

*The Function of Arbitral
Tribunals in the Development
of Human Rights Obligations
of the Investors*

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Abbreviations:

IIL	International Investment Law
HRL	Human Rights Law
UNCTAD	United Nations Conference on Trade and Development
IIISD	International Institute for Sustainable Development
BIT	Bilateral Investment Treaty
IIA	International Investment Agreement
ECOWAS	Economic Community of Western African States
OECD	Organization for Economic Co-operation and Development
UN	United Nation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
FTAs	Free Trade Agreements
VCLT	Vienna Convention on the Law of Treaties
UNCITRAL	United Nations Commission on International Trade Law
UNGPs	The United Nations Guiding Principles on Business and Human Rights
ICSID	International Centre for the Settlement of Investment Disputes
CSR	Corporate Social Responsibility
ILO	International Labour Organization
HR	Business and Human Rights

Abstract

What is often more important in the international investment agreements between a private investor and the host country is to ensure the investors' economic security in the host country. However, recently, one of the concerns in most of these agreements is human rights. Then one of the host country's obligations is the observance of human rights obligations. The problem is that investors are not obliged to comply with human rights obligations. Meanwhile, arbitral tribunals have tried to establish duties for the investor in the host country by relying on international principles and rules, such as balanced interpretation of the agreements. In this case, even though the human rights obligations of investors do not explicitly mention in the agreements, with their violation, investors are held responsible. Apart from analysing these principles in this research, the main purpose is to analyse the arbitration position in identifying the human rights obligations of the investor and acceptance of these awards between the legal scholarships and countries. Also, I analyse whether both parties of the investment agreement are committed to human rights or whether this commitment is merely addressed to the host country.

1. Introduction

1.1 Background

One of the methods to attract capital and economic development in developing countries is to conclude investment agreements. Developing countries benefit from these agreements as these agreements contribute to economic growth and reduce inflation.¹ These agreements matter for foreign investors since developed countries or cooperations invest in underdeveloped countries to meet the needs of the global market and even supply their domestic market. However, associated with the economic aspects of the investment agreement, paying attention to other social issues, such as poverty, women's rights, and human rights, is important in host countries.

As matter of fact, even though developing countries need to achieve economical growth and improve the welfare of their populations by these investment agreements, other social aspects such as human rights, poverty eradication, sustainable agriculture, gender equality, sustainable energy, country equality, and global partnership should be considered too.² That is why there should be a balance between economic development and the promotion of social development. However, there are arguments and conflicted ideas about who should observe these obligations.

International Investment Agreements (IIAs) can be concluded as treaties, Bilateral Investment Treaties (BITs) which are between different countries (state parties), and investment contracts. Foreign investment contracts are agreements between a foreign investor (or a local subsidiary of a foreign investor) and a state (or a state-owned entity). These contracts such as Foreign Direct Investment (FDI) is about an individual or business from one nation and host country.

Due to the limited number of arbitral awards between private investors and the host country which is my main topic, all these types of agreements will be considered. In this thesis, I am talking about international investment contracts between private investors of the home state who

¹ Taiwo Muritala 'Investment, Inflation and Economic Growth: Empirical Evidence from Nigeria'[2011]2(5) Research Journal of Finance and Accounting68, 69.

<<https://www.iiste.org/Journals/index.php/RJFA/article/view/669>> accessed on 5 May 2021.

² UNCTAD facilitates G20 consensus on Guiding Principles for Global Investment Policymaking(2016). available at: <http://investmentpolicyhub.unctad.org/News/Hub/Home/508>; MOFCOM, 2016. Trade Minister.

invests in the host country on the one side and the host country on the other side. However, there are no many cases in this area that specifically talked about human rights obligations such as BITs.

Therefore, I try to use other relevant cases, sometimes under the BIT individual companies can enter into investment agreements in foreign countries, and claim protection against host country violations. In this case, under the BIT or the private-state or private-private investment agreement human rights obligations can be discussed.

A party to an agreement (the BIT) might be different from being a party in litigation under the same BIT. For example, companies claiming violations of the signatory state or states claiming their human rights have been violated by companies. Then, this type of allegations is also mentioned in parts of the research.

In this research, what will be the center of attention is international investment contracts between a private investor and host countries. Now, one of the parties in the private contract between the investor and the host country is the individual or corporations of the home state who invests in the host country. These individuals or corporations, similar to the other party to the agreement, that is the host country, have commitments to the international standards that one of these commitments is the obligations of human rights.³

Human rights obligations of host countries, often in investment agreements are mentioned directly, the investor obligations are not explicitly expressed. In some non-binding instruments, similar to the state, transnational corporations and other business enterprises are liable to respect human rights as in the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises concerning Human Rights⁴ or Ruggie principle (Guiding Principles on

³ Three-dimensional human rights standard: 'respect, protect and fulfil'.

⁴ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises about Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003): " 2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, to eliminate discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or another

Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework") mention.

Besides, the state has to make sure private actors do not violate human rights obligations.⁵ In post World War II, states are mainly liable to protect the human rights of individuals. After that time there was a consensus that the individual human being should be protected under the protection of the international community. National governments have to preserve the life and the liberty of their citizens.⁶ Therefore, the primary responsibility lies with the states, which in turn can impose such obligations on private actors, primarily through introducing statutory law.⁷

Despite the lack of legal-specific mandatory obligation, all companies or investors should respect human rights.⁸ That is why sometimes this subject raised even under an economic agreement. For example, there are non-binding contractual commitments or public opinion of the court or arbitration,⁹ which sometimes can ensure the observance of human rights obligations. However, these rules or methods are not sufficient and there is a need for a binding decision in this area.¹⁰

status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups".

<<http://hrlibrary.umn.edu/links/norms-Aug2003.html>> accessed on 3 April 2021.

⁵ Committee on Economic, Social and Cultural Rights, 'General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc E/C.12/GC/24 (2017), para 14.

⁶ Christian Tomuschat, International Covenant on Civil and Political Rights, United Nations Audiovisual Library of International Law, (2008)1, 2: <<https://legal.un.org/avl/ha/iccpr/iccpr.html>> Accessed on 5 May 2021.

⁷ Jönsson G, Home States' *Duty to Protect Human Rights To what extent is Sweden requiring Swedish corporations to comply with human rights extraterritorially?* (FACULTY OF LAW Lund University, 2020) 31.

⁸ United Nations, Guiding Principles on Business and Human Rights, (2011) 11.

<https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed on 5 May 2021.

⁹ UN Human Rights Office of the High Commissioner, Frequently Asked Questions about The Guiding Principles on Business and Human Rights (2014).

¹⁰ Patrick Dumberry, Gabrielle Dumas-Aubin, How to Impose Human Rights Obligations on Corporations under Investment Treaties?, [2011-2012] 4 Yearbook on International Investment Law and Policy 349, 372.

<https://www.researchgate.net/publication/327289085_How_to_Impose_Human_Rights_Obligations_on_Corporations_under_Investment_Treaties_Yearbook_on_International_Investment_Law_and_Policy_2011-2012_4_569-600> accessed on 22 April 2021.

In the domestic of most countries, there are some provisions about human rights that can apply. The foreign entity has to comply with other standards than the local ones. Corporations will be liable directly or indirectly if they are violating human rights provisions. Foreign investors ought to respect the domestic law of the host country.¹¹ As mentioned that: "international investment protection under the ICSID Convention will not be protected if it is made in violation of the host country's law".¹² However, sometimes this is not stated in investment agreements to encourage the investor to invest in the host country or there is a consistency clause in the agreements which in that case the domestic legislation of the host country only applies to the project if consistent with the investment contract. Moreover, sometimes there are other conditions for the application of the domestic law of the host country.¹³

In the current situation, there must be some solutions that recognize these obligations for the investor which can be invoked by a host country or an arbitrator. In addition to the main sources of international law, such as treaty law, there are several principles and doctrines that sources of international law are acceptable. These general principles of law operate as a source of obligation.¹⁴ Without binding regulations about investor commitments, there are some rules or methods that can be invoked in the case in which there are no explicit obligations.

According to some research¹⁵ principles such as clean hand,¹⁶ offsetting damage, or creative interpretation principles¹⁷ are the principles that can be used in this regards. There may be others, but as far as I have researched and studied, only these principles are mentioned.

¹¹ Rumiana Yotova, ' Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?' [2018] 43 *University of Cambridge Faculty of Law Research*1, 4.

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3199812> accessed on 9 May 2021.

¹² Gustav F W Hamester GmbH & Co KG v. Republic of Ghana' [2010] ICSID Case No. ARB/07/24.

¹³ Lorenzo Cotula,' Strengthening Citizens' Oversight of Foreign Investment: Investment Law and Sustainable Development' ' [2007] BRIEFING 4: Foreign investment contracts, International Institute for Environment and Development1, 2.

<https://www.jstor.org/stable/resrep01405?seq=1#metadata_info_tab_contents> accessed on 9 May 2021.

¹⁴ Robert Kolb, Principles as Sources of International Law (With Special Reference to Good Faith) NILR [2006] 12.

<<https://link.springer.com/article/10.1017%2FS0165070X06000015>> accessed on 3 April 2021.

¹⁵ Patrick Dumberry, Gabrielle Dumas Aubin, ' When and How Allegations of Human Rights Violations can be Raised in Investor-State Arbitration' [2018] 13 (3), *The Journal of World Investment & Trade* 349, 362.

