Boston, Martinus Nijhoff Publishers, 2007 at 392-449. One of the cases applying this doctrine is *Tippets, Abbett, McCarthy, et al v. TAMS–AFFA Consulting–Engineers of Iran*, Award No. 141–7–2 of 29 June 1984, reprinted in 6 Iran–U.S. Claims Tribunal Reports at 225, where the claimant (TAMS) was a U.S. engineering and architectural consulting partnership. Together with an Iranian engineering company, Aziz Farmanfarmaian and Associates (AFFA), TAMS created the TAMS-AFFA partnership in which held 50% of the shares to perform engineering works at the Tehran International Airport. The partnership worked under the principle of joint control, with one member of each shareholder required to give consent before the company could take any decision. Due to the Iranian Revolution, works to be performed under the agreement at the Tehran airport were suspended. The situation worsened with the aggravated relationship between the United States and Iran, until TAMS-AFFA ceased all communication with TAMS. The Iran-U.S. Claim Tribunal found that there had been expropriation and identified its threshold "whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral" (emphasis added).

In *Tecmed v. Mexico*,[315] the claimant invested in a waste landfill in Mexico, and after two years Mexican authorities did not renew the company's license to operate the landfill. Tecmed initiated arbitration, alleging expropriation by the host State. The Arbitral Tribunal found that Mexico's measure amounted to expropriation and violated the Fair and Equitable Treatment standard. Particularly, the Tribunal held that:

> *The Arbitral Tribunal will consider, in order to determine if [the measures] are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments*".[316]

Three were the factors taken into account by the Arbitral Tribunal in assessing whether the governmental measures were proportionate to the damage suffered by the foreign investor. First, the Arbitral Tribunal looked at whether the damage suffered by the investor was "substantial". This shows that the "sole effect doctrine" has not been abandoned, rather, the injurious effect needs to be balanced against the public interest that the regulatory measure aims to protect.[317] Second, there needs to be a *prima facie* existence of a public interest, which the host State has the burden to prove. Third, the Arbitral Tribunal has required that the measures put in place by the authorities are the only available to achieve the public interest objective, or, if a number of effective solutions are possible, that they be the least harmful. In the case at issue, the Arbitral Tribunal reached the conclusion that the Mexican authorities' failure to renew the license to operate the landfill was not the only way to address residents' complaints about the environmental and health consequence of living in proximity of the factory. The Arbitral Tribunal identified viable alternatives to reach the objective, and determined that the measures taken by the Government imposed an undue burden on the foreign investor.[318] In the words of the Arbitral Tribunal:

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[315] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (*Tecmed v. Mexico*) (ICSID Case No. ARB (AF)/00/2).
[316] *Tecmed v. Mexico* (ARB(AF)/00/2), Award of May 29, 2003, 43 ILM, 2004, at para. 122.
[317] *Ibid*., at para. 116.
[318] *Ibid*., at para. 151.

> *There must be a reasonable relationship of proportionality between the charge of the weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure*.[319]

Interestingly enough, the word "proportionality" in the *Tecmed* award referred, in a footnote,[320] to the jurisprudence of the European Court of Human Rights, which will be addressed in the next Section.[321]

The Arbitral Tribunals in *LG&E v. Argentina*[322] and *Azurix Corp. v. Argentina*,[323] have also recognized the importance of the proportionality principle in the field of expropriation, to balance the sole effect doctrine. In any event, the Tribunals could not apply the principle to the cases because the injurious effect was missing in the first place.

(b) *Fair and Equitable Treatment*

More recently, investment tribunals have replaced the finding of a compensable indirect expropriation with a breach of the Fair and Equitable Treatment standard,[324] which is more flexible a standard than that of expropriation.[325] By this operation, the arbitrators can exercise greater discretion in terms of strategic decisions. One of the prominent cases that used this approach is *Total v. Argentina*, were the claimant, a French company operating in the energy sector in Argentina, allegedly made its investment in the country also based on the representations

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[319] *Ibid*., at para. 122.
[320] *Ibid*., at para. 116.
[321] *Matos e Silva, Lda., and Others v. Portugal*, European Court of Human Rights, Application No. 15777/89, Judgment of 16 September 1996 at 18.
[322] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Republic of Argentina*.
[323] *Azurix Corp. v. Republic of Argentina*, ICSID Case No. ARB/01/12.
[324] KRIEBAUM, U., *Regulatory Takings: Balancing the Interests of the Investor and the State*, The Journal of World Investment & Trade, 2007 at 717–744, at 718; FIETTA, S., *Expropriation and the 'Fair and Equitable Standard': The Developing Role of Investors Expectations in International Investment Arbitration*, 23 Journal of International Arbitration, 2006 at 385; *Talsud S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/4) and *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States,* (ICSID Case No. ARB(AF)/04/3) (Conjoined cases, released by ICSID on 21 April 2011) (Argentina-Mexico BIT and France-Mexico BIT respectively), Award of 16 June 2010, at paras. 8-12 [Claimants' submission, based on *Tecmed*] and paras. 8-23 – 8-25, where the Arbitral Tribunal agrees to some of the claimants' submissions, though without explicitly acknowledging the *Tecmed* approach.
[325] ALVIK, I., "Contracting with Sovereignty: State Contracts and International Arbitration", Hart Publishing, 2011 at 193.

made by the Republic of Argentina relating to the legal and regulatory framework that the Government put in place to benefit privatized companies operating in the energy sector. Following Argentina's "Emergency Law", enacted to counter the 2000-2001 financial crisis, Total claimed that such measures[326] breached the commitments made by the host State to favor foreign investments in the energy sector, and belied Total's expectations.

While addressing the issue of protection against regulatory takings, the *Total* Tribunal also, and most importantly, engaged in applying the principle of proportionality to determine the existence of a violation of the Fair and Equitable Treatment standard.[327] The Arbitral Tribunal first looked at whether the claimant had a legitimate expectation in each of its different claims,[328] condition that in the negative, would have excluded the application of the Fair and Equitable Treatment requirement from the start. A finding of the existence of Total's legitimate expectations brought the Arbitral Tribunal to the second step of the analysis, namely to investigate the relationship between the investor and the host State, in the form of "the context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality".[329] This approach gave room to the Tribunal to make a different assessment and balancing of the several specific

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[326] According to Total the measures included the forced conversion of dollar-denominated public service tariffs into pesos (or "pesification") at a rate of one to one; the abolition of the adjustment of public service tariffs based on the US Producer Price Index ("PPI") and other international indices; the "pesification" of dollar-denominated private contracts at a rate of one to one; the freezing of the gas consumer tariff (which is the sum of the: (a) wellhead price of gas, (b) gas transportation tariff, and (c) gas distribution tariff); the imposition of: (a) export withholding taxes on the sale of hydrocarbons, and (b) restrictions on the export of such hydrocarbons; the abandonment of the uniform marginal price mechanism in the power generation market by price caps and other regulatory measures; the pesification, at a one to one rate, of all other payments to which power generators are entitled; and the refusal to pay power generators their dues, even at the dramatically reduced values resulting from the Measures.

[327] *Total S.A. v. Republic of Argentina* (ICSID Case No. ARB/04/1), Award of 27 December 2010, at para. 232: "*When foreign investors complain of State regulatory actions under a BIT, in order to decide whether the measures also amount to an indirect expropriation (a so-called regulatory taking) a tribunal must take into account their features and object so as to assess their proportionality and reasonableness in respect of the purpose which is legitimately pursued by the host State. These regulatory measures, when judged as legitimate, proportionate, reasonable and non-discriminatory, do not give rise to compensation in favour of foreign investors*".

[328] *Ibid.*, at paras. 113-122.

[329] *Ibid.*, at para. 123.

measures enacted by Argentina, some of which resulted in a violation of the investor's expectations, other not.

(c) *Necessity Defense*

Another field where the principle of proportionality has been applied in investment arbitration is the necessity defense, especially in the context of the Argentine crisis and Article XI of the U.S.-Argentina BIT,[330] which reads:

> *This treaty shall not preclude the application by either Party of measures necessary for the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*[331]

The set of cases brought before investment tribunals in relation to the Argentine crisis[332] are controversial, whereby arbitrators reached different conclusions analyzing the same facts and the necessity standard relied upon by the Argentine Republic to justify the measures taken to counter the financial crisis. This is due, however, to the fact that some tribunals based their interpretation of the necessity defense on Article XX GATT. This provision affords a much broader interpretation of the necessity standard than that provided under customary international law.[333] Another methodological mistake.

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[330] Treaty between the United States of America and Argentina Concerning the Reciprocal Encouragement and Protection of Investment (U.S.-Argentina BIT), 31 I.L.M., 14 November 1991 at 124.

[331] *Ibid.*, Article XI.

[332] *CMS Transmission Co. v. Republic of Argentina*, Award of 12 May 2005; *LG&E Energy Corp. v. Republic of Argentina*, Decision on Liability of 3 October 2006; *Enron Corp., Ponderosa Assets, L.P. v. Republic of Argentina*, Award of 22 May 2007; *CMS Gas Transmission Company v. Republic of Argentina*, ICSID, Annulment Proceeding, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic of 25 September 2007; *Sempra Energy International v. Republic of Argentina*, Award of 28 September 2007; and *Continental Casualty v. Republic of Argentina*, Award of 5 September 2008. In *CMS*, *Sempra* and *Enron*, though in different ways, the Tribunals held that Article XI BIT should be discussed in light of the customary international law standard of necessity, whereas the Tribunals in *LG & E*, *Continental Casualty*, and both the *CMS* and *Sempra* Annulment Committee appear to have treated Article XI IT as a separate treaty defense.

[333] *Continental Casualty v. Republic of Argentina*, Award of 5 September 2008, at para. 193, citing *Korea - Measures Affecting Imports of Fresh, Chilled And Frozen Beef*, WTO Appellate Body, WT/DS161/R & WT/DS169/R, 31 July 2000, at para. 161: "*[…] the reach of the word 'necessary' is not limited to that which is 'indispensable' or 'of absolute necessity' or 'inevitable.' Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfill the requirements of Article XX (d). But other measures, too, may fall within the ambit of this exception. As used in Article XX (d), the term 'necessary' refers in our view to a range of degrees of necessity. At a one end of this continuum lies*

(2) Human Rights Law

Outside the context of investment law, originally the principle encompassed a formula to frame the relationship between the State and the population within its jurisdiction. On the vertical level, it served as a paradigm to settle disputes between the interests of the States and the conflicting rights of its citizens;[334] on the horizontal level, it helped resolving controversies between individuals' conflicting rights.

Developed, at the outset, by German administrative and constitutional law,[335] over the last two decades the principle of proportionality has been applied by constitutional courts all over the globe, as well as regional bodies such as the European Court of Human Rights, the Inter-American Court of Human Rights and the European Court of Justice, as a tool to guarantee that fundamental rights be upheld by sovereign States.[336]

'necessary' understood as 'indispensable;' at the other, is 'necessary' taken to mean as 'making a contribution to.' We consider that a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to".

[334] SCHWARZE, J., *The Principle of Proportionality and the Principle of Impartiality in European Administrative Law*, 1 Rivista Trimestrale di Diritto Pubblico, 2003 at 53; ANDENAS, M. & ZLEPTNIG, S., *Proportionality: WTO Law in Comparative Perspective*, 42 Tex. Int'l L. J., 2007 at 383.

[335] *See* BVerfGE 7 at 377, 404-405 (*Apothekenurteil*). The case dealt with the interference with the freedom of profession of pharmacists by a licensing system that limited the number of pharmacy licenses in order to secure the supply of the population with pharmaceuticals. In solving the underlying conflict of rights, the German Constitutional Court stated that the individual right and the public purpose of the law had to be balanced.

[336] *See* SCHWARZE, J., "European Administrative Law", Luxembourg, Sweet and Maxwell, 1992 at 680-702; EMILIOU, N., "The Principle of Proportionality in European Law. A comparative Study", London, Kluwer Law International, 1996, *passim*; AKEHURST, M., *The application of general principles of law by the Court of Justice of the Europe an Communities*, The British Year Book of International Law 1981, Oxford, Clarendon Press, 1992 at 29-51, esp. 38-39; BOYRON, S., *Proportionality in English Administrative Law: A Faulty Translation?*, Oxford Journal of Legal Studies 12, 1992 at 237-264; BARNES, J., *Introducción al principio de proporcionalidad en el Derecho comparado y comunitario*, R.A.P. 135, September-December 1994 at 495-499; BERMANN, G. A., *The Principle of Proportionality*, The American Journal of Comparative Law XXVI, 1978 at 415-432; BRAIBANT, G., *Le principe de proportionnalité*, in "Mélanges offerts a Marcel Waline. Le juge et le droit public", AAVV, Paris, Librairie Générale de Droit et Jurisprudence, 1974, t. II, at 297-306; AUBY, J.-M., *Le contrôle jurisdictionnel du degré de gravité d'un e sanction disciplinaire*, in "Revue de Droit Public et de la Sciencie Politique en France et a l'étranger", January-February 1979 at 227-238; LINARES, J. F., "Razonabilidad de las leyes. El «debido proceso» como garantía innominada en la Constitución Argentina", Buenos Aires, Astrea, 1989, *passim*; GAVARA DE CARA, J. C., "Derechos fundamentales y desarrollo legislativo. La garantía del contenido esencial de los derechos fundamentales en la Ley Fundamental de Bonn", Madrid, Centro de Estudios Constitucionales, 1994 at 293-326; ALEXY, R., "Teoría de los derechos fundamentales", Centro de Estudios Constitucionales, 1993 at 111-112;

From a human rights perspective, the principle has played a key role in the jurisprudence of the European Court of Human Rights to resolve controversies between the Member States' public policies, and the rights granted to individuals by the Convention on Human Rights and Fundamental Freedoms.[337]

In the landmark *Handyside v. The United Kingdom* case, the applicant challenged, *inter alia,* the censorship of a schoolbook by the British Government, on the basis of violations of public morals. The Court framed the scope of its review in the following terms: "The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19)…, is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10... The [European] supervision concerns both the aim of the measure challenged and its 'necessity'. The Court further stated that "whilst the adjective 'necessary', within the meaning of Article 10 para. 2…. is not synonymous with 'indispensable', …'absolutely necessary' and 'strictly necessary'…., neither has it the flexibility of such expression as 'admissible', 'ordinary' 'useful', 'reasonable' or 'desirable'".[338]

In a subsequent case, *Dudgeon v. The United Kingdom*, concerning the XIX century legislation criminalizing male homosexual acts in England, the Court held that "the restriction imposed on Mr. Dudgeon…, by reason of its breadth and absolute character, is… disproportionate to the aims sought to be achieved".[339] The two conflicting elements were the right to privacy, on the one hand, and the necessity, in a democratic society, to exercise some control on homosexual behavior, notably

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WILLOUGHBY, W. W., "The Constitutional Law of the United States", New York, Baker, Voorhis and Company, 1929; GEORGIADOU, A. N., *Le principe de la proportionnalité dans le cadre de la Jurisprudence de la Cour de Justice de la Communauté Européenne*, A.R.S.P. 81, 1995 at 532-541; JIMÉNEZ CAMPO, J., *La igualdad jurídica como límite al legislador*, in "Revista española de Derecho constitucional" 9, 1983 at 71-114, 72.

[337] *Handyside v. The United Kingdom*, Application No. 5493/72, European Court of Human Rights, 7 December 1976; *Dudgeon v. The United Kingdom*, European Court of Human Rights, Application No. 7525/76, Judgment of 22 October 1981; *see also* RIVERS, J., *Proportionality and Variable Intensity of Review*, 65 Cambridge L. J., 2006 at 182. Rivers engaged in a heavy critique of the more lenient reasonableness standards initially applied by British courts, *see* STONE SWEET, A. & MATHEWS, J., *Proportionality Balancing and Global Constitutionalism*, Yale Law School Faculty Scholarship Series No. 14, 2008 at 51-53.

[338] *Handyside v. The United Kingdom*, at paras. 48-49.

[339] *Dudgeon v. United Kingdom*, at para. 61.

to safeguard those individuals who are more vulnerable to the phenomenon because of their age (children). In the case at issue, the application of the principle of proportionality led the Court to argue that the actions taken by the State exceeded those that could have been put in place to re-strike the balance with the public interest.

Again, in a later case always involving England, *James and others v. The United Kingdom*, the trustees of a large estate were deprived of their ownership of a number of properties through the exercise, by the occupants, of rights of acquisition conferred to them by the relevant legislation. The Court had to balance a socio-economic right (*i.e.* the right to property), and a statutory right, and held that "[n]ot only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized".[340]

Finally, in *Matos e Silva, Lda., and others v. Portugal*,[341] the case referred to by the *Tecmed* Tribunal in the application of the principle of proportionality, the applicants were companies and individuals cultivating lands in Portugal. The lands, which were partially owned and partially worked under a Government concession, could be expropriated without any right to compensation. Following the Government of Portugal's conversion of the land parcels owned by the applicants into a natural reserve, the applicants initiated proceedings. Notwithstanding the measures taken by Portugal pursued the public interest, namely the protection of environment, and thus had a reasonable basis, the Court:

> *However… observes that in the circumstances of the case the measures had serious and harmful effects that have hindered the applicants' ordinary enjoyment of their right for more than thirteen years during which time virtually no progress has been made in the proceedings. The long period of uncertainty both as to what would*

[340] *James and others v. The United Kingdom*, European Court of Human Rights, Application No. 8793/79, Judgment of 21 February 1986, at para 50. The Court also referred to the following cases: *Ashingdane v. The United Kingdom*, European Court of Human Rights, Application No. 8225/78, Judgment of 28 May 1985, at para. 57; *Sporrong and Lönnroth v. Sweden*, European Court of Human Rights, Application No. 7151/75; 7152/75, Judgment of 23 September 1982, at para. 69.
[341] *Matos e Silva, Lda., and Others v. Portugal*, at 18.

> *become of the possessions and as to the question of compensation further aggravated the detrimental effects of the disputed measures. As a result, the applicants have had to bear an individual and excessive burden which has upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions.*[342]

(3) Proportionality: Connecting the Dots

First, a number of investment tribunals have expressly referred to the *ratio* adduced by the European Court of Human Rights in the application of the proportionality principle, to assess investment claims.

In *Tecmed v. Mexico* the investment Tribunal, on more than one occasion,[343] recalled the ECtHR jurisprudence to support the principle that "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure".[344] In turn, the *Azurix* Tribunal made express reference to, and acknowledged the section of the award in the *Tecmed v. Mexico* case, further stating that "these additional elements provide[d] useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation".[345] Again, specifically to the notion of *de facto* expropriation, in *Lauder v. Czech Republic*[346] reference was made to *Mellacher and others v. Austria*,[347] where the European Court of Human Rights stated that "an interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[348]

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[342] *Ibid.*, at para. 92.
[343] *James and others v. The United Kingdom*, at 19-20; European Court of Human Rights, *Matos e Silva, Lda., and Others v. Portugal*, at 19.
[344] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, at para. 122 (Tecmed v. Mexico).
[345] *Azurix Corp. v. Republic of Argentina* (ICSID Case No. ARB/01/12), Award of 14 July 2006, at para 312 (Azurix v. Argentina).
[346] *Ronald S. Lauder v. The Czech Republic*, Award of 3 September 2001 at 200.
[347] *Mellacher and others v. Austria*, European Court of Human Rights, Application No. 10522/83; 11011/84; 11070/84, Judgment of 19 December 1989.
[348] *Ibid.*, at para. 48.

In a Fair and Equitable Treatment inquiry, after investigating whether the investor bore a legitimate expectation, the *Total* Tribunal has also looked at the relationship between the reasonableness of the measure put in place by the Government of Argentina, and the appropriateness of such measure to reach the prospected public interest goal. In the series of cases concerning the Argentine crisis, among which *Continental v. Argentina* analyzed above, although the Arbitral Tribunal embraced a broader and friendly approach towards regulatory measures, what matters to the present inquiry is again the link operated by the arbitrators between the goal to be reached and the governmental measures enacted: "we consider that the Government's efforts struck an appropriate balance between that aim and the responsibility of any government towards the country's population".[349] It is indeed such link the essence of the principle of proportionality in investment arbitration: the measure must be proportionate to the objective pursued, meaning it must not put an "excessive" burden on the individual or entity affected by such measure.[350]

This is exactly the same link highlighted in human rights jurisprudence, to which arbitral tribunals have referred to in applying the principle of proportionality to investment cases. One only has to think to *James and Others* or *Matos e Silva v. Portugal*, which were directly or indirectly referred to by the *Tecmed* and *Azurix* Tribunals; but also to *Handyside v. U.K.*, where the ECtHR specified that "every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued",[351] and *Dudgeon v. U.K.*, where the ECtHR stated that it is for it "to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it".[352]

[349] *Continental Casualty Company v. Republic of Argentina*, Award of 5 September 2008, at para. 227.
[350] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, Award of 29 May 2003, at para. 122 (Tecmed v. Mexico); *See also James and others v. The United Kingdom,* at 19-20.
[351] *Handyside v. The United Kingdom*, at para. 49.
[352] *Dudgeon v. United Kingdom*, at para. 59.

From an overall assessment of the aforementioned considerations it emerges that, conceptually, the use of the principle of proportionality in the human rights and investment realms, only apparently overlaps. More precisely, investment law has drawn from the human rights law's structural principle to disentangle complex expropriation and Fair and Equitable Treatment inquiries, using the principle as a measure to detect whether any regulations put in place by host States are "legitimate", in the sense of not imposing an unnecessary burden on the protected investment, compared to the public interest goal that the regulation ought to reach.

Notwithstanding those arguing that the principle of proportionality is not suited to be transposed to the investment realm, due to the structural differences among the two systems,[353] the author claims that these differences, although real, do not play any role in the way fundamental principles can be applied, and are applied, to make determinations on existent rights in many fields of the law. Instead, the fact that such transposition occurs, should be seen in positive terms, rather than pointing the finger at how the systems are so different in terms of harmony, legitimacy of the adjudicative body, exhaustion of internal remedies etc.[354]

Even accepting the critics about the structural differences between the two regimes, the author claims that the transposition of the principle of proportionality from the human rights realm is a demonstration that the two systems are strictly interwoven. The argument put forward by Leonhardsen, that the proportionality analysis applied by arbitral tribunals is "well suited to enhance the perceptions of judicial output legitimacy" in terms of "relationship between the legitimacy of judicial review and modalities of legal reasoning… applied to the setting of a maturing international legal regime", is well put.[355]

In summary, in light of the analysis above, the proportionality analysis too, shows the existence of a bridge between the human rights and the investment regimes,

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[353] NIKIÈMA, S. H., *Best Practices – Indirect Expropriation*, IISD, March 2012 at 17.
[354] *Ibid*.
[355] LEONHARDSEN, E. M., *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, University of Oslo – Law Faculty, 1 August 2011 at 5-6.

bridge that more and more shortens the perceived distance between the two disciplines.

d) Denial of Justice and/or Procedural Fairness

(1) Investment Law

Many commentators, practitioners and policy makers, praise the system of investment arbitration for being a fair, rule-based system, advancing the rule of law.[356] Critics to this position adduce that the fairness of the system is undermined by intrinsic aspects of the investment regime, where arbitrators would naturally tend to favor claimants and in general all the actors, such as appointing authorities, playing a role in the arbitrator-appointment process, in order to advance the interest of the industry and their position within it. In this context, the system is criticized for its failure to "deliver on a core component of fair process, especially the demand of independence (and impartiality) in the final judgment of public law".[357]

The concepts underlying the issue, that most of the time go hand-in-hand, are those of "denial of justice" and "procedural fairness".

The notion of denial of justice has been the subject of several studies.[358] Although the content of the concept, namely the specific situations amounting to a denial of

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[356] WÄLDE, T. W., *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research* in "New Aspects of International Investment Law", P. Kahn and TW Wälde (Eds.), 2007 at 63, 95; PAULSSON, J., "Denial of Justice in International Law", Cambridge: CUP, 2005 at 265; BROWER, C. N. and STEVEN, L. A., *Who Then Should Judge? Developing the International Rule of Law under NAFTA Chapter 11*, 2 Chi JIL, 2001 at 193; BROWER, C. N. and SCHILL, S. W., *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law*, 9 Chi JIL, 2009 at 471; SCHILL, S. W., *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, Institute for International Law and Justice Working Paper 2006/6 (Global Administrative Law Series) at 4, 31, 36; LAIRD, I. A., *NAFTA Chapter 11 Meets Chicken Little*, 2 Chi JIL, 2001 at 223, 229; WEILER, T., *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 Can Bus LJ, 2002 at 405.

[357] VAN HARTEN, G., *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in "International Investment Law and Comparative Public Law", Schill, S. W. (Ed.), Oxford University Press Scholarship 2010 at 2.

[358] *See* GARNER, J. W., *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 10 BYIL, 1929 at 181; FREEMAN, A. V., "The International Responsibility of States for Denial of Justice", Liège: Vaillant-Carmanne, 1983; ADEDE, A. O., *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 The Canadian

justice, is subject to different interpretations, it is accepted that it contains two elements: a) a procedural component that can be illustrated in the impossibility to access a domestic court, and b) a substantive component, which reflects the malfunctioning of the court during the development of the proceedings.[359] It is also acknowledged that, when facing claims based on grounds of denial of justice, national tribunals should avoid dealing with them and pass them over to the international level.[360] The *ratio* behind this is fairly simple: as much as independent a judiciary might be, in a fair process inquiry it is precisely the actions of the judiciary that are called into question. In the context of investment law, the term "procedural fairness" has been referred to as "all types of procedures in which the investor may be involved with the organs of the State, *i.e.* administrative procedures", thus not only before the judiciary.[361] The relevance of both principles, in investment arbitration, has been mainly discussed with reference to the Fair and Equitable Treatment standard.[362]

For instance, in the *Middle East Cement v. Egypt* case,[363] dealing with the seizure and auction, by the Egyptian Government, of a ship without the owner being previously notified, the ICSID tribunal applied the Articles of the BIT, concluded between Greece and Egypt, relating to the Fair and Equitable Treatment and Full Protection and Security standards. In particular, in applying the FET standard, the Arbitral Tribunal assessed that even in the absence of a legal duty on the side of

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Yearbook of International Law, 1976 at 72; PAULSSON, J., "Denial of Justice in International Law", Cambridge: CUP, 2005.

[359] *See ;* PAULSSON, J., "Denial of Justice in International Law", Cambridge: CUP, 2005 at 59: "*international law would not crumble with the disappearance of the expression 'denial of justice'*"; ADEDE, O.A., *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law*, 14 The Canadian Yearbook of International Law, 1976 at 91: denial of justice is an "*improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions*"; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID *Case* No. ARB(AF)98/3), GREENWOOD Second Opinion, at para. 79: denial of justice implies an obligation to "*maintain and make available to aliens, a fair and effective system of justice*" and it is part of international customary law.

[360] TUDOR, I., "The Fair and Equitable Treatment Standard in the International Law of Foreign Investment", Oxford University Press, 2008 at 158.

[361] *Ibid.,* at 157.

[362] *Ibid.*

[363] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/01/7) (Middle East Cement v. Egypt).

the State to do so, a notification was possible, and failure to do so amounted to a FET breach under the BIT.[364]

In *Azinian v. Mexican States*, the claimant, who invested in a Mexican company operating in landfill and waste management in Mexico, claimed that the Mexican authorities terminated without cause the contract that had been awarded to Azinian. The Arbitral Tribunal held that:

> *A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way… There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law.*[365]

In *Mondev v. United States*, claimant submitted a claim for losses suffered by its investment in a company registered under the laws of Massachusetts, allegedly due to a decision, by the Supreme Judicial Court of Massachusetts, and to Massachusetts state law, imposing the immunization from tort liability of the Boston Redevelopment Authority. Recalling the Arbitral Tribunal's ruling in *ELSI*, where a Chamber of the ICJ described as arbitrary a conduct which displays "a wilful disregard of due process of law… which shocks, or at least surprises, a sense of judicial propriety",[366] the ICSID Tribunal made reference to general international law to give a content to the denial of justice, which is identified with that aspect of Article 1105(1) NAFTA relating to the treatment of aliens applicable to domestic courts' decision. The Arbitral Tribunal ruled:[367]

> *The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand*

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[364] *Ibid.*, at para. 143.
[365] *Azinian v. United Mexican States* 39 ILM 537, 1999, at paras. 102-103.
[366] *ELSI v. Italy*, at para. 128, citing the judgment of the Court in the Asylum case, ICJ Reports 1950 at 284, which referred to arbitrary action being "substituted for the rule of law".
[367] *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) (Mondev v. United States), Award of 11 October 2001, at para. 96: "*The Tribunal is thus concerned only with that aspect of the Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals*".

> *that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection.*

In *Loewen v. United States*,[368] claimant sought damages for alleged injuries arising out of litigation in which the company was involved before domestic courts in Mississippi. Here the Tribunal took the position that it is the "responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party".[369]

The more recent ICSID award *Helnan International Hotels AS v. Arab Republic of Egypt*,[370] also explores the issue of procedural fairness. In this case, the claimant entered into a long term management contract with a State agency, to maintain a hotel in Cairo at the level of a five-star hotel. Following several inspection, the Egyptian Ministry of Tourism downgraded the hotel to a four-star and the State agency commenced arbitration to terminate the management contract. After the ICSID Tribunal upheld the host State's position, Helnan applied for annulment proceedings on grounds, *inter alia,* of a "serious departure from a fundamental rule of procedure". The ICSID Annulment Committee ruled that: "there was no failure to observe a fundamental rule of procedure in this regard. Although Egypt did not apparently raise the point until its Rejoinder, Helnan was afforded an opportunity to advance its arguments on the point, both at the Hearing and in its written Post-Hearing Memorial. Its arguments were plainly considered by the Tribunal. They are summarized in the Award at paragraphs 87–88. The right to be heard does not require a tribunal to consider *seriatim* and evaluate expressly in its award every argument raised by each party. Helnan's essential submissions on this point were heard by the Tribunal, but they were rejected in favour of those advanced by Egypt".[371]

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[368] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award of 26 June 2003, at para. 119.
[369] *Ibid.*, at para. 123.
[370] *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19).
[371] *Ibid.*, Annulment Decision of 14 June 2014, at para. 38.

(2) Human Rights Law

Otherwise called "right to a fair trial", the set of values having the scope of providing individuals with a "good process", not only from the point of view of the substance but rather of the procedure, is one of the most important rights enshrined in the Universal Declaration of Human Rights,[372] and codified in the main human rights covenants.[373]

A great contribution to the development of the concept of procedural fairness in the field of human rights comes from the jurisprudence of the Human Rights Committee. For instance, in 1984 the Committee issued a General Comment providing an authoritative interpretation of Article 14 of the ICCPR, dealing with the right to a fair trial.[374]

Article 4 of the ICCPR, enumerating a series of rights that are non-derogable, does not list Article 14, but the Human Rights Committee has, by way of interpretation, extended the non-derogability to other rights (*e.g.* the right not to be subject to arbitrary deprivation of life). According to some authors, this can be read as the impossibility to suspend the basic fair trial rules of Article 14, not even in the context of the "national emergency" defense.[375] This position has subsequently been confirmed by another General Comment, where the Human Rights Committee has recognized that "[s]afeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of

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[372] Article 10 UNHR: "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*".

[373] Articles 14 and 15 but also 9, 2, 6, 7 and 10 ICCPR elaborates upon the fair trial rights identified in the Universal Declaration. Article 14 ICCPR: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…". *See also* Articles 12, 37 (b) and (d), 40 of the 1989 Convention on the Right of the Child; Common Article 3 to the four Geneva Convention for the protection of victims of armed conflict and Article 6 of Additional Protocol II; Article 96, 99-108 of the Third Geneva Convention; Articles 54, 64-74, and 117-26 of the Fourth Geneva Convention; Article 75 of Additional Protocol I.

[374] Human Rights Committee General Comment No. 13: *Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)* of 13 April 1984.

[375] *See e.g.* WEISSBRODT, D. S. & DE LA VEGA, C., "International Human Rights Law: An Introduction", University of Pennsylvania Press, 2007 at 60.

law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency", thus further strengthening the non-derogable nature of the right to procedural fairness.[376]

The United Nations' body of soft law has also contributed to the development of the concept through, for instance, the Code of Conduct for Law Enforcement Officials;[377] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty;[378] Basic Principles on the Independency of the Judiciary;[379] Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;[380] Basic Principles on the Role of Lawyers;[381] and Guidelines on the Role of Prosecutors.[382] Not to mention the body of law of the various regional institutions.

All in all, the United Nations Organization, regional organizations and other international human rights institutions, have over time built-up an authoritative, generally accepted (although not always applied) framework and considerable *corpus* of jurisprudence relating to the procedural fairness standard.

The European Court of Human Rights is probably the most powerful and recognized body litigating and adjudicating human rights cases. Article 6 ECHR enshrines the principle of procedural fairness. It provides a set of protections to

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[376] Human Rights Committee General Comment No. 29: *States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11 of 31 August 2001, at para. 16.
[377] Adopted By General Assembly Resolution 34/169 of 17 December 1979.
[378] E.S.C. res. 1984/50, annex, 1984 UN ESCOR Supp. (No. 1) at 33, UN Doc. E/1984/84 (1984).
[379] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[380] E.S.C. res. 1989/65, annex, 1989 UN ESCOR Supp. (No. 1) at 52, UN Doc. E/1989/89, 1989.
[381] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
[382] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

ensure that any individual can enjoy the right to a fair trial. Core pillars of the ECtHR's case law on the matter are impartiality of judges,[383] and the right to effective hearing participation, both formal as well as substantial. Particularly, in *Perez v. France*, the ECtHR held that the right to a fair trial:

> *[C]an only be seen to be effective if the observations are actually 'heard', that is duly considered by the trial court. In other words, the effect of Article 6 [ECHR] is, among others, to place the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant.*[384]

Article 6(1) ECHR further seeks to establish consistency between criminal and civil proceedings, and does so by pursuing judicial certainty and fairness.[385] To this end, in *Vinčić v. Serbia*, the ECtHR has elevated the lack of judicial certainty to a violation of the right to a fair hearing. The case dealt with claims for employment-related benefits that were rejected by a domestic court. At the same time, other identical claims were simultaneously accepted and the ECtHR noted:

> *[T]hat whilst certain divergences in interpretation could be accepted as an inherent trait of any judicial system which, just like the Serbian one, is based on a network of trial and appeal courts with authority over a certain territory, in the cases at hand the conflicting interpretations stemmed from the same jurisdiction… and involved the inconsistent adjudication of claims brought by many persons in identical situations… Since these conflicts were not institutionally resolved, all this created a state of continued uncertainty, which in turn must have reduced the public's confidence in the judiciary, such confidence, clearly, being one of the essential components of a State based on the rule of law. The Court therefore… considers that the judicial uncertainty in question has in itself deprived them of a fair hearing.*[386]

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[383] HARRIS, D. *et al.*, "Law of the European Convention on Human Rights", (2d ed.), 2009 at 291.
[384] *Perez v. France*, European Court of Human Rights, Application No. 47287/99, Judgment of 12 February 2004, at para. 80.
[385] ECHR, Article 6(1).
[386] *Vinčić v. Serbia*, European Court of Human Rights, Application No. 44698/06, 44700/06, 44725/06, 49388/06, 50034/06, 694/07, 757/07, 758/07, 5062/07, 8130/07, 9143/07, 9262/07, 9986/07, 11197/07, 11711/07, 13995/07, 14022/07, 20378/07, 20379/07, 20380/07, 20515/07, 23971/07, 50608/07, 50617/07, 4022/08, 4021/08, 29758/07, 45249/07, Judgment of 28 August 2012 at para. 56. *See also Nejdet Şahin and Perihan¸ Şahin v. Turkey*, European Court of Human Rights, Application No. 13279/05, Judgment of 20 October 2011, at para. 57; *Beian v. Romania* (No. 1), European Court of Human Rights, Application No. 30658/05, Judgment of 6 March 2008, at paras. 36–39; *Tudor Tudor v. Romania*, European Court of Human Rights, Application No. 21911/03, Judgment of 24 March 2009, at para. 29; *Iordan Iordanov v. Bulgaria*, European Court of Human Rights, Application No. 23530/02, Judgment of 2 July 2009, at paras. 47–53.

Other fair process fundamental aspects have been identified by the ECtHR in accuracy, neutrality and participation. For instance, in *W. v. The United Kingdom*,[387] the applicant and his wife were deprived of their youngest child, assigned to long-term fostering with a view to adoption, due to the couple's history of serious marital and financial difficulties. In ruling that the United Kingdom violated Article 6 of the Convention, the ECtHR held that "[t]he local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8".[388]

The ECtHR has explored the topic of procedural fairness in relation to a variety of matters, such as the procedural obligation to investigate deaths,[389] procedural safeguards and margin of appreciation,[390] the procedural justice in administrative proceedings,[391] and the procedural guarantees under the legality test,[392] the last two of which are of special interest to the present study.

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[387] *W. v. The United Kingdom*, at para. 62.
[388] *Ibid.*, at para. 62.
[389] *Osman v. The United Kingdom*, European Court of Human Rights, Application No. 23452/94, Judgment of 28 October 1998, at para. 115; *McCann and Others v. The United Kingdom,* European Court of Human Rights, Application No. 18984/91, Judgment of 5 September 1995, at para. 161.

[390] *See e.g. Buckley v. The United Kingdom*, European Court of Human Rights, Application No. 20348/92, Judgment of 29 September 1996; *Noack v. Germany*, European Court of Human Rights, Application No. 46346/99, Judgment of 25 May 2000; *Leyla Şahin*, European Court of Human Rights, Application No. 44774/98, Judgment of 10 November 2005.
[391] *Buckley v. United Kingdom*, confirmed by *Chapman v. The United Kingdom*, European Court of Human Rights, Application No. 27238/95, Judgment of 18 January 2001, at para. 92; *Hatton v. The United Kingdom*, Application No. 36022/97, European Court of Human Rights, 2001.
[392] *See e.g. Al-Nashif v. Bulgaria*, European Court of Human Rights, Application No. 50963/99, Judgment of 20 June 2002; *Malone v. The United Kingdom*, European Court of Human Rights, Application No. 8691/79, Judgment of 2 August 1984, at para. 67.

In *Buckley v. The United Kingdom*,[393] relating to a Gypsy woman who was forbidden, by the British Government, to live in a caravan on her land, the ECtHR held:

> *[T]he decision-making process leading to measures of interference [with fundamental rights] must be fair and such as to afford due respect to the interests safeguarded to the individual by [by the Convention]*.[394]

In *Hatton v. The United Kingdom*, case that involved noise disturbance due to night flights at the Heathrow airport, which caused, *inter alia*, depression, sleep deprivation and chronic headaches to the applicants, the ECtHR had the opportunity to take a position on the scope of procedural obligations in environmental cases:

> *In connection with the procedural element of the Court's review of cases involving environmental issues, the Court is required to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available*.[395]

The ECtHR further added:

> *[A] governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake*.[396]

From a practical perspective, in the last case at issue, the ECtHR looked for evidence that the British authorities put in place all the necessary activities in order to afford the applicants the possibility to be heard, such as carrying out investigations and studies over a long period of time on the effects of the noise, monitoring the situation, open public consultations inviting all people living in proximity of the airport to provide their observations.[397] For all this reasons, the

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[393] *Buckley v. The United Kingdom*, at para. 76, confirmed by *Chapman v. The United Kingdom*, at para. 92.
[394] *Hatton v. The United Kingdom*, at para. 104.
[395] *Ibid.*
[396] *Ibid.*, at para. 128.
[397] *Ibid.*

ECtHR found that there had been no procedural flaws in setting-up the Heathrow night flight schedule, and that there was no violation of the Convention.[398]

In *Al-Nashif v. Bulgaria*,[399] a Palestinian national, whose children acquired Bulgarian nationality, was expelled from Bulgaria on national security grounds. In this case, the ECtHR built a procedural justice test in the legal reasoning applied to the case. Particularly, the ECtHR ruled that in order to "lawfully" interfere with fundamental rights, there must be a compliance with the rule of law, which is mirrored in the existence, in the country at issue, of legal provisions forbidding arbitrary interferences by public authorities in private lives:[400]

> *Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence*.[401]

The ECtHR determined that the decision of expulsion was taken by the Bulgarian authorities without providing any reasoning, neither to the applicant, nor to his attorney, and was therefore in violation of the right to respect for his family life.[402] This approach was confirmed by the Court in subsequent cases,[403] one of which, *Nolan and K. v. Russia*,[404] applied the same wording of the legality test to the

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[398] *Ibid.*, at paras. 128-130.
[399] *Al-Nashif v. Bulgaria*.
[400] *See, e.g., Malone v. The United Kingdom*, at para. 67.
[401] *Al-Nashif v. Bulgaria*, at para. 123.
[402] *Ibid.*, at para. 126, 129.
[403] *See Lupsa v. Romania*, European Court of Human Rights, Application No. 10337/04, Judgment of 8 September 2006, at para. 38; *Kaya v. Romania*, European Court of Human Rights, Application No. 33970/05, Judgment of 12 October 2006, at para. 41; *Liu v. Russia*, European Court of Human Rights, Application No. 42086/05, Judgment of 2 June 2008, at para. 59; *C.G. v. Bulgaria*, European Court of Human Rights, Application No. 1365/07, Judgment of 24 July 2008, at para. 40; *Raza v. Bulgaria*, European Court of Human Rights, Application No. 31465/08, Judgment of 11 February 2010, at para. 50; *Kaushal v. Bulgaria*, European Court of Human Rights, Application No. 1537/08, Judgment of 2 September 2010, at para. 29. *See also Capital Bank AD v. Bulgaria* (First Protocol), European Court of Human Rights, Application No. 49429/99, Judgment of 24 February 2006, at para. 134; *Družstevní Záložna Pria v. Czech Republic*, European Court of Human Rights, Application No. 72034/01, Judgment of 28 June 2010, at para. 89; *Forminster Enterprises Limited v. Czech Republic*, European Court of Human Rights, Application No. 38238/04, Judgment of 9 January 2009, at para. 69.
[404] *Nolan and K. v. Russia*, European Court of Human Rights, Application No. 2512/04, Judgment of 6 July 2009, at para. 71.

necessity test. In this case, the applicant, a U.S. citizen living in Georgia, and member of the Unification Church, went to Russia to assist the Church's activities. In order to do so, he was granted leave to stay by the Russian Federation, renewable on a yearly basis. In 2000, the concept of National Security of the Russian Federation was amended in the sense of "opposing negative influence of foreign religious organizations and missionaries". Subsequently, the community where the applicant was operating was dissolved by Russian authorities for its failure to notify the authorities of the continuation of its activities. On his way back to Russia, after a trip to Cyprus, the applicant was detained overnight and informed that his visa had been cancelled. After been transferred to Estonia he was denied re-entering into Russia to reunite with his child, who was left behind with a nanny. The ECtHR found multiple violations of the Convention.