For the protection of human rights in the context of investment agreements, these rules can impose human rights obligations upon corporations before an arbitral tribunal. By these principles, even though there is no direct investor's commitment to human rights inserted in the agreements, in case of violation or non-performance of human rights obligations, the other party, that is the host country, can bring the case to arbitration, and investors held responsible for violations of such rights.¹⁸

Except for a court that is outside the present research, another authority that deals with these issues are the arbitration tribunal. In the investment agreement, there is an arbitration clause that arbitrates between the host country and the foreign investor disputes which are based on a parties consent. In most cases, instead of going to court, the parties to the investment agreement agree that the disputes should be solved in arbitration.¹⁹ Arbitration with an impartial dispute-settlement procedure for the resolution of investment disputes assures both parties that the litigation of the parties will be handled impartially and independently. That is why the function of this organ will be analysed here.

At the same time, one idea that has been put forward is that there is no place for human rights issues in investment agreements arbitrations.²⁰ Therefore, it should also be examined that whether human rights obligations can be addressed in these agreements and whether the parties to

¹⁶ Patrick Dumberry, 'The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law'[2013] in Ursula Kriebaum (ed), *Transnational Dispute Management Special Issue: Aligning Human Rights and Investment Protection*, TDM1, 2.

<https://www.researchgate.net/publication/327318458_The_Doctrine_of_'Clean_Hands'_and_the_Inadmissibility_of_Claims_by_Investors_Breaching_International_Human_Rights_Law_in_Ursula_Kriebaum_ed_Transnational_Dispute_Management_Special_Issue_Aligning_Huma> accessed on 27April 2021.

¹⁷ Ahmad Ghouri, From myopia to flashes of clear vision? Deciding interaction and conflict of treaties in investor-state arbitration after *Urbaser v Argentina*, PART IV in Clair Gammage C, *Sustainable Trade, Investment and Finance* (Edward Elgar Publishing Limited, 2019)201.

¹⁸ Patrick Dumberry, (n16)52.

¹⁹ UNITED NATIONS New York and Geneva, UNCTAD Series on International Investment Policies for Development, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, 25. (2010): https://unctad.org/system/files/official-document/diaeia200911_en.pdf.

²⁰ UNITED Nations Conference on Trade and Development Geneva Selected Recent Developments in IIA Arbitration and Human Rights IIA MONITOR No. 2 International Investment Agreements (2009)16. https://unctad.org/system/files/official-document/webdiaeia20097_en.pdf.

the international investment agreements can be expected to comply with them. In the next part, the host country and investor's human rights obligations are taken into consideration. Moreover, there is the possibility to impose this obligation on investors or not. Then some principles in this field will be discussed that can be used to recognize these obligations of the investors.

As I am talking about human rights abuses by investors, the party who is claiming a human rights violation is the host country. In this case, either an independent claim for violation of human rights obligations by the investor can be raised by the host country or a counterclaim can be filed against the claim of non-compliance with the obligations under the investment agreement. Hereon, the question is how the arbitrator should deal with this issue. However, this optimal result and identification and respect of human rights in the agreements require the active role of investment arbitrations. This institution must be able to rebalance between investor protection and the government's right.²¹ Then, the question of how successful the arbitration has been in this area must be analysed as well.

It can certainly not say that these principles are the only way to overcome the challenge, I will only describe partly the problem and its possible solutions with arbitration. Other methods of protecting the rights of the host country should also be considered which, of course, will not be discussed here.

1.2 Purposes

While, except host country, investors have obligations as well, but there is no desire to explicitly address them in the agreements.²² The overriding purpose of this study is to analyse how the investor's human rights obligations are recognized and applied in the arbitration.

²¹ Xavier Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' [2015] 4 Investment Policy Brief1, 2.

<[https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IAs and Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf](https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IAs_and_Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf)> accessed on 19 April 2021.

²² Patrick Dumbery(n10) 569.

1.3 Questions

1.3.1 The main question:

- How can investors be committed to respect human rights obligations in the arbitration process?
(This question will be answered in chapter 3)

1.3.2 The sub-questions

- What are the human rights obligations of the private investors and host countries in the investment agreement?

(This question will be answered in chapter 2)

- To what extent can arbitrators identify and apply the investor's human rights obligations (This question will be answered in chapter 4)

- What are the views of developed and developing countries? (This question will be answered in chapter 4)

1.4 Scope of research

As with any study, this thesis has certain assumptions and limitations. The scope of this thesis will be limited to the questions of investor's human rights obligations, not the host country in the international investment agreements between investors and the host country. Then, the scope of the thesis excludes any discussion about the host country human rights obligations. Apart from human rights obligations, both the investor and the host country have other obligations, such as environmental obligations which are necessary for the achievement of sustainable development; but these issues are not analysed either.

One of the expectations in investment agreements is that states or investor should be aware of the responsibility to respect during establishing and carrying out their investment activities which may result from a breach of their obligations. This issue has not paid any specific attention to in this research. Remedy as a result of a breach of obligations is also outside the scope of the present thesis.

Moreover, sometimes violations of human rights obligations in these agreements may be raised by a third party and can be the subject of arbitrations (third party *amicus curiae*).²³ This issue will not be analysed here either. Moreover, as I mentioned since most litigations about investment agreements are brought to arbitration, other litigation processes such as a court, compromise, renegotiation etc. will not be considered. Also, the investor is indeed committed to respecting human rights versus the people and others in the host country, but what this research will focus on is the obligations of the investor to the host country itself.

As I said in the introduction, I am analysing international investment agreements between private investors or individuals or corporations of the home state who invests in the host country on the one side and the host country on the other side. However, there are no many cases in this area that specifically talked about human rights obligations. Therefore, I try to use other cases which are relevant to the human rights violation in the investment agreements.

1.5 Material and method

The material in the thesis is essentially the traditional sources of international law, such as books and articles.²⁴ In addition to studying books and articles, other additional materials such as cases should be taken into consideration too.²⁵ Then, the thesis also looks into cases. Even though arbitration awards are usually only public if the parties agree or when an arbitration institution provides a public record, some available cases will be analysed throughout the thesis, which at the time of reading the articles and books for collecting materials, were mentioned and. Moreover, since I am talking about investment agreements, some international investment agreements under BITs or contracts which are available are analysed as well. Then, the thesis also looks into some agreements in this area. In addition to the material collected through legal

²³ In this case, civil society organizations, non-governmental organizations or even home states can intervene and raises human rights concerns.

²⁴ John Hilton III, 'Open educational resources and college textbook choices: a review of research on efficacy and perceptions', [2019] 64, Educational Technology Research and Development 573, 574.

<<https://link.springer.com/article/10.1007/s11423-016-9434-9>>accessed on 5 May 2021.

²⁵ Christina Binder and Jane A. Hofbauer, 'Teaching International Human Rights Law: A Textbook Review'[2018] 28(4)The European Journal of International Law, 1399, 1400. <<https://academic.oup.com/ejil/article/28/4/1397/48663219>>accessed on 5 May 2021.

sources and academics, I used some international investment agreements such as BITs and analysed the aspects of their human rights.

Regarding the subject under discussion specific legislation or preparatory works do not exist, then the research is based on traditional legal methods. First, I am talking about the issue which through the legal dogmatic method, by arbitration awards and their interpretation will be examined. In the meantime ,doctrine or customary law are other sources that have been mentioned in research books while reading related books or articles. Other resources are case law. Since the international arbitration tribunals function will be analysed, cases in this regard will be investigated as well. The material used in case law is mainly from arbitral tribunals under the ICSID Convention.

Most information gathered from ICSIDs own web page contains lists of pending and concluded cases with information on the proceedings and on the tribunals. Based on cases, the role and position of the arbitrator are considered by reviewing. Apart from the fact that most of the cases can be downloaded through the Lund Univesity website, sometimes in the most relevant books or articles, these cases and the issues discussed in their arbitration processes are mentioned in detail, which has been referred to here.

Besides, the reason for paying attention to these cases here is that by studying the sources, it was observed that they have been cited repeatedly, which indicates that they are related to the subject matter in question. Not all cases have been read entirely, and only issues related to the parties' claims regarding the existence of human rights obligations have been considered. There are no binding instruments related to my subject, however, the UNGP, OECD, UNITED provisions, or some reports from the International Law Commission or United Nations in this regard will be discussed too.

The purpose of examining them is that by these instruments I want to show that even though there are no binding instruments regarding the human rights obligation of investor in the international investment contract with the host countries, these obligations are recognized and by many resources that I read somehow, there is consensus in the legal doctrine that there should be some binding rules in this area.

1.6 Current state of research

There are a lot of studies about human rights law, as mentioned in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In particular, investment agreements no longer focus only on economic aspects, and sustainable development and focusing on human rights, environmental or labour rights obligation of the parties would be considered as well.²⁶ As in some books²⁷ these obligations were investigated.

As these issues were raised in arbitration under BITs or investor-State dispute settlement (the International Centre for the Settlement of Investment Disputes (ICSID)), some research discussed case law in this regard. But specifically, there is no comprehensive work on the function of arbitration regarding the imposition of a human right obligation to investors. Most books or articles analysed the obligation of host countries.²⁸

However, in few articles obligations of investors are analysed.²⁹ As it was said that we should use business and human rights arbitration to drive investor accountability in foreign investment. For doing this it is suggested that the role of business and human rights (BHR) arbitration under The Hague Rules on Business and Human Rights Arbitration (The Hague

²⁶ International Centre for Trade and Sustainable Development (ICTSD), *A Turn to Responsible Contracting: Harnessing Human Rights to Transform Investment*, The E15 Initiative Strengthening the Global Trade and Investment System for Sustainable Development (2016) 7.

<<https://www.ohchr.org/Documents/Issues/Globalization/E15-Investment-OHCHR.pdf>> accessed on 27 March 2021.

²⁷ John Anthony VanDuzer J, Simons P, and Mayeda G, *Integrating Sustainable Development in International Investment Law, A Guide for Developing Countries Prepared for the Commonwealth Secretariat* (Commonwealth Secretariat, 2012).

²⁸ For example Beardsworth R, Wallace Brown G and Shapcott R, *The State and Cosmopolitan Responsibilities* (Oxford Scholarship Online, 2019).

²⁹ Sattorova Mavluda, 'Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform' [2019] 113AJIL Unbound 22, 22 – 24. <<https://livrepository.liverpool.ac.uk/3030990/>> Accessed on 3 April 2021.

Jernej Letnar Cernic, 'Corporate human rights obligations and international investment law' [2018] 3 Anuario Colombiano de Derecho Internacional ACIDI

<https://www.researchgate.net/publication/277794539_Corporate_human_rights_obligations_and_international_investment_law> accessed on 22 March 2021.

Rules) for increasing corporate respect for human rights should take into account.³⁰ The present thesis seeks to contribute to the existing research and illustrates how human rights obligation can be imposed by arbitration on investors and will continue to explain how this process is working.

1.7 Structure

The thesis entails 3 chapters, in order to answer the main question first, it should be considered that how human rights obligations in investment agreements is raised and what are the obligations of the parties to the agreement in this area. Therefore, following the introduction of research in chapter I of the thesis, human rights obligations in foreign investment agreements will be defined. Then, as international investment contracts, there are investors and host countries as parties, their human rights obligations will be analysed.

The purpose of chapter II is to answer the main question and analyse the arbitration function. But firstly second sub-question that whether these obligations can be discussed in arbitration is discussed, and if the arbitrators have competence in this area is examined. The next part would be the main issue, meaning the recognition of the human rights obligations of the investor in the investment arbitration by invoking principles (principle of clean hands, offsetting damage, counterclaims and balanced interpretation). Then, three methods by which arbitrators can refer to the investor's human rights obligations will be examined. In this section, the cases in which those principles are mentioned or the regulations will be analysed.

In the last part in chapter III, to answer the second sub-question, based on the analysis of the existing opinions and cases, the author's final statement and views are mentioned, the function of arbitrators and views of developed and developing countries will be discussed.

³⁰ Sonia, Anwar-Ahmed Martinez, 'Bridging the Gap: Using Business and Human Rights Arbitration to Drive Investor Accountability for Business-related Human Rights Harm in Foreign Investment' [2019], 1. <<https://www.ibanet.org/Document/Default?DocumentUid=7E06F4B4-F8EC-446E-BE88-C013C861AEDC> > accessed on 13 April 2021

2. Human rights obligations in foreign investment agreements

2.1 Introduction

International investment contracts between investors who are private companies or individuals with host country as another party of the agreement (which in our cases are mostly developing countries), there is some obligations observation which one of them are human rights. These obligations apart from the fact that they are as a general principle in the international are applicable and binding, sometimes are written down in the investment agreements,³¹ then they are applicable as a binding part of the agreement.

However, sometimes they are mentioned in the non-binding instrument³² or they are not mentioned in the agreement. In this part, the possibility of raising the issue of human rights in the international investment agreements between investors and host country and the obligations of both parties to these agreements will be argued.

2.2 Consistency or inconsistency between human rights and investment obligations

At first glance, it seems that there is a conflict between human rights obligations and economic obligations in the international investment agreements between investors and the host country, meaning that these agreements are about economics and development not human rights issues that are far from the investment area. However, parties to investment agreements should ensure that the trade and investment agreements they conclude are not in conflict with their obligations under international human rights instruments.³³ Because human rights obligations are a *jus*

³¹ For example, Article 1 of the EU-China investment negotiations(22-01-2021) said: "The Parties are committed to pursuing sustainable development, and recognize that economic development, social development and environmental protection are interdependent and mutually reinforcing dimensions of sustainable development".

EU-China Comprehensive Agreement on Investment: Milestones and documents:
<<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115>>accessed on 5 May 2021.

³² As in the UN Guiding Principles on Business and Human Rights (UNGPs), the private should respect human rights, or carry out human rights due diligence in this regard.

³³ Report of the Special Rapporteur on the right to food, Olivier De Schutter, United Nations, General Assembly, Human Rights Council Nineteenth session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development(A/HRC/19/59/Add.5, 2011)2.

cogens norm³⁴ which are accepted and recognized in international law and most international agreements. The main purpose of concluding an investor agreement indeed is to obtain economic benefits and ignoring human rights obligations and the concrete principles of international law in this regard. There is no competition between trade and investment and policy objectives.³⁵

BITs should not be seen as a self-governing regime of international law. It means that this agreement is not a group of rules and principles about only a particular subject matter or an autonomous part of international law.³⁶ Then, investment arbitrators should not stick to the mentioned rules in the bilateral instrument and ignore the customary international human rights norms.³⁷

For example, in the case of *the SS Wimbledon*,³⁸ the court argued the Versailles Treaty's provisions on the Kiel Canal is self-contained since if they had to be interpreted by the treaty's provisions on the inland navigable waterways they would be superfluous. However, in most investment agreements critical rights from a human right such as fair and equitable treatment clause mentioned.³⁹ Then, the rules governing investment agreements do not separate from the human rights obligations.

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf> Accessed on 7 May 2021.

³⁴ Vienna Convention on the Law of Treaties, arts. 53 and 64.

³⁵ Markus Krajewski, 'Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights, [2017] University of Erlangen-Nürnberg CIDSE1, 15.

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939354> accessed on 23 March 2021.

³⁶ Gabisa, Henok, 'The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?' [2014] 45(2) *The International Lawyer* a Triannual Publication of the ABA/Section International Law 153, 156. <<https://scholar.smu.edu/til/vol48/iss2/4/>> accessed on 3 April 2021.

³⁷ James Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's ' [2007] 77 *Duke Journal of Comparative & International Law* 77, 121. <<https://scholarship.law.duke.edu/djcil/vol18/iss1/2/>> accessed on 3 April 2021.

³⁸ The United Kingdom, France, Italy & Japan v. Germany Judgment, S.S. "Wimbledon" Case [1923]PCIJ, Ser. A., No. 1 (Aug. 17) 24 para.

<http://www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon.htm> accessed on 7 May 2021

³⁹ For example in the *ParkeringsCompagniet v. Lithuania*, Award, September 11 [2007]ICSID Case No. ARB/05/8. Section8.

In some cases, investment tribunals acknowledged that human rights and international investment law (IIL) are not inconsistent. For example, in the *Suez/Vivendi v. Argentina*⁴⁰ or *Quasar v. Russia*⁴¹ and *Azurix Corp cases*⁴² tribunals mention that economic obligations and human rights obligations are not inconsistent.⁴³

In *Azurix v. Argentina*, the state argued that affordable water for its citizens should be provided, but the investor discouraged people from paying their water bills. In that case, human rights arguments were invoked by Argentina to justify its measures. The investor argued the state failed to complete the infrastructural works and repairs that, according to ABA which led to the incident. Argentina claimed there was a conflict between its obligations under investment and human rights law. The Respondent has raised the issue of the compatibility of the BIT with human rights treaties. However, the tribunal fails to understand the incompatibility in the specifics of the instant case.⁴⁴

In the *CMS Gas Transmission Company* case, Argentina invoked human rights and said the economic and social crisis affecting the country compromised basic human rights. In this situation, an investment treaty could not prevail since that would constitute a violation of constitutionally recognized rights. It argued that since the economic and social crisis-affected human rights, the protections afforded under the respective investment treaties should not prevail.⁴⁵ The tribunal refused a conflict between human rights and investor rights and said there is no question of affecting fundamental human rights when considering the issues disputed by the parties.⁴⁶

⁴⁰ *Suez et al. v. The Argentine Republic*, [2010] ICSID Case No. ARB/03/19, Decision on Liability, para. 262.

⁴¹ *Quasar de Valores sicav S.A. et al. v. Russian Federation*, [2012] scc Case No. 24/2007, Award, para. 25.

⁴² *Azurix v. Argentina Republic*, [2006] ICSID Case No. ARB/01/12, Award, para. 261.

⁴³ Gattini A, Tanzi A, Fontanelli F, *General Principles of Law and International Investment Arbitration*, (Brill Nijhoff, 2018) chapter 11, 482.

⁴⁴ *Azurix v. Argentina Republic*, 261 para:

<<https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf>> Accessed on 7 May 2021.

⁴⁵ *CMS Gas Transmission Company v The Republic of Argentina*, Award, [2005] ICSID Case No. ARB/01/8 para. 114.

⁴⁶ *Ibid*, para 121.

There are a lot of cases that admitted that human rights issues can be raised in the investment agreements. As in the *Trinh Vinh Binh* case⁴⁷ human rights obligations were mentioned in the conditions of an investment treaty dispute. It was said it is illegal and international norms of due process and human rights should be respected otherwise obligations in the Vietnam-Netherlands BIT would be violated.⁴⁸ Then, international investments are not limited to the private interest of foreign investors. The human rights interest of the local citizens of the host country or international human rights commitment of the host countries shall be respected too.

It true that there are some differences between human rights obligation and investment obligations. For examples, human rights are about individual human beings, and international investment law deals with legal persons or has concerns about fair and equitable treatment, or protection against expropriation.⁴⁹ However, today as I mentioned, often human rights are becoming a part of the investment agreement. That is why in the case law too, there are a lot of references to human rights instruments in the process of expropriation or compensation in these agreements.⁵⁰

2.3 Human rights obligations in investment agreements

It is accepted that the obligations that arise from the investment agreement should not cause harm to the human rights of both parties. International human rights as a customary international norm which is adopted by the Universal Declaration of Human Rights at the U.N. General Assembly should be protected and enforced by everyone.

In addition, based on Guiding Principles of Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” drafted by UN Special Representative, Mr John Ruggie, both sides commit to their human rights obligations. Therefore,

⁴⁷ *Trinh Vinh Binh and Binh Chau Joint Stock Company v. Vietnam*, UNCITRAL, [2007] Netherlands - Viet Nam BIT.

⁴⁸ *Ibid*, para 25.