First, the conditions of the applicant's overnight detention at the Moscow airport equaled to a deprivation of liberty and, therefore, the national system had failed to protect the applicant from procedural arbitrariness under Article 5(1) ECHR; second, the absence, under the Russian legal system, of an enforceable right to compensation, was also considered a violation of the Convention (Article 5(5)); third, the time frame in which the applicant was separated from his son, due to the Russian authorities' failure to assess the impact of their decision relating to the applicant's expulsion, on the welfare of his son, violated Article 8 of the Convention; fourth, by failing to provide any plausible alternative legal or factual justification for the applicant's expulsion rather than that based on his religious activities, the ECtHR found that the Russian ban was designated to repress the applicant's exercise of the right to freedom of religion, rather than in the interest of national security or public order, and therefore was in breach of Article 9 of the Convention.

Particularly, with regard to the legality test applied to procedural fairness, the ECtHR held that:

> *[N]o evidence corroborating the necessity to ban the applicant from entering Russia was produced or examined in the domestic proceedings. It reiterates that even*

> *where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information*.[405]

(3) Procedural Fairness: Connecting the Dots

First, in *Mondev v. United States*, when analyzing the immunization from tort liability granted to a State agency, the Arbitral Tribunal explicitly recalled the jurisprudence of the European Court of Human Rights to give a content to the concept of denial of justice and, in particular, to the standard of Article 6(1) of the European Convention on Human Rights.[406] Precisely, the ECtHR ruled that State immunities for civil matters might violate Article 6(1) ECHR, if they effectively exclude access to courts adjudicating civil rights:[407] "it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1--namely that civil claims must be capable of being submitted to a judge for adjudication--if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons…[408] This instance is a classic example of parallel and consistent application of human rights principles to investment law matters, where the arbitral tribunal directly recalled the ECtHR jurisprudence to disentangle juridical positions under the BIT.

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[405] *Ibid.*, at para. 71.
[406] *Mondev International Ltd. v. United States of America*, Award of 11 October 2001, at paras. 141 and 143. For further literature on the case under consideration, *see* FRANCIONI, F., *Access to Justice, Denial of Justice and International Investment Law*, in "Human Rights in International Investment Law and Arbitration", Dupuy, Francioni, Petersmann (Eds.), Oxford University Press, 2009 at 69-70.
[407] See *Al-Adsani v.The United Kingdom*, European Court of Human Rights, Application No. 35763/97, Judgment of 21 November 2001; *McElhinney v. Ireland*, European Court of Human Rights, Application No. 31253/96, Judgment of 21 November 2001; *Fogarty v. The United Kingdom*, European Court of Human Rights, Application No. 37112/97, Judgment of 21 November 2001.
[408] *Fogarty v. United Kingdom*, at paras. 24-25, citing *Fayed v. The United Kingdom*, European Court of Human Rights, Application No. 17101/90, Judgment of 21 September 1994, at para. 65. *See also Tinnelly & Sons Ltd. v. The United Kingdom*, European Court of Human Rights, Application No. 62/1997/846/1052–1053, Judgment of 10 July 1998; *Devlin v. The United Kingdom*, European Court of Human Rights, Application No. 29545/95, Judgment of 30 January 2002; *Osman v. United Kingdom*; *TP & KM v. The United Kingdom*, European Court of Human Rights, Application No. 28945/95, Judgment of 10 May 2001.

Second, in *Loewen v. United States*, referring to the attorneys in the case who pushed the jury to decide on the basis of the nationality of the investor, the Tribunal stated that "advocacy which tends to create an atmosphere of hostility to a party because it appeals to sectional or local prejudice, has been consistently condemned and is a ground for holding that there has been a mistrial, at least where the conduct amounts to an irreparable injustice".[409] From this statement it emerges again the same positive obligation, already pinpointed when discussing the due diligence principle, borne by host States to ensure that third parties do not impinge on human rights. Article 14 ICCPR is the bridge:[410] the status of a "foreigner" must not affect its status of human being, and as such his entitlement to enjoy fundamental rights such as the right to a fair trial.

Third, also for what concerns the "right to be heard", the investment and the human right realms are on the same page. Particularly, in *Perez v. France*,[411] the ECtHR ruled that procedural fairness is effective if the party is heard, namely if its positions are duly considered by the judges; in the same way, the Arbitral Tribunal in *Helnan International Hotels A/S v. Arab Republic of Egypt*[412] took a similar position in ruling that the claimant was afforded the opportunity to express its position, because its arguments were fully considered by the Arbitral Tribunal.

As illustrated in the paragraphs above, procedural fairness is an important asset in both investment and human rights disciplines, and the point of contact cannot be ignored, no matter what delineation of the concept of procedural fairness is taken.

Thus integration, rather than fragmentation, as suggested, *inter alia*, by Dupuy and Fry.[413] This, however, does not resolve the issue in a univocal and definite way.

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[409] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award of 26 June 2003, at para. 123.
[410] Article 14 ICCPR: "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…*".
[411] *Perez v. France*, at para. 80.
[412] *Helnan International Hotels A/S v. Arab Republic of Egypt*.
[413] DUPUY, P.M., *Unification Rather than Fragmentation of International Law?*, in "Human Rights in International Investment Law and Arbitration", Oxford University Press 2009; FRY, J. D., *International Human Rights Law in Investment Arbitration: Evidence of International Law Unity*, Duke Journal of Comparative & International Law, Vol. 18:77, 2007.

Especially because of the substantial analogies underlying the two systems from a conceptual point of view, in some cases a normative conflict will emerge. Such interaction is the subject of the following chapters.

D. Issues Underlying the Perceived Tension: It´s not a Mere Question of Which is the Prevailing Legal Regime

The issue of the relationship between human rights law and investment law was extensively addressed by the United Nations Economic and Social Council (UNESC) in 2003, following a request by the Sub-Commission on the Promotion and Protection of Human Rights, to produce a report on the state of affairs for what concerns the interaction between human rights, trade and investment; with a specific focus on the human rights implications of privatization.[414]

The first aspect that emerges from the UNESC Report is that it is not a mere question of which the prevailing law is. What is relevant is the way the two spheres of protection interact with each other, and the tools available to avoid that a potential friction be detrimental for one or both. The Report observes that inevitably the liberalization of investments has resulted in a limitation of States' action in implementing policies relating to investments and investors' protection. However, "liberalization should not go so far as to compromise State action and policy to promote and protect human rights".[415]

When substantial issues of human rights protection emerge in the context of foreign investments, the perceived tension manifests itself in the following way. On the one hand, the host State has a duty to abide by the provisions negotiated under the BIT. The Bilateral Investment Treaty is a binding agreement, the breach of which gives right to the parties to resort to an identified mechanism of resolution of the dispute, usually investment arbitration. It is in the course of such arbitral proceedings that, when it becomes clear that substantial issues of human rights protection underline the dispute, one must turn the attention to the other

[414] *See, e.g.*, Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights, UN Economic and Social Council, at 3, UN Doc. E/CN.4/Sub.2/2003/9, 2 July 2003 [hereinafter UNESC Report].
[415] *Ibid.*

flip of the coin. In fact, on the other hand and "to the extent that investment agreement concerns human rights issues, host States have a duty to regulate (the duty to fulfil human rights)". According to the UNESC Report, such duty to regulate emerges in four areas: a) short-term and volatile investments that can be detrimental to the possibility for States to promote human rights;[416] b) where local content requirements are needed in the interest of promoting cultural rights, the BIT should reserve host States the right to intervene with specific actions; c) if experience has proved that liberalization in certain sectors hinders the population's enjoyment of fundamental rights, host States should be able to withdraw their commitment to liberalization; and d) where provisions on expropriation are interpreted too broadly, host States should maintain the ability to introduce new laws and regulations aimed at protecting the rights of the citizens living under their jurisdiction.

Since 2003, extensive multi-stakeholders consultations and researches have been carried out within the United Nations framework. By resolution 14/4 of 16 June 2011, the Human Rights Council has unanimously endorsed the Guiding Principles on Business and Human Rights for implementing the United Nations "Protect, Respect and Remedy" Framework.[417] Furthermore, the recent Forum on Business and Human Rights, that took place between 4 and 5 December 2012,[418] and the Forum on Business and Human Rights established by the Human Rights Council, have addressed important ways forward to tackle the potential frictions. Particularly, renewed attention has been devoted to the May 2012 proposal, by the former UN Special Representative to the Secretary-General, Professor John Ruggie, who has put forward the "Principles for Responsible Contracts", aimed at constituting a guideline for negotiators "to ensure that the management of human

[416] To this end, BITs should reserve host States broader rights to regulate and control this type of investments.
[417] UN Doc. A/HRC/8/5. *See* also the reports of the Special Representative on operationalizing the Framework (A/HRC/11/13 and A/HRC/14/27).
[418] Under the aegis of the Working Group on the issue of human rights and transnational corporations and other business enterprises.

rights risks is integrated into State-investor contract negotiations". These principles, however, remain little known and their use still not widespread.[419]

Although these achievements can be considered as a milestone in *preventing* and addressing adverse impacts on human rights arising from business-related activities, three sets of problems can be identified.

First, the Guiding Principles can surely be considered a point of reference in preventing and addressing abuses, but they are not binding.

Second, the Principles provide for means of *ex ante* prevention of potential frictions between the two spheres of law. What about the BITs concluded in the past where no clear position, as regards human rights issues, had been taken during the negotiation of the agreement? How should the numerous pending investment arbitrations be resolved in those cases where substantive human rights issues, not tackled, underline the disputes?

Third, BITs are legally binding agreements.[420] Article 2(1)(a) of the Vienna Convention on the Law of Treaties--which is widely considered part of the body of international customary law--defines a treaty as "an international agreement concluded between States in written form and governed by international law...". The definition is reinforced by Article 26, named under the Latin *brocardo* "*pacta sunt servanda*", which establishes that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". Many believe that by any widely accepted definition, treaties are binding internationally and this leaves little room for host States to claim that they are allowed to be in breach of them for justifications other than those explicitly included in the investment agreement.

[419] Human Rights Council, Forum on Business and Human Rights - First session, 4 – 5 December 2012, *Programme* Information, A/HRC/FBHR/2012/INF.1.
[420] UNCTAD, *Bilateral Investment Treaties 1959-1991*, United Nations Sales No. E.92.II.A.16, International Chamber of Commerce Sales No. 508.

This is the perspective taken on by the supporters of what has been baptized by D'Amato as the "Contract Paradigm".[421]

Traditionally, the supporters of this paradigm[422] (publicists of the nineteenth and early part of the twentieth centuries), have maintained that a treaty is simply a contract between States as subjects of international law. Like any other contract, its provisions are binding only for the parties thereto (with the limited exception of the possibility to extend contract provisions to third-party beneficiaries, as long as they do not impose an obligation on the designated beneficiary). The contract so formed constitutes a Leibnitzian monad within which the parties thereto regulate their relationship, and are free to derogate from the general applicable law, or to restate it, if they so wish (with the exception of introducing provisions that are contrary to *jus cogens*). Other authors like Hall and Oppenheim have built on this paradigm and came to state that treaties can be either declaratory or derogatory of the underlying customary law, but in both cases the underlying law remains unchanged.[423]

The Contract Paradigm has strongly imposed itself in British literature,[424] but in the 40s consensus was reached that treaties somehow "harden into", or "form part of", or eventually are "transmuted into" customary international law.[425] This

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[421] D'AMATO, A., *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, Northwestern University School of Law, Faculty Working Papers, Paper 88, 2010 at 29. *See also* D'AMATO, A., "The Concept of Custom in International Law", 1971 at 119.

[422] BLUNTSCHLI, J. C., "Le droit international codifié", (4th ed.), 1886; DESPAGNET, F., "Droit international public", (4th ed.), 1910 at 76-77; CALVO, C., "Le droit international théorique et pratique", (5th ed.), 1896 at 160; FIORE, P., "Trattato di diritto internazionale pubblico", (4th ed.), 1904 at 147; FAUCHILLE, P., "Traité de droit international public", (8th ed. Bonfils), 1922 at §§ 53-54; HAUTFEUILLE, L. B., "Droits des nations neutres", (3rd ed.), 1868 at xiv-xv; PRADIER-FODÉRÉ, P., "Traité de droit international public", 1885 at 82-86; PHILLIMORE, R., "Commentaries on International Law", (3rd ed.), 1879 at 53; NYS, E., "Le droit international", (2d ed.), 1912 at 161-166; LAWRENCE, T. J., "The Principles of International Law", (7th ed.), 1910 at 99; SMITH, F. E. (Earl of Birkenhead), "International Law", (6th ed.), 1927 at 25; WESTLAKE, J., "International Law", (2d ed.), 1910 at 16; WHEATON, H., "Elements of International Law", (8th ed. Dana), 1866 at 24; CAVAGLIERI, R. R., "Lezioni di diritto internazionale", 1925 at 25-27; POLITIS, N., "The New Aspects of International Law", 1928 at 16.

[423] HALL, W. E., "A Treaties on International Law", (5th ed.) Higgins, 1924 at 7-8; OPPENHEIM, L., "A treaties on International Law", 8th ed. Lauterpacht, 1955 at 27.

[424] *See* PARRY, C., "The Sources and Evidences of International Law", 1965 at 29-32; WALDOCK, H., "General Course on Public International Law", 106 Recueil des Cours 3, 1962 at 84.

[425] *See* HUDSON, M. O., "The Permanent Court of International Justice", n. 38, 1942 at 609 ("forms part of"); CORBETT, P. E., *The Consent of States and the Sources of the Law of Nations*, 6 *B.Y.I.L.*, 1925 at

position was first reflected in Article 34 of the 1966 International Law Commission's Draft Articles on the Law of Treaties, which left open the possibility for a rule set forth in a treaty to become "binding upon a third State as a customary rule of international law" and subsequently reaffirmed in Article 38 of the "Treaty of the Treaties".[426]

Following this evolution, and the final outcome of the Treaty of the Treaties, it can be argued that nowadays, the Contract Paradigm has lost significance, and that the acceptance of the process of natural transformation of treaty provisions into international customary law can be interpreted, per analogy, as a bridge between the monad-type approach to the contractual nature of Bilateral Investment Treaties, and their broader public international law scope (including the customary norms on the protection of human rights). The latter cannot just be set aside and forgotten in the resolution of international investment disputes arising from the interpretation of BITs.

E. On the Customary Nature of Human Rights

The question arises when one considers that all United Nations member States have ratified at least one of the nine core conventions on the protection of human rights, and 80% of them have ratified four or more, giving concrete expression to the universality of the UDHR and international human rights.[427] Let alone those human rights conventions internationally accepted as constituting customary international law.

Generally speaking, human rights are nowadays considered a form of religion. The concept of "natural right", developed by the classical Greek philosophers, and

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20, 24 ("hardening into"); BAXTER, R. R., *Multilateral Treaties as Evidence of Customary International Law*, 41 *B.Y.I.L.*, 1965-66, at 49 ("transmuted into"). *See also* KOPELMANAS, L., *Custom as a Means of the Creation of International Law*, 18 *B.Y.I.L.* 127, 1937 at 136-38; SØRENSEN, M., "Les sources du droit international", 1946 at 95-98; JENKS, W., *State Succession in Respect of Law-Making Treaties*, 29 *B.Y.I.L.*, 1952 at 105, 108; SCHWARZENBERGER, G., *The Inductive Approach to International Law*, 60 *Harv. L. Rev.*, 1964 at 539, 563.

[426] Vienna Convention on the Law of Treaties, Article 38, (1969).

[427] United Nations Audiovisual Library, *The Universal Declaration of Human Rights*, available at: http://www.un.org/en/documents/udhr/hr_law.shtml, last accessed on 6 April 2014.

subsequently more comprehensively elaborated by Thomas Aquinas,[428] may well be regarded as the earliest direct precursor to human rights. By the *Magna Carta Libertarum* of 1215, the British King reacted to the accusation of abuse of power on his part, and laid the foundation of what it is considered the *rule of law*.[429] The writings of John Locke (1632-1704) on what he described as (pre-state) "natural rights"; of Jean-Jeacques Rousseau (1712-1778), who would have included these rights without hesitation in his "social contract"; and of Immanuel Kant (1724-1804), who identified the "righteous laws" along with the milestones of the French *Déclaration des Droits de l'Homme et du Citoyen* (1789) and the American *Declaration of Independence* (1776), contributed to bring the debate forward during the eighteen and nineteen centuries, and to depart from the longstanding approach of citizens being at the service of their rulers, rather than the other way around. The 1949 Universal Declaration of Human Rights has built on these events to constitute the turning point in strengthening modern human rights conscience. The above and other accomplishments have turned human rights into one of the "success stories" in the field of international law and international relations since World War II.

During the course of the twentieth century, a broad consensus has emerged as to the measurement of States' actions against an international moral code of conduct prescribing a set of benefits to be enjoyed by international citizens for the mere fact that they are human beings. Many human rights advocates and scholars repose their trust in the ever-growing body of human rights treaties to restate the universality of the norms contained therein, and the international obligation to respect them.

But the issues of the extent to which human rights provisions can be deemed part of the body of customary law, and thus internationally legally binding, is subject to debate.

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[428] *See* AQUINAS, T., "Summa Theologica", 1225-1274.

[429] The *Magna Carta Libertarum* of 1215, "*no freemen shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land*" (Article 39).

Is it fair to trust the list of Professor Louis Henkin, considered one of the most influential contemporary scholars of international law, pioneer in human rights law, and whose interpretation has long been the prevailing paradigm on the subject under consideration?[430] To this regard, an interesting study by D'Amato has investigated "how, and how much of, [the] public sentiment for human rights has been transformed into binding international law".[431] As the author observes, for every case prohibiting a certain conduct, because contrary to human rights law, there are hundreds of peripheral cases that might or might not fall within the broad prohibition. We face what D'Amato defines a "definitional" and "source" problem. In the jungle of case law and norms' interpretation, the author has tried to identify an objective method to retrieve a neutral source to define human rights. In his opinion, treaties are a mode of States' practice, which is a focal point in determining the rise of human rights as such. D'Amato concludes, like Henkin, that "human rights norms have become part of customary international law binding on all States".[432] This statement, however, is partially contradictory and not accurate enough, especially in light of D'Amato argumentation throughout his article. If the most important determinant in classifying human rights as such is States' practice, one can hardly find a consistent *praxis* attesting to the universality of human rights norms. As correctly noted by Rainer in his recent study on the universality of human right, the concept of universality is complex because it embraces geographical, cultural, historical and political dimensions. The author takes a very straight position as to the inexistence of "generally accepted notion of universality of human rights".

Reiner identifies the structural territorial aspect of the concept of human rights, and points out at their vertical dimension, which takes place at the national (local), regional and international level; and horizontal dimension, which is characterized by the acceptance of human rights norms throughout the world. The author further identifies an "inner dimension", relating to the "qualities of universality as

[430] HENKIN, L., *Human Rights and State "Sovereignty"*, 25 Ga. J. Int'l & Comp. L. 1995-96 at 31, 37.
[431] D'AMATO, A., *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, Northwestern University School of Law, Faculty Working Papers, Paper 88, 2010.
[432] *Ibid.*, at 32.

such". To this end, from a substantive point of view, a) human rights are inherent to all human beings, b) must be protected against all violations, and c) fundamental values such as dignity, freedom and autonomy must be explicitly or implicitly protected. From a functional prospective, a) constraints on human rights must respect the principle of optimization,[433] b) respect the principle of proportionality, c) leave untouched the essence of human rights, and d) human rights must be judicially protected. Besides his technical analysis of the nature of human rights, the author reckons that the concept of human rights is ideological, meaning that it "presently constitutes a pillar of public awareness in the world, despite the many reported and unreported human rights violations".[434]

Notwithstanding the widely shared public opinion that human rights are universal and must be respected, their political and normative reality bears serious drawbacks, especially for what concerns the mechanism of control and sanction available at the international level. The issue of the existence and efficiency of this protection, when substantive human rights norms come into play in the resolution of investment disputes, is in fact the focus of this study.[435]

Reiner is not an isolated voice criticizing the overestimation of human rights as universally recognized as legally binding on all States. If one should not talk about universality, some authors maintain that the buzz-word in addressing the issue should be "universalization", meaning a steady quest for a "process approach", with an eye well open on shortcomings.[436]

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[433] For a definition of the principle of optimization *see* MÜNCH, R., *From Pure Methodological Individualism to Poor Sociological Utilitarianism: A Critique of an Avoidable Alliance*, "an actor chooses, in any situations, that action which according to his expectations, yields the optimum of preference realization", The Canadian Journal of Sociology, 1983 at 51.

[434] REINER, A., *Reflection on the Universality of Human* Rights, in "The Universalism of Human Rights", Ius Gentium: Comparative Perspectives on Law and Justice, Springer Volume 16, 2013 at 3. *See also* HARDWICK, N.-A., *Theoretically Justifying Human Rights: A Critical Analysis*, E-International Relations, 5 August 2012.

[435] *Ibid*.

[436] *See also* ONUMA Y., *Towards an Intercivilizational Approach to Human Rights. For Universalization of Human Rights through Overcoming of a Westcentric Notion of Human Rights*, in "Asian Yearbook of International Law, 7", 2001 at 21-81.

Particularly, in another recent work, Van Genugten has formulated four realistic warnings concerning the universality of human rights.[437] First, the ratification, by a good number of States, of the main treaties on the protection of human rights, is not decisive as such. As also observed by D'Amato,[438] a close look needs to be given to State practice before being misled by the "UN label".

Second, "universality" is no synonym of "uniformity". It suffices to think that in 1948, when the Universal Declaration was signed, the United Nations counted only fifty-eight Member States, eight of which abstained from voting for reasons that will not be addressed hereto. Nowadays, the international community consists of 193 States. Although it can be assumed that the countries that joined later in time support the Universal Declaration,[439] during the 1993 Human Rights World Conference in Vienna it was determined that "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind".[440] This formulation was again embedded in a core document adopted in September 2005 in occasion of the United Nations' sixtieth anniversary.[441] Furthermore, during the 1993 Conference, the universality principle was challenged and received critics for its alleged Western origin.[442] The two documents outline the tension between the affirmation of human rights as recognized by, and binding on all States, and the intrinsic limitations to such statement, which is clearly a lack of consensus not only from a normative but also

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[437] VAN GENUGTEN, W., *The Universalisation of Human Rights: Reflections on Obstacles and the Way Forward*, in "Global Values in a Changing World", S. Zweegers and A.M. de Groot (Eds.), Amsterdam: KIT Publishers, 2012, at 208-214.
[438] D'AMATO, A., *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, Northwestern University School of Law, Faculty Working Papers, Paper 88, 2010.
[439] *Cf.* States participating to the two World Conferences on Human Rights in Tehran (1968) and in Vienna (1993).
[440] UN Doc. A/CONF.157/23, 12 July 1993, at para. 5.
[441] UN General Assembly Resolution 60/1, 16 September 2005, at para 121.
[442] The so called "Asian Debate". For other critics *see also* SENGHAAS, D., *Über asiatische und andere Werte*, in "Leviathan 1", 1995 at 5-12; GEIGER K. F. & KIESERLING M. (Eds.), "Asiatische Werte. Eine Debatte und ihr Kontext", Münster 2001; ZAKARIA F., *Culture is Destiny: A Conversation with Lee Kuan Yew*, in "Foreign Affairs" 73/2, March/April 1994 at 109-126. Similar critics were already expressed by E. Burke in his polemic against the "Declaration des droits de l'homme et du citoyen de 1789": In Burke's view the treatment of the citizen is specific to the political system of the country where he or she lives in. "Justice" can be conceived in different way depending on the cultural and social condition at the local level. For Burke, a catalogue of human rights poses a threat to political systems on a local level and their understanding of justice (*see* BURKE, E., "Reflections on the Revolution in France", 1790).

from a State praxis point of view, given the gross violations of human rights that continue to be perpetrated across the globe.

Third, a distinction needs to be made between Sates accepting the formulation of human rights norms, and their actual willingness to submit themselves to the scrutiny of international bodies for their implementation, and to the criticisms of independent experts peer review for potential improvements. Let's not forget the definition of customary law and the process through which an international provision becomes legally binding for all States: *diuturnitas* and *opinion juris sive necesitatis*. In this framework, which is the context that needs to be borne in mind when assessing the applicability of human rights provisions *erga omnes*, internationally recognized human rights are "universal" as long as States do not argue, on good grounds, that an exception to the rule is desirable or acceptable under the circumstances.[443] Generally speaking, the greatest source of concern is the growing reservations that States make when joining international human rights treaties, which mainly signal their unwillingness to subject themselves to the jurisdiction of international mechanisms of review. Furthermore, taking a closer look at the number of States parties to UN treaties, many of them have not ratified any human rights conventions, and it is also humble the number of those States that decided to join the protocols to the main human rights treaties, which are, most often, the documents providing individuals (and sometimes others) international *locus standi* (*i.e.* the right to complain).

Fourth, there are frictions between international legal obligations and the national (constitutional) framework within which human rights are conceived in each country. This warning acknowledges the deep interconnection between human rights talks, and the political, religious, and economic dimension of a particular country. Not all States, for instance, can be deemed equal as far as the level of development of democratic institutions is concerned. Some are still young, in

[443] A traditional case concerns the prohibition on torture and the case of the ticking bomb: is it permissible to exercise serious physical pressure on persons deemed to know about a threat of an attack? States have regularly appealed and still do appeal to these types of cases to make exceptions to rules, sometimes even leading to the internal legal recognition that such physical pressure is permissible.

transition, experience political tension or economic distress. All these elements will have an impact on the degree of implementation of international human rights provisions.[444]

Also Hardwick makes a point with regard to the volatile notion of human rights: "The term human rights is… used frequently and understood rarely". He observes that there is a substantial disagreement on the grounds to "justify that all human beings have rights by virtue of being human", and concludes by putting forward a model that shifts the paradigm from assessing human rights in terms of affirming the principle of quality, to a re-evaluation of human rights based on the inherent differences between human beings.[445]

Besides the various theoretical and practical approaches, some against, some in favor of treating human rights provisions as internationally legally binding on all States, it is a fact that the implementation of these rights has not yet reached the point where it should be. If we look around us, a big portion of the world population is still victim of human rights violations. The universality is still a claim, not reality.

This is the reason why it is necessary to take a closer look to the specific human rights that have so far emerged, and been invoked, in investment proceedings, to study the extent to which each of them has, or has not turned into customary law, and whether it is justifiable for arbitral tribunals to consider them a winning argument in case of breach of the investment treaty.

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[444] *See also* KIRCHSCHLAEGER, P., *Universality of Human Rights,* n.d., available at: http://www.theewc.org/uploads/files/Universality%20of%20Human%20Rights%20by%20Peter%20Kirchschlaeger2.pdf, last accessed on 6 April 2014.

[445] HARDWICK, N.-A., *Theoretically Justifying Human Rights: A Critical Analysis*, E-International Relations, 5 August 2012; *see also* PERRY, M. J., "The Idea of Human Rights: Four Inquiries", Oxford University Press,
1998 at 30-31; *see also* KIRCHSCHLAEGER, P., *Universality of Human Rights,* n.d., available at: http://www.theewc.org/uploads/files/Universality%20of%20Human%20Rights%20by%20Peter%20Kirchschlaeger2.pdf, last accessed on 6 April 2014 at 2; TAYLOR C., *Conditions of an Unforced Consensus on Human Rights*, in "The East Asian Challenge for Human Rights", Bauer J. R./Bell D. A. (Eds.), Cambridge 1999 at 124-144; TAYLOR C., *Modernity and the Rise of the Public Sphere*, in "The Tanner Lectures on Human Values", Peterson G. B. (Ed.), Salt Lake City 1993.

F. The General Consensus that Investment Arbitration Negatively Impacts on Human Rights: Is This the Real Problem?

This study does not want to be the nth compilation of critics to the state of affairs for what concerns the negative impact of investment arbitration on the promotion of fundamental rights. Numerous are the works of human rights advocates and scholars who take a strong position against the implications of business on human rights, and invoke reforms of the system that take better into account host States' obligations under human rights law.[446] The author surely shares with these scholarly works the need for more sensitivity in dealing with investment disputes that present substantial human rights issues, but does not believe and does not try to demonstrate that investment arbitration is detrimental. This *super partes* mechanism of resolution of disputes, negotiated by investors and States, is of extreme value if one considers all the implications that litigating before national courts would entail (*i.e.* potential bias towards one or the other party; insufficient experience of State courts to deal with technical issues relating to investments and public international law issues etc.).

Those who criticize the "human right argument" try to undermine the general consensus that investment arbitration negatively impacts on human rights, and strive to demonstrate that investment tribunals' argumentation are actually "compatible with, and even support, human rights law by relying on human rights jurisprudence to make key determinations".[447] Fry claims to be willing to go beyond the theoretical debate to look into the facts and lay the foundation for a theory of unification of international law. In his article, he makes a compilation of the most prominent international investment arbitration cases that directly refer to

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[446] *See* SUDA, R., *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, NYU Global Law Working Paper No. 01, 2005 at 2; BACHAND, R. & RUSSEAU, S., *International Investment and Human Rights: Political and Legal Issues*, Peter Feldstein trans. Rights & Democracy, Background Paper, 2003 at 1; BARNACLE, P., *Promises and Paradoxes: Promoting Labour Rights in International Financial Institutions and Trade Regimes*, 67 Sask. L. Rev. 2004 at 609, 634-35; PETERSON, L. E. & GRAY, K. R., *International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration*, The International Institute for Sustainable Development, Research Paper, 2003 at 3; ALVAREZ, J., *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. Miami Inter-Am. L. Rev. 1997 at 303, 308.

[447] FRY, J. D., *International Human Rights Law in Investment Arbitration: Evidence of International Law Unity*, Duke Journal of Comparative & International Law, Vol. 18:77, 2007 at 79.

the human rights jurisprudence of recognized international bodies, to conclude that investment tribunals apply laws that are *compatible* with and *support* human rights arguments.[448] Although Fry's argument supports a finding of unification of international law, especially when it comes to the reconciliation of the two disciplines at issue, his analysis does not address the debate from the perspective of fundamental rights that do not belong to investors. In other words, most of his article analyzes the interaction between human rights and investment law from the wrong perspective. His findings corroborate this study's claim that investment tribunals have relied on the jurisprudence of the Inter-American Court of Human Rights or the European Court of Human Rights to make determinations on the definition of regulatory expropriation,[449] the exhaustion of local remedies by the investor,[450] the assessment of damages and allocation of costs,[451] retroactivity of the law.[452] All these instances, however, are analyzed in terms of whether the harm caused *to the investor*, by an expropriation, was justifiable in terms of public interest; whether *the investor* is bound by the rules on exhaustion of local remedies; what paradigm should be used to assess damages and costs incurred *by investors* due to the host States breaches of the BIT; whether *investors* can benefit from the principle of retroactivity of the law. The only section where Fry considers the status of a right not related to, and not to benefit foreign investors, is the "right to water", but again, he does not spend much time in assessing how the outcome of investment arbitrations dealing with the right to water impact on third parties, like the population living in the host State's territory. Fry limits itself to state that a) so far no arbitral award has upheld an obligation on the part of host States to protect the population's right to water to defend themselves; b) no tribunal has mentioned a "right to water"; and c) States often do not even argue that they have an obligation to protect the right to water. Without a case law analysis of the rights of affected third parties, Fry observes that the potential side effects that investment awards might have on the population of

[448] *Ibid.*, at 82-103.
[449] *Ibid.*, at 83 *et seq*.
[450] *Ibid.*, at 89.
[451] *Ibid.*
[452] *Ibid.*, at 91-93.

a certain host State are, eventually, only attributable to the population itself because, even if the people do not agree with the content of BITs, the government that represent them do (because they signed them). Therefore, a "type of derived consent by the people", which is "forward looking without the electorate knowing what the government will actually do with its so-called mandate", would at maximum make States responsible towards its population for entering into BITs affecting their fundamental rights, but should not have implications for foreign investors. The author argues that this is an old-fashioned, close-minded approach that has its roots in the "Contract Paradigm" discussed above (Section III.D). BITs cannot be considered in the same manner as private contractual instruments since they are concluded by a public sovereign entity and are often aimed at regulating aspects of social life that have traditionally been handled by States due to their public interest nature (*i.e.* water and sanitation services). Against the "Contract Paradigm", the fact that BITs have been stipulated without including human rights safeguards towards third parties, leaves the door open to argue that certain internationally recognized rights should automatically permeate BITs when their integrity is called into question, and that no further formalities should impinge on their application.

Human rights advocates claim that international investment tribunals do not adequately take into consideration the impact of human rights law on in the resolution of investment disputes. Suda points out that "[t]he analysis brings home the need for the investment treaty regime to be reformed, ameliorating situations in which States face conflicting international legal obligations under the two regimes";[453] Peterson and Gray argue that "if investment tribunals will be expected to take account of a broader range of human rights and human security externalities related to investment, this might require further changes to the substantive and procedural rules of existing (and future) investment treaties".[454]

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[453] SUDA, R., *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, NYU Global Law Working Paper No. 01, 2005 at 2.

[454] PETERSON, L. E. & GRAY, K. R., *International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration*, The International Institute for Sustainable Development, Research Paper, 2003 at 3.

I agree that the debate is not and should not limit itself to a mere critic of how detrimental the development of business and economic law has been on fundamental rights, but rather to acknowledge a gap in the system and put forward reasonable solutions. Fry himself recognizes that "one thing is to say that there is an imbalance and quite another thing to say that international arbitration undermines human rights obligation".[455] This study aims precisely at analyzing the existing imbalance.

[455] FRY, J. D., *International Human Rights Law in Investment Arbitration: Evidence of International Law Unity*, Duke Journal of Comparative & International Law, Vol. 18:77, 2007 at 104.

IV. Cases in Which Host States Have Invoked Human Rights Provisions as a Defense against Investors

A. The Right to Water and Sanitation

Human rights issues have been raised by host States as a defense mainly in the context of the right to water and sanitation.[456] Economic liberalization and globalization have had the consequence to privatize public services, such as water supply and sanitation services. The outsourcing of these services, especially by developing countries, had the effect of exponentially multiplying the number of concession agreements concluded with foreign private corporations. In the cases in which, for several reasons that will be analyzed, the deal did not go as it was envisaged, investors have resorted to international arbitration to settle the dispute, and host States have invoked their population's international human right to water as a defense against the allegation of breach.

The growing of the privatization phenomena has not been accompanied by a clarification on the legal status of the right to water and the role by it played under international law. In this scenario, it is even more difficult to envisage adequate solutions for the settlement of investment disputes arising in connection with the privatization of water and/or sanitation services.

The rights to water and sanitation have been read as subsumed under the highest standard of health, right to housing and food, that a State should promote within its territory. This interpretation has been drawn from a broad lecture of the main international human rights treaties, as the International Covenant on Economic,

[456] Over the last decade, there have been at least a dozen BIT arbitrations brought against governments in relation to disputes in this sector*: Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Republic of Argentina*; *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Republic of Argentina*; *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Republic of Argentina* (Case no. ARB/03/18); *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Republic of Argentina*; *Azurix Corp. v. Republic of Argentina* (ICSID Case no. ARB/01/12); *Aguas del Tunari S.A. v. Republic of Bolivia*; *Azurix Corp. v. Republic of Argentina*; *SAUR International v. Republic of Argentina*; *Anglian Water Group v. Republic of Argentina*, UNCITRAL arbitration filed in 2003; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*; *Impregilo S.p.A. v. Republic of Argentina*; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Republic of Argentina.*

Social and Cultural Rights, the UN Convention on the Rights of the Child, the UN Convention on the Elimination of all Forms of Discrimination against Women, and others, imposing on States a progressive positive obligation of implementation of economic, social and cultural rights (ESCR) at the best of their capability. In particular, in a non-binding but authoritative interpretation of ESCR,[457] the Committee on Economic, Social and Cultural Rights has enucleated a series of requirements that governments should fulfill, including supervision on third parties entrusted with the implementation of the mentioned rights.

This is the general argument put forward by human rights advocates to point the finger against the investor-State system of resolution of disputes emerging from BITs. It has in fact been argued that the privatization of traditional governmental functions and fundamental services like water distribution, has had a negative impact on vulnerable groups.[458]

Is the right to water accepted under international law as much as it is claimed by civil society? In what way would its acceptance impact on the privatization phenomenon? Would it promote or exclude the privatization of this public service?

Starting from an analysis of the primary sources, the following paragraphs will first examine the development of the right to water, and the consensus on its status of "human right" and then, through the available case law, look more in depth into the above allegations to assess whether human rights arguments invoked by host States should really play a role in the resolution of investment dispute relating to the right to water.

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[457] Committee on Economic, Social and Cultural Rights, *General Comment no. 15*, 20 January 2003. The Committee established that a right to water is implicit in Articles 11 and 12 of the ICESCR and explicit in Article 24.2 of the Convention on the Rights of the Child and Article 14.2 of the Convention on the Elimination of Discrimination against Women.

[458] *See* Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 26 January 1997, at para 2; "*Globalization policies have accelerated the trends towards privatization of essential services for livelihood such as water, often at the expense of the poor and women*". UNCHR, *Statement of Mr. Miloon Kothari Special Rapporteur on adequate housing of the United Nations Commission on Human Rights*, 30 August 2002, http://www.unhchr.ch/Huricane/Huricane.nsf/60a520ce334aaa77802566100031b4bf/f9025f723f7eb70ec1256f5b003ae963?OpenDocument, last accessed on 6 April 2014.

1. *The Development of the Right to Water*

According to the United Nations Human Development Report, the global water crisis is not just a false alert but a real concern. In 2006, almost two out of three people were lacking access to clean water and more than 660 million people without sanitation lived on less than USD 2 a day. No other recent report is available but in seven years the population has grown, the financial crisis hit and the situation got probably worse than what it was.

From a theoretical perspective, no actors in the international arena (either individuals, States or organizations) have put into discussion the fact that *anybody* should have access to clean water in sufficient quantity.[459] However, at the current state, there is no comprehensive, explicit and legally binding recognition of the existence of this right under international law.[460] The topic is however not new and the right to water has been referred to in important international and regional human rights instruments.

In order, the earliest instruments providing explicit protection of the right to water are, in the context of armed conflicts, the 1977 Third Geneva Convention on the Treatment of Prisoners of War, and the Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War, establishing that prisoners and other detainees must be supplied with a sufficient amount of drinking water,[461] and that they need to be provided with shower and bathing facilities.[462] Always in the field of humanitarian law, the 1977 Additional Protocols to the Geneva Conventions aim to prevent the destruction of "objects indispensable to the survival of the civilian population such as… drinking water installations and

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[459] MCCAFFREY, S., *The Human Right to Water*, in "Fresh Water and Economic International Law", E. Brown Weiss, L. Boisson de Chazournes, and N. Bernasconi-Ostewalter (Eds.), 2005 at 93. McCaffrey seems to address the issue of a moral right to water.

[460] DUPUY, P. M., *Le droit à l'eau, un droit international*? in "La mise en oeuvre du droit à l'eau", Institute International de droit d'expression et d'Inspiration, G. Grisel (Ed.), 2006 at 277-278 with many further references.

[461] Third Geneva Convention on the Treatment of Prisoners of War of 12 August 1949, Articles 21, 25 and 46 and Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War of 12 August 1949, Articles 89 and 127.

[462] Third Geneva Convention, Article 29.

supplies and irrigation works".[463] It has to be noted that the right to water is framed more as a collective right than as an individual right.

Further to the above, Article 14 (2-h) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women established that women working in the field shall be insured the right to enjoy proper living conditions, especially in relation to water supply.[464] Also the 1989 Convention on the Right of the Child under its Article 14(1) and (2)(c) imposes upon member States the obligation to implement children's rights to health by taking, *inter alia*, adequate steps to fight against diseases and malnutrition.[465]

Besides the mentioned international instruments, regional instruments such as the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, provide for specific references to the right to water.[466]

Taking a step back in time, the 1948 Universal Declaration on Human Rights does not explicitly provide for protection of the right to water, but it has been interpreted as encompassing it. Article 25(1) establishes that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...".[467] Article 22 of the draft Declaration, presented by the Commission on Human Rights by mid-1948, stated that "everyone has the right to a standard of living, including food, clothing, housing and medical care, and to social services, adequate for the health and well-being of himself and his

[463] Additional Protocol to the 1949 Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, Articles 54 and Additional Protocol to the 1949 Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) of 8 June 1977, Articles 14.
[464] General Assembly Resolution No. 34/180 of 18 December 1979, UN Doc. A/34/830.
[465] General Assembly Resolution No. 44/25 of 20 November 1989, UN Doc. A Res./44/25.
[466] *See* Article 14(2)(c) of the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 of 1990: "*states parties… shall take measures to ensure the provision of adequate standard of nutrition ad safe drinking water*" and Article 15(a) of the Protocol to the African Carter on Human and Peoples' Rights on the Rights of Women in Africa, of 11 July 2003, according to which States parties "*shall provide women with access to clean drinking water*".
[467] Article 25 UDHR.

family".[468] As it is clear from the initial wording of Article 22 of the draft, the focus of the final version of the article was shifted from a general adequate "standard of living" to a more encompassing right to "health and well-being". The spontaneous question is: why was water not included in the list? The debate has been resolved in the sense of considering the list of food, clothing, housing etc. not to be a "close list" but rather to be an indication of the "component elements of an adequate standard of living".[469] Supported by the United Nations' records, logic suggests that the drafter of the Universal Declaration implicitly included water as one of the "component elements" of an adequate standard of living, just as air. The threshold of compliance with the standard identified by Article 25 cannot be met without a sufficient quality and quantity of water. This fact can be considered as established, in that it has been recognized by the World Health Organization and other United Nations and international aid agencies. This is an observation of fundamental importance that, albeit the universally recognized customary nature of some of the provisions of the Declaration, it cannot however naïvely ignore the fact that the instrument is a "soft law" tool, not binding upon States.

Besides the Universal Declaration, numerous other non-binding instruments have called for a right to water, with an emphasis on its individual and legally binding nature. These instruments are the Mar del Plata Declaration of the 1977 UN Water Conference,[470] the UN General Assembly Declaration on the Principle for Elderly Persons,[471] and the 1992 Dublin Statement on Water and Sustainable Development.[472]

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[468] United Nations, Yearbook of the United Nations 1947-48. Department of Public Information, United Nations, Lake Success, New York at 576.
[469] United Nations, Yearbook of the United Nations 1956. Columbia University Press/ United Nations Publications, New York at 216.
[470] *See* Preamble, Mar del Plata UN-Declaration, Argentina 1977: "*All people… have the right to have access to drinking water in quantities and quality equal to their basic needs*".
[471] *See* General Assembly Resolution No. 46/91 of 16 December 1991, *Implementation of the International Plan of Action on Ageing and Related Activities*, Section Independence: "Older persons should have access to adequate food, water, shelter, clothing and health care".
[472] Principle No. 3 of *The Dublin Statement on Water and Sustainable Development* of 31 January 1992 of the International Conference on Water and the environment establishes "the basic right of all human beings to have access to clean water and sanitation at an affordable price".

This call has long existed but when it comes to analyze the issue from the perspective of the jurisprudence of international judges on the right to water, the scenario is less positive. Cornerstone cases can be identified in *Lake Lanoux, Spain v. France*[473] or *Gabcikovo-Nagymaros Project, Hungary v. Slovakia.*[474] In the first case, the dispute concerned the use of waters of Lake Lanoux, which was under discussion between the French and the Spanish Governments since 1917. The Lake was in fact located, from a geographical perspective, in the Eastern Pyrenees in France, but its natural outlet is the Font-Vive river that, at some point in its course, crosses the Spanish border until the Mediterranean Sea. In 1950 *Élecricité de France* applied to the French Government for a concession to divert some water of the Lake, to take advantage of a mountain drop that would have increased the energy power produced. France communicated to the Spanish authorities its intention to return to Spain, through the Carol river, an amount of water corresponding to the needs of Spanish consumers (but inferior to the amount drawn). The Spanish Government opposed the project until a meeting of a commission of experts. In the meantime, France revised the project and decided to restore the Carol river with the exact quantity of water diverted from Lake Lanoux, but after having communicated the decision to the counterparty, Spain expressed reluctance to the implementation of the project overall. Further negotiations were held, and France came-up with a new proposal that encompassed several guarantees to Spain's benefit. The parties, however, were not able to reach an agreement on the matter and, in November 1956, they submitted their dispute to arbitration. In the *Compromis* the parties formulated the question to be resolved by the arbitral tribunal in the following terms:

> *Is the French Government correct in maintaining that in carrying out, without prior agreement between the two Governments, works or the utilization of the waters of Lake Lanoux…, it is not committing a breach of the provisions of the Treaty of Bayonne of 26 May 1866, and the Additional Act of the same date?*[475]

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[473] *Lake Lanoux, Spain v. France*, Award of 16 November 1957, 12 Report of International Arbitrational Award at 281-317 (English text available at 24 International Law Reports at 101-142).
[474] *Gabcikovo-Nagymaros Project, Hungary v. Slovakia*, Judgment of 25 September 1997, ICJ Reports 1997 at 7.
[475] The Text of the *Compromis* has been reproduced in the Award, 12 RIAA at 285-286.

Having regard to the circumstances underlying the case, the Tribunal reached the conclusion that in its proposal for water diversion, the French Government took enough into account Spain's interests.

In the *Gabcikovo-Nagymaros Project, Hungary v. Slovakia*[476] case, a "system of locks" for the production of hydroelectricity was to be built on the Danube River, pursuant to a 1977 treaty concluded between Hungary and Czechoslovakia.[477] The system of locks was to be operated jointly by the parties, and also aimed to improve navigation, and provide protection from flooding. Due to the growing domestic ecological concerns and criticism within Hungary, its Government discontinued construction of its part of the project, and eventually terminated the treaty in 1992. These actions were taken on the basis that the ecological risks brought about by the project as it was originally developed, including damage to water quality, seismologic risks, and the consequential loss of fluvial fauna and flora, were unacceptable.[478] As a consequence, Czechoslovakia implemented a variant to the original project, unilaterally diverting the Danube on its territory. This resulted in a considerable curtailment in the flow of the Danube downstream into Hungary.[479]

The ICJ was called on deciding whether Hungary was entitled to back-out from the project; whether Czechoslovakia was justified in unilaterally diverting the Danube waters; and ultimately whether Hungary was entitled to terminate the 1977 treaty.[480] In answering the first questions, the Court found that, first of all, Hungary had breached the 1977 treaty by suspending works, and that the argument of "state of ecological necessity" did not justify the breach.[481] Furthermore, Czechoslovakia's diversion of the river flow was found unlawful, because it deprived Hungary of its rightful "equitable and reasonable share" of the

[476] *Gabcikovo-Nagymaros Project, Hungary v. Slovakia*, Judgment of 25 September 1997, ICJ Reports 1997 at 7.
[477] After the division of Czechoslovakia in 1993, the Slovak Republic became the Successor State to the 1977 Treaty.
[478] *Gabcikovo-Nagymaros Project, Hungary v. Slovakia*, Judgment of 25 September 1997, ICJ Reports 1997 at 35.
[479] *Ibid.*, at para. 27.
[480] *Ibid.*, at paras. 11-12.
[481] *Ibid.*, at para. 46.

Danube River, by implementing the variant. Finally, the ICJ held that Hungary's termination of the treaty was invalid.[482] The numerous arguments put forth by Hungary under the treaty to justify its failed performance on the basis of international environmental law, were rejected by the Court.[483]

The case at issue was enthusiastically anticipated as the first dispute before the ICJ, directly raising issues of international environmental law.[484]

Vice-President Weeramantry's separate opinion has put forward an influential argument concerning the endorsement of sustainable development within the context of human rights.[485] The expectation was that the ICJ would use the notion of "sustainable development" to square the traditional law of treaties with the growing concerns relating to environmental protection.[486] Nevertheless, notwithstanding the reference, by the Court, to the concept of sustainable development,[487] most of the parties' numerous allegations based on environmental law were hardly taken into consideration in the reasoning of the majority.[488] Against this trend, the separate opinion of Vice-President Weeramantry is praised for its thorough analysis of the environmental law aspects of the case, particularly

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[482] *Ibid.*, at para. 69.
[483] *Ibid.*, at paras. 63-68.
[484] A-KHAVARI, A. & ROTHWELL, D. R., *The ICJ and the Danube Case: A Missed Opportunity for International Environmental Law*?, 22 Melbourne University Law Review, 1998 at 507, 508; STEC, S. & ECKSTEIN, G., *Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabcikovo Nagymaros Project*, 8 Yearbook of International Environmental Law, 1998 at 41.
[485] CASSEL, J., *Enforcing Environmental Human Rights: Selected Strategies of US NGOs*, 6 Northwestern University Journal of International Human Rights 1, 2007 at 69. *See also* LEE, J., *The Underlying Legal Theory to*
Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law, 25 Columbia Journal of Environmental Law, 2000 at 283, 312.
[486] STEC, S., *Do Two Wrongs Make a Right? Adjudicating Sustainable Development in the Danube Dam Case*, 29 Golden Gate University Law Review, 1999 at 317, 319.
[487] *Gabcikovo Nagymaros Project (Hungary v Slovakia)* (Separate Opinion of Vice-President Weeramantry) ICJ Rep. 7, 1997, at para. 88 [Separate Opinion]; STEC, S., *Do Two Wrongs Make a Right? Adjudicating Sustainable Development in the Danube Dam Case*, 29 Golden Gate University Law Review, 1999 at 319; ATAPATTU, S., "Emerging Principles of International Environmental Law", 2006 at 150; HIGGINS, R., *Natural Resources in the Case Law of the International Court*, in "International Law and Sustainable Development: Past Achievements and Future Challenges", A. Boyle and D. Freestone (Eds.), 1999 at 87, 111.
[488] PREISS, E., *The International Obligation to Conduct an Environmental Impact Assessment: the ICJ Case Concerning the Gabcikovo-Nagymaros Project*, 7 New York University Environmental Law Journal, 1999 at 307,
308.

the issue of sustainable development, framed as human rights issue. His opinion differed from that of the majority in two important points.

First, sustainable development is elevated to a "principle with normative value", rather than a mere concept; this reformulation strikes a balance between development and environmental protection.[489] Weeramantry further defines the principle to be an "integral part of modern international law",[490] and thus falling within the realm of customary international law, due to its *diuturnitas* and *opinion iuris cive necesitatis*.[491] The then-vice-President's basis of its separate opinion has been the review of past experience of various legal systems and cultures around the world, which allowed him to draw the conclusion that the "need for human activity to respect the environment" is a recognized universal international value, and therefore, a general principle of law.[492]

Second, and probably most relevant for the present study, in Weeramantry's opinion, sustainable development is framed as a principle of reconciliation in the context of conflicting human rights. He drew this conclusion from "the overwhelming support of the international community" to the human right to development, and elevated to human right the protection of the environment, which he defined a "vital part" of the human rights discourse. He has built a bridge between environmental protection and other rights such as the right to life, going so far as to state that without the former, all the other would be impaired.[493] As a result, sustainable development operates as a means to reconcile these rights.[494]

Many commentators have criticized the majority opinion for not adequately addressing the concept of sustainable development, compared to Weeramantry's

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[489] *Gabcikovo Nagymaros Project (Hungary v Slovakia)* (Separate Opinion of Vice-President Weeramantry) ICJ Rep. 7, 1997 [Separate Opinion], at paras. 88-89, 90.
[490] *Ibid.*, at paras. 89, 95.
[491] *Ibid.*, at paras. 93, 95, 104.
[492] *Ibid.*, at paras. 96, 100-105, 109-110. *See also* WEERAMANTRY, C., *Environmental Law Symposium Foreword*, 22 Melbourne University Law Review, 1998 at 503, 504-505.
[493] *Gabcikovo Nagymaros Project (Hungary v Slovakia)* (Separate Opinion of Vice-President Weeramantry) ICJ Rep. 7, 1997, at para. 91.
[494] A-KHAVARI, A. & ROTHWELL, D. R., *The ICJ and the Danube Case: A Missed Opportunity for International Environmental Law*?, 22 Melbourne University Law Review, 1998 at 524.

thorough analysis of the state of affairs.[495] The separate opinion has played a role in shaping the literature on the topic, and "frequently quoted by governments and nongovernmental organizations alike".[496]

Although the separate opinion has undoubtedly had an impact on the development of the notion of sustainable development at the social level, the same cannot be said about its influence at the international law level. Many are the critics of those scholars not sharing Weeramantry's determination of sustainable development as a part of customary international law.[497] Not to talk about the

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[495] *See e.g.*, LOWE, V., *Sustainable Development and Unsustainable Arguments*, in "International Law and Sustainable Development: Past Achievements and Future Challenges", A. Boyle and D. Freestone (Eds.), 1999 at 19, 21; PREISS, E., *The International Obligation to Conduct an Environmental Impact Assessment: the ICJ Case Concerning the Gabcikovo-Nagymaros Project*, 7 New York University Environmental Law Journal, 1999 at 308; A-KHAVARI, A. & ROTHWELL, D. R., *The ICJ and the Danube Case: A Missed Opportunity for International Environmental Law*?, 22 Melbourne University Law Review, 1998 at 527.

[496] MARQUES, C. & TINKE, C., *The Water Giant Awakes: An Overview of Water Law in Brazil*, 83 Texas Law Review, 2005 at 2185, 2236. *See also* SEGGER, M. C., *Governing and Reconciling Economic, Social and Environmental Regimes* in "Sustainable Justice: Reconciling Economic, Social and Environmental Law", M. Segger and C. Weeramantry (Eds.), 2005 at 561, 578. *See also* Transcript of Proceedings, *Case Concerning Land Reclamation by Singapore (Malaysia v. Singapore),* ITLOS, 27 November 2003, http://www.itlos.org/, last accessed on 6 April 2014; JUSTICE PAUL STEIN, *Major Issues Confronting the Judiciary in the Adjudication of Cases in the Area of Environment and Development*, Speech to the South-East Asian Regional Symposium on the Judiciary and the Law of Sustainable Development, 6 March 1999, http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_060399, last accessed on 6 April 2014; *See* also UNEP, *Compendium of Summaries of Judicial Decisions in Environment Related Cases*, 2004 at i, ii and 275 *et seq.*, http://www.unep.org/delc/Portals/119/UNEPCompendiumSummariesJudgementsEnvironment-relatedCases.pdf, last accessed on 6 April 2014 (The majority opinion was merely summarized); JUSTICE BRIAN PRESTON, *The Environment and its Influence on the Law*, (Keynote Address to the Legal Aid New South Wales Civil Law Conference, 26 September 2007, http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_Sept07_PrestonCJ_Environment_and_its_influence.doc/$file/Paper_Sept07_PrestonCJ_Environment_and_its_influence.doc, last accessed on 6 April 2014.

[497] BOYLE, A. & FREESTONE, D., *Introduction* in "International Law and Sustainable Development: Past Achievements and Future Challenges", A. Boyle and D. Freestone (Eds.), 1999 at 16; ATAPATTU, S., *Emerging Principles of International Environmental Law*, The American Journal of International Law Vol. 101, No. 4, October 2007 at 158; MARONG, A., *From Rio to Johannesburg: The Role of International Legal Norms in Sustainable Development*, 16 Georgetown International Environmental Law Review, 2003 at 48; LOWE, V., *Sustainable Development and Unsustainable Arguments*, in "International Law and Sustainable Development: Past Achievements and Future Challenges", in A. Boyle and D. Freestone, (Eds.), 1999 at 24; FRENCH, D., "International law and policy of sustainable development", 2005 at 51; CORDONIER SEGGER, M.-C., *Governing and Reconciling Economic, Social and Environmental Regimes*, in "Sustainable Justice: Reconciling Economic, Social and Environmental Law", M. Segger and C. Weeramantry (Eds.), 2005 at 597; HANDL, G., *Environmental Security and Global Change: The Challenge to International Law*, 1 Yearbook of International Environmental Law, 1990 at 3, 25; GEHRING, M. & CORDONIER SEGGER, M.-C., *Introduction* in "Sustainable Development

acceptance of *subjective* rights, when concerning the protection and distribution of water.

The development of innovative approaches in recognizing the right to water, by linking it to the array of accepted human rights, is a recent progress. From here the qualification of the right to water as an "emerging trend",[498] in international proceedings.

From a practical perspective, the right to water has been associated with the right to health (Article 12 ICESCR), and the right to life (Article 6 of the ICCPR). To give some illustrative examples of how the rights have been linked, one can mention the African Commission's Communications No. 25/89, 47/90, 56/91 and 100/93 (Joined) against Zaire,[499] where the Commission stated:

> *Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16.*

For what concerns the linkage to the right to life, in its Report on the Human Rights Situation in Ecuador the American Commission of Human Rights derived the right to water directly from the right to life.[500] The situation was such that the population was exposed to toxic byproducts deriving from oil exploitation in their drinking and bathing water. The Commission argued that the rights to life and physical safety, and integrity, are the relevant rights to be considered in cases

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in International Trade Law", M. Gehring and M. Segger (Eds.), 2005 at 1, 5; CORDONIER SEGGER, M.-C., *Integrating Social and Economic Development and Environmental Protection in World Trade Law* in "Sustainable Development in International Trade Law", M. Gehring and M. Segger (Eds.), 2005 at 133, 134.

[498] SCANLON, J., CASSAR, A., & NEMES, N., *Water as a Human Right?*, in "World Conservation Union Environmental Policy and Law Paper", No. 51, 2004 at 13 *et seq.*.

[499] *Free Legal Assistance Group and ors v. Zaire*, African Commission on Human and People's Rights, Comm. No. 25/89, 47/90, 56/91 and 100/93, 1995, at para. 47.

[500] Intern-American Commission on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev 1, 1997 ch. VIII, available at: http://www.cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm, last accessed on 6 April 2014.

where environmental contamination and degradation pose a continuous threat to human existence.[501]

In this scenario it has to be noted that not only courts have contributed to the development of the right to water as a human rights. The United Nations Committee on Economic, Social, and Cultural Rights (CESCR)--the body responsible for the supervision of the implementation of the covenant of the same name--started this trend by issuing General Comment No. 14, where it already specified that the right to drinkable water is one of the underlying components of the right to health.[502] But the real innovation came in 2002, with General Comment No. 15 entitled "The Right to Water", which is by far the most relevant of all legal recognition of the right to water.[503] The interpretation, by the Committee, of Article 11(1) of the Covenant dealing with "the rights of everyone to an adequate standard of living… including adequate food, clothing and housing" covers also an independent right to water for personal and domestic use. The door for the Committee to interpret Article 11(1) as extended was the word "including", which indicates that the rights protected by the provision are not limited to those listed (*i.e.* food, clothing and housing), but rather extend to an entire array of non-explicitly mentioned guarantees, vital to ensure the safeguard of an adequate standard of living.[504]

The incomparable innovation in the Committee's interpretation is the introduction of the "stand-alone" nature of the right to water, strengthened by the Committee's further linkage to the right to health under Article 12(1) ICESCR. This provision, in fact, sets forth the right, for everyone, to the highest attainable standard of health. In this context, the Committee elaborated a number of aspects relating to water under the right to health. It concluded that "unsafe and toxic water conditions" may represent a threat to health, and interpreted the Covenant as

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[501] *Ibid.*
[502] United Nations Committee on Economic, Social, and Cultural Rights, General Comment No. 14 UN Doc. E/C 12/2002/4 of 4 February 2002, Articles 11, 12, 15, 34 and 51.
[503] United Nations Committee on Economical, Social, and Cultural Rights (CESCR), General Comment No. 15 UN Doc. E/C 12/2002/11 of 26 November 2002.
[504] *Ibid.*, Article 3.

putting forward a positive obligation for States parties to "ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes. Likewise, States parties should monitor and combat situations where aquatic eco-systems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments".[505]

Furthermore, General Comment No. 15 defines the specific aspects of the right to water from a content point of view. Particularly, drawing from the principle of non-discrimination, the right to water includes the right to sufficient, safe, physically accessible, and affordable water of an accepted quality for everyone.[506] From here the positive obligation for States to respect, protect and fulfill this right.[507]

Notwithstanding being one of the greatest achievements in the field of the recognition of the right to water, General Comment No. 15 has also several shortcomings. To begin with, notwithstanding its nature of authoritative interpretation of the International Covenant on Economic, Social and Cultural Rights, it is *not* a legally binding instrument. In other words, it falls short to establish a far-reaching human right to water. It rather simply expresses the Committee's view that the right to water is an underlying and relevant component of other (accepted) human rights. This is not enough. Secondly, if one wishes to play the role of devil's advocate, by linking the right to water to the right to an adequate standard of living and health, which are socio-economic rights, the Committee's position can be read as implicitly excluding the civil and political implications of the right to water. The *ratio* behind the Committee's position is evident, and lays in the limitation of its mandate to the supervision of the ICESCR. No control is therefore possible and acceptable over the interpretation of the ICCPR.

[505] *Ibid.*, Article 8.
[506] *Ibid.*, Article 12 (a) – (c).
[507] *Ibid.*, Article 20 – 29.

For as much as the achievement of General Comment No. 15 is worthy of attention, the classification of the right to water as a purely socio-economic right has pervasive consequences. International tribunals' alternate attempts to divert the classification towards civil and political rights, by linking the right to water to the right to life, have lost connotation, although this interpretation is in line with the internal legal order of some States.[508]

More recently, at its sixty-fourth session in 2010, the United Nations General Assembly issued Resolution 64/292, which explicitly recognizes the human right to water and sanitation, and acknowledges clean drinking water and sanitation as essential to the realization of all human rights. The Resolution further calls on States parties and international organizations to make financial resources available in order to help capacity-building and technology transfer, especially in developing countries. The same actors are also called on providing safe, clean, accessible and affordable drinking water and sanitation for every human being.[509]

Subsequent UN initiatives in the field of the right to water have been the adoption of Resolution A/HRC/RES/18/1 by the Human Rights Council,[510] and Resolution 64/24 by the World Health Assembly.[511] The former takes the human right to safe drinking water and sanitation a step further, by welcoming the submission, by the Special Rapporteur on the right to safe drinking water and sanitation, of compilation of good practices and practical solutions for the implementation of the right to safe drinking water and sanitation. The Resolution further calls on States parties to ensure enough financing for sustainable delivery of water and sanitation services. The latter is a call on Member States "to ensure that national health strategies contribute to the realization of water- and sanitation-related Millennium Development Goals while coming in support to the progressive realization of the

[508] *See e.g.* Indian Supreme Court in the cases *Normado Bachao Andolan v. Union of India,* 10 SSC 664, 2000 at 767 and *Vivrendra Gaur and ors v. State of Haryana*, 2 SCC 577, 1995.
[509] United Nations General Assembly Resolution No. 64/292, UN Doc. A/RES/64/292 of 3 August 2010, *The Human Right to Water and Sanitation.*
[510] Human Rights Council, Resolution 18/1, UN Doc. A/HRC/RES/18/1 of 12 October 2011.
[511] World Health Assembly Resolution WHA64.24, *Drinking-Water, Sanitation and Health*, 24 May 2011.

human right to water and sanitation",[512] and to WHO's Director General "to strengthen WHO's collaboration with all relevant UN-Water members and partners, as well as other relevant organizations promoting access to safe drinking-water, sanitation and hygiene services, so as to set an example of effective intersectoral action in the context of WHO's involvement in the United Nations Delivering as One initiative, and WHO's cooperation with the United Nations Special Rapporteur on the human right to safe drinking water and sanitation with a view to improving the realization of the human right to water and Sanitation".[513]

Lastly, in February 2012, the *Good practices in realizing the rights to water and sanitation* were released by the UN Special Rapporteur.[514] The document identifies four main types of good practices: a) at the legal and institutional framework, b) financing and budgeting, c) implementation of the right to water, and d) accountability. This compendium is a platform for discussion and analysis of existing practices, oriented to inspire policy and decision-makers, practitioners, advocates and civil society in general, to engage with the rights to water and sanitation. The ultimate goal of the document is to advocate for all the relevant actors to assist in the difficult but crucial process of ensuring that any human being has access to safe, drinking water and sanitation services, both for personal as well as domestic purposes.

A look to the above analysis on the state of affairs reveals that many legal documents in international law *mention* the right to water, and elaborate on its content to various degrees. However, none of them comprehensively establishes its binding nature and, even less, seems to be within the actual political reach a step towards the adoption of a water convention that explicitly recognizes the right to water on a stand-alone basis, or as an addition to any other human rights existing instruments.

[512] *Ibid*., at Section 1(3).
[513] *Ibid*., at Section 2(3).
[514] Catarina de Albuquerque.

At the level of recognition by States, it looks like we are still far from being on track. In fact, attempts to elevate the right to water to the level of human right have been condemned by a majority of States at events such as the World Water Fora in Mexico City in 2006,[515] in Istanbul in 2009[516] and ultimately in Marseille in 2012. During the most recent forum, particularly, through a ministerial declaration, 84 government ministers and dozens of other national representatives called for a "new approach"[517] to water policy and "commit to accelerate the full implementation of the human rights obligations relating to access to safe and clean drinking water and sanitation by all appropriate means as part of our efforts to overcome the water crisis at all levels".[518] This, however, is different from formally defining water and sanitation as human rights. The declaration's wording leaves potential escape ways for countries to eschew their legal and financial obligations to uphold this right. Only separate and isolated voices have, during the Mexico City Fora, suggested that "access to water with quality, quantity and equity constitutes a Fundamental Human Right".[519]

In light of the above, considerable doubts exist on a consensus about the recognition of the right to water and sanitation as a human right. To conclude, the dilemma is two-fold: on the one hand, the Committee's derivation of the right to water from the right to an adequate standard of living and health is closer to an interpretation than to a binding ruling, and is not accompanied by a general acceptance and praxis of States, which would accord the desired legal effects under customary international law. On the other hand, even speculating on a potential acceptance of the right being subsumed under the above mentioned rights, it will be subject to all the limitations and practical shortcomings that socio-

[515] Summary Reports of the World Water Fora in Mexico City and Istanbul published by the International Institute for Sustainable Development (IISID), available at: http://www.iisd.ca/download/pdf/sd/ymbvol82num15e.pdf, last accessed on 6 April 2014.
[516] *Ibid.*
[517] Ministerial Declaration of the 6th World Water Forum, Marseille of 13 March 2012, at para. 10.
[518] *Ibid.*, at para. 3.
[519] Representatives of Cuba, Bolivia, and Venezuela, *Complementary Ministerial Declaration*, available at: http://www.worldwaterforum4.org.mx/files/Declaraciones/Complementary_Ministerial_Declaration.pdf, last accessed on 6 April 2014.

economic rights typically face. *In primis*, their debated nature as proper rights,[520] the contested content of the obligations that States should bear under these rights, and the problems relating to enforcement.

From a theoretical perspective, it is argued that since core socio-economic issues such as nutrition, education, health, housing etc., are already embedded in the welfare state provisions and regular legislation in developing countries, rendering new rights enforceable is not only superfluous, but would also burden already-overstretched judiciaries.[521] Commentators also maintain that making socio-economic rights enforceable would jeopardize traditional notions of democracy and the separation of powers, in that socio-economic issues are at the core of policy-makers' decisions, rather than of the judiciary.[522] Another argument adduced against the desirability of enforceable socio-economic rights is their "positive" nature as opposed to the "negative" nature of civil and political rights. While the latter merely requires States to *refrain* from unjust obstruction from enjoyment of individual liberties, the "positive" effect of socio-economic rights implies that States are burdened with an affirmative obligation to allocate resources to provide remedies for their safeguard.[523] Furthermore, socio-economic

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[520] DENNIS, M. J. & STEWART, D. P., *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L., 2004 at 462, 465.

[521] SCOTT, C. & MACKLEM, P., *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,* 141 U. PA. L. REV., 1992 at 3-4, 9-10, 15, 20, 24-25 (observing that social rights require government action and lack judicial competence).

[522] BEATTY, D. M., *The Last Generation: When Rights Lose Their Meaning,* in "Human Rights And Judicial Review: A Comparative Perspective", David M. Beatty (Ed.), 1994 at 321, 325, 326 (recognizing the concern some have regarding the upholding of the separation of powers in the context of cases involving socio-economic rights); BREST, P., *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,* 90 YALE L.J., 1981 at 1063, 1063-65, 1082, 1105-07; *see also* MANDEL, M., *The Charter of Rights and the Legalization of Politics in Canada*, Toronto: Wall and Thompson, reviewed edition of 1994 at 39, 51 (observing that "[n]obody could seriously argue that courts are as representative as legislatures" when dealing with socio-economic rights).

[523] *See* JOSEPH, K. & SUMPTION, J., "Equality", London 1979 at 47-49 (suggesting that "poverty is not unfreedom" because the individual can still make decisions about the use of their available resources). *But see* HAYEK, F. A., "The Constitution of Liberty", 1960 at 86 (proposing that "*it is the essence of the demand for equality before the law that people should be treated alike in spite of the fact that they are different*").

rights are labelled as being, by nature, open-ended and indeterminate, and lacking conceptual clarity.[524]

From a practical perspective, the enforcement of socio-economic rights is also perceived as a challenge, due to the complexity of cases involving them, and the fact that they tend to be embedded in an entangled net of causes and effects.[525] Furthermore, providing remedies for this category of rights is considered troublesome as they involve continuous social changes that are not suitable to be reflected in immediate implementation. Another potential practical problem relates to the access to justice for the most disadvantaged, poor and marginalized, who do not have the knowledge and the resources to voice their claims. Eventually, it is argued that decisions are made without taking into proper consideration their potentially competing needs.[526] This aspect is quite paradoxical if one thinks that socio-economic rights should, in the first place, be available to the least well-off in society.

The theoretical and practical challenges outlined above represent only a few of the shortcomings ensuing from framing the right to water and sanitation as socio-economic rights. Scholars have argued that this is another example of the, at least partial, failure of the institutional framework of modern international law to protect human rights in an adequate way.[527]

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[524] DENNIS, M. J. & STEWART, D. P., *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L., 2004 at 462, 464, 473 (suggesting that many States ignore socioeconomic rights because they are "*imprecise [and] unenforceable*").

[525] SCOTT, C. & MACKLEM, P., *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution,* 141 U. PA. L. REV., 1992 at 23-24 (discussing a popular view in constitutional scholarship that judges lack the skills, education, or training to adjudicate socio-economic cases given the complexity of the conflicting interests involved, often including questions of institutional design, policy choice, and politics).

[526] GALANTER, M., *Why the "Haves" Come out Ahead. Speculations on the Limits of Legal Change,* 9 LAW & Soc'Y REV., 1974 at 95, 119-121 (concluding that wealthy parties have strategic advantages over their lower-income opponents in legal battles due to their ability to retain quality legal and investigative services, in addition to the further advantage of passivity and overload of institutional facilities).

[527] PETERSON, E.-U., *The Human Rights Approach advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it relevant for WTO Law and Policy?*, 7(3) Journal of International Economic Law, 2004 at 613-614.

Confronted with a failure in the political initiative and a substantive legal gap, judges and arbitrators have taken the lead in shaping the concept. A clear-cut trend might not be so evident in the various case law of different tribunals and institutions for the settlement of international disputes. In fact, sometimes the right to water has been linked to civil and political rights, while other times to economic, social and cultural rights. In brief, the status of the right to water under international law remains ambiguous.

The question thus emerges as to how the right has been treated in the jurisprudence of arbitral tribunals: can a trend been identified for the right to water to play any role in the settlement of international investment disputes? The answer to this question will be explored in the following paragraphs.

2. *Available Investment Case Law on the Right to Water and Sanitation*

Today, there are at least three[528] ICSID arbitrations relating to water concessions that are pending, and at least eight[529] that have been concluded (including settlements),[530] most of which are against the Republic of Argentina. The majority of these cases relates to the question of the accessibility to clean and affordable water by the inhabitants of the host State, who are the ultimate beneficiaries and end-consumers of water and sewage concession services run by foreign investors. One of the most frequent defenses raised by host States in these disputes is that the measures or actions, denounced by investors, fall within the lawful exercise of State regulatory powers (and duties) to protect an essential public interest: ensuring that the population has access to clean water at affordable price.

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[528] *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Republic of Argentina*; *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Republic of Argentina*; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Republic of Argentina.*

[529] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Republic of Argentina*; *Azurix Corp. v. Republic of Argentina* (ICSID Case no. ARB/01/12); *Azurix Corp. v. Republic of Argentina* (ICSID Case no. ARB/03/30); *SAUR International v. Republic of Argentina*; *Impregilo S.p.A. v. Republic of Argentina*; *Branimir Mensik v. Slovak Republic* (ICSID Case No. ARB/06/9).

[530] *Aguas del Tunari S.A. v. Republic of Bolivia*; *Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Republic of Argentina* (ICSID Case No. ARB/03/18).

Following the 1990s privatization trend in many developing countries, activities typically carried out by States, due to their public interest nature, started being implemented by foreign investors. The private management of certain essential services, such as water and sanitation, however, did not come to terms with the responsibility in terms of human rights obligations.

The issue of the interaction between the protection of investment, and the lawful exercise of State regulatory powers to protect, *inter alia*, human rights of the inhabitants of the State where the investment takes place, is increasingly noticeable and a balance has to be struck. Arbitral tribunals have for long failed to develop a comprehensive framework to address commercial disputes having at their core the right to accessible drinking water at affordable prices.[531] Only recently an arbitral decision shed some light on the interpretation of disputes that have at their core the interaction between investment law and the right to water.[532] The paragraphs below will address two of the arbitral awards that have spelled out, better than others, the conflicted interests at stake: the rights of investors relating to the protection of their investments under the BIT, and the more general obligation of sovereign States to protect the fundamental rights of the population living in their territories.

The two arbitral cases analyzed in detail below are not the only ones available. Although the rest of the cases have not spelled out properly the issues object of this study, they will be quickly addressed below for sake of completeness.

One of the first cases dealing with the right to water in investment arbitration was *Compañía de Aguas del Aconquija S.A.* and *Vivendi Universal v. Republic of Argentina*,[533] where the investor, Vivendi/CGE, commenced an arbitration under the France-Argentina BIT, in connection with a concession contract for water and sewage services, in the Tucumán province of Argentina. The investor's claim

[531] HIRSCH, M., *Investment and Non-Investment Obligations*, in "Oxford Handbook of International Investment Law", Muchlinskly, Ortino and Schreuer (Eds.), OUP, 2008 at 163.
[532] *SAUR International v. Republic of Republic of Argentina.*
[533] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Republic of Argentina* (ICSID Case no. ARB/97/3).

related to expropriation and the alleged breach, by the Argentine Republic, of the Fair and Equitable Treatment standard. Particularly, the host State was said to have obstructed the investment through a "concerted public attack… by government authorities, which included a series of inflammatory statements and other acts encouraging customers not to pay their bills".[534] In turn, Argentina alleged failure of the investor to perform under the concession contract, providing a poor service to the citizens. The parties tried to resolve their differences and to renegotiate the concession contract but failed, and ultimately, the investor commenced arbitral proceedings.

In its award rendered in 2000, the Arbitral Tribunal resolved that, in order to interpret the BIT provisions, it was necessary to first address the issue under the concession contract. However, since the concession contract assigned the jurisdiction over its interpretation to Argentine administrative courts, the Arbitral Tribunal dismissed the claims based on the grounds that the investor ought to first pursue the case before Argentine administrative courts. This award has been partially annulled, on the basis that it had exceeded its powers when it failed to examine the merits of the claims for the measures taken by the Tucumán authorities under the BIT.[535] This event led to a new arbitration before a new constituted arbitral tribunal, which issued an award in 2007.[536] Since the Republic of Argentina did not raise any issue relating to its citizens' right to water, neither the first nor the second award explore the topic or the analysis of interaction between investment law and human rights.

Another of the "water cases" is *Azurix Corp. v. Republic of Argentina*,[537] which involved similar regulatory issues already encountered in the previous case. The investor, a spin-off of the Enron Corporation, was awarded a 30-year concession to

[534] General Comment, para 44 (a).
[535] Decision on Annulment, *Compania De Aguas Del Aconguija S.A. and Vivendi Universal* (formerly *Compagnie des Eaux*) *v. Republic of Argentina*, July 3, 2002, in 41 ILM 1135, No.5.
[536] *Compania De Aguas Del Aconguija S.A. and Vivendi Universal v. Republic of Argentina*, Award of 20 August 2007.
[537] *Azurix Corp. v. Republic of Argentina* (ICSID Case no. ARB/01/12).

provide water services in Buenos Aires.[538] End-consumers very soon started to complain about, and issues arose, in connection with water quality and pressure.[539] The situation brought the Government of Argentina to warn half a million end-consumers to not drink local water and to avoid showers and baths, due to a finding of toxic bacteria in the local water supply.[540] Azurix, in turn, attributed the poor quality service to the failure of the host State to provide adequate infrastructure in order for the investor to perform under the concession contract.[541] As a result, in October 2001 the investor terminated the concession contract and commenced arbitration against the Argentine Republic, alleging that the State's actions caused the investment to be expropriated, and breached the Fair and Equitable Treatment and Full Protection and Security standards.[542] As a defense during the proceedings, Argentina raised the issue of conflict between the BIT and human rights treaties that protect consumers' rights. The expert called by the host State testified to the fact that a conflict between investment provisions contained in BITs, and human rights norms, must be resolved in favor of human rights, because a public service interest must prevail over the private interest of service providers.[543] Besides addressing human rights arguments in the part relating to the principle of proportionality, to determine whether an expropriation occurred (already explored *supra* in Section III.C.1.c)), the only part in the award where the Arbitral Tribunal addressed the issue of the interaction between the two spheres of the law was to say that Argentina did not fully argue the matter of alleged incompatibility of BIT provisions with human rights treaties, and that therefore the Arbitral Tribunal failed to appreciate what the conflict would be,

[538] PERIN, M., *Azurix Water Bugs Argentina*, Houston Business Journal, 5 May 2000.
[539] *Ibid.*
[540] *Ibid*.
[541] Azurix, SEC Quarterly Report, Nov. 19 2001 Available on-line at: www.sec.gov/Archives/edgar/data/1080205/000095012901504206/0000950129-01-504206.txt.
[542] *Ibid*.
[543] *Azurix Corp. v. Republic of Argentina* (ICSID Case no. ARB/01/12), Dr. Solomoni's expert opinion, pp. 27-28.

especially in light of the fact that the investor had continued to provide water services to end-consumers during five months after the termination notice.[544]

In another case, *Aguas del Tunari S.A. v. Republic of Bolivia*,[545] also ensuing from the privatization of water and sewage services, a U.S. company held a long-term water concession.[546] Right after the conclusion of the concession contract, the price of water to consumer was raised immediately, some bills doubled and amounted to a quarter of inhabitants' monthly incomes, and tens of thousands of citizens protested against the water privatization. All public water supplies were expropriated, and a sever unrest spread in the Bolivian province and across the country. The protest led to episodes of violence and culminated in the declaration of martial law: the "Water War" (*Guerra del Agua*) begun. The investor claimed that the Bolivian authorities warned the investor's executives that their safety could not be guarantee, and they were forced to leave the country. It is however disputed whether the investor abandoned the concession, or was forced to do so. The parties eventually settled the case, proceedings were discontinued at the request of the Respondent, and the Tribunal was not given the chance to address the topic subject matter of this study, leaving the "Water War" without redress.[547]

[544] *Azurix Corp. v. Republic of Argentina* (ICSID Case no. ARB/01/12), Award of 14 July 2006, at para. 261.
[545] *Aguas del Tunari S.A. v. Republic of Bolivia*.
[546] FINNEGAN, W., *Letter from Bolivia, Leasing the Rain: the Race to Control Water Turns Violent*, The New Yorker, 8 April 2002.
[547] Order taking note of the discontinuance pursuant to ICSID Arbitration Rule 44 issued by the Arbitral Tribunal on March 28, 2006.

In *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*,[548] Biwater Gauff Tanzania Ltg. (BGT) commenced arbitration against the United Republic of Tanzania, alleging that the host State illegally expropriated its investment by terminating a contract entered into by the parties, for operation and management of the Dar es Salaam water system, in Tanzania. According to the available pleadings, Tanzania terminated the contract with the investor due to BGT's failure to meet some performance guarantees set forth in the agreement. The project for revamping Dar es Salaam water system was funded by the World Bank.

The pleadings filed in the proceedings have been kept confidential, and some of the details of the parties' legal argument are available only through the Arbitral Tribunal's summary of the parties' positions in the Award rendered. However, a group of interested parties (Tanzanian and international NGOs), was granted permission to file an *amicus curiae* brief, to support the Tanzanian Government's defense. The *amicus* was filed in 2007, and argued that the investor's actions and omissions were the only cause for the failure of the investment. In fact, argued the brief, foreign investors operating water systems in a given country, have a heightened level of responsibility because the success of a business deal in a sector such as, but not limited to, the water sector, has a direct impact on the achievement of a fundamental human right, the right to clean and safe water. In the words of the *amici*:

> Amici *submit that the Claimant's decision to enter into this sector encumbers it with the highest level of responsibility to meet its duties and obligations as a foreign investor, precisely because the risks associated with failure in this sector are so great for those who need it most: the poor, the sick, the struggling and women and girls (who bear the brunt of getting water when proper services fail). As noted earlier, this is not a run-of-the-mill business. Indeed, there is no other like it. In assessing the investor's conduct and responsibility, this context cannot be ignored*.[549]

[548] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania.*
[549] *Ibid,*, *Amicus Curiae* Submission by Lawyers' Environmental Action Team, Legal and Human Rights Centre, Tanzania Gender Networking Programme, Center for International Environmental Law, and International Institute for Sustainable Development, 26 Mar 2007, at para. 50.

The brief made clear that operating in public interest sectors does not create, for investors, an open-ended liability. Nor a situation similar to the one at issue, where a public interest sector is concerned, should always alleviate a host State from liability for potential breaches of its international obligations, when properly established. The main point raised by the *amici* was that "human rights and sustainable development issues must be factors that condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations between the investor and the host State".[550]

In summary, the *amici*'s intervention was aimed at highlighting that the termination of the concession contract by Tanzania was grounded in valid reasons, namely to prevent further deterioration of the water delivery services by the investor. In other words, taking into consideration human rights and sustainable development arguments, termination of a contract stipulated in a public interest sector, by a host State, if done in good faith to prevent the worsening or avoid the abuse of human rights, may not be deemed a contractual breach.[551]

According to *amici*:

> *Citizens were suffering as a direct consequence of the failed investment. The Claimant had failed to meet the agreed performance targets and had caused a decline in the availability of water in many parts of Dar es Salaam. The Claimant had failed to meet the water service expansion targets, or set aside the funds required for the "First Time New Domestic Water Supply Connection Fund". Both of these continued to increase human health risks and impose costs and water collection problems on citizens of Dar es Salaam. These problems especially affected women and children*.[552]

In light of its analysis, the brief noted that one of the possible outcomes of claims of this kind, is for the tribunal to reduce the damages award in consideration of the investor's conduct.[553] This was the case, for instance, in the *MTD Equity v. Chile*,[554] where the investor's failure to make an informed decision against business

[550] *Ibid.*, at para. 51.
[551] *Ibid.*, at para. 98.
[552] *Ibid.*, at para. 59.
[553] *Ibid.*, at para. 98.
[554] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7).

risks, did not lead the Arbitral Tribunal to dismiss the claim, but to reduce the damages to be corresponded by the host State.[555]

In 2008, the Arbitral Tribunal issued the Final Award, in which it found that Tanzania breached the terms of the BIT concluded with the United Kingdom, without discussing any aspect of the *amici* brief or any other human rights argument. However, the Tribunal declined to award the investor the monetary damages requested.