⁴⁹ Pavel, Sturma, 'Public Goods and International Investment Law: Does the New Generation of IIAs Better Protect Human Rights' [2018]19(1) *J World Investment & Trade* 1, 9.

<https://www.researchgate.net/publication/326334147_Public_Goods_and_International_Investment_Law_Do_the_New_Generation_of_IIAs_Better_Protect_Human_Rights > accessed on 3 April 2021.

⁵⁰ *Azurix Corp v Argentine Republic*, , [2009] ICSID Case no ARB/01/12.

both parties have some obligations in this regard which is mentioned below. In this section, first, these principles and the obligations of both parties are mentioned.

2.3.1 Investor's human rights obligations to the host country

In some cases, investment agreements impose discrete human rights obligations on investors, and in some of them, they do not. In a few cases which are more about national investment agreements and not a contract between a foreign investor and a host country, these obligations are mentioned. For example, the Economic Community of Western African States (ECOWAS) Supplementary Act on Common Investment Rules for the Community said, investors, shall uphold human rights in the workplace and not breach human rights. The draft Pan African Investment Code stipulates that investors should comply with human rights principles,⁵¹ and support them.⁵² But in some international agreements between a private investor and the host country stipulates that home states can hold investors responsible for any acts in the host country that causes significant damage, injuries, or loss of life.⁵³

Some scholar said that following status egalitarianism the state has to recognize and protect equal standing in dealings with citizens and others.⁵⁴ Investors or corporations, especially large-scale ones which are political actors like states in the world or they sometimes have much more influence than the state has the same obligations.

⁵¹ Draft Pan-African Investment Code, African Union Commission Economic Affairs Department (2016):

<https://au.int/sites/default/files/documents/32844-doc-draft_pan_african_investment_code_december_2016_en.pdf> Accessed on 10 may 2021.

⁵² Article 24 of the draft said: "Business Ethics and Human rights The following principles should govern compliance by investors with business ethics and human rights: a. support and respect the protection of internationally recognized human rights; b. ensure that they are not complicit in human rights abuses; c. eliminate all forms of forced and compulsory labour, including the effective abolition of child labour; d. eliminate discrimination in respect of employment and occupation, and e. ensure equitable sharing of wealth derived from investments".

⁵³ Barnali Choudhury, 'Input for Working Group on Business and Human Rights' report on Human Rights compatible International Investment Agreements (IIAs)' 5.

https://www.ohchr.org/Documents/Issues/Business/WG/Submissions/CSOs/University_College_London.pdf.

⁵⁴ Nien-hê Hsieh, 'Should Business Have Human Rights Obligations?' [2015] 14(2) Journal of Human Rights, Journal of Human Rights1, 1.

<file:///C:/Users/galavizh/Downloads/JHR_2015_Final.pdf>Accessed on 7 May 2021.

It is true that despite the linkage between foreign investment and human rights, in the traditional view, investors are not subject to legal liability for business-related human rights harm under IIAs and only states have commitments to uphold international human rights standards. Nevertheless, today it is accepted that there is no exception in the foreign investment regime in this regard.⁵⁵

Apart from the fact that investors operate in host countries and are also bound by certain human rights obligations in the host country,⁵⁶ some decisions, such as *Urbaser v. Argentina* case,⁵⁷ mentioned that companies who operate internationally are not immune from international law rules and obligations. Then, human rights obligations related to investment activities apply to an investor.⁵⁸ Most international investment agreements between states mention that an investor should respect the laws and regulations of the host country.⁵⁹ In some BIT models such as the SADC Model BIT⁶⁰ or Model Text for the Indian Bilateral Investment Treaty⁶¹ also, this point is

⁵⁵ Sonia, Anwar-Ahmed Martinez (n30)5.

⁵⁶ Sheng Zhang, ' Human Rights and International Investment Agreements: How to Bridge the Gap? '[2019] 7(3) The Chinese Journal of Comparative Law 387, 458. <<https://academic.oup.com/cjcl/article-abstract/7/3/457/5739309> > Accessed on 2 April 2021.

⁵⁷ *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic* [2018] ICSID case no ARB/07/26.

In this case, Urbaser as a shareholder in a concessionaire was responsible for the supply of water and sewerage services. Argentina's emergency measures led to financial losses of the concessionaire, which resulted in its insolvency. Argentina claimed the concessionaire's failure to provide the necessary level of investment in the supply services and the human right to water has been violated. on December 8, 2016, an International Centre for Settlement of Investment Disputes (ICSID) tribunal (the Tribunal) held that human rights obligations can be imposed on the investor itself.

This case is important because it talked about BIT's relation to international law and human rights.

⁵⁸ Mavluda, Sattorova, 'Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform' [2018] 113 AJIL Unbound 41.< <https://livrepository.liverpool.ac.uk/3030990/> .> accessed on 7 April 2021.

⁵⁹ King, p. Lau, N, *Werner Meng International Economic Law: Basic Documents*(Walter de Gruyter, 2019) 594.

Some cases mentioned ti that ideat to for example *Plama Consortium Limited v. Bulgaria*[2005] ICSID Case No. ARB/03/24, Decision on Jurisdiction.

⁶⁰ ARTICLE 11 “Compliance with Domestic Law Investors and Investments shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments”

SADC Model Bilateral Investment Treaty Template with Commentary, Southern African Development Community(2012)<<https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>. > accessed on 7 May 2021.

emphasized. It is not just a matter of the protection of an investor under the fair and equitable treatment standard. Investors also have obligations towards the host countries in the international investment agreements between investors and the host country. However, these obligations are not mandatory and not binding.⁶²

These obligations to respect human rights that have been imposed on them are based on soft law and non-binding instruments. However, these indirect obligations of corporations can not meet the expectations of the international community and ensure compliance with internationally protected human rights. Therefore, they do not bring any responsibility for violations of such rights, because there are indeed no clear commitments in this area for the investor.⁶³

The current situation does not mean that they should not comply with the rules of international law, especially human rights obligations. In most cases, corporations have to comply with obligations to observe human rights obligations.⁶⁴ It is much easier than such obligations include in a corporation's obligations in the agreement with emphasis on fundamental

⁶¹ Article 11: "Compliance with laws The parties reaffirm and recognize that: (i) Investors and their investments shall comply with all laws, regulations, administrative guidelines and policies of a Party concerning the establishment, acquisition, management, operation and disposition of investments....".

Model Text for the Indian Bilateral Investment Treaty(2017).

<https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> accessed on 7 May 2021.

⁶² Penfold, Bonnie 'Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities' [2004]92-2-117370-4[ISBN]International Labour Office – Geneva, Multinational Enterprises Programme Working Paper No. 95, 2.

<https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/--multi/documents/publication/wcms_101040.pdf> accessed on 7 May 2021.

⁶³ Marcin Kałduński, 'Principle of Clean. Hands and Protection of Human Rights in International Investment Arbitration' [2015] 4(2)polish review of international and European law 75.

<https://www.researchgate.net/publication/318788884_Principle_of_Clean_Hands_and_Protection_of_Human_Rights_in_International_Investment_Arbitration> accessed on 29 March 2021.

⁶⁴ Denis G Arnold, 'Corporations and Human Rights Obligations' [2016] 1(2) Business and Human Rights Journal, Cambridge University Press255, 256.

<<https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/corporations-and-human-rights-obligations/23E88D0F8F28CF3CBE61F3D206F8B0BB>> accessed on 17 April 2021.

human rights obligations of corporate investors.⁶⁵ However, as it is said before, this happens less often⁶⁶.

Moreover, in the bolder approach in the Morocco-Nigeria BIT, business and human rights obligations mentioned together. Then, under BITs, companies should uphold human rights in the host country and respect core labour standards of the ILO Declaration on Fundamental Principles and Rights of Work and do not violate human rights obligations. This agreement mentions investor liability in the case of violating human rights obligations.⁶⁷

Besides arbitration is as enforceable as court awards. Arbitration awards are binding similar to a court order, and if an award is issued in favour of one of the parties, the other party is required to obey. Except in some cases where the decision can be annulled, the award is valid. If there is a decision in a BIT arbitration and the host countries do not comply, diplomatic pressure from the home state can make the host country enforce the award which is issued by the arbitration tribunal.⁶⁸

This mentality has also grown in arbitration that protection of the general interest of developed and developing countries should be considered and host country should be protected as much as investors are protected against the host country.⁶⁹ Therefore, it can be said that the traditional view has changed, and human rights obligations transform into enforceable

⁶⁵ Jernej Letnar (n27) 269.

⁶⁶ Bernaz N, *Business and Human Rights History, Law and Policy - Bridging the Accountability Gap*, (Routledge, 2017) 146.

⁶⁷ Morocco - Nigeria BIT (2016):

Article 20 this agreement said "[i]nvestors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made about the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state."

<<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3711/morocco%E2%80%93nigeria-bit-2016>> Accessed on 29 March 2021.

Of course, this document also states that any such violations should be dealt with in civil litigation in the home state and did not mention the jurisdiction for an arbitration tribunal. However, this does not mean that arbitration competence is excluded.

⁶⁸ Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights [2020] 39(3) Denver Journal of International Law & Policy 490.

<<https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1189&context=djilp>> accessed on 11 April 2021.

⁶⁹ Amco Asia Corp. v. Indonesia [1993] ICSID Case No. ARB/81/1, Award for Resubmitted Case, May 31, 1990, 1 ICSID (W. Bank) para 569.

international obligations. States are no longer the only primary holders of international legal obligations. Corporations are not exempt from the relevant obligations as well.⁷⁰ However, it said⁷¹ the home state has no obligation under international law to sanction investors who breach human rights and there are no direct legal obligations on corporations to be obliged by human rights obligations.