Impregilo S.p.A. v. Republic of Argentina[556] is another of the Argentine cases relating to disputes over water concession contracts concluded in the context of the Argentine privatization process. Besides supplying drinking water and sewage services to the Buenos Aires province, the investor, AGBA, was also to undertake a detailed Service Expansion and Optimization Program to improve and expand the water system in Argentina. The investor started experiencing difficulties in collecting fees from end-consumers who were affected by the Argentine financial crisis. AGBA's request to Argentina to raise the water tariffs, in order for the investor to comply with its goals, was rejected, until Argentina enacted a law which froze all utility contracts. In 2007 the investor commenced arbitration against Argentina, alleging a series of violation under the Argentina-Italy BIT, among which expropriation and breach of Fair and Equitable Treatment standard. Argentina, in turn, raised a defense based on the protection of human rights of its population: "the regulatory actions taken by the Province and Argentina were lawful and proportionate. In this case, the regulatory powers of the State were particularly important in order to guarantee its inhabitants the human right to water".[557] In finding that the host State did not expropriate the investment but that it did breach the Fair and Equitable Treatment standard, the Arbitral Tribunal did not address the issue of the interaction between investment provisions and the protection of Argentine inhabitants' human rights, even if the host State properly raised the defense.

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[555] *Ibid.*, at para. 104.
[556] *Impregilo S.p.A. v. Republic of Argentina.*
[557] *Ibid.*, Award of 21 June 2011, at para. 228.

Finally, of the remaining water concession cases publicly known, *Urbaser S.A. et al. v. Republic of Argentina*[558] is still pending;[559] while the proceedings in *Branimir Mensik v. Slovak Republic* have been discontinued in 2008 due to failure, by the parties, to pay advances on costs, pursuant to Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations.

Background: The 2001 Argentine Financial Crisis

The end of 2001 has represented for Argentina a negative economic landmark in the history of the country.[560] The crisis sparked out with Argentina's default on external debt obligations due to balance of payments difficulties.[561] The country imploded when, overnight, the Argentine *Peso* dropped of 40% of its value. Following the breaking down, a run on banks ensued. [562] This event of catastrophic proportions caused the "income per person in dollar terms… shrunk from around $7,000 to just $3,500", with unemployment rearing up to around 25%.[563]

By late 2002, the economic turmoil brought over half of the Argentine population to live below the poverty line. The financial crisis rapidly spread from the economic to the political domain. In December 2001, a series of demonstrations led to the resignation of President Fernando de la Rua, and to the collapse of the government.[564] As a reaction to the crisis, the country adopted (under the auspices

[558] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Republic of Argentina*.
[559] The claimants filed a reply on the merits, and a counter-memorial on the counter-claims on 15 November 2013.
[560] BLUSTEIN, P., *And the Money Kept Rolling In (and Out): Wall Street, The IMF and the Bankrupting of Argentina* 1-2, 2005. For details of the economic background of the Argentine financial crisis, *see* "Indep. Evaluation Office, Int'l Monetary Fund, the IMF and Argentina 1991-2001", 2004.
[561] WEISBROT, M., *Vultures Circle Argentina*, THE GUARDIAN, 5 June 2009, 4:00 PM, http://www.guardian.co.uk/commentisfree/cifamerica/2009/jun/02/argentina-debt-us-vulture-funds, last accessed on 6 April 2014.
[562] BURKE-WHITE, W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in "The Backlash against Investment Arbitration: Perceptions and Reality", Michael Waibel *et al.* (Eds.), 2010 at 407.
[563] *Argentina's Collapse: A Decline without Parallel*, ECONOMIST, 28 February 2002, http://www.economist.com/node/1010911, last accessed on 6 April 2014.
[564] BURKE-WHITE, W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in "The Backlash against Investment Arbitration: Perceptions and Reality", Michael Waibel *et al.* (Eds.), 2010 at 409-410.

of the IMF) a range of expedients to stabilize the economy and restore political confidence,[565] such as a significant devaluation of the *Peso* through the termination of the currency board, which pegged the *Peso* to the U.S. dollar, resulted in the "pesification" of all financial obligations, and the effective freezing of all bank accounts.[566] In other words, the process instituted an austerity regime that tightened fiscal policies, reduced public spending, and raised taxes. Argentina's efforts to restructure the arrangements under its foreign currency bond issuances,[567] however, also imposed short run and grievous costs on all participants in the Argentine economy, including foreign investors.[568] While Argentina ultimately negotiated with three quarters of its creditors a settlement of approximately thirty-four cents on the dollar, several creditors not participating in the debt restructuring continued pursuing their claims in national courts and international arbitral *fora*.[569] The general trend in the decision-making process has been for national judges and international arbitrators to uphold investors' claims against the sovereign State. Only an isolated dissenting opinion put forth the customary law principle of economic emergency, precisely in connection with sovereign unequivocal obligations to uphold superior, international law guarantees such as human rights.[570] The Argentine financial crisis brought about extremely severe consequences on the population in terms of threats to people's lives and health. There was surely room to argue that these circumstances constituted sufficient grounds to justify Argentina's chosen intervention in terms

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[565] For data reproduced in the Report, *see* "Indep. Evaluation Office, Int'l Monetary Fund, the IMF and Argentina 1991-2001", 2004 at 58, 59.
[566] BURKE-WHITE, W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in "The Backlash against Investment Arbitration: Perceptions and Reality", Michael Waibel *et al.* (Eds.), 2010 at 410. For details on the Argentine situation and government intervention, *see* EICHENGREEN, B. J., *Financial Crises: And What to Do about them*, Oxford University Press, 2002 at 101-133.
[567] *Argentina's Debt Restructuring: A Victory by Default?*, ECONOMIST, 3 March 2005, http://www.economist.com/node/3715779?story_id=3715779, last accessed on 6 April 2014.
[568] BURKE-WHITE, W. W., *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in "The Backlash against Investment Arbitration: Perceptions and Reality", Michael Waibel *et al.* (Eds.), 2010 at 410.
[569] HALVERSON CROSS, K., *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB., 2006 at 335. For details of the debt restructuring agreement between Argentina and willing bond holders, *see* GOMEZ-GIGLIO, G., *A New Chapter in the Argentine Saga: The Restructuring of the Argentine Sovereign Debt*, J. INT'L BANKING L. no. 2, 2005 at 345.
[570] 2 BvM 1/03, at paras. 81-87.

of temporary suspension of payments to foreign creditors to prevent social unrest from taking its own dangerous, and potentially life threatening, course, and thus, protecting human rights.

The Argentine crisis not only had a negative impact on the actual value of bondholders' investments, it manifested itself in all its violence in numerous forms, and of course also with regard to the obligations under the Bilateral Investment Treaties in place.

The following paragraphs will outline those cases relating to water concessions that, among those available, have best addressed the interaction between the two spheres of law under consideration. The cases will be analyzed in chronological order of issuance of the awards, or decisions on liability, in case of bifurcating proceedings.[571]

a) Aguas Argentinas cases

(1) The Cases

The disputes underlying the cases *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Republic of Argentina*,[572] *Aguas Cordobesas, S.A., et al. v. Republic of Argentina*,[573] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Republic of Argentina*,[574] and *Anglian Water Group v. Republic of Argentina*[575] (*Aguas Argentinas* cases for ease of

[571] When cases are complex, sometimes arbitral tribunals decide to address the issue of liability and the *quantum* phase separately, to better address the issues at stake.
[572] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Republic of Argentina*, case pending: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C18&actionVal=viewCase, last accessed on 6 April 2014.
[573] *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Republic of Argentina* (Case no. ARB/03/18), case concluded with a settlement between the parties, and the proceedings was discontinued.
[574] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Republic of Argentina* (Case no. ARB/03/19), case pending: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C19&actionVal=viewCase, last accesses on 6 April 2014.
[575] *Anglian Water Group v. Republic of Argentina*, UNCITRAL arbitration filed in 2003.

reference),[576] some of them still pending before ICSID,[577] arose in connection with one of the world's largest privatization projects of water distribution and waste water treatment, implemented in the city of Buenos Aires.

In the cases at issue, the investors had to cope with a freezing of water-prices charged to end-consumers in the context of the Argentine financial crisis that was spreading in the country. The investors' claim of being contractually entitled to modifications of tariff-rates in case of inflation or currency devaluation, and the refusal of the Argentine Government to approve the revisions in the context of the emergency situation ensuing from the financial crisis, saw the economic equilibrium of the contract frustrated over the time.

Procedurally, except from *Aguas Cordobesas, S.A., et al. v. Republic of Argentina*,[578] where the parties settled and the proceedings was discontinued; the other three cases,[579] following an agreement between *Suez, Sociedad General de Aguas de Barcelona, S.A.* (AGBAR), *Interagua Servicios Integrales de Agua, S.A., Vivendi Universal S.A. and Anglian Water Group* (AWG) (the claimants), were joined in the same proceedings before the same Arbitral Tribunal. The *ratio* behind the joinder was that the single investors were all part of the consortium *Aguas Argetinas*, which was the entity that concluded the water concession contract with the Republic of Argentina. Therefore, eventually the dispute related to the interpretation of the same concession contract. Although the cases are formally still pending, the Arbitral Tribunal has agreed to a bifurcation of the proceedings

[576] The following footnotes will refer to the Decision on Liability of 10 July 2010, which joins the findings for ICSID Case No. ARB/03/17, ICSID Case No. ARB/03/19, and the *Anglian Water Group v. Republic of Argentina*. For ease of reference, the Decision on Liability will be referred to as ICSID Case No. ARB/03/17 *et al.*, Decision on Liability of 30 July 2010. Any other document or pleading relating to the joined case will be preceded by: ICSID Case No. ARB/03/17 *et al.*.

[577] For the status of the proceedings: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending, last accessed on 6 April 2014. *Aguas Cordobesas, S.A., et al. v. Republic of Argentina* is the only case concluded at this time.

[578] *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Republic of Argentina*, case concluded with a settlement between the parties, and the proceedings was discontinued.

[579] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Republic of Argentina*; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Republic of Argentina*; and *Anglian Water Group v. Republic of Argentina.*

in the liability phase and, subsequently, in the assessment of damages, for reasons of judicial economy, due to the complexity of the case and the volume of the record. The issuance of the Decision on Liability in July 2010, jointly for the three cases, is of great help to assess the cases in the merits and understand the Tribunal's approach on the right to water.

(2) Factual Background

To carry out the privatization of the water and sewage system in the Capital Federal, the Argentine Government outsourced the above fundamental services by granting a concession to *Aguas Argentinas S.A.*, set-up and ran by the claimants. Following the 1980s hardening of Argentina's economic conditions, and its negative effects, *inter alia*, on public companies, the public management of the water and sewage system worsened dramatically. In response to the aggravating circumstances, in 1989 Argentina reformed the legal system[580] on the basis of a state of emergency of the country's public services, and launched a wide privatization program. This program foresaw the transfer of all assets, operations, and functions of a series of State-owned companies to private investors. As explained above, in 1991 Argentina adopted further measures, namely pegged the value of its currency, the *Peso*, to the United States Dollar, and established a currency board.[581] The promotion of foreign direct investment was also on the agenda and, by the year 2000, fifty-seven Bilateral Investment Treaties were concluded.[582] A further Decree enacted in 1990 regulated the privatization of a series of designated public services through a bidding procedure, whereby foreign investors would be granted long-term concessions agreements with an obligation, on the side of the investor, to inject new capital and technology into the country.[583] The process, for what concerns water, culminated with the issuance, two years later, of the so called "Water Decree", aimed to establish a regulatory framework providing for the rights and obligations of the future concessionaire, the

[580] Argentina Law No. 23,696 of 23 August 1989 (the State Reform Law).
[581] Argentina Law No. 23,928 of 28 March 1991.
[582] ICSID Case No. ARB/03/17 *et al.,* Decision on Liability of 30 July 2010, at para. 29.
[583] Argentina Decree No. 2074/90 of 5 October 1990.

regulatory bodies, and the final users.[584] What the country was looking for was a qualified investor who could provide the service in an efficient-fashion, at lowest cost to users. The consortium formed by *Suez*, *AGBAR*, *Vivendi*, *AWG* and other Argentine companies resulted the winning bidder, on the basis of its promising the largest tariff reduction in the framework of quality and efficiency standards. In the course of the tender period, on two occasions the Government revised the "reference tariff" contained in the Bidding Documents, to take into account inflation and taxes. Bidders were called to propose an "adjustment coefficient" that would lead to the lowest tariff. Such possibility of revision of tariffs was to be applied throughout the life of the concession. The deal was that investors would have received their cash flow through the revenues from tariff payments effected by end-users in Argentine *Pesos*. During the period of the concession, this would have constituted a) the means for the consortium to cover the costs of operating and developing the service, and b) its return.

An important aspect to be borne in mind is that the regulations and the concession contract were so construed to accord investors tariff revisions throughout the concession period.

Due to the original poor conditions of the water and sewage system subject of the concession, the concessionaire had an obligation, arising from the contract, to expand and improve the system to make it apt to provide quality services. It came not as a surprise, and it represents also a customary situation when dealing with long-term concession contracts of this kind, that the necessary considerable investments during the early years were not covered immediately from tariff revenues. As a consequence, the concessionaire's only option to finance the project was to seek loans, especially from multilateral lending institutions, whose loans were denominated and payable in U.S. dollars. The reason for this choice was the unavailability of long-term loans needed for project of this magnitude, from Argentine financial institutions. Furthermore, the interest rate charged by multilateral agencies looked more appealing than other sources of financing,

[584] Argentina Decree No. 999/92, of 30 June 1992 (the "Water Decree").

under the condition that the members of the consortium would step-in, and intervene to provide financial support, in case the consortium was not able to fulfil the schedule payments under the loans. Evidence not contested by Argentina shows that during the first year of the concession the Argentine population's access to drinking water increased of 41.37%, and to sewage services of 32.12%,[585] achieving some of the goals set forth in the concession contract.

As it is custom in long-term concession contracts of this kind, the contract legal framework provided for tariff adjustments in the face of changed or unexpected circumstances, which were upheld by the Argentine Government in two occasions, in 1994[586] and 2001.[587] As to this second negotiation in 2001, claimants sought a tariff revision that would take into account Argentina's problematic financial situation, including inflation much higher than expected, and the difficulties that the concession was facing. Particularly, part of the Argentine population was reluctant to pay the infrastructure charges for water and sewage connection, labelled inadequate because subject to political pressure and *pro capita* consumption of water higher than anticipated.[588] A series of *Acta Acuerdo* were adopted by the Government to reflect the changed conditions under the concession contract. Besides the technicalities that were agreed between the parties to the contract, the relevant aspect is the evidence of fluid relationship based on cooperation and consultation.

The events outlined above were taking place in an atmosphere of burdensome austerity put in place by the Government as a response to the financial crisis. This was the context in which claimants' tariff collection deteriorated considerably, until the consortium's financial situation worsened so much that it became

[585] ICSID Case No. ARB/03/17 *et al.*, Decision on Liability of 30 July 2010, at para. 36.
[586] ICSID Case No. ARB/03/17 *et al.*, Decision on Liability of 30 July 2010, at para. 38: "*1994 when the Ente Tripartito de Obras y Servicios Sanitarios (ETOSS), the regulatory authority, and the municipality of Buenos Aires requested AASA to incur additional investments in order to expand the system beyond the requirement of its then current investment plan. By ETOSS Resolution 81/94 of 30 June 1994, with the approval of the relevant government authorities, an extraordinary tariff revision was effected under the regulations to allow for the requested increased investments*".
[587] ICSID Case No. ARB/03/17 *et al.*, Decision on Liability of 30 July 2010, at para. 39: "*A second adjustment in the terms of the Concession came about as a result of a renegotiation that took place during the period 1997-1999*".
[588] Argentina Note No. 6682/96, of 12 April 1996.

extremely expensive for the concessionaire to secure the financing necessary to fulfil its obligations under the concession contract, as well as to repay the debts contracted in U.S. Dollars under the loans with the multilateral agencies. As a result, claimants sought further revisions of the tariff, but the Government started arguing that the risks associated with the financing could in no way be borne by the State or by end-consumers. Rather, they were within the sole responsibility of the concessionaire.

As the crisis was worsening, and with it the severity program stiffening, including the issuance of a series of emergency legislative measures which substantially modified important provisions of Argentine law, the concession suffered severe damages.

The concessionaire steadily pursued various requests for an extraordinary revision of the tariff, without success. By a resolution of the Argentine Ministry of Economy of April 2002, all Argentine regulatory agency were forbidden from taking measures that could directly or indirectly affect the tariffs of any companies subject to their regulatory supervision.[589] Not only the concessionaire's attempts to obtain a renegotiation of the tariff were in vain; by 2003 the Argentine Government requested the concessionaire to provide water and sewage services to areas in the Capital Federal that were not originally foreseen under the concession contract.

Talks had been on-going for four years, without the parties being able to resolve their differences. The concessionaire started experiencing substantial losses, also in light of the extreme devaluation of the *Peso* and its obligations for loans repayment to the multilateral agencies, contracted in U.S. Dollars. As originally agreed, the shareholders of the constituencies of the consortium had to step-in and effect the loan payments on behalf of the concessionaire. Besides, the Government requested the concessionaire to fully comply with its obligations, failure of which would have resulted in fines imposed on it by the Argentine regulatory agency.

[589] Argentina Resolution No. 38/02, of 10 April 2002.

During the renegotiations, the Government alleged a number of performance failures on the side of the concessionaire, namely the high levels of nitrates in the water distributed.

The extremely difficult financial situation in which the concessionaire versed ultimately convinced the partners to the consortium, in September 2005, to terminate the concession contract. After Argentina started a formal investigation on the level of nitrates in the distributed water, the Government too decided to terminate the concession contract, on the grounds of various breaches committed by the concessionaire, and drew under the performance bond issued by claimants.

As a result, the obligations under the concession contract were immediately transferred to a State-owned entity, *Agua y Saneamientos Argentinos S.A.* (AySA), bringing to an end Argentina's experience with the water and sewage privatization process started thirty years before.

National court proceedings were started by the concessionaire to regulate the legal situation arising in connection with the termination. The losses alleged by the concessionaire, object of the arbitration proceedings, amounted to $1.0192 billion as of June 2008. The Republic of Argentina, in turn, alleged losses for a total amounts of $2.4 billion, due to the concessionaire's failure to fulfill its obligations under the contract.

(3) The merits

Claimants raised a number of allegations relating to Argentina's breach of treaty provisions, namely a) guarantees against direct and indirect expropriation of their investments; b) Full Protection and Security safeguard; and c) guarantees to accord Fair and Equitable Treatment to their investments. Besides denying claimants' allegations, the Argentine Government raised the affirmative defense of the customary state of necessity[590] to claim that: 1) it was justified in its failure to meet

[590] As reflected in Article 25 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (2001). "Article 25 – Necessity: *1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril;*

the obligations under the BIT, and 2) the application of other provisions under the BIT was pre-empted, as a result of the severe crisis and the measures taken by the Government in response to it.

The following paragraphs will address the claims that directly or indirectly dealt with human rights issues.

(a) *Interpretation of Expropriation*

On the one hand, to support its allegations, Argentina referred to the Committee on Economic, Social and Cultural Rights General Comment No. 15, inferring that the governmental actions taken in light of the crisis, rather than an illegitimate indirect expropriation under the BIT, amounted to a proportionate measure to "ensure availability of water to all members of society",[591] as "prescribed" by the Committee.

On the other hand, the investors claimed that the consideration of a right to water was completely irrelevant for the purpose of the arbitration and insisted, instead, on the specific expectations, or promises, that the Argentine Government made at the moment of the stipulation of the agreement.

Following a thorough analysis, by the investment Tribunal, of the measures taken by the Argentine Government to ease the financial crisis, it found that "none of them, either individually or collectively, violated the BIT provisions governing direct and indirect expropriation".[592] However, in reaching this conclusion, the Tribunal did not directly address the issue of the right to water. In reaching their conclusion, the arbitrators merely considered the actual rights held by the concessionaire under the concession contract.

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and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity. It is to be noted that the ILC Articles do not define the nature of the necessity defense in positive terms. Rather they limit themselves to stating the situations in which the defense of necessity may not be raised" (emphasis added).

[591] ICSID Case No. ARB/03/17 *et al.*, Rejoinder of the Republic of Argentina of 17 August 2007, at paras. 1003-1005.

[592] ICSID Case No. ARB/03/17 *et al.*, Decision on Liability of 30 July 2010, at para. 157.

(b) *Interpretation of Fair and Equitable Treatment*

Claimants' argument on the breach of the Fair and Equitable Treatment standard by the Argentine Government is the classic allegation that the Government's actions have altered the investment framework defeating the investors' legitimate expectations by a) failing to assure the equilibrium principle by revising the concession tariff; b) forcing renegotiation of the concession contract; and c) terminating the contract.

With respect to this element, the interaction between the two spheres of international law emerges again: the customary international law principle of Fair and Equitable Treatment is challenged by Argentina through the invocation of another obligation under international law, namely providing clean water at affordable prices. Similarly to the defense raised in the context of expropriation, Argentina invoked again the broader context of the extraordinary crisis affecting the country as a justification for a) failure to fulfill its duty to treat the investor in a fair and equitable way, and b) to restrict the unrealistically "broad" interpretation of claimants' "legitimate expectations".[593] Particularly, the State called the Tribunal upon considering the circumstances of the case, to find that Argentina "acted in a reasonable, responsible, non-discriminatory and proportionate manner in light of its responsibility to the population within [the concessionaire's] Concession area in the extraordinary economic circumstances that prevailed",[594] given the high public purpose nature of the provision of access to drinking water and sewage services. As to the termination of the concession contract, the State argued that, after having heard claimants' intentions to walk out of the deal, Argentina acted reasonably under the circumstances, because it had a duty to assure that a vital service for health and wellbeing of its population, such as the access to water and sanitation, be not discontinued.

In assessing the claimants and Respondent's positions, the Arbitral Tribunal interpreted the BIT provisions on Fair and Equitable Treatment through the

[593] ICSID Case No. ARB/03/17 *et al.*, Counter-Memorial of Republic of Argentina, 8 December 2006, at paras. 892-93.
[594] *Ibid.*, at para. 892.

guidance of the Vienna Convention on the Law of the Treaties, and the case law of other arbitral tribunals.

Ultimately, the Tribunal identified the core element of the Fair and Equitable Treatment standard in the legitimate expectations of investors deriving from the laws and regulations in force in the host country. To this end, through its legislation and the treaties signed and enforced, Argentina "locked-in", and actively sought, to create legitimate expectations in the claimants and other potential investors, in order to attract foreign capital. Investors' subjective legitimate expectations need to be counterbalanced by the host country's historical, political, economic, and social circumstances. In light of the crucial role played by the tariff regime, the Government initial willingness to adjust the program to reflect current changes, and the fact that a sophisticated tariff regime was embedded in the concession contract, constituted for the investors a legitimate and reasonable expectation that Argentina frustrated, by persistently refusing to revise the tariff pursuant to the legal framework that the Government itself had agreed to, and by pursing the forced renegotiation of the concession contract contrary to that legal framework.

(c) *Interpretation of the State of Necessity in Light of Human Rights Obligations*

In the context of its affirmative defense, Argentina has extensively based its argumentation on human rights premises. Particularly, it argued that the actions taken were aimed to deal with the financial crisis in order to safeguard crucial State's interests, such as the human right to water of the population living within its territory. From Argentina's perspective, due to the essential value that water plays in people's life and health, water cannot be treated as an ordinary commodity.[595] As a consequence, the Government advocated for the Arbitral Tribunal to take into consideration this fundamental aspect when judging the conformity of its actions to the obligations under the treaty, and to accord Argentina a wider margin of discretion than in situations involving other kind of

[595] ICSID Case No. ARB/03/17 *et al.*, Decision on Liability of 30 July 2010, at para. 252.

services not fundamental to life and health. Argentina further stressed the relevance of international law and the need not to divorce it from the interpretation of obligations under BITs. The way Argentina framed its defense aimed to convince the Tribunal of the fact that a proper interpretation of the BIT should not affect "the fulfillment of other international obligations between the states signatory of such BITs",[596] alluding to human rights obligations, and in particular "any treaty on human rights contemplating the human right to water".[597] Furthermore, through alleging some failures on the part of the investors in carrying out their obligations under the agreement, the Government argued that, in light of these shortcomings, it was pushed to take positive steps to honor the fundamental right of the population to be provided with drinkable water at a fair price, notwithstanding the market conditions.

If claimants, on the one hand, never questioned the right of the population to water, and observed that by its decision to privatize the water sector in Buenos Aires, the Government indeed showed its willingness and efforts to make such right more effective for a larger number of end-consumers; on the other hand Argentina jeopardized the same right to water when it deprived the concessionaire of the means to carry out the distribution project. A further point put forward by claimants, very much grounded in the "Contract Paradigm", was that the relevant issue was to determine whether Argentina breached its legal obligations under the BIT, human rights law playing no role whatsoever in the Arbitral Tribunal's decision.[598]

To no avail were the allegations of the *amicus curiae* submission filed by non-governmental organizations[599] to assist the Arbitral Tribunal in better framing the relationship between the human right to water, and the interpretation of the BIT. The brief highlighted the close connection between the right to water and other

[596] ICSID Case No. ARB/03/17 *et al.*, Counter-Memorial of Republic of Argentina, 8 December 2006, at para. 796.
[597] *Ibid*., at para. 800.
[598] *Ibid*., at para. 255.
[599] The five NGOs were: *Asociación Civil por la Igualdad y la Justicia*, *Centro de Estudios Legales y Sociales*, *Center for International Environmental Law*, *Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria*, and *Unión de Usuarios y Consumidores*.

human rights, including the right to life, health, housing, and adequate standard of living. The *amici* argued that Argentina had a legal obligation, under international human rights law, to adopt the necessary steps in order to secure the population's access to drinkable water (both physically, as well as economically), and that under the circumstances the Government's actions fully conformed to human rights law.

While acknowledging the Argentine financial crisis as "undoubtedly one of the most sever in history" accompanied by "almost total breakdown of the political system",[600] the Tribunal took the position that Article 25 of the ILC Articles poses more strict requirements than the severity of the crisis to justify a necessity defense. According to the Tribunal, the *ratio* behind the strictness of the conditions posed by customary international law on necessity was avoiding that States evade the obligations undertaken under treaties. In the words of the Arbitral Tribunal this would "threaten the very fabric of international law and indeed the stability of the system of international relations".[601] But wouldn't have this argument applied to obligations undertaken under human rights treaties, as well?

The qualification of the Argentine crisis as a situation in which the Government is entitled to invoke the state of necessity as a defense for not compliance with its obligations under the BITs, is controversial. In the cases relating to *Aguas Argentinas*, the Government built its defense on the interpretation of a state of necessity rooted in its human rights obligations under the UN Charter, other international human rights instruments, and its constitutional duties of honoring the fundamental rights of the population.

In response, claimants pointed out other strategies that the Government could have put in place to safeguard a uniform access to water without frustrating the expectation of the investors: for instance, subsidizing the poorest social classes in order to shield them from increased prices of water during the crisis, whilst

[600] ICSID Case No. ARB/03/17 *et al.,* Decision on Liability of 30 July 2010, at para. 257.
[601] *Ibid.*

having the industry and wealthier consumers paying the price in proportion with the increased cost of other basic products.[602] This suggestion, however, was of doubtful practicability in the context of the crisis.

(d) *The Arbitral Tribunal's Analysis of the Right to Water in Light of the Human Right to Water*

The Tribunal found that Argentina did not meet all of the four conditions set forth by Article 25 of the ILC to invoke the state of necessity defense. More than interested in the specific reasons why the case of Argentina during the 2001 financial crisis did not fall within the definition of state of necessity, for the purpose of the present study it is relevant to analyze the Arbitral Tribunal's position on those aspects of the necessity defense relating to Argentina's obligation to respect and protect the population's right to water.

First, in analyzing the first condition of the defense of necessity (*i.e.* the only way to safeguard an essential interest), the arbitrators acknowledged that "[t]he provision of water and sewage services to the metropolitan area of Buenos Aries certainly was vital to the health and well-being of nearly ten million people and was therefore an essential interest of the Argentine State".[603] As one can immediately note, the Tribunal dropped the linkage suggested by the *amicus* brief aimed to establish a direct derivation of the right to water from the right to life, therefore reaffirming the separate nature of the right to water from civil and political rights, already indirectly put forward by the UN Committee on Social, Economic, and Cultural Rights.[604]

Second, when considering the third condition for the necessity defense (*i.e.* Treaty obligations do not exclude the necessity defense), the Arbitral Tribunal rejected the allegation presented by Argentina and the *amicus curiae*, that the right to water may trump the obligations undertaken under the BIT. Again, the position of the Tribunal is pervaded by the black or white Contract Paradigm and does not leave

[602] ICSID Case No. ARB/03/17 *et al.*, Reply of Suez, at para. 508.
[603] *Ibid*., at para. 260.
[604] *See* above Section IV.A.1.

room for sovereign States to take actions in disregard of BITs obligations, in light of the existence of essential human rights obligations.

The Arbitral Tribunal did not seem to identify a hierarchy between the set of rights underlying the dispute. To the contrary, the Tribunal observed that: "Argentina is subject to both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally".[605] The arbitrators went even further to state that "Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive",[606] but provided no framework suggesting *how* to reconcile such obligations in case of friction.

(4) Other Cases on the Necessity Defense

In *CMS v. Argentina*,[607] the Tribunal did not uphold the Government's defense based on the invocation of human rights obligations towards its citizens, as a justification for breach of the BIT. The argument was dismissed on the basis that the protection to which foreign investors were entitled to, in investing in Argentina's public utilities, could not be frustrated because Argentina's population fundamental rights were not affected. Furthermore, the Tribunal expressed the opinion that Argentina's Constitution, as well as international human rights treaties, already provide protection for property rights, thus making it unlikely that former stipulations were in conflict with investment treaty provisions protecting property.[608] The Tribunal seemed to justify its position on the basis of a syllogism for which property is a human right; investment treaties protect property; therefore, investment treaties are instruments which protect, rather than harm, human rights.

[605] ICSID Case No. ARB/03/17 *et al.*, Decision on Liability of 30 July 2010, at para. 262.
[606] *Ibid*.
[607] *CMS Gas Transmission Company v. Republic of Argentina*.
[608] *Ibid.*, Award of 12 May 2005, at paras. 114-121.

In the same direction, in *Sempra v. Argentina*,[609] the Tribunal did not uphold Argentina's argument that the survival of the State was at stake due to the financial crisis; rather, the arbitrators expressed the view that several alternative policy measures were available to the Government to cope with the situation, without frustrating investors' interests, despite an expert witness for the investor conceded that Argentina was called upon safeguarding its constitutional order in light of its obligations under the Inter-American Convention on Human Rights.

In a completely different direction, in *LG&E v. Argentina*[610] and *Continental Casualty v. Argentina*,[611] the Tribunal was keen on paying greater attention to a more generalized human rights defense, and took the position that the social and economic conditions in which the country found itself, were so cumbersome to push the State to act out of a state of necessity.[612] The arbitrators went even further: not only is a positive action harming an investor justifiable; it is also desirable and it should be a priority of the State to try to prevent threats to fundamental rights and liberties, rather than letting the situation coming to a head, and have to cope with a catastrophe in the aftermath.

In one of the two cases, the Government advanced a bold argument alleging that fundamental rights occupy a higher level in the hierarchy, compared to the rights contained in investment treaties,[613] thus deserving priority in their safeguard, especially in the context of a severe financial crisis. This argument is corroborated by a finding of the Inter-American Court of Human Rights, according to which no investment treaty could override a government's obligation to guarantee the "free and full exercise of the rights of all persons under its jurisdiction".[614]

As shown by the case law, the approaches to the necessity defense grounded in the protection of fundamental rights are not univocal. The Tribunals finding *against*

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[609] *Sempra Energy International v. Republic of Argentina*.
[610] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Republic of Argentina*.
[611] *Continental Casualty Company v. Republic of Argentina*.
[612] *Ibid.*, Award of 5 September 2008, at para. 180.
[613] *Continental Casualty Company v. Republic of Argentina*, Counter-Memorial of Republic of Argentina at paras. 851, 568-69.
[614] *Ibid*.

the necessity defense in *CMS* and *Sempra*, ruled, respectively, in May 2005 and in September 2007. The Tribunals finding *for* the necessity defense in *LG&E* and *Continental*, ruled in July 2007 and September 2008, respectively. Therefore, although the *Sempra* award precedes the *LG&E* ruling of a little more than a month, taken in chronological order the trend seems to positively evolve in a broader interpretation of the necessity defense based on fundamental rights, in investment cases.

b) SAUR International v. Republic of Argentina[615]

In this second ICSID case, which is also still pending before the Arbitral Tribunal, and that was also subject to bifurcation, the Tribunal recently issued a Decision on Liability where it set out the sources that the Tribunal will have to deal with to settle the dispute, among which, international human rights and the *fundamental* right to water.[616]

(1) The Case

Sauri, the claimant, was a French company operating in the production, treatment and distribution of water and sanitation. The claimant invested in an Argentina-owned company holding a concession to distribute drinking water and providing sanitation services in the Mendoza Province. According to the claimant, from the beginning, the Argentine authorities breached their obligations under the concession contract and, as the crisis hit in 2002, they rejected all requests for an increase of tariffs, to which the claimant had right under the concession. In 2010, after the investor held on to the contract in a situation of absolute financial emergency, the Argentine authorities rescinded the concession contract on the basis of damage to the public interest, health of the population, and human right to water. The claimant initiated arbitration proceedings alleging expropriation, a

[615] *SAUR International v. Republic of Argentina* (ICSID Case No. ARB/044). The claimant has commenced annulment proceedings, which are still pending before an *ad hoc* committee: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C23&actionVal=viewCase, last accessed on 6 April 2014.
[616] *SAUR International v. Republic of Argentina*, Decision on Liability of 6 June 2012, at para. 330.

violation of the Fair and Equitable Treatment standard, and breach of the Full Protection and Security obligation under the France-Argentina BIT.[617]

(2) The Merits

The Republic of Argentina claimed that the regime of investment protection set forth in the France-Argentina BIT does not supersede the obligations undertaken by Argentina under international human rights treaties, which, in the Argentine legal system have constitutional force.[618] For these reasons, the Republic of Argentina maintained that the obligations under the BIT should be interpreted in harmony with the provisions relating to the protection of human rights, and especially, the human right to water. Particularly, the Republic claimed that the action of the Mendoza Province, that ultimately terminated the concession contract, were in line with the human rights obligations incumbent on the State, relating to drinkable water distribution, at affordable prices.[619] Ultimately, the Respondent State argued that measures of this kind, aimed at protecting the population and its basic rights, are legitimate and cannot be deemed unjust or expropriatory. Rather, they were a necessary exercise of the sovereign police and regulatory powers of the State.[620]

In the claimant's view, the Republic's invocation of human rights arguments in general, and the "human right to water" in particular, was nothing more than an *ex post* attempt to justify the measures adopted by the authorities of the Mendoza Province in 2009 and 2010.[621]

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[617] Agreement on the Promotion and Protection of Investment between Argentina and France, signed on 3 July 1991.
[618] *SAUR International v. Republic of Argentina*, Republic of Argentina *Contestación*, at para. 532.
[619] *Ibid.*, at para. 538.
[620] *Ibid.*, at para. 534.
[621] *SAUR International v. Republic of Argentina*, SAUR *Réplica*, at para. 252.

(3) The Arbitral Tribunal's Decision

In addressing the merits of the case and the parties' position on the matter, the Arbitral Tribunal expressed itself in the following terms:[622]

> *[H]uman rights in general, and the right to water in particular, constitute one of the various sources that the Tribunal will have to take into account to settle the dispute, due to the fact that these rights are built in in the Argentine legal system with constitutional standing,*[623] *and on top, they are among the general principle of international law. The access to drinkable water constitutes, from the State's perspective, a public service of first necessity, and from the perspective of the citizen, a fundamental right.*[624] *For these reasons, on this subject the legal system can and should reserve to the public Authority legitimate functions such as planning, supervision, policy, sanction, intervention--including termination, with the aim at the protection of the public interest.*

But the Arbitral Tribunal went even further and, in making clear that the prerogatives of the sovereign State are "compatible" with investors' rights under the BIT, not only did it uphold the theory of unification of international law; the Tribunal clearly classified the "human right to water" as a "fundamental right":

> *These prerogatives are compatible with the investors' rights to receive the protection accorded by the BIT. The fundamental right to water and the right of the investor to the protection under the BIT, operate on different levels: the concessionaire of a public service of first necessity finds itself in a situation of dependency in the face of the public administration, which holds special powers to guarantee the enjoyment, by the sovereignty of the fundamental right to water…"* (emphasis added).[625]

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[622] *SAUR International v. Republic of Argentina*, Decision on Liability of 6 June 2012, at para. 330, traduzione dall'originale in lingua spagnola: "*En realidad, los derechos humanos en general, y el derecho al agua en particular, constituyen una de las varias fuentes que el Tribunal deberá tomar en consideración para dirimir la disputa, pues esos derechos están integrados en el sistema jurídico argentino con rango constitucional353, y además forman parte de los principios generales del Derecho internacional. El acceso a agua potable constituye, desde el punto de vista del Estado, un servicio público de primera necesidad, y desde la óptica del ciudadano un derecho fundamental354. Por ello, en esta materia el ordenamiento jurídico puede y debe reservar a la Autoridad pública legítimas funciones de planificación, supervisión, policía, sanción, intervención e incluso rescisión, en protección del interés general*".

[623] *SAUR International v. Republic of Argentina*, Expert Opinion of M. Pinto, at para. 4.

[624] Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, Doc. ONU, A/HRC/6/3 2007, at para. 13, p. 11. and para. 18, p. 13. Annex MP 100.

[625] *SAUR International v. Republic of Argentina*, Decision on Liability of 6 June 2012, at para. 331 traduzione dall'originale in lingua spagnola: "*Pero estas prerrogativas son compatibles con los derechos de los inversores a recibir la protección ofrecida por el APRI. El derecho fundamental al agua y el derecho del inversor a la protección ofrecida por el APRI, operan sobre planos diferentes: la empresa concesionaria de un*

The Arbitral Tribunal did not put into question the fact that in case the investment is unlawfully expropriated (without a justification), or if the Fair and Equitable Treatment or Full Protection and Security standards are breached due to the exercise of public powers, the investor is entitled to compensation, as set forth in the BIT.

In order to analyze the substantial allegations put forward by the claimant, the Arbitral Tribunal recognized that its task would be to balance the two aspects above mentioned: the rights of the investor under the BIT and the host State's duty to protect the fundamental rights of its population, among which, the "fundamental right to water".

The Arbitral Tribunal determined that the actions taken by the province amounted, indeed, to a "direct expropriation", more precisely to a nationalization pursuant to Article 5.2 of the BIT.[626] The second step in the Tribunal's reasoning has been to determine whether the measures were justified, and whether they should result or not in an entitlement of the foreign investor to compensation for the damage suffered.

In order to justify the measures adopted by the province, and to argue that since no expropriation occurred, SAUR was not entitled to compensation, the Argentine Government pleaded that the contract rescission, and the other measures taken by the province, were justified by the poor level of the service provided by the investor, and grounded in the protection of the population's public health. They were, therefore, legitimate measures taken in the framework of the regulatory and police power of the State.

The Arbitral Tribunal, however, determined that the province exercised its regulatory and police powers *after* having breached the concession contract, and that therefore, its defense could not prevail.[627] The Tribunal accepted that the

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servicio público de primera necesidad se halla en una situación de dependencia frente a la administración pública, que dispone de poderes especiales para garantizar el disfrute por la soberanía del derecho fundamental al agua…".

[626] *Ibid.*, at para. 392.

[627] *Ibid.*, at para. 405.

province was entitled, on grounds of public necessity, or more in general for the public interest, to interfere with private property, including nationalizing the essential public service of water distribution and sanitation, in case of severe worsening of the service provided.[628] This, however, in the case at hand, did not exempt the State from compensating the investor of the value of the damage, pursuant to the BIT.[629]

Notwithstanding the Arbitral Tribunal's finding that the Argentine authorities breached the concession contract *before* resorting to the legitimate regulatory powers to protect the public interest, the decision of the Arbitral Tribunal did elevate the right to water to a fundamental right, and it is revolutionary in nature. The Tribunal's decision that compensation was due to the investor, is based on the specific finding that the province was in breach of one of the documents concluded with the foreign investor. Had the breach not happened with that timing, or, had the legitimate regulatory powers been exercised before the breach, there is room to argue that Argentina's defense could be fully upheld.

Since the July 2010 Decision on Liability in the *Aguas Argentinas* cases, to the June 2012 Decision on Liability in *SAUR International SA v. Republic of Argentina*, a positive, revolutionary trend is clearly visible, and this will be discussed in the next chapter.

B. Right to Peaceful Assembly

Although prevalent, the rights to water and sanitation do not constitute the only instance in which human rights issues have emerged in investment proceedings.

A typical situation where the population's right of freedom to peaceful assembly could clash with investors' rights, is that of a peaceful demonstration of a group of citizens against the construction, for instance, of a nuclear power plant in a given country, which might considerably delay the implementation of the investment. Most likely, the investor would invoke the Full Protection and Security clause

[628] *Ibid.*, at para. 413.
[629] *Ibid.*

under the BIT, and the host State would find itself in a conflicting situation: respect its obligations under the BIT, dissolve the demonstration, and thus breach the rights of peaceful assembly owed to its citizens under human rights treaties or the State's constitution; or let the demonstration be and take on responsibility for any delay or damage to the investment and the investor.

The following paragraphs will explore the development of the right to peaceful assembly, its practical application in the jurisprudence of international human rights bodies and then move on to the case law of investment arbitration.

1. *Development of the Right to Peaceful Assembly*

According to the New World Encyclopedia, "freedom of assembly" is defined as "the freedom to take part in any gatherings that one wishes".[630] It is a concept that is closely associated with the rights of freedom of speech, expression, and association, which all have the same roots, although imply slightly different safeguards. All these rights are considered to be milestones in liberal democracies, whereby citizens may gather and express their views theoretically without government constraint. To be precise, the right to freedom of assembly dates back to the XIII century when, in England, the confrontation that opposed the king to his subjects, constituted one of the most important landmarks in history for individual freedoms. These events return over and over again in the history of the birth of fundamental rights, however, it is interesting to emphasize different aspects of the events, for the origin of different rights. Following the loss, by King John, of the war against France, and his ruling like a tyrant, in 1215 a civil war spread in the United Kingdom. Particularly, the wealthy and powerful barons, who were constantly under an overwhelming tax pressure to pay the war debts, lost confidence in King John and demanded a charter of liberties to protect them against the King's unjust ruling. After their seizing of the City of London, the King came to a compromise and the *Magna Carta Libertarum*, who would have later

[630] New World Encyclopedia, *Freedom of Assembly*, accessible at: http://www.newworldencyclopedia.org/entry/Freedom_of_Assembly, last accessed on 6 April 2014.

changed the world, came into existence. This revolutionary instrument, for the first time in history brought a King to accord rights to his subjects in writing, and established mechanisms of enforcement of those rights. In fact, if ever the King divested anyone of their "lands, castles, liberties or rights", the King would reinstate them immediately. In case of differences over certain situations or rights, according to the *Magna Carta* they should have been "settled by the judgment of twenty-five barons". And if the King or any of his servants "offend in any way… then those twenty-five barons together with the community of the whole land shall distrain and distress us in every way they can, namely seizing castles, lands and possessions… until in their judgment amends have been made" (emphasis added). This group of barons, who would later be called "Grand Council", together with the community of the whole land, later become known as "the people", would gather to reach decisions over disputes between the King and his subjects. This was freedom of assembly, and for the first time the instrument acknowledged the existence of a "community of people", bearing a collective identity separated from each individual and recognized by the King, the longstanding most powerful individual in the realm.

Lord Denning, in 1956, defined the *Magna Carta* as the "greatest constitutional document of all times--the foundation of the freedom of the individual against the arbitrary authority of the despot". Only considering that for centuries before 1215, kings and queens had ruled with unquestionable "divine powers" allegedly derived from God, that there were no elections, no legislatures to discuss and draft laws, the *Magna Carta* represented a true revolution that was brought as an example in the history of peoples' rights, ever since.

Centuries after, by Resolution 59(1), at its very first session in 1946, the United Nations General Assembly proclaimed that "freedom of information is a fundamental human right and… the touchstone of all the freedoms to which the United Nations is consecrated".[631] Two years later the United Nations Universal

[631] UN General Assembly Resolution 59(1) of 14 December 1946, *Calling of an International Conference on Freedom of Information*.

Declaration came to life and its Article 20 established that "Everyone has the right to freedom of peaceful assembly and association".[632]

More recently, and of particular interest to the present study, in September 2010, the United Nations Human Rights Council (UNHRC) adopted a milestone resolution on the "Rights to Freedom of Peaceful Assembly and of Association".[633] For the first time in history, the Resolution established a Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai.[634] His 2012 Annual Report, *Best practices that promote and protect the rights to freedom of peaceful assembly and of association*,[635] defined the freedom of peaceful assembly and of association as "an intentional and temporary gathering in a private or public space for a specific purpose". It is worth noting that, after that, in June 2011, the Organization of American States (OAS) also adopted a resolution on the "Promotion of the Rights to Freedom of Assembly and of Association in the Americas".

The UNHRC Resolution at its para. 1:

> *Calls upon States to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations under international human rights law*[.]

The first relevant element is that only "peaceful" gatherings can enjoy protection under international law. It might be the case, however, that assemblies born to hold a peaceful demonstration, collapse into violent protests due to factors such as

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[632] Article 20 UNHR.
[633] UN General Assembly Resolution 15/21 of 30 September 2010, A/HRC/RES/15/21.
[634] Office of the High Commissioner for Human Rights, *Special Rapporteur on the rights to freedom of peaceful assembly and of association*, accessible at: http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx, last accessed on 6 April 2014.
[635] KIAI, M., UN Special Rapporteur on Freedom of Assembly and Association, *Best Practices That Promote and Protect the Rights to Freedom of Peaceful Assembly and of Association*, A/HRC/20/27 of 21 May 2012.

counter-protests, actions of the protesters themselves, or any other provocative agents that might trigger the use of physical force. Furthermore, the Resolution makes a very general statement and does not envisage situations where the right to freedom of peaceful assembly of the population enters into friction with economic law and the host State's investment decisions. It however provides a good platform to envisage a positive obligation for States to guarantee that any limitations of the right at issue is compatible with the State's obligations under international human rights treaties.

Although the resolutions of the United Nations or its organs are instruments of soft-law without binding force, the Universal Declaration on Human Rights, including Article 17, can at least be considered a significant evidence of customary international law,[636] that was followed by two important legally binding treaties, the ICCPR and ICESCR.[637] The UNHRC Resolution mirrors Article 21 of the International Covenant on Civil and Political Rights, which is a treaty imposing positive obligations on Member States which establishes that:

> *The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

Article 21 ICCPR deals with the exceptions, or restrictions, to the exercise of the right to peaceful assembly and association. After subjecting any limitation to the rules set forth in the specific law of each country, Article 21 identifies four grounds under which the right at issue can be restricted: a) national security or public safety, b) public order, c) the protection of public health or morals, and d) the safeguard of the rights and freedoms of other individuals. Most democratic societies have the right to freedom of peaceful assembly embedded in their constitutions, including restrictions to it. The grounds identified by the ICCPR are

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[636] THORNBERRY, P., "International Law and the Rights of Minorities", Oxford: Clarendon Press, 1991 at 237-238.

[637] HANNUM, H., *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287, 1995-1996; *see also*, SCHACTER, O., "International Law in Theory and Practice", Dordrecht: Martinus Nijhoff (Eds.), 1991 at 336.

general grounds for restriction, common to most national constitutions, and the main regional charters mirror the wording of Article 21 ICCPR: Article 11 of the European Convention on Human Rights,[638] Article 15 of the Inter-American Convention on Human Rights (ACHR),[639] Article 20 of the Arab Charter on Human Rights (ARCHR),[640] Article 11 of the African Charter on Human Rights (AFCHR).[641]

In terms of "best world practices" and international law standards governing the freedom of assembly, guidelines are much more limited when compared to the freedom of association. Even well-established democracies struggle with striking a balance between the respect of their citizens' right to protest, and the preservation of public order or other public interests. It seems to be accepted, however, that international and human rights law only protect peaceful gatherings, where the members are not violent and where the assembly was set-up with peaceful intentions only.[642]

The European Court of Human Rights has dealt with two cases involving the right to freedom of peaceful assembly that will help gathering some structured thoughts on the topic, when it comes into play in investment arbitration.

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[638] Article 11 ECHR: *1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

[639] Article 15 ACHR: *The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.*

[640] Article 28 ARCHR: *All citizens have the right to freedom of peaceful assembly and association. No restrictions shall be placed on the exercise of this right unless so required by the exigencies of national security, public safety or the need to protect the rights and freedoms of others.*

[641] Article 11 AFCHR: *Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.*

[642] UN Special Rapporteur on Peaceful Assembly and Association, Annual Report, A/HRC/20/27, 21 May 2012; Organization for Security and Co-operation in Europe (OSCE), *Guidelines on Freedom of Peaceful Assembly*, (2 Ed., 2010), 25 October 2010.

In *Ziliberberg v. Moldova*, the applicant, a Moldavian citizen, was a student who attended a demonstration against a decision, by the Moldavian authorities, to remove public transport privileges for students. The demonstration was not organized nor conducted pursuant to Moldavians laws and regulations, and the leaders did not ask for an authorization. While the demonstration started out peacefully, later the participants started throwing eggs and stones to the Municipality building, which made the police intervene. The applicant was arrested, detained, and interrogated and finally fined by the administrative court, for having actively participated in a demonstration, carried out without authorization. However, according to the applicant and several witnesses, he was not involved in any act of violence. After having exhausted, in vain, all local remedies to uphold his claim, his case was analyzed by the ECtHR, which noted that:

> *An individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior*.[643]

Therefore, the ECtHR determined that there had been an interference with the applicant's right to peaceful assembly under Article 11 ECHR, and, most important, that even if a demonstration turns out to be violent, an individual continues to enjoy the right to assembly, as long as he does not take part in the acts of violence and his or her intention continued to be peaceful. The ECtHR reiterated its position in the recent case *Schwabe and M.G. v. Germany*.[644]

In *Rai and Evans v. The United Kingdom*[645] the applicants, two British citizens, took part in a demonstration that one of two applicants had organized. The demonstration was to take part in a prohibited area, pursuant to UK laws and

[643] *Ziliberberg v. Moldova*, European Court of Human Rights, Application No. 61821/00, Judgment of 4 May 2004.
[644] *Schwabe and M.G. v. Germany*, European Court of Human Rights, Application No. 8080/8577, Judgment of 1 December 2011.
[645] *Milan Rai and Maya Evans v. The United Kingdom*, European Court of Human Rights, Application No. 26258/07 and 26255/07, Judgment of 17 November 2009.

regulations,[646] and the organizer took all the necessary steps (informed the police about the demonstration, its date, time and place), including informing the police

[646] Section 132 of the 2005 Serious Organised Crime and Police Act is entitled "Demonstrating without authorisation in designated area" and reads as follows: "*(1) Any person who (a) organises a demonstration in a public place in the designated area, or (b) takes part in a demonstration in a public place in the designated area, or (c) carries on a demonstration by himself in a public place in the designated area, is guilty of an offence if, when the demonstration starts, authorisation for the demonstration has not been given under section 134(2). (2) It is a defence for a person accused of an offence under subsection (1) to show that he reasonably believed that authorisation had been given. (3) Subsection (1) does not apply if the demonstration is (a) a public procession of which notice is required to be given under ... section 11 of the Public Order Act 1986 (c. 64), or of which ... notice is not required to be given, or (b) a public procession for the purposes of section 12 or 13 of [the Public order Act 1986]… (7) In this section and in sections 133 to 136 (a) "the designated area" means the area specified in an order under section 138, (b) "public place" means any highway or any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission, (c) references to any person organising a demonstration include a person participating in its organisation, (d) references to any person organising a demonstration do not include a person carrying on a demonstration by himself, (e) references to any person or persons taking part in a demonstration (except in subsection (1) of this section) include a person carrying on a demonstration by himself".* Section 133 is entitled "Notice of demonstrations in designated area" and reads as follows: "*(1) A person seeking authorisation for a demonstration in the designated area must give written notice to that effect to the Commissioner of Police of the Metropolis (referred to in this section and section 134 as "the Commissioner"). (2) The notice must be given (a) if reasonably practicable, not less than 6 clear days before the day on which the demonstration is to start, or (b) if that is not reasonably practicable, then as soon as it is, and in any event not less than 24 hours before the time the demonstration is to start. (3) The notice must be given (a) if the demonstration is to be carried on by more than one person, by any of the persons organising it, (b) if it is to be carried on by a person by himself, by that person. (4) The notice must state (a) the date and time when the demonstration is to start, (b) the place where it is to be carried on, (c) how long it is to last, (d) whether it is to be carried on by a person by himself or not, (e) the name and address of the person giving the notice. (5) A notice under this section must be given by (a) delivering it to a police station in the metropolitan police district, or (b) sending it by post by recorded delivery to such a police station. (6) Section 7 of the Interpretation Act 1978 (c. 30) (under which service of a document is deemed to have been effected at the time it would be delivered in the ordinary course of post) does not apply to a notice under this section.* Section 134 is entitled "Authorisation of demonstrations in designated area" and reads as follows: "*(1) This section applies if a notice complying with the requirements of section 133 is received at a police station in the metropolitan police district by the time specified in section 133(2). (2) The Commissioner must give authorisation for the demonstration to which the notice relates. (3) In giving authorisation, the Commissioner may impose on the persons organising or taking part in the demonstration such conditions specified in the authorisation and relating to the demonstration as in the Commissioner's reasonable opinion are necessary for the purpose of preventing any of the following (a) hindrance to any person wishing to enter or leave the Palace of Westminster, (b) hindrance to the proper operation of Parliament, (c) serious public disorder, (d) serious damage to property, (e) disruption to the life of the community, (f) a security risk in any part of the designated area, (g) risk to the safety of members of the public (including any taking part in the demonstration). (4) The conditions may, in particular, impose requirements as to (a) the place where the demonstration may, or may not, be carried on, (b) the times at which it may be carried on, (c) the period during which it may be carried on, (d) the number of persons who may take part in it, (e) the number and size of banners or placards used, (f) maximum permissible noise levels. (5) The authorisation must specify the particulars of the demonstration given in the notice under section 133 pursuant to subsection (4) of that section, with any modifications made necessary by any condition imposed under subsection (3) of this section. (6) The Commissioner must give notice in writing of (a) the authorisation, (b) any conditions imposed under subsection (3), and (c) the particulars mentioned in subsection (5), to the person who gave the notice under section 133.*" Section 136 is entitled "Offences under sections 132 to 135: penalties" and reads, in so far as relevant, as follows: "*(1) A person guilty of an offence under section 132(1)(a) is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding level 4 on the standard scale, or to both. (2) A person guilty of an offence under section 132(1)(b) or (c) is liable on*

that no authorization would be sought. Accordingly, the organizer posted information about the demonstration on a website specifying that no authorization was sought to hold the demonstration, and that the risk of arrest would be high. The police attended at the announced demonstration location and warned that the applicants would get arrested if they did not dismiss the gathering. They decided to continue the demonstration, which was against the Iraqi conflict, and although they behaved in a peaceful and orderly manner throughout, they were arrested, detained at the police station and charged. At the court of first instance, both applicants were judged to have violated the provision of the 2005 Serious Organised Crime and Police Act. The applicants appealed to the High Court, which determined that since it was accepted that the section of the UK law requiring an authorization was compatible with Articles 10 and 11 ECHR, dealing with the freedom of expression and assembly respectively, the High Court was not required to inquire about the nature of the activity pursued, to determine whether a sanction had to be imposed.

The ECtHR understood that the interferences set forth in UK law were legitimate in seeking to protect national security and maintain public order, but found that the applicants' arrest, detention, charging and convictions breached their right to freedom of assembly set forth in Article 11 ECHR, because these measures were disproportionate to the public goal sought. All actions taken by the British authorities were merely based on a lack of authorization, and did not take into account the peaceful nature of the demonstration.

In *Ollinger v. Austria*, the applicant, an Austrian citizen, informed the authorities that on All Saints' Day he would be holding a silent meeting in front of the war memorial in Salzburg, in memory of the Jews killed by the SS during World War

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summary conviction to a fine not exceeding level 3 on the standard scale." Section 138 is entitled "The designated area" and provides as follows: "(*1) The Secretary of State may by order specify an area as the designated area for the purposes of sections 132 to 137. (2) The area may be specified by description, by reference to a map or in any other way. (3) No point in the area so specified may be more than one kilometre in a straight line from the point nearest to it in Parliament Square*". By the 2005 Serious Crime and Police Act (Designated Area) Order 2005, the Secretary of State defined, pursuant to section 138 of the 2005 Act, an area of London surrounding Parliament and Downing Street as constituting a "designated area" for the purposes of the 2005 Act. The text of the Order and a map attached to it delineated the precise area.

II. He further noted that the meeting would coincide, in place and time, with the gathering of Comradeship IV, commemorating the SS soldiers killed during World War II and, in his eyes, unlawful. Another Austrian citizen also had informed the Salzburg authorities about the allegedly illegal assembly of Comradeship and on the basis of this submission, the Austrian authorities found out that the gathering planned by the applicant had also the aim of a confrontation with Comradeship IV. The authorities decided, therefore, to prohibit the meeting on grounds of public order and security.

Subsequently, the applicant pursued judicial proceedings claiming violation of his rights to freedom of assembly, expression, religion and non-discrimination but in 2000 the Austrian Supreme Court dismissed his complaint.

The ECtHR found that "[i]t is common ground that the prohibition in issue constituted an interference with the applicant's right to freedom of peaceful assembly which was prescribed by law".[647] The Court further noted that States have a certain margin of appreciation in determining if a certain measure, restrictive of fundamental rights, is proportionated to the aim pursued, but that the Court has the final say "on whether a restriction is reconcilable with the rights protected by the European Convention".[648] From a practical perspective, the case sees competing fundamental rights: a) the applicant's right to freedom of peaceful assembly, b) the Comradeship IV's right of association and protection against disruption of its assembly, and c) the cemetery's visitor right to their freedom of manifesting their religion.

The ECtHR recognized that "the right to freedom of peaceful assembly as guaranteed by Article 11… comprises negative and positive obligations on the part of the Contracting State",[649] namely abstaining from interfering with a peaceful demonstration that may disturb people who oppose the ideas that the demonstration seeks to promote; and at the same time States may be required to

[647] *Ibid.*, at para. 32.
[648] *Ibid.*, at para. 33.
[649] *Ibid.*, at para. 35.

take positive steps to protect a lawful demonstration against counter-demonstrations. The ECtHR, however, found "striking" that Austrian authorities attached no weight to the fact that the applicant--a member of the Austrian parliament--by demonstrating on the same day and time of the Comradeship IV's gathering, essentially wished to express his opinion on an issue of public interest, namely to remind the public of the crimes committed by the SS. The ECtHR, therefore, found no justification in the State's protection of the Comradeship IV's gathering as opposed to the applicant's gathering. As to the cemetery's visitors, and their right not to be disturbed by demonstrations and counter-demonstrations, as it occurred in the past on All Saints day, the ECtHR observed that the applicant's freedom of peacefully assembly "was in no way directed against the cemetery-goers' beliefs or the manifestation of them".[650] Eventually, the ECtHR condemned the Austrian Government's unconditional prohibition of the counter-demonstration, noting that the measure was not proportionate to the interest pursued, and that it was not the only viable alternative to handle the situation (*i.e.* authorities could have allowed both meetings and have police forces on sight to keep the two gatherings separated). Austrian authorities violated, therefore, Article 11 of the Convention and the ECtHR concluded that:

> *Having regard to these factors, and notwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the Austrian authorities failed to strike a fair balance between the competing interests.*[651]

Finally, although dealing with the right to freedom of expression, it is worth mentioning the case *Informationsverein Lentia and Others v. Austria*,[652] where the ECtHR ruled on the existence of a positive obligation for the State to protect the right to freedom of peaceful assembly of the people under its territory. In the case at issue, by identifying the State as the "ultimate grantor" of the principle of pluralism, the ECtHR's judgment can be read as if the freedom of expression, and the other correlated rights, do not simply impose on the State a duty of non-

[650] *Ibid.*, at para. 47.
[651] *Ibid.*, at para. 50.
[652] *Informationsverein Lentia and Others v. Austria*, European Court of Human Rights, Application no. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90; Judgment of 24 November 1993, at para. 38.

interference. A merely negative nature of such rights would be contrary to the ECHR's general spirit. Rather, the State bears a positive obligation to secure the efficient enjoyment of such freedoms, especially when the individuals involved hold unpopular views, or belong to minorities and are, therefore, in a vulnerable position.

One of the three fundamental pillars of the UN Declaration on Human Right, otherwise called International Bill of Rights,[653] imposes on States a duty to safeguard, *inter alia,* freedom of expression,[654] peaceful assembly, and non-violent protest. These fundamental obligations are imposed, as well, by human rights regional bodies which sometimes, besides acknowledging the existence, and promoting the respect of such rights, go as far as to impose on States an obligation to take positive steps to promote these rights. The correspondent and reverse of the latter obligation, in the context of foreign investments, is the duty of the host State to provide Full Protection and Security to investors who have engaged in business in the territory of the host State. Although this obligation does not constitute a source of strict liability but rather a duty of due diligence, in any case it puts the State in a sort of conflict of interests. In fact, the legal obligation of employing due diligence in protecting foreign investments extends to the conduct of non-State actors (*i.e.* citizens, activist campaign, army, other businesses etc.). In this scenario, the right of the population to freedom of peaceful assembly can enter into friction with other investors' rights. This happens especially in light of arbitrators' inclusive reading of the Full Protection and Security clause, which is not only deemed protection from physical threat, but also from more general harassment as, for instance, non-violent blockades or pickets by activists who oppose the investment.

The above described situation was faced, *inter alia*, by the Government of Guatemala, which found itself torn between affording protection to a highly

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[653] HUMPHREY, J., *The International Bill of Rights: Scope and Implementation*, 17 Wm. & Mary L. Rev., 1971 at 527, 527. *See also* HUMPHREY, J., "No Distant Millennium: The International Law of Human Rights", Paris: UNESCO, 1989 at 527, 529, where the author emphasizes the fact that the Declaration is now "*binding on all states, including the states that did not vote for it in 1948*".
[654] Articles 19 and 21 ICCPR.

controversial foreign-owned gold and silver mine, and its duties to honor the rights of the population, especially Indigenous groups, to peacefully assemble and demonstrate against the mining project. Ultimately, the protest turned into a violent clash to oppose the project,[655] and the Government felt under a legal obligation to provide protection to the investor not to frustrate the investment and incur in a huge lawsuit by the foreign company.[656] This case was not brought to arbitration and, although it would have been a very interesting platform to study the arbitrators' attitude toward the clash of rights, the State preferred to uphold the "Contract Paradigm" and set-aside the human rights obligations undertaken towards its citizens.

Generally speaking, BITs do not envisage the protection of rights such as freedom of expression and assembly, nor offer guidance to resolve the interaction between the host State's human rights obligations towards its population, and those of security (or any other obligation under BITs) owed to investors.

The case law offers only a handful of cases where investors sued host States for breach of their obligations of Full Protection and Security under BITs, due to citizen or worker protests that allegedly negatively affected the investment.[657] Furthermore, the available information is silent about whether host States raised substantial human rights arguments as a defense against investors.

That of the relationship between bilateral investment treaties and the freedom of expression and assembly, has so far remained unexplored in scholarly works.

In prominent cases, arbitral tribunals have in general been cautious in reading the Full Protection and Security clause too broadly, and have rather considered the protection of foreign investments within the delicate framework of the balance with rights and liberties of the local population.

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[655] STUECK, W., *Clashes Reported in Guatemala over Glamis Mining Project*, The Globe and Mail, 13 January 2005.
[656] STEVENSON, M., *Gold Rush Runs into Opposition over Mines, Cyanide*, The Associated Press, 12 April 2005.
[657] One famous instance, brought before the International Court of Justice, is: *ELSI v. Italy.*

2. *Available Investment Case Law on the Right to Peaceful Assembly*

a) Técnicas Medioambientales Tecmed, S.A. v. United Mexican States

In *Tecmed v. Mexico*,[658] already analyzed above,[659] the Tribunal refused to uphold the company's allegation that the Mexican Government did not act reasonably in the control of protesters' conduct against the landfill project.[660] However, had the investor provided sufficient evidence relating to the conduct of governmental authorities to support its allegations, the Arbitral Tribunal would have had a hard time to determine where to draw the line and strike the balance between the two conflicting obligations (security of the investment v. right to public protest). The Tribunal ruled:

> *The Arbitral Tribunal agrees with the Respondent, and with the case law quoted by it, in that the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it. At any rate, the Arbitral Tribunal holds that there is not sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state, or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill.*

b) Noble Ventures Inc. v. Romania

In *Noble Ventures Inc. v. Romania*, the investor, an American company operating in the field of business consulting services for steel companies in Eastern Europe, invested in a State-owned steel mill located in Romania, Combinatul Siderurgic Resita. The dispute arose out of a privatization agreement, and, according to the investor, was grounded in the country's political transition which allegedly affected the investment. The specific claims raised by Noble Ventures were deprivation of treatment in accordance with international law, Full Protection and Security, and expropriation. Particularly, the investor accused the host State of neglecting to subdue labor unrest, thus negatively affecting the claimant's industrial operations in the territory. The Government's defense was built around

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[658] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Award of 29 May 2003, at para. 175.
[659] *See supra* Section III.C.1.c)(1)(a).
[660] *Ibid*., at para. 177.

the protest being engendered by the investor's failure to pay wages owed to workers, and that the demonstration was conducted in an orderly manner, preceded by a notice to the proper authority. The Arbitral Tribunal upheld the Government's defense, pointing out the lack of evidence of a failure, by the Romanian Government, to meet the minimum standard of protection drawn from the specific treaty provisions.[661] The Arbitral Tribunal noted:

> *With regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the "Investment shall ... enjoy full protection and security", the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State… Even assuming the correctness of the Claimant's factual allegations, it is difficult to identify any specific failure by the Respondent to exercise due diligence in protecting the Claimant. And even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree. The Claimant has failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard… Accordingly the claim has to be dismissed.*[662]

c) Plama Consortium Limited v. Republic of Bulgaria

In *Plama Consortium Limited v. Republic of Bulgaria*,[663] a similar situation to that of *Noble Ventures Inc. v. Romania* occurred. Claimant invested in a State-owned oil refinery in Bulgaria, whose poor financial conditions led it to bankruptcy and ceasing of operations. Claimant submitted a recovery plan to the competent local court, in order to put in place all the necessary corrective measures to put the refinery back into operation. It was the claimant's opinion that the Government of Bulgaria, and the other local authorities, deliberately created problems to the investment, and unreasonably delayed the adoption of the necessary corrective measures. Particularly, according to the claimant, worker protests jeopardized the investment and the governmental authorities failed to fulfill the State's obligation

[661] *Noble Ventures Inc. v. Romania*, ICSID Case no. ARB/01/11, Award of 12 October 2005, at paras. 160-67.
[662] *Ibid*, at paras. 164, 166-167.
[663] *Plama Consortium Limited v. Republic of Bulgaria*, Award of August 27, 2008.

under the Full Protection and Security clause.[664] Bulgaria counter-argued that what the investor defined as "riots", were peaceful protests caused by the failure of the foreign company to pay due wages to the workers. Furthermore, the Government alleged that the demonstrations were policed by the proper authorities.[665]

Being the arbitrators unable to identify which of the allegations was most accurate, and being the *onus* on the investor to make its case, the Tribunal ultimately did not find the claim of breach of Full Protection and Security by Romania a convincing one.

C. The Rights of Indigenous Peoples

The third and last category of investment disputes witnessing a clash between conflicting rights is that relating to the rights of Indigenous peoples.

These cases do not involve a positive defense raised by host States as a justification to the breach of the BIT treaty to protect the rights of Indigenous populations under their jurisdiction. The analysis of the available case law might nonetheless be useful to obtain a broader understanding of how human rights issues can substantially be interwoven to investment disputes and how these issues are becoming so important to be even invoked by investors sometimes against their own interests.

1. *Development of the Rights of Indigenous Peoples*

Some commentators trace the origins of the concerns for the right of Indigenous peoples back to the XVI Century, when Europeans started their expansion into the New World and the first controversies over colonization begun.[666] In Gregs'

[664] *Ibid.*, at paras. 185-189.
[665] *Ibid.*, at paras. 190-195.
[666] MARKS, G., *Sovereign States v. Peoples: Indigenous Rights and the Origins of International Law*, Australian Indigenous Law Reporter 1, 5(2), 2000 at 3; LINDLEY, M. F., "The Acquisition and Government of Backward Territory in International Law", Longmans, London and New York, 1926 at 20; BERMAN, H. R., *Panel Discussion: Are Indigenous Populations Entitled to International Juridical Personality?*, in "American Society of International Law Proceedings", 1985 at 189, 190; SANDERS, D., *The Re-emergence of Indigenous Questions in International Law*, Canadian Human Rights Yearbook,

opinion, this even coincided with the birth of international law, in terms of the debate over what principles and regulations should apply to the relationship between autochthonous and invaders.[667] In other words, according to this stream of thought, the development of human rights law after World War II, and with it the growing concerns about the rights of Indigenous peoples, is nothing more than a return of international law to its original concerns, rather than a new development.

The recordation of such issues started in the 1920s, when, with the belief that "there can be no lasting peace without social justice", the International Labor Organization (ILO) started to address the condition of "native workers" in the overseas territory colonized by Europeans, who were subject to harsh exploitation, and faced terrible leaving conditions when they were expelled from ancestral domains, and forced to become "seasonal, migrant, bonded or home-based labourers".[668] It was in this scenario that, in 1930, ILO adopted Convention No. 29 on Forced Labour.[669] The ILO Convention establishes positive obligations for States parties to put in place all necessary measures to uphold Indigenous peoples' rights. For instance, just to mention some of the provisions relevant to this study, Article 3 establishes that "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination"; Article 4 calls States upon adopting "special measures… as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the people concerned"; Articles 13 to 19 deal with the property right to ancestral lands and Article 14 establishes that "[t]he rights of ownership and possession of the peoples concerned over the lands which they

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1983 at 30; MARKS, G., *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas*, AU Year Book Int. Law 1, 13, 1992 at 1; MORRIS, G. T., *In Support of the Right of Self-Determination for Indigenous Peoples under International Law*, 29 German Year Book of International Law 277, 1986 at 284-88; TODOROV, T., "The Conquest of America", Harper Perennial, New York, 1992.

[667] MARKS, G., *Sovereign States v. Peoples: Indigenous Rights and the Origins of International Law*, Australian Indigenous Law Reporter 1, 5(2), 2000 at 3.

[668] International Labour Organization, *History of ILO's Work*, webpage accessible at: http://www2.ilo.org/Indigenous/Aboutus/HistoryofILOswork/lang--en/index.htm, last accessed on 6 April 2014.

[669] 1930 ILO Forced Labour Convention No. 29.

traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities".

Subsequently, at the end of the 1940s, the United Nations, under the auspices of the Economic and Social Council (ECOSOC), established the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, a think tank of the United Nations Commission on Human Rights with the mandate to "undertake studies on human rights issues, to make recommendations concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities".[670] However, a more general framework, protecting aboriginal rights not only in terms of labor conditions, had to wait until 1966, when the United Nations General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discriminations.[671]

It was not until 1970s, however, that Indigenous human rights started being at the core of an important international advocacy, which led the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to order, in 1971, a study on the *Problem of Discrimination against Indigenous Populations*.[672] This study was carried out by Jose R. Martinez Cobo, and identified the problem of racial discrimination as the common denominator among aboriginal populations. Furthermore, it defined "Indigenous peoples" as:

> *[T]hose people having a historical continuity with pre-invasion and pre-colonial societies [who] consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their*

[670] Office of the United Nations High Commissioner for Human Rights, *Sub-Commission on the Promotion and Protection of Human Rights*, accessible at: http://www2.ohchr.org/english/bodies/subcom/, last accessed on 6 April 2014.
[671] International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force on 4 January 1969.
[672] United Nations Doc. E/CN.4/Sub2/1986/7.

> *continued existence as peoples in accordance with their own cultural patterns, social institutions, and legal systems*.[673]

Indigenous peoples have been for a long time, and still are, the victims of racism and racial discrimination. This condition has informed the United Nations broad framework of mechanisms addressing the legacy, and the still on-going, racial discrimination preventing aboriginal population from enjoying their fundamental rights. This mechanisms can be identified in: the Sub-Commission of the Working Group on Indigenous Population[674] which, established in 1982, has the mandate of reviewing any development relating to the promotion and protection of Indigenous peoples' rights and freedoms; a Working-Group[675] established in 1995 to elaborate a draft declaration on the rights of Indigenous peoples, which was issued by the General Assembly in 2007;[676] the permanent Forum on Indigenous Issues,[677] an advisory body to the ECOSOC with the mandate of discussing Indigenous peoples' issues in the fields of social and economic development, culture, environment, education, health and human rights; and the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, who collates and exchanges information with institutions, Indigenous communities and NGOs, in order to formulate recommendations to the Commission on Human Rights which, in turn, will facilitate the adoption of adequate measures within the United Nations system to improve Indigenous peoples' conditions.

In terms of sources of law protecting Indigenous peoples' rights, on a domestic level many States provide a complex network of constitutional protections, as well as case law. As regards international instruments, besides those identified above, the ICCPR at its Articles 1 and 27, and the CERD at its Articles 2, 4 and 5,[678] are also relevant in the discourse, as well as regional human rights instruments such

[673] United Nations Doc. E/CN.4/Sub.2/1984/SR.32, [48], Add. 4 at 379, 381.
[674] ECOSOC Resolution 1982/34.
[675] United Nations Doc. E/CN4/Sub2/1994/2/Add1/.
[676] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, UN Doc. A/RES/47/1, 2007.
[677] ECOSOC Resolution 2000/22.
[678] *See also* CERD General Recommendation 23, 18 August 2007.

as the Inter-American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

As to the specific rights protected, the post-Westphalia legal system has traditionally prioritized the rights and freedoms of the individual.[679] In other words, the specific rights protected by the most prominent international human rights instruments are individual rights, which is at odd with the collective nature of Indigenous objectives.[680] For example, Article 27 ICCPR, which reads:

> *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*.[681]

is interpreted as a single and separate individual right to gather with other Indigenous peoples, without being subject to discrimination or prejudice.[682] Although collective rights are sanctioned by some international law instruments,[683] some commentators maintain that, when it comes to Indigenous peoples' rights, the Western system of human rights of the individual is inconsistent with the collective nature of the Indigenous society.[684]

A decision by the Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[685] recognized the rights of Indigenous peoples as collective. The case was one where the IACtHR had to determine whether the State of Nicaragua breached several articles of the Inter-American Convention on

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[679] FALK, R. A., "Human Rights Horizons", New York: Routledge, 2000 at 151; SUNSTEIN, C., *Rights and Their Critics*, 70 Notre Dame Law Review, 1995 at 727, 730.
[680] KETLEY, H., *Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples*, 8 International Journal on Minority and Group Rights, 2001 at 331, 335.
[681] Article 27 ICCPR.
[682] FALK, R. A., "Human Rights Horizons", New York: Routledge, 2000 at 127.
[683] Articles 1(a), 2, 4(a) and 14 of the CERD; the ILO Convention No. 169 uses the term "Indigenous peoples" throughout; Articles 19, 20, 21, 22, 23 and 24 of the AFCHPR; 1978 United Nations Education, Science and Culture Organisation (UNESCO) Declaration on Race and Racial Prejudice; the 2001 UNESCO Declaration on Cultural Diversity; and Article 6(1) of the 1992 Convention on Biological Diversity.
[684] *See e.g.*, CHARLESWORTH, H., "Writing in Rights: Australia and The Protection of Human Rights", Sydney: UNSW Press, 2001.
[685] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, (Ser. C) No. 79 (2001), Judgment of 31 August 2001.

Human Rights through its failure to delimit the community lands of the Awas Tingni Community,[686] and to adopt valid measures to ensure the property rights of the Community to its ancestral lands and natural resources. Nicaragua further granted a concession on the Community's lands without asking prior consent, and without putting in place any remedial measures in response to the Community's protests regarding its property rights. By seven votes to one, the Court determined, *inter alia*, that Nicaragua violated the right to property protected by Article 21 of the Inter-American Convention on Human Rights, to the detriment of the Community, and unanimously determined that "the State must adopt in its domestic law… the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of Indigenous communities, in accordance with their customary law, values, customs and mores".[687]

As to the existence of the community "collective rights", the Court held:

> *Among Indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community*.[688]

The IACtHR was called upon judging a similar situation involving the rights of an Indigenous community, this time specifically with regard to the protection of the rights of Indigenous peoples *vis-à-vis* foreign investments, in *Sawhoyamaxa Indigenous Community v. Paraguay*.[689] The Sawhoyamaxa native community brought a claim before the Inter-American Court of Human Rights, alleging that their right to property to certain ancestral lands, judicial protection, and fair trial had been violated. Particularly, the Community alleged that Paraguay failed to ensure its ancestral property right, with a claim for territorial rights pending since

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[686] The Awas Tingni is an Indigenous Mayagna community settled in the Miskito Coast of Nicaragua, a densely forested area. In Mayagna, *Awas Tingni* means "Pine River" and denotes both the town and the river by which the town is located.
[687] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR (Ser. C) No. 79 (2001), Judgment of 31 August 2001.
[688] *Ibid.*, at para. 149.
[689] *Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR (Ser. C) No. 146 (2006), Judgment of 29 March 2006.

1991. This situation had barred the Community and its members from enjoying title to, and possession of their lands, and had caused a worsening of living, nutritional, medical and health conditions, threatening the integrity and the survival of the group.

With regard to the breach of the Community's property rights, the host State's put forward as a defense that the owner of the ancestral lands was protected under a treaty between Paraguay and Germany on the promotion and reciprocal protection of capital investments from both countries.[690] Particularly, Paraguay "does not deny its obligation to restore rights to these peoples", but the members of the Sawhoyamaxa Community "claim title to a piece of real estate based exclusively on an anthropologic report that, worthy as it is, collides with a property title which has been registered and has been conveyed from one owner to another for a long time".

Basing his reasoning on the ILO Convention No. 169, and the evolution of the rights of Indigenous peoples through the Inter-American system, the IACtHR found that the collective "notion of ownership and possession of land does not conform to the classic concept of property, but deserves equal protection under Article 21 of the Inter-American Convention".[691] Furthermore, as to Paraguay's defense based on the Paraguay-Germany BIT, the IACtHR observed that the treaty foresees that foreign investments can be condemned or nationalized for a "public purpose or interest", which could justify land restitution to Indigenous peoples.[692] Overall, the IACtHR dismissed the host State's arguments as insufficient to justify non-enforcement of the Community's property rights.[693]

A key point affirmed by the IACtHR is that the Inter-American Convention on Human Rights should always be taken into account in the implementation of

[690] Treaty between the Republic of Paraguay and the Federal Republic of Germany for the promotion and reciprocal protection of capital investments, entered into force on 3 July 1998.
[691] *Sawhoyamaxa Indigenous Community v. Paraguay*, IACtHR (Ser. C) No. 146 (2006), Judgment of 29 March 2006, at para. 120.
[692] *Ibid.*, at para. 140.
[693] *Ibid.*, at para. 141.

commercial treaties, because it is an instruments *sui generis* that creates individual rights regardless reciprocity among States:

> *[T]he Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.*[694]

Another claim brought by the claimant, which was a direct consequence of the Community being deprived of its lands, was the violation of their right to life, under Article 4 of the IACHR. Paraguay claimed that it made available to Indigenous peoples all health services that were available to the other citizens under its jurisdiction. It was a fact that the members of the Sawhoyamaxa Community were forced to live under severe physical conditions, due to the separation from the lands where they used to crop and hunt. This led to sever health conditions and the death of several members of the Community. Therefore, it was the IACtHR's view that although the host State did not deprive the Indigenous Community of its rights to health and life, it failed put in place positive steps consistent with the promotion of the Community's right to life:

> *[A]lthough the State did not take them to the side of the road, it is also true it did not adopt the adequate measures, through a quick and efficient administrative proceeding, to take them away and relocate them within their ancestral lands, where they could have used and enjoyed their natural resources, which resources are directly related to their survival capacity and the preservation of their ways of life.*[695]

2. *Available Investment Case Law on the Rights of Indigenous Peoples*

a) Glamis Gold Ltd. v. United States of America

In *Glamis Gold Ltd. v. United States of America*, the claimant was a public State-participated Canadian corporation operating in the exploration, development and extraction of gold and other precious metals in the United States and in Latin

[694] *Ibid.*, at para. 140.
[695] *Ibid.*, at para. 164.

America. In light of the success of is activities, the claimant decided to open a mine near the Arizona and Mexico borders, particularly on a South- and West-facing alluvial plain to the South of the Indian Pass Area of Critical Environmental Concern (CEC), in the Chocolate Mountains.[696] The investor commenced arbitration against the United States under NAFTA, alleging that its investment had been expropriated by the host State by measures put in place, *inter alia*, to protect the rights of Indigenous peoples (in violation of Article 1110 NAFTA); and that it was deprived of the Fair and Equitable Treatment standard (in violation of Article 1105 NAFTA). The measures taken by the host State included regulations requiring back-filling and grading for mining operations, in proximity of Indigenous communities' sacred sites.

Particularly, Glamis' golden mine project had been opposed by the members of the Quechan Indian Nation, on the basis of the threat the mining project would pose to cultural and sacred sites in the region. It was the Indigenous community itself, and not the parties, that called the Arbitral Tribunal to consider international provisions on the rights of Indigenous peoples in settling the dispute, on the basis that neither of the pleadings submitted by the parties outlined, with sufficient precision, the relevant international legal framework:[697]

> *In any dispute that directly involves the rights and/or interests of Indigenous peoples, it is patent that international law norms establishing or otherwise concerning Indigenous peoples should be considered as being included in the 'rules of international law that are applicable' with respect to that dispute. This is true regardless of whether the Indigenous peoples [are parties to the case or not].*
>
> *Under NAFTA Article 113(1), the Tribunal is required to be mindful of how it construes [Articles 1105 and 1110 of NAFTA] so that they do not require or authorize State conduct of the kind that would conflict with international norms protecting Indigenous peoples… Such an approach is the only way to ensure consistency in wider public international law and is also mandated in the customary international law rules on treaty interpretation.*[698]

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[696] *Glamis Gold, Ltd. v. United States of America*, Award of 8 June 2009, at para. 31.
[697] *Glamis Gold, Ltd. v. United States of America*, Non-Party Submission of Quechan Indian Nation, 19 August 2005 at 1.
[698] *Ibid.*, at 8, citing the 1969 Vienna Convention on the Law of the treaties and World Trade Organization Appellate Body's case law.

Another argument put forward by the Quechan Indian Nation is that investors, whose investment has allegedly been expropriated, cannot seek compensation claiming to acquire rights to which no legitimate expectation of enjoyment exists.[699] In other words, the Indigenous community tried to convince the Tribunal that Glamis knew, or should have known, that the lands acquired under the investment for the purpose of exploitation, belonged to Indigenous peoples and were sacred territories. Accordingly, any right to enjoy such properties would exist only if compatible and coexistent with the international obligations owed by the United States to the Indigenous peoples settled therein, to take positive steps to protect and promote their rights and interests in the ancestral lands.[700]

After having assessed that the Quechan Indian Nation's submission complied with the NAFTA provisions on non-disputing party participation,[701] the Arbitral Tribunal also recalled that acceptance of the submission did not mean that the Tribunal was neither accepting nor rejecting the merits of the submission. Furthermore, at no stage in the issuance of the arbitral award would the Arbitral Tribunal be compelled to address any issue raised in the Quechan Community's submission.[702]

At the time of the issuance of the award, the Tribunal noted that it:

> *Is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of Indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property. These issues were extensively argued in this case and considered by the Tribunal. However, given the Tribunal's holdings, the Tribunal is not required to decide many of the most controversial issues raised in this proceeding… it believes that its case specific mandate and the respect demanded for the difficult task faced squarely by some future tribunal instead argues for it to confine its decision to the issue presented.*[703]

The Arbitral Tribunal considered all the evidence, in terms of expert and witness testimonies, relating to the importance of ancestral land properties for the

[699] *Ibid.*, at 19.
[700] *Ibid.*
[701] *Ibid.*
[702] *Glamis Gold, Ltd. v. United States of America*, Award of 8 June 2009, at para. 274.
[703] *Ibid.*, at para. 8.