Also, it would be easier to have concrete regulation in domestic to impose significant penalties on industries for deterring them from future misbehaviour.⁷² By this argument a state duty to protect human rights recognized in the principle of the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework. Then the host country can prosecute corporations based on violating human rights obligations in the domestic courts."⁷³

2.3.2 The host country's human rights obligations to the investor

Host countries should respect human rights obligations along with exercising due diligence to prevent a breach of such rights. The state must protect human rights following the principle of the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect,

⁷⁰ Sonia Anwar-Ahmed Martinez (n30) 11.

For example preamble of the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises concerning Human Rights says "States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights,.....transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights outlined in the Universal Declaration of Human Rights.....transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments."

⁷¹ David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' [2004] 44(4) Virginia J.I.L 135.

<<https://www.business-humanrights.org/en/latest-news/doc-from-talk-to-walk-the-emergence-of-human-rights-responsibilities-for-corporations-at-international-law-2/>> accessed on 27 April 2021.

⁷² Enrique Boone Barrera, 'Extractive Industries and Investor-State Arbitration: Enforcing Home Standards Abroad, Sustainability [2019] 11. 8 and 11.

<<https://www.mdpi.com/2071-1050/11/24/6963>> accessed on 5 March 2021.

⁷³ Patrick Dumberry, (n16)52.

<https://www.researchgate.net/publication/256021552_When_and_How_Allegations_of_Human_Rights_Violations_Can_Be_Raised_in_Investor-State_Arbitration.> accessed on 7 April 2021.

Respect and Remedy' Framework" drafted by UN Special Representative, Mr John Ruggie.⁷⁴ The host country must control, regulate, investigate and prosecute actions any violation of the human rights of those within its territory.⁷⁵

Regarding the host country responsibility, there are the 1966 International Covenant on Civil and Political Rights (ICCPR) or the International Committee on Economic, Social and Cultural Rights rules as well to ensure that the business activities of this country do not infringe human rights.⁷⁶ This issue clearly in the international investment agreement is recognized that entitle foreign investors to be protected and their human rights are preserved by a host country.⁷⁷

3. Increase of human rights obligations of the investor in International Arbitration and methods of their imposition

3.1 Introduction

In addition to the imposition of obligations directly to investors, which can be enforceable through the dispute settlement mechanisms, without direct obligations, arbitration can make investors committed to human rights rules. If agreements include legally binding human rights

⁷⁴ The United Nations Guiding Principles on Business and Human Rights (UNGPs)

⁷⁵ Ibid, 352.

⁷⁶ For example Committee on Economic, Social and Cultural Rights

General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business.

<<https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwIhCJcXiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSubw6ujlnCawQrJx3hlK8Odk6DUwG3Y>> accessed on 11 April 2021.

⁷⁷ Davitti D, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection*, (Oxford Publishing, 2019) 139.

provisions, investors should respect these obligations.⁷⁸ Although this solution could be the best way, in most agreements, there is no specific regulation in this regard.

Even if the obligations are not explicitly mentioned, it can be said that arbitration can somehow recognize the responsibility and accountability of investors with some principles.⁷⁹ The methods will be discussed in this chapter. Before discussing these methods, it is first necessary to consider whether the arbitrators have jurisdiction in violating human rights obligations.

3.2 Arbitration competence regarding human rights obligations

When the parties sign a contract that includes an arbitration clause, they have practically expressed their consent to arbitration, meaning that consent gives both parties the power to bring their claims to the arbitration.

However, most investment arbitration is about commercial disputes, not human rights, and even when it arises, the jurisdiction of the tribunal to address human rights violations is ambiguous. For example, in the arbitration tribunal's decision in *Biloune and Marine Drive Complex Ltd. v. Ghana*. Mr Biloune.⁸⁰ Biloune raised claims about the human rights violation of the tribunal and said that human rights violation under an applicable BIT cannot refer to

⁷⁸ In most cases such as article 12 of the Argentina-Qatar BIT, CSR provision stipulates that companies should make efforts to comply with the CSR standards:

the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar.

<https://oxia.ouplaw.com/view/10.1093/law:iic/bt1835.regGroup.1/law-iic-bt1835?prd=IC> accessed on 11 April 2021.

But in some cases, Canadian Bilateral Investment Treaties CSR is formulated in the binding form. In the 2014 Canada-Mali BIT or 2015, Canada Burkina-Faso BIT Article 16 mentioned: "Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties...".

Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments.

<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3557/burkina-faso--canada-bit-2015-> > accessed on 11 April 2021.

⁷⁹ Patrick Dumberry (n10) 349.

⁸⁰ *Biloune & Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, uncitral, Award on Jurisdiction and Liability) [1994] 19 Y.B. Comm. Arb. 11. Ad hoc tribunal (UNCITRAL rules).

arbitration because the BIT only obligated the parties to arbitrate disputes about foreign investment, not any independent violation claims.⁸¹

The tribunal declared “any dispute ... in respect of an approved enterprise ... may be submitted to arbitration”⁸²....International law establishes the minimum standard of treatment and fundamental human rights. However, "it does not follow that ... this tribunal is authorized to deal with allegations of violations of fundamental human rights...”.⁸³ Then arbitration has no jurisdiction because there is a jurisdictional clause in the agreement and arbitration only covers disputes arising in respect of the enterprise.

According to that case, the tribunal has no competence about outside matters and the tribunal’s jurisdiction covers only investment disputes. However, if a violation of human rights affects the investment, it can be considered an investment dispute. In the *Bernhard von Pezold and Others v. Zimbabwe and Border Timbers v. Zimbabwe* also tribunal did not extend its competence to the pure human rights claim and argued that its jurisdiction is limited.⁸⁴

On the contrary, to the *Biloune* case, in *Chevron v. Ecuador* case,⁸⁵ the tribunal said even though there is a jurisdictional clause, the subject of human rights is related to the investment, so the requirement for competence exists.

In *Toto v. Lebanon* case,⁸⁶ concerning specific human rights (fair trial), the tribunal accepted its jurisdiction. Also in *Grand River Enterprise v. u.s.* case⁸⁷ mentioned human rights which are jus cogens, customary international law and indigenous peoples' rights should be taken into account in the arbitration process. The claimant debated that terms such as investment or

⁸¹ Ibid, 494 para

⁸² Ibid, 188 para.

⁸³ Ibid, 203 para.

⁸⁴ *Bernhard von Pezold and Others v Republic of Zimbabwe*, [2010] ICSID Case No. ARB/10/15, and *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2, 26.

⁸⁵ *Chevron Corporation (u.s.) & Texaco Petroleum Corporation (u.s.) v. the Republic of Ecuador*, pca[2008] Case No. 34877, Interim Award, paras. 2, 3, 207. In this case, CHEVRON found guilty of a violation of human rights.

⁸⁶ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, [2009] ICSID Case No. ARB/07/12.

⁸⁷ *Grand River Enterprises Six Nations, Ltd et al. v. the United States of America*[2011] UNCITRAL Award, 66, 182 paras.

enterprise should be construed broadly, and this obligation includes the process of interpreting human rights norms and customary rules relevant to indigenous peoples.⁸⁸

Another view is that international investment agreements between investors and the host country should contain a broad dispute resolution clause. In this case, the violation of human rights obligations can also be considered in the jurisdiction of the arbitrators.⁸⁹ For example, in the *Hesham Talaat M. Al-Warraq v. Indonesia* case, it is argued that the term basic rights in the investment agreement include human rights.⁹⁰ By accepting such claims by arbitrators, one can accept the jurisdiction of an arbitrator to deal with human rights violations.

Nonetheless, this obligation is recognized as a general principle of international investment law. In the tribunal's decision in the *Urbaser* case also this obligation is recognized as a matter of general principle of law. In this situation, it is international law that imposes human rights obligations on the investors or corporations.⁹¹

Besides, except the fact that investment treaty or trade agreement is binding and parties should comply with its content in good faith,⁹² for having legal and *bonafide* investments, both

⁸⁸ Ibid, 63 and 66 paras.

⁸⁹ Patrick Dumberry (n10) 373.

⁹⁰ *Hesham Talaat M. Al-Warraq v. the Republic of Indonesia*, [2011] UNCITRAL Final Award, 178–184 paras.

184 para said: "the Claimant submits that by making adverse public comments about him, the Respondent failed to respect his right to be presumed innocent and has therefore acted in violation of the basic rights under Article 10. 1 of the OJC Agreement...." . moreover, "The Claimant argues that the phrase 'basic rights in Article 10(1) means 'fundamental rights and "includes the Claimant's human and civil and political 159 rights codified in international law"(519 para). In 258 para the Respondent argues that: "Article 10(1) speaks of "basic rights" in the context of the "ownership, possession or utilisation of his capital", as is obvious from the construction, context and objective of the provision. It does not concern the "human rights" of an OIC national to a criminal proceeding". Tribunal says:" the interpretation of 'basic rights following the general rule of interpretation in Article 3 I. 1 VCLT. ...The object and purposes of the OIC Agreement, as mined in paragraph 73 of the Partial Award, is investment promotion and protection by conferring a broad range of rights on investors"(549 para).

⁹¹ Marcin Kalduński (n63) 99.

⁹² Rafael Peels, Elizabeth Echeverria M, Jonas Aissi, Anselm Schneider, 'Corporate social responsibility in international trade and investment agreements: Implications for states, business and workers [2016] 13ILO Research Paper1, 4.

<<https://ideas.repec.org/p/ilo/ilowps/994949191002676.html> > accessed on 13 April 2021.

parties should act according to the general law in good faith way.⁹³ As it mentions that an investment will not be protected under the ICSID Convention if there is a violation of national or international principles of good faith by misusing the system of international investment protection.⁹⁴ Then the human rights must be respected by both parties in any investment agreement. Therefore, the jurisdiction of arbitration in this area does not need to be explicitly mentioned in an investment treaty.