Quechan Nation Community. However, the award never made any reference to the Quechan Community's submission or the sources cited therein. For what concerns the expropriation, the Tribunal rejected the investor's claim on the basis that Glamis failed to prove the necessary economic impact for an expropriation to occur.[704] Similarly, as to the violation of the Fair and Equitable Treatment standard, the Arbitral Tribunal deemed that the investor could not establish that the measure taken by the host State amounted to such violation.[705]

In other words, despite the attempts made by the Quechan Indian Nation to provide the Tribunal with the proper tools to assess the Glamis case in light of Indigenous peoples' fundamental rights under international law, the Arbitral Tribunal refused to take a position or even discuss the issues raised by the non-party submission, because it could decide the case on alternative grounds.

b) Grand River Enterprises v. United States of America

The *Grand River Enterprises v. United States* case[706] originates from a lawsuit brought by more than 40 U.S. State attorneys general against the major U.S. tobacco companies in the 1990s. The litigations were aimed at seeking compensation for the States' expenditures of treated tobacco-related illnesses. After several negotiations, a complex settlement document, which envisaged several restrictions on advertising and other marketing practices by the tobacco producers, was signed. The settlement further compelled the tobacco companies to fund smoking prevention and cessation programs, and to make in perpetuity payments based on a certain percentage of their sales in favor of the cause. These payments were then to be distributed to each participating State.

Gran River Enterprises Six Nations Ltd., a Canadian company, Jerry Montour, Kenneth Hill and Arthur Montour, technically Canadian citizens for the purposes of NAFTA, commenced arbitration on their own behalf and on behalf of Native Wholesale Supply (Grand River or the claimants). The claimants, operating in the

[704] *Ibid.*, at paras. 328 *et seq.*
[705] *Ibid.*, at paras. 398 *et seq.*
[706] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America.*

field of production and sale of tobacco products, did not take part to the settlement and claimed damages allegedly resulting from the above discussed 1998 settlement between the U.S. States and the major tobacco producers. The individual claimants were, in particular, members of the First Nations Indigenous Community (also known as the Haudenosaunee), and alleged violation of several provisions under NAFTA Chapter 11.[707] As members of an Indigenous community, they claimed that they were entitled to a "heightened level of vigilance and care" in their right to carry out traditional commercial activities in their occupied territories, and should be involved in consultations before measures impairing the said rights are put in place.[708]

The claimants stressed that the provisions of the 1998 settlement had to be interpreted in light of the wider body of international law, namely those provisions relating to human rights protecting Indigenous peoples. Particularly, the claimants based their core human rights argument on customary international law,[709] and argued that the United States failed to treat them according to the "basic human rights norms that condition how the customary international law standard of fair and equitable treatment should be interpreted, particularly when the interests of the First Nations members and communities are at stake".[710] The claimants attached to their Memorial on the Merits a letter by the National Chief of the Assembly of the First Nations Indigenous Community, urging the Arbitral Tribunal to consider that the duty of States to respect and protect the rights and interests of the First Nations across borders is an evolving norm of customary

[707] NAFTA Articles 1102 (National Treatment), 1130 (Most-Favored-Nation treatment), 1104 (better of National or Most-Favored-Nation treatment), 1105 (minimum standard of treatment under international law) and 1110 (expropriation).
[708] *Grand River Enterprises v. United States of America*, Claimant's Memorial on the Merits, 10 July 2008, at para. 2.
[709] *Grand River Enterprises v. United States of America*, Award of 12 January 2011, at para. 150. *See also* the *Amicus Curiae* Submission of the Office of the National Chief of the Assembly of Nations, filed on 19 January 2009 in support of the claimants' argument, at 2.
[710] *Grand River Enterprises v. United States of America*, Award of 12 January 2011, at para. 3.

international law, and this principle should be taken into account in the treaty interpretation when rights and interests of Indigenous communities are at stake.[711]

On 12 January 2011, the Arbitral Tribunal issued an award where it declared its lack of jurisdiction over three of the claimants,[712] on the basis that they were no established enterprise, and did not make an investment in the United States pursuant to Article 1139 NAFTA.[713] With respect to the Indigenous peoples' rights claim, the Arbitral Tribunal observed that the "assertions of undocumented understandings 'customary among Indigenous peoples'… are too vague and lacking in evidentiary support to make out an enterprise from the records".[714]

The Arbitral Tribunal established that it had jurisdiction over Arthur Montour's claim, because he operated a substantial business of importing cigarettes manufactured by Grand River, and distributed them in the United States, which fulfilled the NAFTA definition of investment.[715] However, according to the Tribunal, even if Arthur Montour was subject to unfair treatment, it did not rise to the level of a breach of the Fair and Equitable Treatment standard protected by Article 1105 NAFTA, as the latter is limited to the international law standard of treatment of aliens.[716]

Although the Arbitral Tribunal rejected Arthur Montour's claim on the merits, this gave the Arbitral Tribunal an opportunity to express itself on the issue of Indigenous peoples' rights. The members of the Arbitral Tribunal agreed that "the U.S. states, in developing and implementing the MSA [1998 settlement], do not appear to have been at all sensitive to the particular rights and interests of the claimants or the Indigenous nations of which they are citizens, including those interests in maintaining and developing cross-border trade relations in accordance

[711] *Grand River Enterprises v. United States of America*, Claimant's Memorial on the Merits of 10 July 2008, at paras. 2, 171, 189-191.
[712] Kenneth Hill, Jerry Montour and Grand River. *Grand River Enterprises v. United States of America*, Award of 12 January 2011, at para. 5.
[713] *Ibid.*, at paras. 103-106.
[714] *Ibid.*, at para. 93.
[715] *Ibid.*, at para. 6.
[716] *Ibid.*, at para. 187.

with longstanding traditions in promoting economic development opportunities for Indigenous communities".[717] The Arbitral Tribunal:

> *[C]annot avoid noting the strong international policy and standards articulated in numerous written instruments and interpretive decisions that favor state action to promote such rights and interests of Indigenous peoples.*[718]

Particularly, as regards the duties of consultation borne by the U.S. States towards Indigenous communities, the Tribunals observed that:

> *It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult Indigenous peoples on governmental policies or actions significantly affecting them. One member of the Tribunal has written that there is such a customary rule. Moreover, a recent study by a committee of several international law experts assembled under the auspices of the International Law Association, after an exhaustive survey of relevant state and international practice, found a wide range of customary international law norms concerning Indigenous peoples, including "the right to be consulted with respect to any project that may affect them".*[719]

However, argued the Tribunal, any obligations of consultation run at the level of State and the collectivity of Indigenous peoples, as opposed to the individual Indigenous person. Therefore, the duty of consultation does not extend to the individual Arthur Montour, who, according to the evidence, had not been entrusted with the authority of representing the First Nations Community.[720] Furthermore, argued the Tribunal, even assuming (*quod non*) that customary international law requires consultations directly with an individual Indigenous investors, "it would be difficult to construe such a rule as part of the customary minimum standard of protection that must be accorded to every foreign investment pursuant to Article 1105 [NAFTA]".[721] The reason for this conclusion being that the customary minimum standard of protection is the minimum level of

[717] *Ibid*, at para. 186.
[718] *Ibid.*
[719] *Ibid.*, at para. 210.
[720] *Ibid.*, at para. 211.
[721] *Ibid.*, at para. 213.

protection to be granted to *all alien investors' investments*, and not some investors, but not others.[722]

The claimant did, however, receive some relief through the Arbitral Tribunal's order on costs. Such order, in fact, departed from Article 40 of the UNCITRAL Rules, assigning the costs of the proceedings to the unsuccessful party. By acknowledging the individual claimant' status of Indigenous person, and the sub-standard treatment received by the United States, the Tribunal concluded that it:

> *[H]as considered factors going beyond the narrow question of which party was "unsuccessful". It has taken into account, in particular, the Claimants' atypical situation as First Nations enterprises and entrepreneurs carrying on cross-border trade in the tradition of their ancestors. It is mindful of the economic difficulties faced by the First Nations communities of which they form part, as by many Indigenous communities, as the result of historical factors, and of the role of Claimants' business ventures, particularly on the reservation at Ohsweken, as an important source of employment and income. The Tribunal believes that it would have been appropriate for governmental authorities in the United States to give greater recognition to, through appropriate consultations, the interests and concerns of Native American communities and entrepreneurs potentially affected by the MSA and related measures. Even if there be no right of redress established under NAFTA, the Tribunal believes that "[a]n appreciation of these matters can fairly be taken into account in exercising the Tribunal's discretion in terms of costs and expenses".*[723]

c) Burlington Resources Inc. v. Ecuador[724]

In this case, a U.S. oil company, commenced arbitral proceedings against Ecuador for alleged breach, *inter alia*, of the Full Protection and Security clause under the U.S.-Ecuador BIT.[725] The claimant allocated four oil exploration areas in Ecuador, to its subsidiaries, under production sharing contracts (PSCs). Among other guarantees, the PSCs contained a tax indemnification clause in favor of the claimant.

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[722] *Ibid*.
[723] *Ibid.*, at para. 247.
[724] *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)).
[725] Article II(3)(a) of the Treaty between the United States and Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993. *See also Chevron Corporation and Texaco Petroleum Co. v. The Republic of Ecuador*, Permanent Court of Arbitration Case No. 2007-2, 2011.

According to the claimant, the host State had failed to take sufficient steps to protect the investment from damages suffered by the investment due to protests, death threats, and violent attacks by Indigenous communities settled in the areas, which opposed the project.[726] With regard to two of the four areas assigned to the claimant's subsidiaries, Ecuador raised a *force majeure* defense and further added that the claimant had failed to comply with the requirements of Article VI(3) of the U.S.-Ecuador BIT, whereby a minimum period of six months had to lapse before the investor could raise claims relating to lack of Full Protection and Security against Indigenous upraising. In other words, according to Ecuador, the State was never put on notice of such a dispute. As a result, the investor was in breach of the BIT and the Arbitral Tribunal lacked jurisdiction on the matter.

The Arbitral Tribunal found that the waiting period requirement was, in fact, not abided by, as the investor did not notify Ecuador of the existence of the dispute at issue, before filing the request for arbitration.[727] As a consequence, the Arbitral Tribunal declared that it lacked jurisdiction over the investor's claim, which lifted the Tribunal from taking a position on this very important and sensitive topic.

The dynamic of the case at issue emphasizes the impasse that investors might face in cases of Indigenous communities' antagonism towards the investment. On the one hand, a diplomatic approach in these situation would be desirable in order to sensitize the host State to provide assistance to investors in dealing with protests and demonstrations. On the other hand, it is necessary that investors inform, in clear terms, the relevant governmental authorities that a failure to take action before occurrences of this kind will cause the investor to resort to a dispute settlement mechanism to establish jurisdiction under the BIT.

[726] *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Jurisdiction of 2 June 2010, at paras. 26-37.
[727] *Ibid.*, at paras. 316-318.

d) Border Timbers Limited et al. v. Republic of Zimbabwe

The case, *Border Timbers Limited et al. v. Republic of Zimbabwe*,[728] is one where Swiss and German investors brought a claim against the Zimbabwean Land Reform Program, which they alleged being the cause of a taking under the relevant BITs. According to the investors, a vast area of territory, the Border Properties, were expropriated and then redistributed, and the investors seek now restoration of the full unencumbered legal title and exclusive control of such lands. The case is still pending and cover by confidentiality. To no avail was the joint *amici* brief submitted by an international NGO and four Indigenous communities requesting to have access to the pleadings, to file a submission and attend the oral hearing.

Particularly, the Indigenous communities wished to intervene in the proceedings to remind the parties of their responsibilities with regard to Indigenous peoples' property rights over their ancestral lands, which were precisely the territories that the claimants alleged being taken from them. In their submission, the petitioners claimed that the Arbitral Tribunal's mandate derived from "powers delegated to it by Contracting Parties with concrete human rights obligations under international law".[729] The *amici* further invoked Article 26 of the UN Declaration on the Rights of Indigenous People, which sets forth an obligation for States to legally recognize and protect ancestral lands, territories and resources possessed by Indigenous communities, on the basis of traditional ownership or other traditional occupation or use, and other customary international law norms which should be considered binding.

Unfortunately, this study will be concluded before the Arbitral Tribunal will issue a decision on the matter. However, the rejection of the *amici* brief and the comments, by the Arbitral Tribunal, in Procedural Order No. 2, do offer an overview on the ICSID Tribunal's perspective on the issue of the interaction between investment law and human rights. The panorama envisaged is pretty

[728] *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25).
[729] *Ibid.*, *Amici* Submission at 7, reference to in Procedural Order No. 2, at para. 58.

harsh. Not only does the Arbitral Tribunal deny the *amici* submission on the basis, *inter alia*, of lack of the petitioners' "significant interest" in the proceedings.[730] The Tribunal did not consider the issue raised by the *amici* "a matter within the scope of the dispute".[731] It is in the Tribunal's view that the petitioners:

> *[P]rovided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete… The Arbitral Tribunals are not persuaded that consideration of the foregoing is in fact part of their mandate under either the ICSID Convention or the applicable BITs.*[732]

Furthermore, the Arbitral Tribunal noted that the Respondent State had an opportunity to comment on the *amici*'s submission but neither did it raise as a defense its obligations towards the Indigenous peoples in its territory under international law, nor did it indicate that the petitioners' arguments are relevant to the factual or legal issues underlying the proceedings.[733]

It is unfortunate that the Arbitral Tribunal, in the case at issue, has taken such position on the relevance of Indigenous peoples' right in the resolution of the dispute. By stating that "the reference to 'such rules of general international law as may be applicable' in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs",[734] the arbitrators have erected a wall where the rest of the international order is trying to build bridges in the sense of going towards unification, rather than fragmentation.

3. *Land Redistribution Programs and the Dilemma of Compensation*

Yet turning to the issue of invocation of human rights provisions by States willing to protect the people under their jurisdiction, another issue arises, namely in the context of expropriation of foreign properties for the purpose of land redistribution programs.

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[730] *Ibid.*, Procedural Order No. 2, 26 June 2012, at para. 61.
[731] *Ibid.*, at para. 60.
[732] *Ibid.*, at paras. 58, 60.
[733] *Ibid.*, at para. 59.
[734] *Ibid.*, at para. 57.

It is well known that expropriation for public purpose is allowed, provided that the State pays compensation for the affected property-owners. What is not clearly defined in BITs or in other treaties, is what the actual amount of compensation for breach of the agreement in the context of land reforms should be. BITs often refer to the "fair market-value"[735] of the assets in question, but this could vary depending on the domestic laws of different countries and on the particular reason in which the expropriation is grounded (in some countries racial redress or land reforms may require a State to pay less than the market value).

When treaties' wording about compensation is ambiguous, providing for "just", "fair", or "appropriate" redress, interpretations by tribunals are controversial.

In *CDSE v. Costa Rica*,[736] the Tribunal required the host State to pay market-value compensation for the expropriation of lands that were destined to constitute a natural preserve.

In the opposite direction *CME v. Czech Republic*:[737] this case, although not relating to land distribution, interpreted the wording "just compensation" as not requiring full market-value compensation, when the latter would be too cumbersome for the host State in financial terms.[738]

The latter interpretation is supported by a statement by the European Court of Human Rights in *Holy Monastaries v. Greece*,[739] where the Court waived a right to full compensation on the basis that "public interest" reasons may justify lesser amounts.

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[735] For instance, the South Africa-Korea BIT speaks of "market value"; the Germany-Namibia BIT speaks of the value of an investment immediately prior to the expropriation; the UK-Paraguay BIT speaks of the market value immediately before the expropriation took place.
[736] *CDSE v. Costa Rica* (ICSID Case no. ARB/96/1), Award of 17 February 2000, at paras. 69-71.
[737] *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL filed in 1999). Separate Opinion on the Issues at the Quantum Phase, Ian Brownlie, 14 March 2003, available on-line at: ita.law.uvic.ca, last accessed on 6 April 2014.
[738] *Ibid.*, at para. 31.
[739] *Holy Monastaries v. Greece*, European Court of Human Rights, Application no. 13092/87; 13984/88, Judgment of 9 December 1994.

On the same path, the Norwegian Government proposed a model investment treaty addressing the issue: the question of compensation in case of expropriation would be attached to the circumstances motivating a given expropriation, implicitly referring to the cases in which a host State is honoring the rights of Indigenous peoples by implementing *bona fide* land reforms.

The latter positions, however, are deeply contested and the reality is that more and more frequently land-reform measures, and other redistribution policy initiatives are being challenged by investors as a breach of investment treaties.

What is even more of concern is that this kind of claims, pursued as a violation of investment treaties, allow arbitration to be the primary channel through which positive actions that would benefit Indigenous communities are challenged in *fora* other than national courts, under the constitutional systems in which they have been conceived.

Another issue relating to the award of such disputes lays in the potential discrepancy between the amount of money assigned to the investors by arbitral tribunals, and that assigned by human rights courts. This to say that in considering a reform in the field of modern investment law to the extent of its interaction with human rights treaties, not only is it fundamental to monitor disputes that involve substantial human rights issues and study the trend, but also to consider how different international adjudicative bodies would handle similar cases.

What is sure, is the need of a clearer wording in the instruments regulating foreign investments, in order to offer a more effective standard in striking the balance between human rights owed to people under the jurisdiction of the host State, and those owed to investors. The problem, however, is that ambiguity in BITs provisions sometimes is a calculated strategy of the business bargain not to overload negotiations, and to allow more flexibility in the resolution of a potential dispute.

V. Wrapping-Up the Jurisprudence

A. The Right to Water

In assessing the investor's claim for expropriation, the Arbitral Tribunals in the *Aguas Argentinas* cases ruled that the measures taken by the Government of Argentina toward the water concession, did not breach the BIT, neither individually, nor collectively. However, in reaching this conclusion, the Tribunal did not directly address the issue of the right to water or its status under international law. The *amici* brief filed by a NGO to help the Arbitral Tribunal framing the relationship between the State's obligations under the BIT, and those to respect and protect the fundamental rights of its population, was not taken into consideration by the Tribunal. The arbitrators strictly interpreted the affirmative defense of necessity raised by Argentina to justify its failure to revise the tariff, as established under the concession contract, and concluded that the Vienna Convention on the Law of the Treaty poses strict conditions that go beyond the severity of a financial crisis, in order for actions to be justified under the said defense. The Arbitral Tribunal recognized that the right to water is an essential interest for the Republic of Argentina--therefore satisfying the first of the four conditions for the necessity defense identified by the Vienna Convention,--but no mention to the derivation, suggested by the *amici* brief, of the right to water from the right to life, was made. Finally, as to the third necessity condition, that necessity is not necessarily trump by treaty obligations, the Arbitral Tribunal took the position that human rights obligations did not, in the specific case, trump BIT obligations, and that the two sets of obligations are not inconsistent, mutually exclusive or contradictory.

In *SAUR International v. Republic of Argentina*, the factual background very much resembles the *Aguas Argentinas* cases, with the difference that the Arbitral Tribunal took a very different stance. It showed greater understanding of the importance of the right to water, both from the perspective of the State, which the Tribunal defined a "public service of first necessity", and from the perspective of the population, for which water is a "fundamental right". In this scenario, the Arbitral

Tribunal expressly recognized that, due to the very nature of the right to water, a legal system "may and should" reserve to the public authority broad powers to protect it. The Arbitral Tribunal did not stop here: after recognizing that the prerogatives of a sovereign State are "compatible" with investors' rights under the BIT, the Tribunal held that the right to water and investors' rights under the BIT operate on different levels, and that when foreign investors run a public service of "first necessity", they find themselves in a situation of "dependency" in the face of the public authority, which holds, and it is deemed to resort, to its special powers in order to guarantee the enjoyment of "the fundamental right to water".[740] The particulars of this case did not allow the host State to avoid paying compensation, due to the fact that the Argentine province exercised its legitimate powers only after having breached a document annexed to the concession contract. The Arbitral Tribunal did accept that the province was entitled, based on necessity or, more in general, the public interest, to interfere with the investor's private property and to nationalize an essential public service in light of the worsening of the service provided.[741] Had the province not breached the document at issue, there is room to argue that the measures exercised by the host State fell within the category of legitimate regulatory powers, necessary to ensure the enjoyment of fundamental rights; and therefore, being justified, they were not to result in compensation of the investor for damages suffered.

The recent *SAUR* case is a turning point in the history of the cases relating to the right to water and the Argentina crisis: not only did the Tribunal elevate the right to water to a fundamental right; it also recognized that the actions of a host State to positively protect and make the enjoyment of fundamental rights possible, are justified and even necessary, and shield the host State from compensating the investor.

The investment Tribunal's position on the right to water can be interpreted extensively to support the allegation that there is a general awareness of the existence of this right and its relevance in the international investment scenario.

[740] *SAUR International v. Republic of Argentina*, Decision on Liability of 6 June 2012.
[741] *Ibid.*, at para. 413.

From the perspective of the extent to which such a defense can prove to be successful in international investment proceedings, there has clearly been an evolution from the *Aguas Argentinas* cases, to the recent decision on liability in the *SAUR International v. Republic of Argentina* case.

First, in the large series of arbitrations commenced by the constituencies of the *Aguas Argentinas* consortium, against the Republic of Argentina, the Arbitral Tribunal does not make the effort to lay out a structured reasoning why the right to water should be cut-off of the equation when assessing the merits of the dispute. Probably, the Tribunal did not feel compelled to do so because the defense raised by the host State was a necessity defense, therefore the Arbitral Tribunal limited itself to analyze, one by one, the four conditions that need to be satisfied under Article 27 of the Vienna Convention on the Law of the Treaties (*Supra* Section IV.A.2.a)). Conversely, two years later, in the Decision on Liability in the *SAUR* case, the Arbitral Tribunal not only announced that the right to water (and human rights in general) had to be taken into account to reach a decision on the matter;[742] the arbitrators provided the specific reasons why this should be the case. Particularly, the first element adduced by the *SAUR* Tribunal was the position occupied by human rights in the Argentine internal legal order, therefore identifying the first element of a potential test that could be applied to future cases: whether the right under consideration has constitutional rank in the legal system of the host country where the investment takes place. The second step in the reasoning of the Tribunal has been to identify the meaning of the right to water from the perspective of the State on the one hand, which in modern democracies has been mandated to guarantee the rights of the people living in its territory; and its citizens on the other, who have an expectation that they rights be safeguarded by the people they voted for.[743] A public service of first necessity for the first, and a fundamental right for the latter. From these premises, the Arbitral Tribunal has

[742] *Ibid.*, Expert Opinion of M. Pinto, at para. 4.
[743] Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, Doc. ONU, A/HRC/6/3 2007, at para. 13, p. 11. and para. 18, p. 13. Annex MP 100.

drawn the conclusion that the public administration has and should use all the broad powers attributed to it by the legal system, to protect the public interest.

Second, from considering the "right to water" foreign to investment arbitration, and thus starting from a perspective of fragmentation of international law and water-tight compartments between investment law and human rights safeguards, the *SAUR* case clearly shows an evolution in the sense of unification of the two regimes, and holds the "right to water" and investors' right "compatible". While in the *Aguas Argentina* cases, the Tribunal stressed that a State is subject to "both international obligations, *i.e.* human rights *and* treaty obligation, and must respect both of them equally",[744] and set, therefore, a separation of the two spheres of international law, which, however, are not necessarily inconsistent;[745] according to the *SAUR* Tribunal, human rights and investment obligations form part of the same universe of rules, they only "operate" on different levels. In the words of the *SAUR* Tribunal,[746] an investor providing a service of first necessity, stands in a position of "dependency" from the public administration responsible to guarantee such service. The position of an investor in the host State can alternatively be read, or translated into, the obligation owed by the host State towards the investor; while the duty of the public administration to guarantee a service of first necessity--to the end-consumer who is, ultimately, the citizen--can be translated into the obligation owed by the host State towards its citizens. Accordingly, it can be argued that according to the *SAUR* Tribunal, the obligations owed to an investor under the BIT are in a position of dependency towards the obligations that the host State ultimately owes to its citizens, and the powers that it shall exercise to guarantee the fundamental rights of the population.

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[744] ICSID Case No. ARB/03/17 *et al.*, Decision on Liability of 30 July 2010, at para. 262.
[745] *Ibid*.
[746] *SAUR International v. Republic of Argentina*, Decision on Liability of 6 June 2012, at para. 331: "*These prerogatives are compatibles with the investors' rights to receive the protection accorded by the BIT. The fundamental right to water and the right of the investor to the protection under the BIT, operate on different levels: the concessionaire of a public service of first necessity finds itself in a situation of dependency in the face of public administration, which holds special powers to guarantee the enjoyment, by the sovereignty of the fundamental right to water*" (emphasis added).

In summary, notwithstanding the lack of *stare decisis* in international arbitration, a trend seems to develop whereby arbitral tribunals might become keen on accepting sovereign States' defenses grounded in the population's right to drinkable water at affordable prices.

B. The Right to Peaceful Assembly

As shown above in Section IV.B, there is no big variety of case law, in investment arbitration, relating to the freedom of peaceful assembly, as opposed to the case law relating to the right to water. Generally speaking, in the available cases, arbitral tribunals have always found that the actions or omissions of host States facing peaceful protests against foreign investments, did not amount to a breach of the Full Protection and Security clause under the relevant BITs. However, arbitral tribunals have not directly, and in explicit terms, upheld the right to peaceful assembly of the citizens of the host State. They have indirectly done so, through the rejection of investors' claims of breach of Full Projection and Security, on the basis of a thorough assessment of the right itself and its interaction with investors' rights. No award presents a structured analysis of the interaction between investors' rights under BITs, and the right to peaceful assembly. So far, arbitral tribunals have not even referred to a right to peaceful assembly, which shows that the discourse on the development of this right in the field of investment arbitration, is still *in fieri*.

In *Tecmed v. Mexico*,[747] the Arbitral Tribunal deemed that the obligation, by a host State, to accord Full Protection and Security to an investment, does not impose a strict liability upon the State. The investor did not present sufficient evidence to show that the Mexican authorities did not act reasonably and consistently within the framework of a democratic State. In the same way, in *Noble Ventures Inc. v. Romania*, the investor claimed that the host State breached its Full Protection and Security obligation under the BIT by failing to suppress labor unrest, therefore negatively affecting the investment. Romania based its defense on the fact that the unrest was caused by the investor itself, who failed to pay wages to the workers,

[747] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States.*

and on the demonstration being conducted in an orderly manner, in accordance to Romanian laws on freedom of assembly. The Arbitral Tribunal upheld Romania's defense, again on the basis of the failure, by the investor, to provide evidence as to the host State's lack of due diligence which allegedly caused losses to the investor. Finally, in *Palma Consortium Limited v. Republic of Bulgaria*, a case having a very similar factual background to that of *Nobel Ventures*, the Arbitral Tribunal once again found the evidence provided by the investor not sufficient to support a breach of the Full Protection and Security clause.

An assessment of the prominent case law, although substantially in favor of honoring the population's right to assembly, is not promising if one considers that in all cases there was a lack of evidence of liability and the Tribunals could not have read the clause of Full Protection and Security in a way other than relatively restrained.

In instances in which more serious protests would entirely jeopardize the investors' business, it cannot be foreseen how the interaction between substantive laws will be resolved.

C. The Rights of Indigenous Peoples

There are not many publicly available investment arbitration cases where Indigenous rights have come into play. However, the few existing examples are meaningful in terms of demonstrating the numerous facets through which the issue can arise.

As emerges from Section IV.C *supra*, investment arbitration cases relating to the rights of Indigenous peoples, can be classified as follows.

First, Indigenous people can play the role of claimants, against a host State, and invoke specific protections accorded to them by the BIT.[748] This was the case in the UNCITRAL arbitration *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, where the individual investors were member of the First Nations

[748] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America.*

Indigenous Community, who not only could benefit from the traditional safeguards under the BIT. The Community could also invoke the Indigenous rights 'locked-in' by the host State through the ratification of the relevant human rights treaties[749] and customary international law, as a 'sword' to enhance their claims of breach of BIT provisions. Particularly, as already pointed out *supra* in Section IV.C, the Indigenous investors claimed their entitlement to a "heightened level of vigilance and care" in their right to do business in the ancestral territories occupied by the communities to which they belonged.[750] The Arbitral Tribunal, in its decision, partially took the Indigenous investor's claim into consideration, especially with regards to the duty, borne by the State of nationality, of consultation with Indigenous communities in terms of governmental policies significantly affecting them.[751] However, noted the Tribunal, such duty of consultation runs at the level of the State and the *collectivity* of Indigenous peoples, as opposed to the individual investor on which the Tribunal declared to have jurisdiction.[752] Although the Arbitral Tribunal recognized the Indigenous investor a relief on costs, departing from the applicable arbitration rules, it denied his claim on the merits. The narrow spectrum applied by the arbitrators to interpret Indigenous rights in the dispute at issue, is controversial.

Second, Indigenous communities can be third interested parties intervening in arbitral proceedings through an *amicus curiae* brief, as parties whose interests are negatively affected by the investment.[753] Third, the investor might complain about the measures taken by the State to protect the rights of Indigenous peoples living under the State's jurisdiction.[754] These two scenarios will be treated together because the same case, *Glamis Gold Ltd. v. United States*, can account for both situations. In this case too, human rights obligations constituted a "double-edged

[749] The United States ratified the Convention on the 1966 Elimination of all Forms of Racial Discrimination on 21 October 1994, and the 1966 International Covenant on Civil and Political Rights on 8 June 1992.
[750] *Grand River Enterprises v. United States of America*, Claimant's Memorial on the Merits, 10 July 2008, at para. 2.
[751] *Grand River Enterprises v. United States of America*, Award of 8 June 2009, at paras. 186, 210.
[752] *Ibid.*, at paras. 211-213.
[753] *Glamis Gold Ltd. v. United States*; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe.*
[754] *Glamis Gold, Ltd. v. The United States of America.*

sword" for the host State. In fact, if on the one hand the State has shown the international community its will to abide by the rule of law by committing to international treaties imposing human rights obligations, on the other hand, the respect of these obligations might make it incur in breach of BIT provisions. In *Glamis Gold Ltd. v. United States*, the Arbitral Tribunal denied the claimant's claim of expropriation and breach of Fair and Equitable Treatment, but did so without making any reference to the *amici curiae* brief submitted by the Quechan Indigenous Community, which made a good effort to outline the international and domestic legal framework to support the protection of Indigenous peoples' ancestral lands. In other words, the Tribunal chose not to touch upon the interaction between human rights provisions relating to the protection of Indigenous peoples' property, and investment law, in a case where it could decide the issue on different grounds. Had the Arbitral Tribunal decided the dispute on the basis of the fact that the measures adopted by the United States were proportionate and legitimate, because grounded in the protection of the public interest, it would have reached the same outcome. However, based on the fact the State's measures did not cause a sufficient economic impact to amount to an expropriation, and that the investor failed to prove a violation of the FET standard, the Arbitral Tribunal opted for the "Contract Paradigm", rather than going a step forward and engage in an integrationist approach. This might appear to the reader as a mere formality. However, in the debate on the fragmentation or unification of international law, the methodology--more than the outcome--of resolution of cases such as those at issue, where two spheres of international law that are only apparently separate come together, is the real player which can inform future arbitral decisions.

The *Border Timbers Limited et al. v. Republic of Zimbabwe* is still pending, and most of the information relating to the proceedings are confidential. However, the *amici curiae* intervention has been denied by the Arbitral Tribunal, which confirms a rather negative development in considering third party intervention in support of human rights arguments.

Fourth, an investor might claim breach of the Full Protection and Security standard for a host State's failure to adopt measures to avoid that Indigenous peoples' actions harm the investment.[755] This was the case in the ICSID arbitration *Burlington Resources Inc. v. Republic of Ecuador*, which, however, is not a significant decision to assess arbitral tribunals' trend in deciding over disputes involving Indigenous peoples rights. In this case, the Arbitral Tribunal reasoned on procedural grounds to then find that it lacked jurisdiction over the claim of the investor, losing a chance to take a position on the merits of the claim, and to show the methodology of its reasoning.

In summary, of the four investment arbitration cases involving human rights relating to Indigenous peoples, only two[756] offer some degree of elaboration, on the part of the arbitral tribunals, on the issue of Indigenous people's rights in an investment dispute. Taken in chronological order, the cases show a peculiar trend. While the *Glamis* Tribunal, although accepting the Quechan Peoples' *amicus* brief, decided the dispute without making any reference to the human rights arguments raised in the submission, and decided on the only available alternative grounds; the *Grand River* Tribunal, although rejecting the Indigenous investor's claim on the merits, its partially welcomed and surely elaborated on the human rights arguments raised. This clear positive evolution in considering human rights issue from the *Glamis* to the *Grand River* case is, however, again put into question by the recent decision of the Arbitral Tribunal in *Border Timbers Limited et al. v. Republic of Zimbabwe*, to reject the *amicus* brief in support of Indigenous rights. It remains to be see what the outcome of this decision will be.

[755] *Burlington Resources Inc. v. Republic of Ecuador*.
[756] *Glamis Gold Ltd. V. United States*; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*.

VI. What Forum?

Many scholars have argued that the broad protections accorded to foreign investors under BITs are disproportionate, and impinge on human rights. Besides proposing all sort of reforms to tackle the alleged inadequacy of the investment arbitration system,[757] very few commentators have actually put forward alternative *fora* where investment disputed having at their core fundamental rights issue, could be litigated.[758] It is necessary to take cognizance of the fact that substantial human rights issues have and will continue to emerge in investment proceedings, and that regardless whether States will be accorded a waiver or limitation of responsibility for breaching BITs on the basis of human rights obligations, an important practical problem remains: adjudication.

At present, no unified international judicial system in charge of resolving conflicts between human rights and investment law is in place.

What solution?

A. Ex-Novo Mechanism?

The above reflections lead to explore the desirability of creating an *ad hoc* authority to deal with this kind of cutting edge cases where human rights issues play an important role in the resolution of investment disputes.

An *ex novo* international body, a sort of hybrid tribunal constituted of members who, while being competent in handling commercial disputes, would also be sensitive to human rights arguments, would have the advantage of taking into account the economic and social context in which a State has allegedly breached the investment treaty. It could, more in general, redress the deficiencies of a tribunal focusing only on investment law. Furthermore, another potential advantage of a hybrid court would be the ability to foster broader public

[757] *See e.g.*, DUPUY, P. M.; PETERSMANN, E.-U., & FRANCIONI, F. (EDS.), "Human Rights in International Investment Law and Arbitration", 2009.
[758] WEILER, T., *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B. C. Int'l & Comp. L. Rev., 2004 at 429.

acceptance, build local capacity and disseminate international human rights norms. A hybrid court would further incorporate a snapshot of the social and economic situation of the country where the investment was made; the tribunal member experts in both field of law would confer legitimacy, resources, human rights expertise and technical knowledge. Finally, a hybrid panel would also create the opportunity for mutual exchange of ideas and best practices between adjudicators from different legal systems, and blend together what everybody seems to believe separate strands of justice, integrating the private and the public, the individual and the social level, the local and the international.

However, there are downsides in conceiving such an *ad hoc* mechanism. Besides constituting a bureaucratic burden, there could be problems of legitimacy in the sense of identifying the grounds to refer a dispute to such mechanism. There would be an increase in transaction costs, especially if the hybrid court is used as a "deferral mechanism" in those instances where the host State is not satisfied with the investment tribunal's findings on human rights defenses. A further obstacle is represented by a potential "institutional conflict", in the sense that arbitral tribunal members will hardly admit their lack of skills in handling such cases, and the new body could potentially exist only "on the paper" if no deferrals were to be made. To this regard, another issue would be identifying the authority in charge of deciding when a case should actually be filed before an ordinary investment tribunal, or should be brought to the attention of the hybrid court. Should it be a deferral by the arbitral tribunal? Should it be an independent authority? Should it be a choice of the parties? The fact that a case is pending before such a body, would it exclude the possibility to further litigate the case in a traditional arbitration forum?

These are only few of the concrete issues that the implementation of such a mechanism would face, without mentioning the skepticism of the parties to refer to an "untested body", instead of relying on traditional mechanisms.

The conclusion is probably that an *ex novo* tribunal would not be necessarily flawed, but it would be costly from a bureaucratic point of view, and may only

operate successfully if there is an active international support and a genuine will to take human rights considerations of third parties into account when adjudicating investment disputes.

B. UN Human Rights Monitoring Bodies

International human rights monitoring bodies, as those within the system of the United Nations, could hypothetically be a possibility to issue guidelines. However, the non-binding nature of the recommendations might represent a problem.

For instance, in its *Concluding Observations on Canada*, in May 2006,[759] the UN Committee on Economic, Social and Cultural Rights, after having before it evidence of conflict between NAFTA's Chapter 11 provisions on investors' protection, and other provisions contained in the International Covenant on Economic, Social and Cultural Rights, expressed its recommendation to the Government of Canada to consider:

> *[W]ays in which the primacy of Covenant rights may be ensured in trade and investment agreements, and in particular in the adjudication of investor-State disputes under Chapter 11 of the North American Free Trade Agreement (NAFTA).*[760]

Again, in its *Concluding Observations* after considering the fifth report of Germany on the implementation of the ICCPR,[761] the Committee on Economic, Social and Cultural Rights expressed concerns that the State party's policy-making process in supporting investments by German companies abroad, does not give due consideration to human rights, in particular to the right to adequate standard of living.[762] For this reasons, the Committee:

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[759] ECOSOC, Concluding Observations on Canada, May 2006, UN Doc. E/C.12/CAN/CO/5.
[760] *Ibid.*, at para. 68.
[761] *Ibid.*
[762] ECOSOC, Forty-sixth session, *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant*, UN Doc. E/C.12/DEU/CO/5 of 12 July 2011.

> *[C]alls on the State party to ensure that its policies on investments by German companies abroad serve the economic, social and cultural rights in the host countries.*[763]

More recently, during a mission to Japan in July 2013, an independent UN expert on foreign debt and human rights has called on Japan to be sensitive to relevant human rights and labour standards, when boosting Japanese investment abroad. This includes respecting UN Guiding Principles on Business and Human Rights.[764]

Yet, recommendations against multi-million dollar arbitral awards could mean, in practice, that human rights claims will never be upheld.

C. Arbitral Tribunals

Looking at other existing options already in place, arbitral tribunals themselves could be also suitable to adjudicate investment disputes with fundamental human rights at their core, as long as they show some openness to endorse international human rights obligations and commit to extend their technical expertise in human rights law, if the case so requires. There is an emerging trend in this sense; however, the system would need to be tuned for the purpose.

If investment arbitrators have really to be the front line players in assessing to what extent human rights obligations can play a role in investment proceedings--thus limiting or waiving States' responsibility for violating investment treaty obligations--several aspects have to be discussed.

If, in the future, explicit human rights provisions will be included in BITs, as suggested by many, this would at least represent a clear signal for arbitrators to engage in human rights arguments. However, this leads inevitably to the even greater concern on the ability of investment arbitrators to deal with human rights issues emerging from investment disputes. Notwithstanding the international

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[763] *Ibid.*, at paras. 10 *et. seq.*
[764] UN News Centre, *UN Expert Urges Japan to Put Human Rights at Centre of Global Development Efforts*, accessible at: http://www.un.org/apps/news/story.asp?NewsID=45466&Cr=development%20cooperation&Cr1=#.UqOW7dF3vmI, last accessed on 6 April 2014.

skim of the two systems, and the argument on the unification of international law, human rights law and investment law were born as separated subject matters and they have not been considered a cutting edge topic for a substantial amount of time in history. This has unfortunately led the two areas of law to develop independently, especially from a technical perspective, and so the expertise of the authorities presiding over each process. There are jurists with a background in both human rights and investment law, who could act as arbitrators, but in general, they are not many. A lawyer expert in human rights will hardly successfully handle an investment dispute; similarly, an investment expert will rarely be able to properly consider and to appreciate the importance of human rights arguments emerging from an investment dispute. This would eventually give raise to a *de facto* barrier to the harmonization of human rights norms with investment provisions.[765] The major risk in investment law experts handling human rights issues, as long as human rights provisions will not be included in BITs as a form of guidance, lays in arbitrators' potential finding that host States' human rights obligations do not represent measures related to investments, and thus yielding for compensatory award in favor of the investor.

To this regard, to shorten the distance between the different expertise, an international attempt could be made, at the level of the United Nations, pursuant to its mandate under Article 56 of the UN Charter, to sensitize arbitral tribunals and arbitrators in general, to include fundamental human rights courses in their Continuing Legal Education. Another area for improvement would be in arbitral tribunals' constitution. Particularly, arbitration rules could be amended as to spell out the possibility, already intrinsic to most arbitration rules, to choose arbitrators with a specific background in both investment and human rights law, when the parties' attorneys anticipate that the outcome of the dispute will lie on fundamental rights issues.

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[765] HIRSCH, M., *Investment Tribunals and Human Rights Treaties: A Sociological Perspective*, in "Investment Law within International Law – Integrationist Perspectives", Freya Beatens (Ed.), Cambridge, 2013 at 85; LEVINE, J., *The Interaction of International Investment Arbitration and the Right of Indigenous Peoples*, in "Investment Law within International Law – Integrationist Perspectives", Freya Beatens (Ed.), Cambridge, 2013 at 106.

At the moment, the only source of expertise that arbitral tribunal members can rely on are briefs prepared by *amici*, whose right to intervene in arbitral proceedings seems to be now, to a certain extent, accepted.[766] There are, however, two limitations to *amici* briefs submissions.

First, notwithstanding the claim of general acceptance of third parties' submissions in investor-State arbitration, and their endorsement by many arbitration rules such as ICSID and UNCITRAL, the praxis is more controversial. By Procedural Order No. 2, issued on 26 June 2012, the Arbitral Tribunal in *Border Timbers Limited et al. v. Republic of Zimbabwe* (analyzed in Section IV.C.2.d) above),[767] has rejected the *amicus curiae* brief, jointly submitted by a NGO and four Zimbabwean Indigenous communities, reversing the recent trend in favor of transparency in investor-State arbitration.[768] The *amici* submission by, *inter alia*, Indigenous communities residing on the lands at issue, sought authorization to file a joint brief as third party in the arbitration; access to the key arbitration documents; and permission to take part in the hearings. The Arbitral Tribunal denial of the *amici* brief was grounded on "legitimate doubts" on the independence or neutrality of the petitioners.[769] Against the trend of lifting

[766] As to the participation of *Amici*, there has been extensive success in the context of the Argentine Government's freezing of water tariffs in January 2002 (*Suez/Vivendi*). CELS and other Argentine NGOs obtained the right to intervene in arbitral proceedings. The ICSID Arbitration Rules, last reformed in 2006, have increased transparency through provisions for amicus submissions by third parties, as for instance Rule 37(2), through which third parties may be allowed to file *amicus* submissions subject to certain requirements. *See* TRIANTAFILOU, E., *A More Expansive Role For Amici Curiae In Investment Arbitration?*, Kluwer Arbitration Blog, 11 May 2009. Furthermore, in July 2013, the United Nations Commission on International Trade Law amended the arbitration rules to the effect of ensuring transparency in investor-State arbitration (the "Rules on Transparency"). Particularly, Rules on Transparency expressly affirm the authority of investment tribunals to accept submissions from so-called *amicus curiae*.

[767] *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*.

[768] *See* the 2005 *Suez Order* (available at: http://italaw.com/sites/default/files/case-documents/ita0815.pdf, last accessed on 6 April 2014); the 2007 *Biwater Order* (available at: http://italaw.com/sites/default/files/case-documents/ita0091_0.pdf, last accessed on 6 April 2014, case 58, Procedural Order No. 5); *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, 2 August 2010, at para. 50; *Piero Foresti v. Republic of S. Africa*, Award of 4 August 2010; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Award of 14 March 2011, at para. 39.

[769] *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, Procedural Order No. 2, 26 June 2012, at para. 56.

petitioners from proving their independence, as stated in the 2006 *Suez Order*,[770] the Arbitral Tribunal reintroduced the criteria and found that the petitioners lacked independence because they stated that "both Parties have responsibilities towards the Indigenous communities relating to their alleged rights over or in relation to their ancestral lands". In the eyes of the Tribunal, this statement was the demonstration that the petitioners stood against the investor, as well as against Zimbabwe, and that this approach was not compatible with applicable rules.[771] The Arbitral Tribunal further noted that under Article 37(2) ICSID Rules, a petitioner has to possess a significant interest in the proceedings,[772] which was lacking in the case at issue because the petitioner NGO's expertise focused on corporate responsibilities for human rights abuses, and the claimants had strenuously objected to be talked into such arguments.[773]

Second, the kind of expertise provided by these organizations is, in practice, very limited, because of the secretive nature of investment treaty arbitration, which prevents NGOs to know what exactly is going on in the proceedings, or whether proceedings are taking place at all. This might change in arbitrations under UNCITRAL Rules, which, in July 2013, were amended to include more transparency in investor-State arbitration through a mechanism, under Articles 2 and 3 of the new UNCITRAL Transparency Rules,[774] that will allow public access to documents generated during treaty-based investor-state arbitrations. The new UNCITRAL Transparency Rules have entered into force on 1 April 2014, and represent a revolutionary achievement. However, their success will need to be measured against the praxis, and remains limited to arbitrations brought under the UNCITRAL system.

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[770] See ICSID Case No. ARB/03/17 *et al.*, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006, at para. 23.
[771] *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, Procedural Order No. two, 26 June 2012 at paras. 50-51.
[772] *Ibid.*, at para. 62.
[773] *Ibid.*, at para. 61.
[774] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Pre-release publication – 2 October 2013.

Finally, the lack of remedial powers of arbitral tribunals with respect to human rights violations constitutes another limit to investment tribunals being suitable to adjudicate hybrid disputes.

D. International Regional Bodies

International *fora* in which human rights obligations could be duly addressed in the context of investments, are those international regional bodies with authority to review both human rights arguments, as well as economic-investment agreements.

For instance, within the European territory, the ECJ has the power to consider both issues of fundamental rights under European Law, as well as to review domestic law or bilateral treaties inconsistent with European Law. Article 19 of the Treaty of the European Union (TEU) provides that the role of the ECJ is "…to ensure that in the interpretation and application of the Treaties, the law is observed".[775] With regard to investments, the European Commission has filed cases against some European countries before the ECJ, alleging a failure, by the countries, to take actions to eliminate inconsistencies between their pre-accession BITs and European Law.[776] There are decisions, by the ECJ, against Austria[777] and Sweden,[778] just to mention a few, where the ECJ has found that the countries breached Article 307 TEU, due to their failure to take steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements entered into with a number of non-European countries.[779]

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[775] Article 19 TUE.
[776] Global Arbitration Review, *The Future of Investment Treaty Protection in Eastern Europe*, The European & Middle Eastern Arbitration Review 2009, available at: http://www.globalarbitrationreview.com/handbooks/14/sections/53/chapters/511/the-future-investment-treaty-protection-eastern-europe, last accessed on 6 April 2014 (with subscription).
[777] *Commission of the European Communities v. Republic of Austria*, ECJ, Case C-205/06, Judgment of 3 March 2009.
[778] *Commission of the European Communities v. Kingdom of Sweden*, ECJ, Case C- 249/06, Judgment of 3 March 2009.
[779] *See Commission of the European Communities v. Republic of Austria*, ECJ, Case C-205/06, Judgment of 3 March 2009, at para. 45; and *Commission of the European Communities v. Kingdom of Sweden*, ECJ, Case C- 249/06, Judgment of 3 March 2009, at para. 45.

This is a confirmation of the compatibility of BITs' review under European Law, before the ECJ.

For what concerns human rights, the ECJ, based in Luxembourg, is not a human rights guardian *per se*, mandate that is typical of the European Court of Human Rights (ECtHR), which belongs to the Strasbourg-based Council of Europe. The European system is complex and the regime of human rights protection overlaps, but the ECJ, with its 27 judges coming from each Member State, is a body specialized in several branches of the law and does have jurisdiction on fundamental freedoms and human rights within European law. This would probably constitute the main concern of delegating the resolution of investment disputes, with fundamental rights at their core, to bodies such as the ECJ: the jurisdiction limited to fundamental freedom and rights "within European law". It would therefore be hard to imagine a scenario where the ECJ decides on a case relating to a European investor willing to purchase lands that belong to Indigenous communities in Latin America, where the host State tries to justify its breaching of the BIT invoking its Indigenous population's human rights.

Reasoning under the assumption that investment/human rights disputes could be heard by regional bodies, another disadvantage of the latter to adjudicate the type of disputes at issue is the potential mistrust of host States to be heard, most likely, by a Court biased in favor of the European investor. Similarly, envisaging a review of the disputes at issue by regional human rights bodies such as the ECHR or the IACHR, would have the downsides of being perceived biased towards human rights.

These are only minor shortcomings in entrusting international regional bodies with a definite solutions.

In terms of a review of awards under public international law is that, with only few exceptions that do not involve human rights issue, such review is limited to a) awards' interpretation, b) correction of minor errors, or c) review on the basis of new facts. Of these three modalities, only the third one may lead to the reversal of

an arbitral award. However, the standard is rigorous, as shown by Article 61(1) of the Statute of the International Court of Justice, Article 44 of the Statute of the European Court of Justice, Rule 80(1) of the European Court of Human Rights, Article 55 of the 1899 Hague Convention for the Pacific Settlement of International Disputes, and Article 83 of the 1907 Hague Convention, as well as Article 38(1) of the International Law Commission's Model Rules on Arbitral Procedure.[780] Therefore, strict standard of review is an obstacle to the substantial revision of an award on the basis of violation of human rights provisions by international regional bodies. Overall, they are not viable choice.

E. Domestic Courts

Another possible venue to deal with disputes involving human rights and investment issues could be to have the host State's domestic courts or domestic constitutional courts reviewing the interpretation of investment agreements, to monitor their compatibility with constitutional-embedded human rights. Among the advantages are that the principles of constitutional supremacy and the rule of law are generally better developed under domestic law. Furthermore the peculiar economic and social situation of a certain country, and the regulatory policies adopted by a government to cope with particular issues can only be fully understood by actors familiar with the system.

Generally speaking, if on the one hand constitutional supremacy is seen as a threat to the rule of law at the international level, the negotiation of treaties within a State is an act of the executive branch and it should generally be subject to constitutional review, with the difference that, while in monist legal systems domestic courts are empowered to recognize the supremacy of international human rights treaties, in dualist legal orders--absent transposition--international human rights treaties are not enforceable by domestic courts.

[780] As an example, Article 61(1) of the Statute of the ICJ: "*[a]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.*"

Numerous are the arguments put forward by scholars to support domestic judicial review of investment disputes.[781]

In a way, we live in a decentralized international legal system, where there is no final arbiter of legality than States themselves. There are both scholarly articles, as well as legal principles, supporting the idea that "domestic courts are the natural judges of international law".[782] Based on the fact that a natural centrally instituted third-party instance does not exist, argues Tzanakopoulos, "the first instance power of auto-interpretation also becomes, *de facto*, the last".[783] According to this argument, States' domestic courts are those that are best suited to consider the conformity of State conduct with international law, thanks to the numerous inward-looking rules. Furthermore, they are, at the same time, the "point of first contact" as well as the "last line of defense" and thus the last chance for a State to align itself to, and comply with, its international obligations.

In terms of general principles supporting such argument, one can think to the requirement of exhaustion of local remedies[784] before being able to elevate a claim at the international echelon, on the assumption that an international rule has been breached. The ILC Draft Articles on Diplomatic Protection,[785] as well as the Articles on the Responsibility of States for International Wrongful Acts,[786] refer to the need of exhaustion of local remedies before addressing an international body, or invoking the responsibility of a State. The rule on the exhaustion of local remedies can therefore be interpreted as an acknowledgement, by international law, of domestic courts' primacy as dispute-settlers and law enforcers; and the

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[781] *See e.g.* VAN HARTEN, G., "Sovereign Choices and Sovereign Constraints", Oxford University Press, 2013.

[782] TZANAKOPOULOS, A., *Domestic Courts in International Law: The International Judicial Function of National Courts*, Loy. L.A. Int'l & Comp. L. Rev., Vol. 34:153, 2011 at 171; BENTHAM, J., *Draught of a Code for the Organization of the Judicial Establishment in France*, in "4 The Work of Jeremy Bentham", 1843 at 296-97 (commenting on Title V, para. 1, Articles I-III). *See also*, *Librairie Hachette v. Société Coopérative*, Swiss Federal Tribunal, 72 Int. L. Rep. 78, 80-81, 1987; TZANAKOPOULOS, A., *Domestic Courts as the 'Natural Judge' of International Law: A Change in Physiognomy*, in "3 Selected Proceedings of the European Society of International Law, James Crawford & Sarah Nouwen (Eds.), 2012 at 156-157.

[783] *Ibid*.

[784] *ELSI v. Italy*, at para. 50.

[785] Article 14 ILC Draft Articles on Diplomatic Protection.

[786] Article 44 ILC Articles on Responsibility of States for Internationally Wrongful Acts.

residual role of international courts. Another example to support the argument is the international obligation to extradite wrongdoers to their country of nationality, or, in the alternative, to prosecute them.[787]

In the field of human rights, the European Court of Human Rights has developed the concept of "margin of appreciation",[788] which allows the ECtHR to consider a different application of the Convention in the various Member State, because of the legitimate different interpretations based on cultural, historical and philosophical differences between the member States. The margin of appreciation can, in a way, be assimilated to the concept of subsidiarity. There is an emerging trend to generally accept the margin of appreciation doctrine in favor of domestic authorities, including domestic courts, which suggests an inclination towards the subsidiary role of international courts on the matter.[789]

In international investment law, domestic courts would also be the natural instance judge, unless otherwise indicated by the parties in writing.[790] The "Waiting Period" rule is also a mechanism that may be used as a tool to support the soundness of the jurisdiction of national courts. Particularly, this rule allows investors to pursue arbitration only after a "waiting period" (usually of 3-6

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[787] BASSIOUNI, M. C., & WISE, E. M., *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, 1995; GALICKI, Z., *Preliminary Report on the Obligation to Extradite or Prosecute* ("*aut dedere aut judicare*"), Rep. of the International Law Commission, 58th Session, 1 May – 9 June, 3 July – 1 August, 2006, UN Doc. A/CN.4/571, 7 June 2006.

[788] *Handyside v. The United Kingdom*.

[789] BLICKLE, P., HÜGLIN, T. O., & WYDUCKEL, D., "Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche Staat und Gesellschaft Rechtstheorie", Beiheft 20, Berlin Duncker und Humblodt, 2002 at 475 *et seq.*; CAROZZA, P., *Subsidiarity as a structural principle of international human rights law*, 97 American Journal of International Law, 2003 at 38 *et seq.*; SHANY, Y., *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 Eur. J. Int'l L., 2005 at 926-931; SHELTON, D., *Subsidiarity and human rights law*, 27 1/4 Human Rights Law Journal, 2006 at 4 *et seq.*; HELFER, L., *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 European Journal of International Law, 2008 at 125-159; Interlaken Declaration on the Reform of the European Court of Human Rights (On 18-19 February 2010, ministers representing 47 nations from the Council of Europe convened in Interlaken, Switzerland to address the need for urgent reforms to the European Court of Human Rights).

[790] *See, e.g.*, Article 25(1), ICSID Convention.

months).[791] It therefore incentivizes disputes to be heard by local courts until the period has lapsed.[792]

Domestic courts have, therefore, theoretically a say in adjudicating the disputes object of the present study. In the praxis, whether local courts in various countries are actually empowered to interpret international investment treaties, depends on various factors, such as the type of legal system of the host State, its constitutional order and structure, the type of dispute settlement clause etc. This question becomes more and more important in today's economically globalized world, where States, but also other actors, express a preference for local tribunals in settling investor-State disputes.

Particularly, the current tendency is that of a loss of credibility in the investor-State dispute resolution system, and therefore a call for an increased role of domestic tribunals in adjudicating these type of disputes. Some countries have started to amend their policies dealing with BITs stipulation, in favor of excluding investment arbitration as a means of dispute settlement. Australia, for example, after signing and ratifying the Australia-United States Free Trade Agreement,[793] instrument ensuring greater access to the United States market for Australian products, decided not to include the traditional international investment dispute settlement mechanism in the agreement.[794] The country has adopted a similar approach in the Closer Economic Relation (CER) Investment Protocol that Australia concluded with New Zealand on 16 February 2011.[795] Finally, the Government of Australia has also disclosed that the exclusion of a traditional

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[791] SCHREUER, C., *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, in "The Law and Practice of International Courts and Tribunals" 1: Koninklijke Brill NV, Leiden, The Netherlands, 2005 at 3. *But see Siemens A.G. v. The Republic of Argentina* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004 and *Emilio Agustín Maffezini v. The Kingdom of Spain* too, where, to avoid the waiting period, MFN Clause was invoked.

[792] In *Maffezini v. Spain* and *Siemens v. Republic of Argentina*, claimants relied on the MFN clause to import favorable jurisdictional requirements, minimizing the relevance of the waiting period requirement.

[793] The AUSFTA came into effect on 1 January 2005.

[794] *See* Australian Government, Department of Foreign Affairs and Trade, http://www.dfat.gov.au/fta/ausfta/guide/21.html, accessed on 6 April 2014.

[795] *Protocol on Investment to the New Zealand – Australia closer economic relations trade agreement*, National Interest Analysis (undated), accessible at: http://www.mfat.govt.nz/downloads/trade-agreement/australia/Australia-NZ-CER-Body.pdf, accessed on 6 April 2014, at 24.

dispute settlement mechanism in the resolution of investor-State disputes will also apply for what concerns negotiations with developing countries.[796]

One of States' main concern is the intrusive effect of investor claims on their public purpose sovereign choice. The Government of South Africa, for instance, after foreign investors brought claims against its Black Economic Empowerment Program,[797] is in the process of drafting a bill which will conspicuously limit the rights of foreign investors to resort to international arbitration.[798] Some States, such as Ecuador and Bolivia, have even resorted to the drastic measure of denunciating the ICSID Convention. Ecuador has gone as far as declaring that empowering arbitral tribunals to resolve investor-State disputes under BITs, is unconstitutional. Finally, the inability for Argentina to comply with the over 40 arbitral awards rendered against it, is further in support of the argument that the system is flawed.

1. *Monist and Dualist Systems*

In monist jurisdictions, the internal and international legal systems are blended in unity, whereby the executive and/or the legislative branches are not called on undertaking any substantial transposition in order for the domestic legal system to embrace a particular international instrument. By the simple ratification, a mere formality, international law may be indirectly applicable by local courts, and be invoked by citizens.[799] The ratification process implies that domestic courts will

[796] Department of Foreign Affairs and Trade, Australian Government, *Trading Our Way to More Jobs and Prosperity*, Gillard Government Trade Policy Statement, 12 April 2011: "*[I]f Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessment about whether they want to commit to investing in those countries*", accessible at: http://www.dfat.gov.au/media/features/201104.html, last accessed on 6 April 2014.
[797] *Piero Foresti, Laura de Carli and others v. Republic of South Africa.*
[798] Allen & Overy Publications, *South Africa Seeks to Exclude Recourse to International Arbitration for Foreign Investors*, 4 November 2013, accessible at: http://www.allenovery.com/publications/en-gb/Pages/South-Africa-seeks-to-exclude-recourse-to-international-arbitration-for-foreign-investors.aspx, accessed on 6 April 2014.
[799] *See* STAKE, J.G., *Monism and Dualism in the Theory of International Law*, Brit. YB Int'l L., 1936.

presume conformity of internal laws with international treaties, which translates in citizens' access to domestic legal remedies.[800]

On the contrary, dualist legal systems presuppose that the domestic legal system and the international legal system lay on different levels, and international law is not contemplated as law existing within a given country. In order for national courts to be able to apply international law, the latter needs to be transposed into the domestic system, which means, in most jurisdiction, an act of the legislative branch is necessary for domestic courts to apply international law, and for the citizens to invoke it.[801]

The praxis shows that many countries' legal system, such as in Russia, South Africa, and the United States, do not perfectly fall within the definition of monist or dualist jurisdictions.

The enforcement of international treaties by monist or dualist jurisdictions should not be confused with the nature of the treaty. Usually, self-executing treaty provisions do not need a specific action by the State's organs, to be enacted, and can theoretically by applied directly by domestic courts and be invoked by citizens; conversely, a non-self-executing treaty provision will require implementing legislation. However, there is an open scholarly debate on the distinction between these provisions, and the study will leave this aside.[802]

A case-by-case analysis of the specific legal system is necessary to determine whether a greater involvement of host States' domestic courts is desirable. An empirical study commissioned by UNCTAD to the Trade Law Clinic of the Geneva Graduate Institute of International and Development Studies, reviewed the legal system, BITs and instances where BITs have been invoked, in the

[800] *Ibid.; see also* SLOSS, D., "The Role of Domestic Courts in Treaty Enforcement: a Comparative Study", Cambridge: CUP, 2009 at 4.
[801] *Ibid*.
[802] JACKSON, J., *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Int'l L., 1992 at 310; PAUST, J., *Self-Executing Treaties*, 82 Am. J. Int'l L., 1988 at 760; VÁZQUEZ, C., *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L. Rev., 2008 at 599.

following countries: Argentina, Australia, Canada, Ecuador, France, India, Republic of South Africa, United Kingdom, United States and Venezuela.[803]

According to the study, the Argentine system legal structure does accord courts the possibility to directly interpret and apply international treaties; therefore domestic courts are active in resolving investment disputes, and in some cases dispute settlement clauses require a claim to be first heard by local tribunals, before they can be taken to the international level.

In Australia, as well as in Canada, absent a national law incorporating the international treaty, investors will not be well off in invoking substantive rights for protection, which makes it unlikely that domestic courts would be chosen as a point of reference for the resolution of investment disputes. This is true especially for Australia, in light of Article 21.15 of AUSFTA providing that "neither Party [Contracting] may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement", provision that rules out the possibility for an investor to challenge a State's measure at the international or domestic level, based on investment treaty protection.[804]

In Ecuador, there seems to be a preference for international arbitration, even if Article 425 of Ecuador Constitution does allow for the application of BITs by local courts. Conversely, in France, BITs' provisions are not directly applicable by domestic courts and therefore investors would not benefit from treaty protection. This most likely excludes that French domestic courts will soon play a significant role in the resolution of international investment disputes.

India and its common law system also lack an investor-friendly approach: the Indian Supreme Court has determined that, in principle, international treaties signed by India can be embraced by the Indian legal system to the extent that they

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[803] YIMER, B.; CISNEROS, N.; BISIANI, L.; DONDE, R., *Application of International Investment Agreements by Domestic Courts*, Trade Law Clinic, 10 June 2011.
[804] DODGE, W. S., *Investor-State Dispute Settlement between Developed Countries: Reflection on the Australia-United States Free Trade Agreement*, Vanderbilt Journal of Transnational Law, Vol. 39, No. 1, January 2006 at 25.

do not "affect the rights of citizens or others or modify the laws of the State". As BITs would most likely affect such rights, the claims under them will hardly be heard by domestic courts, unless BITs are transposed under Indian law. Also the Republic of South Africa falls under the category of those countries that are not international law friendly. South African domestic courts' lack of capacity, and the domestic political pressure hinders any path in the opposite direction.[805]

The United Kingdom is a strictly dualist country and there seems to be no room for private parties (as opposed to a signatory party), to invoke BITs in domestic courts. However, in a decision relating to *Occidental Exploration & Production Company v. The Republic of Ecuador*, the English Court of Appeal came to the conclusion that due to the hybrid nature of BITs for their trespass into the area of domestic constitutional rights law, domestic courts are deemed to have judicial oversight of arbitral tribunals.[806]

The United States seem to consider BITs as self-executing treaties. However, U.S. courts are likely to assume a nationalist approach towards BITs interpretation. The last of the countries analyzed by the report, Venezuela, has given a very limited role to domestic courts in the BITs subscribed. Regardless this trend, case law evidence the possibility, for local courts, to directly apply investment treaty provisions.

2. *Pros and Cons*

Considering the concrete situations where domestic courts may be suitable to adjudicate disputes within the broader international investment law regime, scholars have identified instances of: a) competition between the domestic court's jurisdiction over its own rights, and that of investment arbitral tribunals; b) exhaustion of local remedies as a pre-condition for the claim to be heard at the international level; c) collaboration with international investment tribunals in

[805] NIJMAN, J., & NOLLKAEMPER, A., (Eds.), "New Perspective on the Divide between National and International Law", Oxford, Oxford University Press, 2007 at 312.
[806] *Occidental Exploration and Production Company v. Republic of Ecuador,* United Kingdom Supreme Court of Judicature Court of Appeal (Civil Division), 9 September 2005.

ordering *interim* measures, collecting evidence or enforcing arbitral awards; or d) interference with investment arbitration by issuing anti-arbitration injunctions, denying assistance, operating an extensive review of awards issued by international arbitral tribunals in setting aside and enforcement proceedings.

What is of interest to the present study is the first situation, namely a conflict of interest on the subject matter of the dispute between domestic courts and investment tribunals, particularly relating to the BIT interpretation affecting the fundamental rights of the population living under the jurisdiction of the host State.[807] What are the pros and cons of domestic courts' involvement in settling the disputes at issue? Which domestic court should be referred to? The host State's domestic courts, the investor country's state courts, or third countries' domestic courts?

Given that the concern of the present study is how to interpret rights and obligations under a BIT in light of the international human rights obligations of host States towards their citizens, the only domestic courts which could sensibly contribute to the fundamental rights argument, also measuring it specifically against the internal constitutional order and circumstance, are the host State's domestic courts. These, on the one hand, have the most relevant understanding of the internal social and economic situation experienced by the country. This insight could help to better frame the measures taken by the host State, to assess them against fundamental rights arguments and investors' rights. Neither the investor country's courts, nor any other "neutral" court, could have the relevant understanding.

On the one hand, local tribunals' public character and transparency attributes make them a good candidate; furthermore, the local insight on public interest issues, that are exactly those that are relevant in the debate of the proper mechanism of dispute resolution, constitute another good reason for entrusting local courts. Such sensitivity for public policy concerns would be expressed in the

[807] SCHREUER, C., *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, The Law and Practice of International Courts and Tribunal, 2005.

context of an organized State structure, which deserves predictability and legitimacy.

On the other hand, foreign investors are clearly reluctant to subject themselves to the jurisdiction of domestic courts because of their belief that they are biased in favor of the host-State. In fact, domestic courts are States' organs and, as such, are perceived partial and political.[808] This concern, however, should be assuaged by Article 27 of the Vienna Convention on the Law of Treaties which establishes that a State party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

Furthermore, investors' are concerned with local judges' lack of expertise in the field of international investment law and complex cross-border transactions,[809] their insistence in applying only national laws, the lack of resources of domestic courts, and the case load which prevents an efficient and quick resolution of the dispute. Another aspect is the perceived reliance, by domestic courts, on the Act-of-State doctrine and foreign sovereignty immunity, whereby the country may not be questioned in the courts of another State, even if it was acting in its private commercial capacity.[810] Precisely these reasons are at the basis of the development of the international investment arbitration system, which allows foreign investors to bypass domestic courts and the local remedies attached thereto.

The above concerns may be even more accentuated in developing countries, where the State's structure is considered not sufficiently developed, corrupt and unreliable. The dependence of the judiciary from a corrupt government, and the pressure to which courts are subject, would not make such a country attractive for foreign investments, if it were not for the existence of alternative disputes mechanisms such as investment arbitration.

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[808] DOLZER, R. & SCHREUER, C., "Principles of International Investment Law", Oxford Univ. Press, Oxford, 2008 at 214.
[809] *Ibid*.
[810] DODGE, W., *National Courts and International arbitration: Exhaustion of local Remedies and Res judicata under Chapter Eleven of NAFTA*, Hasting International and Comparative Law Review, Vol. 23, 2005 at 358.

3. *Domestic Judicial Review?*

This brief review of the role, and the potential role, played by domestic courts in adjudicating investment disputes shows that the scenery is scattered and that no black or white rule can be identified. Not even the monist, dualist distinction has proved to be a rule of thumb in determining whether domestic courts can apply international agreements. In fact, monist countries such as France, do not let an investor invoke BITs' protection before local courts; others, like Argentina, do. In the same way, dualist countries, such as the United States, leave room to BITs provisions to be self-executing; while others, like India, don't. The numerous nuances of each legal system carry within a series of different outcomes that, in the existing legal order, make it unlikely that local courts be attractive for investors.

In conclusion, BITs' arbitration clauses provide for arbitration at the international level bypassing potentially biased domestic courts. In absence of specific provisions in BITs, arbitration rules do not require domestic remedies to be exhausted, thus denying the host State a chance to review under domestic law, any alleged breach of the BIT. Considering that proceedings before domestic courts would have a "disclosure effect", the absence of the requirement of exhaustion of remedies in arbitration has itself general negative implications on human rights, especially when arbitration proceedings are relating to substantial public interest issues (*i.e.* water, sanitation, environment, health): in fact, the secrecy in which arbitral proceedings are held, jeopardizes the right of a democratically based judicial system involving public welfare to scrutiny, access and accountability. Domestic judicial review of public interests issues would therefore be desirable.

In *Solange I* and *II*, the legal issue before the German court was the constitutionality of the ultimate authority of the ECJ to review the interpretation of European Law (under the mandate of the European Community Treaty). In the first decision in 1974, the German court established its power to retain jurisdiction over constitutional rights, and refused to alter the basic structure of its Constitution, *so long as* (*so lange*) the European Community integration lacked a

catalogue of fundamental human rights.[811] As the integration process progressed though, European Community Law evolved as to guarantee the safeguard of fundamental rights: in this new perspective, in the *Solange II* decision the German court renounced to the role of monitoring the protection of fundamental rights to entrust the European Union.[812]

An argument, by analogy, that domestic courts should retain jurisdiction over BITs interpretation, "so long as…" the investment arbitration system cannot guarantee compliance of BITs with fundamental rights, would be flawed due to the peculiar structure of the European Union system and delegation of powers by Member States, which is alien to the investment arbitration system. However, the *Solange I* and *II* decisions offer a good spark to appreciate the relevancy of thinking in terms of human rights protection mechanisms and guarantees, to ensure that fundamental rights are adequately honored in compliance with the host State's constitutional provisions.

Is there a compromise solution?

F. Refusal of Enforcement and Annulment Procedures of an Investment Arbitral Award

1. *The Refusal of Enforcement of Specific Assets under Article 54(1) and (3) ICSID*

Instead of thinking in terms of a hybrid body competent to hear these disputes or of multiple levels of review, a possible course of actions to re-establish the balance in dealing with the disputes at issue is using the enforcement stage as an opportunity to review the award on grounds of violation of *ordre public* (public order) of the host State. In fact, human rights violations of the inhabitants of a State have been consistently recognized as an issue of public order.[813]

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[811] *Solange I*, CMLR 540, BVerfGE, 1974, at para. 37.
[812] *Kälin refers to BverfGE*, 2 BvQ 3/89, officially unpublished Judgment of 12 May 1989.
[813] MCDOUGAL, M. S., *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, The Virginia Journal of International Law, No. 3, Vol. 14, Spring 1974 at 387 *et seq.*; MCDOUGAL, M. S.; LASSWELL, H. D. & CHEN, L.-C., *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, The American Journal of International

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (the New York Convention), is the most important international treaty concluded in the field of international arbitration, with international force, and has proved its success over a half-century use. The text allows a party seeking the enforcement of an arbitral award, to do so supplying a domestic court with a) the arbitral award and b) the arbitration agreement.[814] The party against whom the enforcement is sought can oppose the enforcement by providing evidence that one of the grounds listed under Article V(1) of the New York Convention is fulfilled.[815] Paragraph 2 of the same Article provides for the possibility that the domestic court where enforcement is sought, on its own motion, denies enforcement on grounds of violation of public policy. Article V(2)(b) of the New York Convention provides:

> *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought*

Law Vol. 63, No. 2, April 1969 at 237-269. The meaning of 'public policy' in this context was further elaborated upon by for example, the ILA Committee on International Commercial Arbitration, which defined it as follows in its Resolution 2/2002: "*1.1(d) The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules" and (iii) the duty of the State to respect its obligations towards other States or international organisations.*" (Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, International Law Association (ILA), New Delhi Conference, 2002).

[814] Article IV of the 1958 UN New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[815] Article V(1) of the 1958 New York Convention provides for the following grounds of refusal of recognition and enforcement: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

> *finds that:… (b) The recognition or enforcement of the award would be contrary to the public policy of that country.*[816]

However, Article 1 of the New York Convention, defining the scope of applicability of the Convention, specifies that the text only applies "to the recognition and enforcement of arbitral awards… arising out of differences between persons, whether physical or legal",[817] and it is therefore applicable only to commercial arbitrations, as opposed to investment arbitration between persons, physical or legal, and a sovereign State. If, on the one hand, such a provision may trigger mass refusals of enforcement, on the other hand the praxis shows that most jurisdictions interpret the public policy exception narrowly.[818]

The "public policy" exception to enforcement under the New York Convention does not have an explicit corresponding provision in ICSID, the instrument that by definition regulates investor-State arbitration. However, for certain specific assets targeted in the country where enforcement of the award is sought, Article 54(1) ICSID might bring about the same result as that set forth in the New York Convention.

The common perception is that no resistance can be opposed to the enforcement of ICSID arbitral awards. However, digging through the drafting history of the Convention, it emerges that after a preliminary draft referring to enforcement as if

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[816] Article V(2)(b) of the New York Convention.
[817] Article I of the New York Convention.
[818] Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, ILA, New Delhi Conference, 2002. *See also* PAULSSON, J., *El Orden Público como Criterio para Negar el Reconocimiento y la Ejecución de Laudos Arbitrales,* in "El Arbitraje Comercial Internacional, Estudio de la Convención de Nueva York con motivo de su 50º Aniversario", G.S. Tawil and E. Zuleta (Eds.), 2008 at 609; OSTROWSKI, S. & SHANY, Y., *Chromalloy: United States Law and International Arbitration at the Crossrads*, 73 New York University Law Review, 1998 at 1657-1658. For jurisdictions interpreting the public policy exception narrowly: United States, 508 F.2D 2nd Cir. 969, 1974; United Kingdom: REDFERN, A., & HUNTER, M., "Law and Practice of International Commercial Arbitration", 4th Ed., Sweet and Maxwell, 2004 at 542; New Zeland: KAWHARU, A., *The Public Policy Ground for Setting Aside Arbitral Awards: Comments on New Zealand Approach*", Journal of International Arbitration 24(5), 2007 at 492. Jurisdictions interpreting broadly the public policy exception under the New York Convention: Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Journal of International Arbitration 25 (6), 2008 at 787; Federal Arbitrazh Court of the Urals Circuit, Case No. 09-211-/05-C6, 12 October 2005; Federal Arbitrazh Court of the East Siberian Circuit, Case No. A58-2103/05, 16 October 2006.

the award were a final judgment of the local courts,[819] a hot debate emerged between the delegates to the ICSID Treaty negotiations supporting[820] the possibility to review ICSID award by domestic courts, and those opposing[821] it, to rather defend the idea of the Convention's self-contained regime of review.[822] Particularly, there were voices supporting the possibility to deny enforcement on the same grounds provided by the New York Convention,[823] or at least on the grounds of a conflict with the *ordre public* of the forum of enforcement.[824]

The subsequent draft not only reiterated the wording of the final judgment of the courts of the enforcing State, but added a sentence to the effect that no review, other than verification of the award's authenticity, would be allowed.[825] This generated further debates on the desirability to inspire the ICSID system to that of the New York Convention,[826] or the preservation of the right to refuse enforcement based on public policy grounds.[827] In this draft, a compromise proposal was put forward to allow refusal to enforce an award on grounds of public policy in third States, but not for contracting States and for the State whose nationals were party to the proceedings.[828] This proposal survived two drafts,[829] but eventually was defeated in a vote.[830]

The revised draft maintained the wording of the final judgment of a court of the enforcing State.[831] The German delegate insisted, in vain, on a mechanism of review based upon the *ordre public* exception of the enforcement forum,[832] but was

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[819] History of ICSID Negotiations (herein after: *History*), Vol. I, 1958 at 426.
[820] *See* BROCHES, A., *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev. - FILJ, 1987 at 308, 314. A number of delegates wanted to keep open the possibility of review under domestic law (*See* History, Vol. II, at 346, 426, 427, 466, 575).
[821] *See* History, Vol. II, at 42-427, 430, 522, 575.
[822] *Ibid*.
[823] History, Vol. II, at 425-426, 429, 521.
[824] *Ibid.*, at 345-347, 427, 521, 575.
[825] History, Vol. I, at 248, 252.
[826] History, Vol. II, at 671, 887-888, 894-895.
[827] *Ibid.*, at 661, 699, 888-891, 893, 895, 901-903.
[828] *Ibid.*, at 658, 671, 889, 893, 900-901, 903.
[829] *Ibid.*, at 885, 900.
[830] *Ibid.*, at 903.
[831] History, Vol. I, at 248.
[832] History, Vol. II, at 989, 991-992, 1018.

strongly opposed by other executive directors and the chair, Mr. Broches.[833] Eventually, the final wording of Article 54(1) of the Convention that compromised the different views, limited the enforcement obligation of domestic courts to "pecuniary obligations".[834]

Prof. Schreuer observed:

> *The Convention's drafting history shows that domestic authorities charged with recognition and enforcement have no discretion to review the award once its authenticity has been established. Not even the* ordre public *(public policy) of the forum may furnish a ground for refusal. The finality of awards would also exclude any examination of their compliance with international public policy or international law in general*.[835]

Article 53 ICSID provides that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention".[836] Article 54, in turn, provides that an award rendered under ICSID Rules should be recognized binding by each contracting State and that the State should "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State".[837] As far as the enforcement of pecuniary obligations is concerned, "[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought".[838] If on the one hand the reading of Article 53(1) and 54(1) of the ICSID Convention set forth a stand-alone and simplified system for recognition and enforcement of ICSID awards, on the other hand it does not provide a similar safeguard for execution of final awards against specific assets of the losing party. In the latter case, the national law of the country where enforcement is sought will apply.

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[833] *Ibid.*, at 989-991.
[834] *Ibid.*, at 990, 991, 1018.
[835] *Ibid.*, at 315 (citation omitted). *See also* SCHREUER, C. H., "The ICSID Convention: A Commentary", 2001 at 1118, paraphrasing *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*, Cour de Cassation, 11 June 1991, 2 ICSID Rep. 341, 1991.
[836] Article 53 ICSID.
[837] Article 54(1) ICSID further specifies that "*A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state*".
[838] Article 54(3) ICSID: "*Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought*".

It seems to be accepted, also according to the Convention drafting history, that a contracting State would certainly honor an ICSID award, without the need for further litigation.[839] In the face of this allegedly water-shed system, the little available case law belies its apparent strength. The judicial decisions rendered on the basis of Article 54(3) CSID are limited, but less than fully consistent with the alleged robust state of the art. To the author's knowledge, only four decisions exist relating to the judicial enforcement of ICSID awards: *Benvenuti & Bonfant v. Congo*,[840] *SOABI v. Senegal*,[841] *LETCO v. Liberia*,[842] and AIG *Capital Partners v. Kazakhstan*.[843]

In *Benvenuti & Bonfant v. Congo*,[844] the *Tribunal de grande instance* of Paris issued an *exequatur*[845] in favor of a claimant seeking enforcement of an ICSID award against Congo, including the following formula: "No measure of execution, or even a conservatory measure shall be taken pursuant to the said award, on any assets located in France, without the prior authorization of this Court". The claimant

[839] BROCHES, A., *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev. – FILJ, 1987 at 303, 305.
[840] *SARL Benvenuti & Bonfant v. People's Republic of the Congo* (Case No. ARB/77/2), Award of 8 August 1980, 1 ICSID Rep. 330, 1993. On 23 December 1980, the *Tribunal de grande instance* of Paris denied enforcement and execution of the award. The decision is not published, but its relevant parts are found at 1 ICSID Rep. at 370, 108 "Journal du Droit International" at 843. That same court confirmed its earlier decision on 13 January 1981. *See* 1 ICSID Rep. at 369; 108 "Journal du Droit International" at 365-66. The claimant successfully appealed to the *Cour d'appel* of Paris on 26 June 1981. *See* 1 ICSID Rep. 371; 108 "Journal du Droit International" at 843, 845.
[841] *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal* (Case No. ARB/82/1), Award of 25 February 1988, 6 ICSID Rev. - FILJ 125, 1991; 2 ICSID Rep. 114, 1994. The decision of the *Tribunal de grande instance* was not published. The *Cour d'appel* of Paris rendered its decision on 5 December 1989 and reports of that decision can be found at 2 ICSID Rep. 337, 117 "Journal du Droit International" at 141 (the English translations should be treated with caution). The decision of the *Cour de cassation* was issued on 11 June 1991 and is reported at 6 ICSID Rev. - FILJ 598, 1991; 2 ICSID Rep. 341, 118 "Journal du Droit International" at 1005.
[842] *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia* (Case No. ARB/83/2), Award of 31 March 1986, 2 ICSID Rep. 346. Three U.S. District Court decisions were published in the *LETCO* enforcement proceedings: a decision in the U.S. District Court for the Southern District of New York on 5 September 1986, 2 ICSID Rev. - FILJ 187, 1987; 2 ICSID Rep. 384, 1994; a second decision in the U.S. District Court for the Southern District of New York on 12 December 1986, 650 F. Supp. 73 (S.D.N.Y. 1986), 2 ICSID Rep. 385, 2 ICSID Rev. - FILJ 188; and a decision in the U.S. District Court for the District of Columbia on 16 April 1987, 659 F. Supp. 606 (D.D.C. 1987), 2 ICSID Rep. 391, 3 ICSID Rev. - FILJ 161.
[843] *AIG Capital Partners Inc. and another v. Republic of Kazakhstan*, UK Royal Court of Justice, 2005 EWHC Comm. 2239, 20 October 2005, available at www.bailii.org/ew/cases/EWHC/Comm/2005/2239.html, last accessed on 22 January 2014.
[844] *SARL Benvenuti & Bonfant v. People's Republic of the Congo*, Award of 8 August 1980.
[845] An *exequatur* is a legal document issued by a sovereign authority allowing a right to be enforced in the authority's domain of competence.

requested that the Court review the condition, but it refused, maintaining that the initial stage of the enforcement does not allow to differentiate between assets that Congo used for sovereign or commercial purposes. In expressing this position, the Court further observed that the ICISD award "does not contain anything that is in conflict with law and public order [*aux lois et à l'ordre public*]".[846] Therefore, the lower court used a public policy standard to assess the enforcement of the award. After the claimant appealed the limiting condition of the *exequatur*, the *Cour d'appel* of Paris upheld the claimant's request on the basis that ICSID established a simplified enforcement procedure, independent from domestic law. As a result, the *Cour d'appel* held that, in determining whether *exequatur* should be granted, the lower court was allowed to base its decision only on the authenticity of the award. The appellate court, however, did not address the statement about *ordre public* made by the lower court decision.[847] When the claimant ultimately sought to attach the funds of a Congolese bank to enforce the award, the French courts prevented him from doing so, based on the fact that the Congolese bank was a separate entity whose funds could not be used to satisfy an award against Congo. Therefore, in assessing whether the execution of particular assets in France can be used to satisfy an award, French courts ultimately applied domestic law as required by ICSID Articles 54(3) and 55.