Besides, sometimes both parties to arbitration proceedings agree to the application of international human rights law to their dispute which in that case human rights obligations can be imposed upon.⁹⁵ Sometimes, it is the home state that can raise human rights allegations. In this case, the home state against the interests of its nations, intervene in the arbitration proceedings.⁹⁶ In all these cases, the issue cannot be ignored because of the arbitrator's incompetence. Therefore, it is possible to hear the claim in arbitration and customary rules of international law and international human rights law in the arbitration process will be applied.

3.3 Identification methods for the human rights obligations of the investor

What the cases show is that HR issues might be of interest if they are strongly connected with the investment and that violations conducted by a (signatory) state against a private entity domiciled in the other party (home state) could be, at least sometimes, addressed in terms of HR violations under the BIT. Besides guiding principles or other soft law or regulations which impose the respect of human rights on corporations or investors, there are other potential options such as the principles that have been considered by arbitral tribunals or other jurisdictions. By these methods,

⁹³ Rosella Galiano, 'Good faith and the abuse of right in the context of the autonomy of negotiating contract'[2013/2014] 3<
<https://www.semanticscholar.org/paper/Good-faith-and-the-abuse-of-right-in-the-context-of-Galiano/168b07d98e525365cf1896c08c6fa286f1e7c775>> accessed on 13 April 2021.

⁹⁴ Gustav F W Hamester GmbH & Co KG v. Republic of Ghana [2010] ICSID Case No. ARB/07/24.

⁹⁵ Patrick Dumberry, 'The Admissibility of Amicus Curiae Briefs by NGOs in Investor-States Arbitration: The Precedent set by the Methanex Case in the Context of NAFTA Chapter 11 Proceedings' [2001]1(3) Non-State Actors and International Law 201, 214. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1288792> accessed on 13 April 2021.

⁹⁶ Anthea Roberts, Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, ' [2010] 104 A.J.I.L 220. <<https://www.jstor.org/stable/10.5305/amerjintelaw.104.2.0179?seq=1>> accessed on 13 April 2021.

the responsibility of the investor in this regard can be raised. These principles are mentioned below.

3.3.1 Protection of human rights under the principle of clean hands

One of the principles in international law is a clean hand. This rule means no one can take advantage of one's wrong willful wrongdoing. There is no protection with injury if that injury happens as a consequence of wrongful conduct. Therefore, illegal conduct of investor during the performance of the investment affects the tribunal's analysis of liability and damages.⁹⁷ In other words, if investors do not comply with the law, they do not have any protection under the international investment regime.⁹⁸

In the Report of the International Law Commission, 57th Session, UN Doc. A/60/10, 236 argued: "the clean hand's doctrine is an important principle of international law that has to be taken into account whenever there is evidence that an applicant has not acted in good faith and that it has come to court with unclean hands".⁹⁹ Also, according to the good faith principle, the clean hand's doctrine can be a precondition for investors to apply the investment arbitration tribunals.¹⁰⁰

In *Saluka BV* case, mentioned that when there is a violation of the law of the host country, the clean hand principle can be invoked. Consequently, nobody can benefit from his fraud.¹⁰¹ In this case, the Nomura Group had acted fraudulently and dishonestly throughout the events which are contrary to international law. This failure to act in good faith and the abuse of process shows company had never even been a bona fide holder of an investment. Then, protection should be denied under the treaty.¹⁰²

⁹⁷ Jamal Seifi, Kamal Javadi, 'The Consequences of the "Clean Hands" Concept in International Investment Arbitration' [2018] 19 Asian Yearbook of International Law 122, 125. < <https://brill.com/view/book/edcoll/9789004379756/BP000005.xml>> accessed on 15 April 2021.

⁹⁸ *Saluka Investments BV (The Netherlands) v. the Czech Republic* [2006] Permanent Court of Arbitration, UNCITRAL.

⁹⁹ < <https://legal.un.org/ilc/sessions/57/>> accessed on 27 April 2021.

¹⁰⁰ Markus (n35) 22.

¹⁰¹ *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*[2006] ICSID Case No. ARB/03/26.

¹⁰² *Ibid*, 184 para.

This rule can also be justified by saying that the investor must act under the law of the host country, and if there is a violation of the law of the host country, this country as a defence can claim substantive violations of the agreement.¹⁰³ When investors overlook the law of the host country and not act in compliance with its law, there is a jurisdictional defence for the host country to claim substantive violations of its international investment contract with an investor.

3.3.2 Offsetting damage and human rights obligations

Another option when the investor claim and brings the case to arbitration is that the respondent state can mention human rights violations during the arbitral proceedings by “offsetting damage”. In his process as an offsetting of damages or mitigation damages, when tribunals want to make a decision, take into account this allegation of state.¹⁰⁴ Then, damages may be reduced proportionally because the investor violates human rights obligations.

Another example of contributory in ICSID arbitrations is in the awards in *Bear Creek Mining Corporation v. the Republic of Peru*¹⁰⁵ and *Burlington Resources v. the Republic of Ecuador*¹⁰⁶ which compensation to the claimants reduced because of the contributory fault. There are not international investment agreements between investors and the host country, but they are some examples for offsetting damage applications.

¹⁰³ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*[2007] ICSID Case No. ARB/03/25.

286 para: "...the duty to comply with the host country's law is an ongoing one which must be respected throughout the period in which the investment is made....". ".....If, at the time of the initiation of the investment, there has been compliance with the law of the host country, allegations by the host country of violations of its law in the course of the investment, as a justification for state action concerning the investment, might be a defence to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction....."345 para.

It is true that this case is not specifically about human rights violations and generally refers to violations of the host country's rights, but it can also be extended to human rights violations.

¹⁰⁴ Patrick Dumberry (n10) 595.

¹⁰⁵ *Bear Creek Mining Corporation v. the Republic of Peru*[2017] ICSID Case No. ARB/14/21.

The tribunal reduced recoverable damages claimed by Bear Creek from US\$522m to just US\$18m because of Bear Creek's contributory fault to the social unrest and the resulting predicament faced by Peru.

¹⁰⁶ *Burlington Resources Inc. v. the Republic of Ecuador*[2017] ICSID Case No. ARB/08/5.

In this case: "Ecuador contends that, as a matter of law, compensation must be excluded (or, at the very least, significantly reduced) if the alleged victim contributed to its loss(549 para)... On the facts, Burlington denies having engaged in any wrongful conduct that could justify a reduction of the compensation owed to it(567 para)". Tribunal issued its Decision on Ecuador's Counterclaims and Decision on Reconsideration and Award.

Article 18 (B) of the IISD Model International Agreement on Investment for Sustainable Development says:” (B) Where an investor or its investment is alleged by a host country or an intervener in a dispute settlement proceeding under this agreement to have failed to comply with its obligation relating to pre-establishment impact assessment, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or any damages awarded in the event of such award".¹⁰⁷

At this time an arbitrator can take into consideration the investor's behaviour and according to the violation mitigate the damage that they deserve. As in the *Phoenix* case,¹⁰⁸ the investor conduct has been considered. In this case, there may be a suspicion about the jurisdiction of the arbitral tribunal. It is said that in the agreement, there should be an express authority or a clear clause for the competence of the tribunal to hear that litigation.¹⁰⁹ Indeed, human rights violations of investors are considered contributory negligence which affects a compensation quantity.¹¹⁰ Not only it cannot be argued that this issue is beyond the jurisdiction of the arbitrators, but also investors in this situation have no protection because they violate human rights.¹¹¹

3.3.3 Counterclaims based on international human rights obligations of the investor

Other methods of imposing human rights obligations on investors are counterclaim by member states. In this case, the state initiates a counterclaim that involves the subject that the investor has not fulfilled its obligations under the agreement. Then the not only investor can not challenge the

¹⁰⁷ Howard Mann Konrad von Moltke Luke Eric Peterson Aaron Cosbey, IISD Model International Agreement on Investment for Sustainable Development Negotiators' handbook(2006).

<https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf> accessed on 13 April 2021.

¹⁰⁸ *Phoenix Action Ltd. v. the Czech Republic*, [2009] ICSID Case No. ARB/06/5.

¹⁰⁹ *Ibid.*

¹¹⁰ Balcerzak F, *investor-State Arbitration and Human Rights, chapter 4: Compensation and Costs in Investor-State Arbitration and the Issue of Human Rights*(Brill Nijhoff publishing, 2017) 218.

¹¹¹ *Phoenix* case (n108) 78 para.

tribunal's jurisdiction about a state's counterclaim, but also the tribunal can confirm that the investor violates obligation regarding human rights.¹¹²

According to this, if there are arguments or claims on behalf of investors, a host country has an opportunity to bring direct claims against investors for violations, including human rights abuses.¹¹³ In this situation, host country can raise allegations of human rights violations if that country participates as a respondent in arbitration proceedings.

Common Market For Eastern And Southern Africa Investment Agreement For The COMESA Common Investment Area specifically in the article 28.9 mentioned that:" A Member state against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set-off or another similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages".

This method is accepted in the ICSID Convention, which allowed to raise a counterclaim against the investor or in Article 19(3) of the 1976 Uncitral Rules when the claim is formulated on the "same contract," the counterclaims can be heard.¹¹⁴ The outstanding example in the case law in this regard is in *Urbaser v. Argentina* case where the tribunal decided that it had jurisdiction about the state's human rights counterclaim. In this case, while the investor claimed the violation of an agreement based on discriminatory measures, the state on the other side, counterclaimed violation of obligation access to water as an international human right.¹¹⁵

¹¹² Treaty Establishing the Common Market for Eastern and Southern Africa (1994, amended 2009), art. 28(9); Indian Model BIT, art. 14.11.

¹¹³In other such as environment, there are some arbitration cases involving environmental counterclaims. One of them is David R. Aven and Others v. Republic of Costa Rica[2018] ICSID Case No. UNCT/15/3.

¹¹⁴ James J. Nedumpara, 'Aditya LaddhaHuman Rights and Environmental Counterclaims in Investment Treaty Arbitration' [2020] Handbook of International Investment Law and Policy1, 7. < DOI:10.1007/978-981-13-5744-2_82-1 > accessed on 3 April 2021.

¹¹⁵ Patrick Abel, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration Fallacies and Potentials of the 2016 ICSID Urbaser v. Argentina Awards' [2018] 1(1) brill open law 61, 67. < <https://doi.org/10.1163/23527072-00101003> > accessed on 3 April 2021.

Worth mentioning that counterclaim, in this case, was finally rejected, but still accepting jurisdiction over human rights are important implications in this case. Therefore, human rights-based counterclaims can potentially fall within the jurisdiction of investment tribunals.¹¹⁶ In *the Bear Creek case* tribunal accepted jurisdiction over human-rights based counterclaims in response to a primary claim filed by the investor and by challenging the investor's wrongful conduct.

Counterclaims by host countries against investors based on human rights violations are within the jurisdiction of investment tribunals which includes investor responsibility. This issue is predicted in the Draft Pan-African Investment Code that includes the option for a counterclaim in the text of the IIAs.¹¹⁷ In this situation, in the same arbitration, the investor holds accountable for its unlawful conduct, but sometimes such as during the 34th and 35th sessions of the Uncitral working Group sessions on states' concerns about investor-state dispute settlement, it announced that this right is only allowed where there is a specific obligation in a specific instrument not as a general rule.¹¹⁸ However, this method could create a balance between the right of the investor and the host country, moreover prevent parallel proceedings.

Regarding the filing of such these lawsuits despite general permission by arbitral rules, there are some conditions. One of them is counterclaim is in the tribunal's jurisdiction, meaning that the parties have consented to submit this dispute to arbitration.¹¹⁹ If the special rule governs on agreements, such as ICSID Convention, this rule in the example ICSID rule, should allow for counterclaims. If no such rule governs on agreements, in the text of agreements, there should be signs of permission to counterclaim. For example, the agreement says that each party in the agreement can bring disputes in connection with investments to the arbitration.

¹¹⁶ GattinI (n43) 260.

¹¹⁷ Article 43: "Counterclaims by the Member State".

¹¹⁸ Anthea Roberts and Zeineb Bouraoui, 'UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third-Party Funding and Counterclaims' [2018] EJIL: TALK!.

<<https://www.ejiltalk.org/uncitral-and-isdsreforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/>>
accessed on 23 April 2021.

¹¹⁹ Of course, this consent to arbitration is limited to the specific investment claim that is related to the agreements and it is not a "general" consent: Patrick Dumberry (n 10) 575.

Another condition is a connection between the principal claim and the counterclaim, the dispute should be directly related to the subject matter of the dispute, legally or factually.¹²⁰ With the close linkage between human rights and investment, the arbitrators could not ignore their legal relevance. In this case, there should be a broad dispute resolution provision as in *Aven*,¹²¹ which the tribunal found out the counterclaim cannot be exempted, and there is no excuse for challenging the tribunal's jurisdiction over the counterclaim.

3.3.4 Balanced interpretation of investment agreement

After the collapse of the Rana Plaza Building in Bangladesh¹²² and global developments of corporations, obligations on investors became one of the issues that should be addressed in the arbitration legal courts. In that case, tribunals should take into consideration human rights norms when interpreting international investment agreements.¹²³ As in many cases such as *SAUR International case*,¹²⁴ have been pointed out that human rights must be considered by the arbitrators.

The general rule of treaty interpretation in article 31 of the Vienna Convention says that agreements shall be interpreted in good faith following the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose.' Then, interpretation should be compliant with international law principles. In that case, HR instruments related to the international investment contracts between a private investor and host countries can be applied,

¹²⁰ Barnali Choudhury, *Investor Obligations for Human Rights*[2019] ICSID Review (Forthcoming)12.

¹²¹ *Aven case*, (n113) 648-657 para.

¹²² On April 24, 2013, in Savar, in the suburb of Dhaka, Bangladesh, the "Rana Plaza" factory collapsed and killed at least 1,130 people and 2,000 injured peoples:

FIDH - International Federation for Human Rights Odhikar One Year After the Rana Plaza Catastrophe : Slow Progress and Insufficient Compensation,

https://www.europarl.europa.eu/meetdocs/2014_2019/documents/droi/dv/46_fidhbdranaplaza_/46_fidhbdranaplaza_en.pdf

¹²³ Hendrik Fahner, J, Happold, M, *The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration*(Cambridge University Press, 2019)10.

¹²⁴ *SAUR v. Argentina*, Decision on Jurisdiction and Liability[2012] ICSID Case No. ARB/04/4.

even if the host country has not ratified a special HR instrument. Because some general rules and customary rights, even when they are not legally recognized under national law, are applicable.¹²⁵

The theory of balanced interpretation of treaties¹²⁶ said not only Vienna Convention on the Law of Treaties (the VCLT rules), subjective and objective elements (with priority to an objective rather than a subjective approach),¹²⁷ but also any relevant rules of international law applicable in the relations between the parties (Article 31(3)(c)) which includes the human rights obligations under general international law.¹²⁸

The balanced approach addresses any issue relating to both the investor and the host country priorities in the international investment contracts between a private investor and host countries. However, there may be a question that the balance between the party's interests is not the duty of the arbitrators, but responsible for interpreting vague and general laws governing a dispute is an important duty of the arbitrator,¹²⁹ that does not mean that arbitrators' perspectives about substantive obligations do not matter or cannot be raised. As a result, they must balance the obligations and rights of the parties. Then one of the issues in this area is paying attention to their human rights obligations and establishing a friendly relationship between human rights and international investment agreements between investors and the host country.

Even with the limited scope of tribunal competence, interpretation and application of certain provisions of the investment treaty can be applied.¹³⁰ It is not true that being said human rights norms are not relevant for purposes of interpreting the substantive provisions of an

¹²⁵ Cotula L, Tienhaara, K, *Reconfiguring Investment Contracts to Promote Sustainable Development*, in K. Sauvant (ed), *Yearbook on International Investment Law & Policy 2011-2012*, Oxford, (Oxford University Press, 2013)32.

¹²⁶. Mills, Alex, 'The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration, Final draft, for inclusion in Z Douglas, J Pauwelyn and J Vinuales (eds) ' [2013] *The Foundations of International Investment Law* 1, 2. <DOI:10.1093/acprof:oso/9780199685387.003.0015> accessed on 3 April 2021.

¹²⁷. Ibid, p21.

¹²⁸ Gattini (n 43) 226.

¹²⁹. August Reinisch and Christina Knahr, 'Transparency Versus Confidentiality in International Investment Arbitration' [2007] 6(1) *The Biwater Gauff Compromise*, 6 *Law & Prac. INT'L CTS. & Tribunals* 97, 114.

<https://brill.com/view/journals/lape/6/1/article-p97_3.xml?language=en> accessed on 12 April 2021.

¹³⁰. Markus Krajewski (n35) 120.

investment treaty.¹³¹ This issue can prevent the treaty from being a "self-contained, closed and limited system".¹³² According to the growing demand of the current society, investor obligations, explicitly in new treaties or by deriving them from existing treaties through treaty interpretation,¹³³ should be considered. If the first method is not possible; the second method, which means interpretation, can at least be applied in arbitral tribunals. Based on this idea, it is not necessary to refer directly to the investor's obligations, and even though there is no explicit mention of the human rights obligations of the investor, the treaty does not exclude the possibility of interpretation of obligations for non-state actors.

As it said arbitral tribunals can strike the balance between obligations of parties by applying international law rules¹³⁴ in the interpretation of treaties,¹³⁵ with minimum conflict with human rights.¹³⁶ In *Técnicas* case,¹³⁷ the tribunal referred to the European Court of Human Rights. In some cases, Universal Declaration on Human Rights is referred¹³⁸ in the interpretation

¹³¹ Luke Eric Peterson and Kevin R. Gray, 'International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration' [2003] International Institute for Sustainable Development 1, 28.< <https://www.escri-net.org/docs/i/404561> > accessed on 12 April 2021.

¹³² The Asian Agricultural Products Ltd v Republic of Sri Lanka[1990] ICSID Case No ARB/87/3. 21 PARA.<<https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf>> accessed on 29 April 2021.

¹³³ Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application' [2020] 5(1):1-25. DOI: 10.1017/bhj Business and Human Rights Journal 105, 107. <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/nightmare-or-a-noble-dream-establishing-investor-obligations-through-treatymaking-and-treatyapplication/D38968B6D2D29658FF6506B02A6C8CEE> accessed on 19 April 2021.

¹³⁴ David R Aven and the Others v Republic of Costa Rica, ICSID Case No UNCT/15/3[2015] (Eduardo Siqueiros T, President; C Mark Baker; Pedro Nikken) (Aven case).

The tribunal courageously held that, although the enforcement of environmental law is primarily on the States, it cannot be accepted that a foreign investor could not be subjected to international law obligations in this field.

<<http://arbitrationblog.kluwerarbitration.com/2018/12/12/david-aven-v-costa-rica-an-aftershock-of-urbaser-v-argentina/>> accessed on 29 April 2021.

It is the only case about enforcing investor obligations concerning the environment under international law.

¹³⁵ Ghouri A, *Interaction and Conflict of Treaties in Investment Arbitration* (Wolters Kluwer Law & Business, 2015)192.

¹³⁶ International Commission of Jurists, *Bilateral Investment Treaties and International Human Rights Law: Harmonization through Interpretation* Stratos Pahis (2011)47 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3444603.