The *SOABI v. Senegal* case[848] had a similar development. The Paris court of first instance issued an *exequatur* against Senegal with respect to an ICSID award. However, the appellate court vacated the order on the basis that ICSID arbitration does not amount to a waiver of sovereign immunity when it comes to execution of final awards against specific sovereign assets. The appellate court further specified that immunity would protect Senegalese assets as long as they were not connected to commercial activities (*de jure gestionis*), as opposed to sovereign activities (*de jure imperii*). Given that the claimant could not show that the assets were connected to a commercial activity, they remained protected by sovereign

[846] Translation of BROCHES, A., *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REV. - FILJ at 318-319, No. 156, 1987.
[847] *Ibid.*, at 320.
[848] *SOABI v. Senegal*, Award of 25 February 1988.

immunity, because a decision to the contrary would have infringed the *ordre public* of immunity. Therefore, just like in the first French decision, *ordre public* principles came into play in the court's assessment. On appeal, the *Cour de cassation* distinguished between enforcement and execution and held that execution of particular assets within the French system is regulated by domestic law.

U.S. courts in *LETCO v. Liberia*[849] also recognized the differentiation between enforcement and execution. In this case, the investor sought to enforce the award in the New York Federal District Court for the Southern District. The enforcement order was declined on sovereign immunity grounds for what concerned the execution against fees and taxes payable to Liberia. A later attempt to execute the order against bank accounts in the District of Columbia was also denied on the basis of diplomatic and sovereign immunity.

Finally, in the more recent case *AIG v. Kazakhstan*,[850] the investor attempted to execute the ICISD award obtained in its favor against cash and securities located in London, and owned by the National Bank of Kazakhstan (NBK).[851] NBK intervened in the proceedings claiming the assets' immunity from enforcement on the basis of the English State Immunity Act. Invoking Article 55 ICISD,[852] the English court applied the English State Immunity Act and declared the bank's assets immune from execution.[853]

This brief overview on ICSID awards execution under Article 54(3) ICSID shows that the contracting States' domestic courts have not fully consented to a deferential role of the ICSID enforcement procedure. In fact, in the available "cracks" of the system, where domestic courts are allowed to play a role in the

[849] *Liberian Eastern Timber Corporation (LETCO) v. Republic of Liberia*, Award of 31 March 1986.
[850] *AIG Capital Partners Inc. and another v. Republic of Kazakhstan*, UK Royal Court of Justice, 2005 EWHC Comm. 2239, 20 October 2005, available at: www.bailii.org/ew/cases/EWHC/Comm/2005/2239.html, last accessed on 10 January 2014.
[851] *Ibid.*, at para. 1.
[852] Article 55 ICSID: "*Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution*".
[853] *AIG Capital Partners Inc. and another v. Republic of Kazakhstan*, UK Royal Court of Justice, 2005 EWHC Comm. 2239, 20 October 2005, at para. 95.

execution of particular assets, they have demonstrated to straightly resort to national law.

These cases show that despite the apparent strength of the system, domestic courts based their enforcement and execution decisions on national and international public policy, therefore making judicial enforcement of ICSID awards in France, United States or elsewhere not simple and unchallengeable.

a) The Challenge of Commercial Arbitral Awards

In the field of commercial arbitration there are a few successful examples of reversal of awards by host States' domestic courts, through procedures that technically disallowed an appeal of the award. For example, in *Jose Cartellone Construcciones Civiles, S.A. v. Hidroelectrica Norpatagonica S.A. o Hidronor S.A.*, the Argentine Supreme Court of Justice upheld the respondent's request of modification of the arbitral award on grounds of public policy.[854] In the case at issue, the claimant was successfully awarded damages plus interest in an arbitration against the respondent. In an attempt to enforce the arbitral award in Argentina, the country of the respondent company (which was then State-owned), the respondent challenged the award, but the claimant argued that the parties agree that the award would not be subject to appeal.[855] After an Argentine lower court upheld the claimant's argument opposing the review of the award, the Supreme Court found that certain parts of the award concerning the calculation of interest accrual conflicted with the terms of the arbitration agreement. Particular, and much more significant than the outcome of the case under consideration, the Argentine Supreme Court ruled that agreements to limit the review of arbitral awards by Argentine domestic courts do not prevent the Supreme Court from finding that such awards contravene *ordre public*. The Supreme Court's *ratio* at the basis of its decision is the fact that parties cannot limit appellate review of arbitral award by agreement, because the public interest overrides parties' autonomy:

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[854] *José Cartellone Construcciones Civiles S.A. v. Hidroeléctrica Norpatagónica S.A. o Hidronor S.A.* (hereinafter *José Cartellone*), Corte Sup. Argentina, published on 1 June 2004, JA 2004-III-48.
[855] *Ibid.*, at paras. 14, 17, 19 *et seq.*

> *Article 872 [of the Argentina Civil Code] prohibits that parties can wave rights granted for the purpose of safeguarding the public interest, which justifies the narrow interpretation that this court is applying*.[856]

More recently, in the Slovak Republic, the Constitutional Court ruled that an arbitral award may be subject to constitutional review in case of breach of fundamental rights, namely: "the fundamental right to property under Article 20(1) of the Constitution of the Slovak Republic, the fundamental right to judicial and other legal protection under Article 46(1) of the Constitution of the Slovak Republic, the right to a fair trial under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and the right to property under Article 1 of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms".[857] The underlying award was rendered by the Court of Arbitration of the Slovak Chamber of Commerce.[858] *Per se*, the decision leaves room for praxis to evolve in terms of undermining the principle of finality and limited review of arbitral awards, by creating an appeal venue for the losing party, in domestic courts.

The Slovak Constitutional Court is modeled after the German Federal Constitutional Court and, besides having jurisdiction on the constitutionality of Slovak legislation, it retains the powers to review those cases where private individuals claim that a Slovak public authority has breached their fundamental constitutional rights. It seemed to be generally accepted, before the decision at issue, that the Constitutional Court did not, however, have authority to review or set aside arbitral awards. In fact, modelled after the 1985 UNCITRAL Model Law, Section 40 of the Slovak Arbitration Act lists only limited grounds for domestic

[856] *Ibid.*, at paras. 13.
[857] Slovak Constitutional Court, Case No. III US 162/2011-34. Available at: http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=393604, last accessed on 6 April 2014.
[858] Court of Arbitration of the Slovak Chamber of Commerce, Big Krtis, sp. spots. VK 507/2010 of 2 November 2010 (confidential).

courts to set aside arbitral awards,[859] which do not include mistake in law, failure to provide reasons, or the *ordre public* exception.

The case at issue is one where a claimant lent a sum of money to three individual borrowers who were jointly and severally liable. On the borrowers' default, the claimant resorted to the arbitral institution indicated in the loan agreement and obtained an arbitral award against two of the borrowers. The claimant then sought a decision also against the third borrower, before the same arbitral institution. This time, however, the arbitral tribunal dismissed the claim based on the fact that the claimant should have brought the claim against all three jointly and severally liable borrowers at the same time. Under Slovak law, however, a creditor is allowed to sue his or her jointly and severally liable creditors also individually, for the whole amount. Since the creditor did not have any ground for challenge left under the Slovak Arbitration Act, he resorted to the Constitutional Court, claiming that the second award infringed on his constitutional right to a fair trial, legal protection and right to property.

The Slovak Constitutional Court first noted that it was the first case where it was called to assess the legality and constitutionality of an award issued by a private arbitral institution. After recalling that, according to the Slovak Arbitration Act, the grounds for domestic courts to interfere with an arbitral award should be kept to a minimum and interpreted narrowly, the Court observed that there are nonetheless principle of justice, legality and constitutionality enshrined in the Slovak Constitution and the ECHR, which must be protected. Particularly, argued the Court, the second award was clearly rendered based on a mistake of law, and did not provide any reasons for the conclusion reached. Given the absence of any

[859] The grounds of Section 40 of the 2002 Slovak Arbitration Act are: a) award issued in a matter outside the jurisdiction of the arbitral tribunal; b) the award was issued on a *res iudicata* matter; c) invalidity of the arbitration clause or agreement; d) award issued on a matter outside the scope of the arbitration agreement, if the objection was raised by a party during the arbitral proceedings; e) lack of counsel of a party in matters where Slovak law requires one; f) challenged arbitration took anyway part in rendering the award; g) breach of the principle of equality of parties; h) a renewal of proceedings in the same matter could be requested under conditions of the Code of Civil Procedure for proceedings at general courts; i) the arbitration award was influenced by a criminal act of an arbitrator, party or expert; l) the laws regulating consumer protection have been violated in deciding of the dispute.

other remedy to be exercised by the creditor to restore the injustice caused by the system, the Constitutional Court ruled that, by analogy, its power to set aside unconstitutional state court decisions should also apply to arbitral awards issued by private institutions. As a result, the award was set aside, and the arbitral institution was ordered to hear the case again.

Going against the limited two procedural grounds set forth in the Arbitration Act to challenge an award, the equal treatment of the parties and the opportunity to present their case, the Constitutional Court has created a potential additional venue for the challenge of arbitral awards in the Slovak system. In fact, the decision has now introduced in the legal system the stricter test of the right to a fair trial, which, as developed by the ECtHR and the Slovak Constitutional Court, includes also an obligation, by the adjudicators, to provide sufficient reasoning in rendering a decision. Another important potential implication is that, under Slovak law, locally rendered arbitral awards are treated as domestic, even if they are international in character (*i.e.* an international bank providing financing to a Slovak debtor). The decision in the case at issue might, therefore, also affect international disputes, if they find their way through the Slovak judicial system due to the existence of a foreign element.

Although the resort to domestic review of awards in Slovakia, and the modification of the award in *Jose Cartellone* ensued from commercial arbitration as opposed to investor-State arbitration, it is not unreasonable to envisage that domestic courts--where enforcement is sought--may read a "public policy exception" into the ICSID Convention, or, in the alternative, that host State manage to delay enforcement of an award violating the rights of its population, raising such exception before domestic courts.[860] The host State could resort to its own domestic courts, which might be sympathetic with its reasons to seeking annulment, regardless the terms of the ICSID Convention. Even if the invalidation

[860] BALDWIN, E.; KANTOR, M., & NOLAN, M., *Limits to Enforcement of ICSID Awards*, 23 J. Intl. Arb., 2006 at 9 *et seq.*; BEATENS, FREYA, *Enforcement of Arbitral Awards: 'To ICSID or not to ICSID' is Not the Question*, in "The Future of ICSID", Todd Weiler, Ian Laird (Eds.), Juris Arbitration Series, Martinus Nijhoff Publishers, 2013 – forthcoming.

of the award in a host State may not prevent its enforcement somewhere else, such a decision could negatively affect the chances of the winning party to enforce the award.

Article 54(1) ICSID, requiring member States to the Convention to "recognize an award rendered pursuant to this Convention as binding… as if it were a final judgment of a court in that State",[861] can be read as a bridge to reject enforcement or to allow a review of the award, if the domestic legal system so foresees. This way, the host State could use its domestic courts to reject enforcement of an award, on the basis of its failure to meet certain requirement for enforcement (*i.e.* breach of the State's fundamental rights). A very sensitive example of the potentials of the argument is the 2006 then-Argentine Ministry of Economy's statement that the awards in the numerous arbitral proceedings pending against Argentina in the aftermath of the financial crisis, would still be subject to domestic judicial review if they "disturb public order because they are unconstitutional, illegal or unreasonable or if they were handed down in violation of the terms and conditions undertaken by the parties".[862]

2. *Annulment*

Article 52 of ICSID sets forth the cases where the annulment of an award is admissible, but none of them contemplates a "public policy exception".[863]

The evolution of ICSID annulment decisions, especially for what concerns, most recently, the development of some of the then pending investment arbitrations against Argentina, shows a trend of broader interpretation of the grounds for annulment. This such broad interpretation has led some ICSID *ad hoc* committees to review investment awards almost giving the losing party "a second chance" on

[861] Article 54(1) ICSID.

[862] *Argentina Economy: Ministry Denies Foreign Investors Discrimination*, EIU ViewsWire, 26 October 2004. *See also* ROSATTI, H., *Los tratados bilaterales de inversion, el arbitraje internacional obligatorio y el Sistema constitucional argentino*, La Ley, 15 October 2003.

[863] Article 52 ICSID provides for the possibility of annulment of an award in case: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

substantive issues. Critics have been harsh. The following paragraphs will attempt to put forward some constructive thoughts on this development.

Prof. Schreuer has identified three generations of ICSID annulment proceedings.[864] The first generation of annulment decisions (1985-1986) related to awards invalidated because the arbitral tribunals manifestly exceeded their powers.[865] From 1989 to 1992, given the severe criticisms of the two annulment decisions of first generation, which were seen as improperly crossing the line between annulment and appeal,[866] the ICSID *ad hoc* committees were more cautious (second generation). The third generation of annulment decisions (2002-2009)[867] is known for its more balanced approach. The *ad hoc* committees issuing the decisions made clear that an annulment process is not aimed at providing the loosing respondent with a second chance through a full right of appeal; rather, it is a minimum tool to provide the proper safeguard to preserve the legitimacy of the system. Nair and Ludwig have built on Schreuer's three generations, to investigate whether there are traits ascribable to a fourth generation,[868] especially in light of the four annulment decisions issued between 2009 and 2011.[869] The fourth generation of

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[864] SCHREUER, C., *Three Generations of ICSID Annulment Proceedings*, in "Annulment of ICSID Awards". E. Gaillard and Y. Banifatemi (Eds.), Juris Publishing Huntington, 2004. *See also* BINDER, C.; KRIEBAUM, U.; REINISCH, A.; & WITTICH, S. (Eds.), "International Investment Law for the 21st Century: Essays in Honour of Christopher Schreuer", Oxford Scholarship, September 2009.

[865] *Ibid.*, at 25 *et seq. See Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon* (ICSID Case No ARB/81/2); *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1).

[866] DELAUME, G. R., *The Finality of Arbitration Involving States: Recent Developments*, 5 Arb. Int'l, 1989 at 21, 32; FELDMAN, M. B., *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID Rev. - Foreign Inv. L.J., 1987 at 85; GAILLARD, E., *Note*, 25 I.L.M., 1986 at 1439-40; GAILLARD, E., *Centre international pour le réglement des différends relatifs aux investissements (C.I.R.D.I.) – Chronique des sentences arbitrales*, 114 Journal du Droit International (J.D.I.), 1987 at 135, 184 *et seq.*; at 101 *et seq.*; MUCHLINSKI, T., *Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes* in "Control over Compliance with International Law", William E. Butler (Ed.), 1991 at 175, 188; PAULSSON, J., *ICSID's Achievements and Prospects*, 6 ICSID Rev. - Foreign Inv. L.J., 1991 at 380, 388 *et seq.*; REISMAN, M. W., *The Breakdown of the Control Mechanism in ICSID Arbitration*, Duke L.J., 1989 at 739.

[867] *Wena Hotels Limited v. Arab Republic of Egypt*; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina*; *CMS Gas Transmission Company v. Republic of Argentina.*

[868] NAIR, P. & LUDWIG, C., *ICSID Annulment Awards: The Fourth Generation?*, Lexology, 18 February 2011.

[869] *Sempra Energy International v. Republic of Argentina*, Decision on Annulment of 29 June 2010; *Enron Creditors Recovery Corporation* (formerly Enron Corporation) *and Ponderosa Assets, L.P. v. Republic of Argentina*, Decision on Annulment of 30 July 2010; *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision on Annulment of 14 June 2010; *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Republic of Argentina*, Decision on Annulment of 20 August 2007.

annulment decisions seems to deviate again from the balance that was established during the second and third generations.

The *Sempra v. Argentina*[870] and *Enron v. Argentina*[871] *ad hoc* committees ruled in favor of an annulment on the basis that the arbitral tribunals did not operate a proper application of the customary international law defense of "necessity" raised by the Republic of Argentina. Like several arbitrations brought against the Government of Argentina in the aftermath of the crisis, the two cases at issue ensued from emergency measures adopted by Argentina to deal with the 2001 financial clash. The investors deemed the emergency measures violating the terms of the BIT concluded with the host State. In turn, Argentina argued that such measures were legitimate under Article 11 of the BIT, which empower States to take "measure 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".[872] Given the absence of a definition or the identification of the conditions for the State to raise a necessity defense under the BIT, the arbitral tribunals resorted to customary international law to assess whether Argentina was justified in raising such a defense. In both cases, the arbitrators found that the host State failed to establish a right to invoke the necessity defense, and held Argentina responsible for violations of the terms of the BIT.

Particularly, in *Sempra v. Argentina*, the Arbitral Tribunal equated Article 11 of the BIT to the customary law definition of, and conditions for, the invocation of necessity. Conversely, the *ad hoc* committee that ruled on the request for annulment found that the BIT contains a "stand-alone" and broader criteria to invoke a necessity, compared to that set forth by customary international law. The committee determined that the *Sempra* Tribunal did not commit an error of law, which would not qualify as a ground for annulment. Rather, it was a "failure to

[870] *Sempra Energy International v. Republic of Argentina*, Decision on Annulment of 29 June 2010, at paras. 159 *et seq.*
[871] *Enron Creditors Recovery Corporation* (formerly Enron Corporation) *and Ponderosa Assets, L.P. v. Republic of Argentina*, Decision on Annulment of 30 July 2010, at paras. 355 *et seq.*
[872] Article 11 US-Argentina BIT.

apply the applicable law", which the committee deemed serious enough to constitute a "manifest excess" of the arbitral tribunal's powers.

The *Enron ad hoc* committee, while it condoned the *Enron* Tribunal's assimilation of Article 11 BIT to the customary international law necessity defense, it found that the Arbitral Tribunal had failed to address a number of essential legal elements of the necessity defense under customary law. To make an example, the arbitrators ruled that Argentina had the burden to prove that the emergency measures adopted to counter the crisis were the only available. The Tribunal's reasoning was based on an expert opinion pointing out that Argentina had several alternative policy options to reach the same result. The *ad hoc* committee in the annulment proceedings took the view that the Tribunal had dealt with the issue in a superficial manner, and that it should have assessed whether the alternatives put forward by the expert were, in fact, viable. The Tribunal's failure to grapple with such issues amounted too, in the view of the committee, to a manifest excess of powers.

These two rulings, issued both in 2010, showed that the arbitral tribunals in the cases under consideration made serious faults, consisting in failing to properly apply customary international law tests, and to address a number of essential legal elements under customary international law.

In *Helnan v. Egypt*,[873] the *ad hoc* committee made a substantive assessment on the applicable principles, and found that the Arbitral Tribunal had failed to properly apply the rule on exhaustion of local remedies. Particularly, the Arbitral Tribunal stated that Helnan, the investor, was required to exhaust local remedies before being able to resort to ICSID arbitration.[874] The *ad hoc* committee established for the annulment proceedings, found that through its position on the exhaustion of local remedies, the Arbitral Tribunal manifestly exceeded its powers in disregarding the requirements set forth in Article 9 of the BIT, and Article 26

[873] *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision on Annulment of 14 June 2010, at para. 73.
[874] *Helnan International Hotels A/S v. Arab Republic of* Egypt, Award of 3 July 2008, at paras. 148-149, 162.

ICSID.[875] Eventually, the decision annulled the award only partially, in the part where the Arbitral Tribunal, "while disclaiming a requirement of exhaustion of local remedies before ICSID arbitral recourse may be implemented, nevertheless accepts that challenge by Helnan of the decision to terminate its Management Contract in competent Egyptian administrative courts was required in order to demonstrate the substantive validity of its claims".[876] While the opinion of the Arbitral Tribunal on the exhaustion of local remedies was subject to disagreement, it is questionable whether its decision was so patently unjustifiable as to amount to a "manifest excess of its powers", as observed by the *ad hoc* committee. It has to be noted that the partial annulment of the award on the above described grounds was not dispositive on the merits of the controversy. In other words, the decision of the Arbitral Tribunal's on the merits still stands.

Finally, following the award in *Vivendi v. Argentina*,[877] the Republic of Argentina sought annulment on several grounds, including, but not limited to, the improper constitution of the Arbitral Tribunal, and a serious departure from a fundamental rule of procedure.[878] Particularly, one of the arbitrators, Gabrielle Kaufmann-Kohler, had failed to disclose to the parties that she was a member of the board of directors of one of the investor's shareholders. The *ad hoc* committee for the annulment proceedings severely criticized Kaufmann-Kohler's behavior for her failure to observe the rules on conflict disclosure, and stated that the "[t]ribunal

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[875] *Helnan International Hotels A/S v. Arab Republic of Egypt,* Decision on Annulment of 14 June 2010, at para. 55. Article 9(2) of the Denmark-Egypt BIT: "*If such dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of six months, investor shall be entitled to submit the case either to: (a) international arbitration of the International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965 (ICSID Convention), or (b) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or (c) arbitration under the Cairo Regional Centre for International Commercial Arbitration, or (d) Arbitration Rules of the International Chamber of Commerce (ICC)*"; Article 26 ICSID: "*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention*".

[876] *Ib Helnan International Hotels A/S v. Arab Republic of Egypt,* Decision on Annulment of 14 June 2010, at para. 73(1).

[877] *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Republic of Argentina*, Decision on Annulment of 10 August 2010.

[878] *Ibid.*, at para. 2.

was no longer properly constituted after the board appointment of Professor Kaufmann-Kohler, and that there was a serious departure from a fundamental rule of procedure" which "could lead to annulment whenever justified".[879] However, notwithstanding the *prima facie* existence of a ground for annulment, the committee did not annul the award, based on a finding that Kaufmann-Kohler had no actual knowledge of the connection between her employer and Vivendi, until after the award was issued.[880]

Even if the announcement by the then-Argentine Ministry of Economy did not become true in terms of domestic judicial review of ICSID awards, Argentina did get the annulment of two arbitral awards rendered in the aftermath of its crisis based on a fairly broad interpretation of the "manifest excess of powers" standard under Article 52 ICSID. According to the harshest critics, this broadly interpreted ground for annulment has been used by ICSID *ad hoc* committees as a *quasi* appeal tool to review awards in their substance.

The author does not completely disagree with the possibility of reviewing, to certain extent, the finding of an arbitral tribunal in an investment proceedings. There is no doubt that a full appellate system would undermine the speed and the finality of the award, which are the greatest incentives of pursuing arbitration. In the ICSID drafting history, the only reason adduced to exclude a review of the award, by the forum of enforcement, on public policy grounds, was the fact that granting the *ordre public* exception to all States, including the State which was party to the dispute, could have constituted a dangerous erosion of the binding character of the award.[881] If this was indeed the only reason dating back to 1966, the current system's trend of case law might well suggest that the time has come to make a poll in order to explore the desirability, in the XXI Century, for States to reserve some "discretion" in reviewing a final ICSID award, in case its provisions

[879] *Ibid.*, at para. 232.
[880] *Ibid.*, at para. 234.
[881] BROCHES, A., "Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law", Martinus Nijhoff Publishers (Eds.), 1995 at 237; *see also* History, Vol. II, at 424-431 & 899-904.

violate national and international *ordre public*, or in other words, fundamental rights of its population.

VII. Conclusion

Despite the fact that the signing of human rights treaties brings about great sovereignty costs, commentators have identified numerous positive spillovers in terms of attraction of foreign direct investments in developing countries. Particularly, the signaling that developing countries are ready to qualify as "good international citizens", "lock-in" liberal policies and give proof of their commitment to consolidate and abide by the rule of law, makes investors more comfortable to look for business opportunities in their territories.

This study aimed at investigating one of the two consequences that the signing of human rights treaties by developing countries might have on foreign investments: the anomalous case (emerged in recent years) that human rights provisions are invoked by sovereign States instead of investors, who were originally the only parties to benefit from the States' signing of international human rights treaties.

As shown in the overview over the existing case law, there are several instances where human rights provisions have been invoked by host States as a defense against investors. These cases relate to situations where, by blindly conforming to the obligations contracted under the BIT, host States would have endangered the rights of the population living under their jurisdiction.

The study has shown that the fear of His Excellency Judge Gilbert Guillaume, then-President of the International Court of Justice, about the threat of "fragmentation" of the international legal order, was not eventually grounded, at least not in the realm of human rights and investment law.

Some authoritative scholars have always been confident that fragmentation does not constitute a real threat. Particularly, Simma, recognizes that societal evolution could lead to fragmentation, but is confident that international actors will naturally conform their behavior to uphold the unity of the international legal order. Koskenniemmi, in turn, starts from the assumption that international law is not a legal system, but rather a blend of normative and political systems, and therefore a fragmentation confronted with the diversity of legal systems loses

relevance. The author ultimately claims that the threat itself is nothing more than an academic creature catalyzed by scholars to gain attention among their peers. Nobody has, in fact, suggested a systematic analysis or provided a pragmatic approach to demonstrate why, or why not, the thesis of fragmentation of the international legal order is to be believed.

The present analysis has attempted to do so, with a special focus on the two areas of international law subject of this study. Without ignoring the differences intrinsic to the two regimes for covering areas different in nature (*i.e.* economic activities as opposed to the inherent entitlement to certain protections), and protecting the interests of different subjects (*i.e.* foreign investors as opposed to all human beings), the conclusion has been reached through an analysis of the main shared conceptual grounds (or general principles of law) underlying the two regimes.

The principle of non-discrimination constitutes one of the main goals of a successful foreign investment, as well as of any public authority's measure taken towards the member of a collectivity. The shared goal is not the only aspect that the principle has in common under the two regimes. As put forward by Ortino, the analysis needs to be made through the lens of judicial interpretation,[882] which means, from a human rights perspective, through the assessment of international human rights courts; and from an investment perspective, through the assessment of the awards rendered by investment tribunals. The analysis on the application of the principle in the case law and jurisprudence of the different adjudicators has shown, for instance, that the concept of preferences has been interpreted by the Committee on Economic, Social and Cultural Right in the case of Vietnam, in the same way as in *Pope & Talbot* or *SD Myers v. Canada*. Particularly, the unreasonable promotion of children of war victims and decorated families in Vietnam is comparable to the preferential treatment accorded to local investor as opposed to foreign investors. The *ratio* underlying the impropriety of such approach, in both cases, was the subtraction of resources and opportunities from a

[882] ORTINO, F., "Basic Legal Instruments for the Liberalization of Trade: a Comparative Analysis of EC and WTO Law", Oxford: Hart Publishing, 2004 at 25.

certain category (*i.e.* the rest of the population or the foreign investors) to be unevenly distributed to the advantage of certain categories (*i.e.* the children of war victims or local investors).

Although the *Occidental* Tribunal based its finding on the wrong comparator, the Human Rights Test[883] applied to the investment case at issue brings about the same result reached by the investment Tribunal: particularly, the effect of the VAT measure had the result of favoring a local investor (Petroecuador) without a reasonable, objective and legitimate purpose. Therefore, the measure was discriminatory in nature, as held by the Arbitral Tribunal. A decision to the contrary would have had the effect of disproportionately favor the domestic investor as opposed to the foreign investors. In the same way, in *Methanex v. United States*, there was no finding of violation of the national treatment standard, as there was no differential treatment between American and Canadian investors. The California's ban, in fact, produced equal effect on both categories of investors, and since methanol and ethanol could not be considered "like products", differential treatment was admissible, therefore satisfying the Human Rights Test.

Furthermore, in both fields of law, "equality" or "non-differential treatment" imply an external criterion by reference to which the level of protection is determined and assessed, and differentiations are admissible if they are objective, reasonable and if their purpose is legitimate under the relevant instrument.[884]

Finally, thorough a comparison of the jurisprudential and case law tests developed in the relevant human rights and investment cases, it has been shown that the protection accorded by the principle of non-discrimination in the two realms of the law is also comparable, and it is carried out through the identification of a) the correct comparator against which to assess the measure at issue, b) the actual

[883] *Supra* Section III.C.1.a)(3).
[884] Human Rights Committee General Comment No. 18: *Non-Discrimination*, UN Doc. A/36/40, 10 November 1989, at para. 13. *See also Jacob and Jantina Hendrika van Oord v. The Netherlands,* Communication No. 658/1995, 4 November 1994 (CCPR/C/60/D/658/1995); and Belgian linguistics Case, 1EHRR 252, 1968; *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 of 10 April 2001, at paras. 73-104.

effect of the measure, and c) the existence of grounds that could legitimately justify the differential treatment.[885]

The interpretation of the due diligence principle has many aspects in common in the resolution of human rights and investment disputes. In cases such as *AAPL v. Sri Lanka*,[886] *Lauder v. Czech Republic*,[887] and others,[888] the principle identifies a positive obligation, borne by a well governed State, to apply due diligence to determine the "minimum international standard" to which an investment should be subject. Particularly, the obligation goes beyond a passive protection of the investor. It rather embraces the prevention of damage to investors' property, and the establishment of all legislative arrangements in order for the investor to be able to seek redress. The same positive obligation has been identified by the ECtHR in cases such as *Young, James and Wenster v. The United Kingdom*,[889] where the negligence of a State in implementing domestic legislation that violates fundamental rights within its territory, makes it responsible for such violations. Furthermore, investment tribunals such as the *AAPL v. Sri Lanka* Tribunal,[890] as well as international human rights courts such as the ECtHR in *W. v. The United Kingdom*,[891] have rejected the absolute liability standard in due diligence inquiries.

As far as the principle of proportionality is concerned, arbitral tribunals have expressly referred to the jurisprudence of the European Court of Human Rights in the interpretation and application of the principle.[892] As a result, a clear bridge has been laid between the two realms, whereby adjudicators in each one of them, in pursuing different interests relating to the nature of the respective discipline protected, make sure that a certain measure adopted by a State or public authority is reasonable and stands in a relationship of proportionality with respect to the

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[885] *Supra* Section III.C.1.a)(3).
[886] *AAPL v. Sri Lanka*, Award of 27 June 1990, at para. 639.
[887] *Ronald Lauder v. Czech Republic,* Award of 3 September 2001, at para. 292.
[888] *See also ELSI v. Italy*; *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award of 8 December 2000, 41 ILM 896, 2002; *Parkerings Compagniet A.S. v. Republic of Lithuania*, Award of 11 September 2007.
[889] *Young James and Webster v. The United Kingdom*, at para. 49.
[890] *AAPL v. Sri Lanka*, Award of 27 June 1990, at paras. 45-53.
[891] *W. v. The United Kingdom*.
[892] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, Award of 29 May 2003, at para. 122; *Azurix Corp. v. Republic of Argentina*, Award of 14 July 2006, at para. 312; *Ronald S. Lauder v. The Czech Republic*, Award of 3 September 2001, at para. 200.

interest that the measure seeks to protect, be it an expropriation (as in *Tecmed v. Mexico*, *Azurix v. Argentina* or *Lauder v. Czech*)[893] or a censorship measure (as in *Handyside v. The United Kingdom*).[894] Besides expropriation, the same reasoning has been applied by arbitral tribunals in Fair and Equitable Treatment inquiries.[895] In short, investment law has drawn from the human right interpretation of proportionality to disentangle complex investment inquiries, particularly to detect whether regulations implemented by host States are "legitimate" in terms of the burden imposed on the investment, compared to the public interest goal that the measure seeks to pursue.

Finally, for what concern procedural fairness, here again the bridge between human rights and investment law seems to be established. The *Mondev v. United States* Tribunal has expressly recalled the jurisprudence of the ECtHR on procedural fairness to determine the legitimacy of immunity for civil matters granted to a State agency.[896] In applying the standard of Article 6(1) of the ECHR, the Arbitral Tribunal found that no immunity was admissible.[897] Article 14 ICCPR constituted another bridge in *Loewen v. United States*, leading the Arbitral Tribunal to condemn as an "irreparable injustice" the advocacy of a party attorney who tried to bias the jury with arguments based on the nationality of the investor.[898] As far as the "right to be heard" is concerned, the ECtHR in *Perez v. France*,[899] and the *ad hoc* committee on annulment in the investment case *Helnan v. Egypt*,[900] observed that the parties were given an opportunity to put forward their arguments, and the adjudicator did actually hear such arguments and fully considered them.

The study has shown, through a systematic analysis of the core principles underlying the two disciplines, that the two systems are integrated. As put

[893] *Ibid*.
[894] *Handyside v. United Kingdom*, at paras. 48-49.
[895] *Total S.A. v. Republic of Argentina*, Award of 27 December 2010, at para. 123.
[896] *Mondev International Ltd. v. United States of America*, Award of 11 October 2001 at paras. 141 and 143.
[897] *Ibid*.
[898] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award of 26 June 2003, at para. 123.
[899] *Perez v. France*, at para. 80.
[900] *Helnan International Hotels A/S v. Arab Republic of Egypt*, Annulment Decision of 14 June 2014, at para. 38.

forward by the UNESC Report, it is not a mere question of what, among investment principles or human rights provisions, should prevail in the resolution of investment disputes. The body of human rights treaties does not necessarily, in its entirety, constitute customary international law in order to claim the automatic transposition into BITs. Also the general consensus that investment treaty arbitration negatively impacts on human rights, is questionable, and does not tackle the real issue. The public interest nature of BITs, and the contracts deriving from them, do not allow to consider them mere private contractual instruments.

A general statement as to the unification of international law does not help disentangle the issue if not analyzed in connection with the actual rights that are at stake in the disputes under consideration, and the way arbitral tribunals have made them interacting with BITs provisions.

As far as the right to water is concerned, an analysis of all available investment cases and decisions dealing with the issue has shown that investment arbitrators have become more and more aware, over time, that the right to water is a right, and its protection has to work its ways through the investment arena. As to a "right to water" defense, raised by a host State to justify its actions under the BIT, if it was difficult to imagine its success back in 2010, in connection with the *Aguas Argentinas* cases,[901] the recent decision in *SAUR International v. Argentine* sheds a new light on the topic.[902] Not only has the Arbitral Tribunal recognized the relevance of the right to water in the investment discourse, and labelled it as a "fundamental right".[903] The arbitrators went as far as to provide a structured reasoning, and outline a legal framework, to explain why human rights considerations in general, and the right to water in particular, should be taken into account in settling investment disputes. Starting from the identification of the position occupied by human rights in the Argentine legal system, the Tribunal

[901] *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Republic of Argentina*; *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Republic of Argentina*; *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Republic of Argentina*; *Anglian Water Group v. Republic of Argentina*.
[902] *SAUR International v. Republic of Argentina*.
[903] *Ibid.*, Decision on Liability of 6 June 2012, at paras. 330-331.

smoothly spelled out the meaning of the right to water for Argentina, for modern democracies in general, and for the citizens of a country. This *parcour* led the Tribunal to conclude that an investor providing a service of first necessity, such as water, stands in a position of "dependency" from the public administration responsible to guarantee that public service of first necessity.[904] Although the author claims that the issue does not revolve around chasing the prevailing right, the *SAUR* decision is a strong one, and represents one of the ways to resolve frictions in the interaction between fundamental rights and investment law.

Compared to the evolution of the right to water, the interaction of investment law with the right to peaceful assembly in investor-State disputes is blurrier. There are only a few cases that have indirectly dealt with the issue, and none of them has ever explicitly referred to the right of peaceful assembly of the citizens of the host State. Although the available arbitral decisions have all rejected investors' claims that the actions of the host States amounted to a breach of the Full Protection and Security clause, this was based on the failure of the investors to prove the breach. In other words, the acquiescence of arbitral tribunals to the actions of host States' citizens demonstrating against a certain investment, on the basis of investors' failure to prove a breach of the Full Protection and Security clause, cannot be considered a thoughtful reasoning on the interaction between the two fields of law. The discourse is still very premature, and arbitral tribunals have shown to strictly reason in terms of procedure and investment dogma: no evidence, no breach. This is not a positive sign of integration; however, it is also not a negative sign. If the international legal order is moving toward integration, rather than fragmentation, it is not to be excluded that a "jump", such as the one operated in the field of the "right to water", might be possible with regards to other fundamental rights that naturally emerge in investment disputes. Therefore, no negative score, but rather an incentive to follow the debate with a careful ear.

Finally, the cases relating to the rights of Indigenous peoples are multifaceted. They help to understand the multiple forms in which Indigenous peoples' rights

[904] *Ibid.*, at para. 331.

can emerge in investment disputes, whether they are violated in their quality of third parties affected by the investment; in their quality of investors; or as originating cause of the damage, when the State's actions put forward to protect Indigenous rights have somehow had the effect of hindering the investment.

In the first example, unfortunately, when it comes to Indigenous peoples playing the role of third interested parties intervening in the proceedings, for instance, through *amici curiae* briefs, the case law is harsh. The Tribunal in *Glamis Gold v. United States*[905] has not, by far, made any reference to the precious information provided by the Quechan Indian Nation with the goal of providing the Arbitral Tribunal with a better legal and social framework to assess the dispute. The fact that the Tribunal decided in favor of the host State, as opposed to the investor, is again no sign of a systematic discourse or awareness on the rights of Indigenous peoples and their relevance when it comes to investment expropriation of ancestral lands. The account is definitively negative if one thinks to the *Border Timbers v. Zimbabwe* case,[906] where the Arbitral Tribunal harshly struck an Indigenous peoples' *amicus* brief from entering the proceedings--and with it, the substantive arguments in favor of a resolution of the dispute that could take into account Indigenous peoples' rights.

In the second example, the Arbitral Tribunal's decision in *Grand River v. United States*[907] provided quite a narrow interpretation of the rights of an Indigenous individual, as opposed to those of the Indigenous collectivity. Indigenous rights have historically been conceived as pertaining to a collectivity, and this aspect has played against the Indigenous claimant in the arbitration at issue. However, the outcome of this award should not be read as a negative sign. The Tribunal has demonstrated to be opened in the interpretation of the interaction between Indigenous rights and BITs provisions, but decided to avoid revolutionary slopes

[905] *Glamis Gold Ltd. V. United States.*
[906] *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe.*
[907] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America.*

in reinventing the century-old collective construction of the nature of Indigenous peoples' rights.

In sum, there are only two cases, not decided on procedural grounds,[908] that can serve, to a certain extent, to interpret the state of the art on Indigenous peoples' rights in investment arbitration. Chronologically, there has been a positive evolution from the *Glamis* Tribunal, which condemned the investor, but did not make any reference to the substantive arguments raised in the *amicus* brief; and the *Grand River* Tribunal, which only partially welcomed the human rights arguments raised, due to the traditional interpretation on the collective nature of Indigenous rights claims.[909] The positive trend is, however, again put into question by the recent decision of the Arbitral Tribunal in *Border Timbers Limited et al. v. Republic of Zimbabwe*, to reject the *amicus* brief in support of Indigenous rights.

The addressing, totally or partially, or the failure to address, human rights issues when they are clearly at the core of investment disputes, depends very much on the tribunal responsible to assess such disputes. As shown in the analysis of the case law, although there seems to be, overall, a positive trend in taking into consideration human rights issues, the current system is far from being perfect. International investment arbitration is a powerful and effective tool to resolve investment disputes due to, *inter alia*, the speed and expertise of the proceedings. When the core issues deviate from traditional economic arguments, investment tribunals might not be the perfect fit. It has been shown that an *ex novo* mechanism would be too cumbersome from a bureaucratic perspective, and would probably open-up more issues than it would resolve; UN human rights monitoring bodies should be kept in the loop, but the non-binding nature of their instruments cast doubts on the actual contribution that they might provide to the debate; international human rights bodies and domestic courts would be perceived as biased against investors, as much as investment tribunal are against

[908] *Glamis Gold Ltd. V. United States*; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*.
[909] *See e.g.* CLINTON, R. N., *The Rights of Indigenous Peoples as Collective Group Rights*, in 32 Ariz. L. Rev., 1990 at 739; ENGLE, K., *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, Eur. J. Int. Law, 22(1), 2011 at 141-163.

human rights arguments. The author claims that a review of an award limited to national or international *ordre public* grounds, available at the stage of enforcement or annulment of the investment award--as allowed under the New York Convention--could be the least invasive and most reasonable solution to give host States a second chance against an award disregarding the host State's human rights obligations owed to the population under its jurisdiction.

Why is the debate on a proper forum that takes into due consideration human rights arguments, necessary to give a practical dimension to the theoretical sentiments on the importance of human rights? "Vision without execution is hallucination".

VIII. Going Forward

The grappling with human rights issues, by investment arbitration tribunals, is a growing reality that cannot be denied. There is little doubt that arbitrators acknowledge the emerging necessity of dealing with human rights issues in investment disputes but rarely, in treaties, an indication is provided of how arbitral tribunals should reconcile the protection investors are entitled to, and human rights obligations owed by host States to their citizens.

Good practice would be for governments to clarify that the obligations under the investment treaties (*i.e.* Full Protection and Security, National Treatment etc.) should not violate the provisions set forth in national and international instruments protecting fundamental rights and liberties. From a practical perspective, a technical expedient would be for treaty negotiators to elaborate "tests" that would guide arbitrators in striking a proper balance in the specific case. For instance, to what extent should investors consider their rights under the treaty not violated, in order for the fundamental rights of the host State's citizens to be honored?

Ultimately, the solution to the dilemma over the reconcilability of investment agreements with human rights obligations seems to have no better outlet than the adoption of a new approach to trade policy, in that the tug of war of investor-state powers should come to an end: the two actors, taking cognizance of today's new legal order based on the global governance model, should begin a dialogue that would craft in the agreements new rules insuring that foreign investments support the public interest.

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Table of Acronyms

ACHR	American Convention on Human Rights
AUSFTA	Australia-United States Free Trade Agreement
AFCHR	African Charter on Human Rights
AGBAR	Sociedad General de Aguas de Barcelona, S.A.
ARCHR	Arab Charter on Human Rights
AWG	Anglian Water Group
BBE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
BGT	Biwater Gauff Tanzania
CEDAW	Convention to Eliminate All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social, and Cultural Rights
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EIB	Estonian Innovation Bank
ESCR	Economic, Social and Cultural Rights
FDIs	Foreign Direct Investments

FET standard	Fair and Equitable Treatment standard
GATT	General Agreement on Tariffs and Trade
HDSAs	Historically Disadvantaged South Africans
HSE exceptions	Health, Safety, and Environmental exceptions
IACHR	Inter-American Convention on Human Rights
IACmHR	Intern-American Commission of Human Rights
IACtHR	Intern-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreements
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
MFN	Most-Favored-Nation
MPRDA	South Africa Mining and Petroleum Resources Development Act

MTBE	Methyl Tertiary Butyl Ether
NAFTA	North American Free Trade Agreement
NBK	National Bank of Kazakhstan
New York Convention	UN New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PSCs	Production Sharing Contracts
TEU	Treaty of the European Union
UDHR	Universal Declaration on Human Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Education, Science and Culture Organisation
UNHR	United Nations Human Rights Council
WTO	World Trade Organization

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