¹³⁷ *Técnicas Medioambientales S.A. (Tecmed) v. Mexico*, [2003] ICSID Case No. ARB(AF)/00/2, 116-122.

¹³⁸ *Ioan Michula and Others v. Romania*, [2008] ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 88 para.

of BITs. Then, human rights norms of customary international law can be applied in investment treaty cases. Consequently, there is a possibility of interpreting the treaty language with a method of inserting investor obligations into existing treaties.¹³⁹

Another method is to pay attention to the introduction of the international investment agreements between investors and the host country.¹⁴⁰ Another issue is relying on soft law, such as UNGPs¹⁴¹ or the OECD Guidelines, the arbitrators can use these principles governing investment to interpret the treaties. The UN Guiding Principles talks about corporate human rights risk assessment through the due diligence procedure outlined in Paragraph 17.

Since the insertion of norms, containing explicit duties of investors usually are not considered, arbitration tribunals should have the courage to adopt an interpretation of investor's rights to balance between the investor's interests and the need for the host country to regulate public interest regulations, where such interest involves human rights considerations. Establishment binding legal obligations for business actors is not possible due to the reluctance of countries,¹⁴² but at least arbitrators can be expected to strike a fair balance in this area.

4. Analysis

4.1 Introduction

Concerns about hearing human rights claims in international arbitration and also paying special attention to the obligations of companies are increasing every day in international law. This makes the work of the arbitrations more difficult; because they need to pave the way for identifying the human rights obligations of both parties of international investment contracts between a private investor and host countries, especially investors, by applying the principles and rules. However, there are no common points of view in this regard.

¹³⁹. Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements, report the expert meeting co-organized by IISD and Friedrich Ebert Stiftung (FES) in Versoix, Switzerland(2018)18.

¹⁴⁰. Ursula Kriebaum, The State's Duty to Protect Human Rights Investment and Human Rights:

<https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Kriebaum/Publikationen/states_duty_protect_human_rights.pdf> Accessed on 13 April 2021.

¹⁴¹. The UN guiding principles on business and human rights.

¹⁴² It is true that countries introduce HR protection and can apply them to investors under BITs. However, here I am not talking about BITs or the relationship of countries together. I am talking about contracts between investors and host countries.

After introducing the principles and practical rules to identify the human rights responsibility of the investor, in this section, the performance of arbitration in this field is analysed, and then the views of the developed and developing countries are examined.

4.2 The function of arbitration

There are doubts about human rights allegations of the host country due to the primary responsibility of the host country for human rights and not direct international responsibility for foreign investors and limited jurisdiction of investment tribunals. However, as explained, it does not mean that human rights considerations from host countries cannot be brought before investment tribunals.

Even though mention of human rights obligations or human rights instruments is useful guidance for arbitrators, there are some thoughts that arbitrators disinclined to examine specific human rights instrument provisions or the role of human rights in the investment agreement are limited.¹⁴³ Contrarily, some argued the role of human rights in the process of the tribunals is undeniable,¹⁴⁴ and arbitrators should interpret international investment contracts between a private investor and host countries with considering human rights law obligations.¹⁴⁵

However, arbitrators must be more efficient and have positive performance in this area. To move unbalanced situation between private interests and host country, not only there should be a broader approach about jurisdictions regarding human rights-related matters in arbitral processes, but also the concept of 'sustainable development in international case law should be considered by arbitrators as a principle of international law.

¹⁴³ Hirsch M, *Investment tribunals and human rights treaties: a sociological perspective* (Cambridge University Press, 2013)99.

¹⁴⁴ James, Harrison, *Human Rights Argument in Amicus Curiae Submissions: Promoting Social Justice?*. Human Rights in International Investment Law and Arbitration, Dupuy, Petersmann and Francioni, (eds., OUP, 2009), 396.

<https://www.researchgate.net/publication/290845562_Human_Rights_Arguments_in_Amicus_Curiae_Submissions_Promoting_Social_Justice> accessed on 13 April 2021.

¹⁴⁵ Luke Eric Peterson, 'Human Rights and Bilateral Investment Treaties Mapping the Role of Human Rights Law within Investor-state Arbitration', [2009] Rights & Democracy, International Centre for Human Rights and Democratic Development 1, 10.

<http://publications.gc.ca/collections/collection_2012/dd-rd/E84-36-2009-eng.pdf> Accessed on 13 April 2021.

This is true that HR obligation of the host country can be mentioned through the application of these HR obligations emanating from the BITs. However, in the contract between the private investor and the host country, private actors are not direct holders of human rights obligations.¹⁴⁶ Even though business enterprises should respect human rights and act with due diligence to the human rights of host countries, sources of these obligations are mostly non-binding documents.¹⁴⁷ This is where an important duty of arbitrators comes into play in identifying these obligations and think outside the box.

Moreover, due to the existence of contradictory opinions and lack of correct identification of this issue, arbitrators must show more creativity. It means that without reference to human rights in investment treaties or other agreements such as international investment contracts between a private investor and host countries, arbitration tribunals should have encouraged to balance between the investor's interests and the need for the host country to regulate public interest regulations, where such interest involves human rights considerations.

The limited jurisdiction of international investment tribunals is acceptable and the tribunal has no jurisdiction regarding matters which fall outside the tribunal competence, and the tribunal's jurisdiction does not extend to other types of disputes. Nevertheless, by a broad interpretation of the arbitration clause, the tribunal can hear a human rights counterclaim or allegations. Then, even though the investment contract itself does not contain human rights obligations for foreign investors, by principles set out in the previous chapter, these claims can be heard.

Balanced interpretation of investment agreements between the private investor and the host country by the arbitrators and not merely paying attention to the investor's rights and ignoring their obligation is one option that discussed. Another way is addressing the issue of human rights obligations as defences by the host country against investors. Both in foreign direct investment cases and arbitrations under BITs tribunals such claims taken into consideration by tribunals

¹⁴⁶ Eric de Brabandere, 'Human Rights and Foreign Direct Investment', in Markus Krajewski and Rhea Hoffmann (ed.), *Research Handbook on Foreign Direct Investment* (Cheltenham: Edward Elgar, 2018) 4.

¹⁴⁷ *Ibid.*, 5.

acknowledged. Tribunals have relied on their limited jurisdiction and invoked to human rights considerations to avoid such arguments.¹⁴⁸

4.3 The developed and the developing country views

From the point of view of developed countries, the host countries should directly or indirectly respect human rights and not violate human rights. Even though without discrimination, private entities also should be held responsible for their acts committed, this responsibility of individuals for violations of human rights is not accepted explicitly by developed countries.

Following some arbitration awards, arbitrations should ensure that private entities are held responsible for their human rights violations. Then, there are some regulatory interventions, such as the UN Principles for Responsible Investment Initiative for institutional investors (2006) or Ruggie principles. Nevertheless, this is not the prevailing opinion among developed countries. Although there are an increasing number of bilateral investment treaties (BITs) or international investment agreements between investors and host country with direct reference to human rights, there are rare,¹⁴⁹ and they prefer to remain silent in this regard.

However, it is not always true that the responsibility of investors in this area pleased countries who are looking for capital and investments. International human rights commitments of foreign investors may drive potential investors away from developing countries. That is why sometimes these countries do not pay attention to these obligations and they are not their priorities.¹⁵⁰

It is undeniable that in the arbitration process, host countries can use methods to protect human rights. Direct claims against investors for human rights violations in the counterclaims or defence of tribunal jurisdiction over theirs human rights counterclaim are some examples. This may discourage investors from investing in these countries; which will ultimately have

¹⁴⁸ Eric de Brabandere (n 147) 23.

¹⁴⁹ Sheng Zhang (n 56) 457.

¹⁵⁰ OECD, "Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses, OECD working paper on international investment, Number 2002/1 (2002).

detrimental effects on developing countries. Due to the reluctance of investors to comply with human rights obligations, they may choose countries that are less sensitive in this regard.

Conclusion

On the one hand, the host country is scared that will not be able to attract investment to its country if the investor's human rights obligations are mentioned in international investment contracts between private investor and host countries. In this case, the investor may refuse to sign the agreement. On the other hand, there is no obligation under international law for investors and even for home states to sanction investors who breach international law principles such as human rights. Moreover, investors are reluctant to mention these obligations in the international investment contracts between private investor and host countries.

Therefore, besides CSR, companies, home country and host country legislation, international human rights principles and international organs such as arbitration, which can apply these principles in these awards can improve the current situation. Even though there are criticisms that arbitral tribunals cannot resolve human rights claims and these issues are out of

arbitration jurisdiction, there are a lot of cases in that arbitration could enforce investors to respect these obligations.¹⁵¹

Most international investment contracts between private investor and host countries protect investors' rights and their human rights, not investors' responsibilities against the state or citizens of the host state. Still, under principle 15(b) of the UNGPs, all companies across all sectors are expected to take due diligence steps to "identify, prevent, mitigate and account for how [they] address their impacts on human rights". Besides these kinds of soft laws, there are some principles that arbitral tribunals can utilize to recognize the human rights obligations of investors, and held them responsible for the violation.

The reason for paying attention to this issue is that there seems to be a balance between international law obligations, including human rights obligations and obligations arising from international investment contracts between private investor and host countries. Otherwise, if international investment contracts between private investor and host countries are interpreted without paying attention to human rights aspects, maybe some conflicts between international obligations might occur. To be specific there should be no sovereignty of economical and developmental policies in these agreements over of human rights' protection rules.

In my opinion, most of these are international obligations that each party should respect them. It should not be assumed that human rights obligations have no place because international investment contracts between private investor and host countries are talking about the economy and trade. It is also not true that since we are talking about trade and the economic aspects of these agreements must be sacrificed to these commitments. In addition to the economic obligations and the obligation of the host country or the investor to comply with their contractual obligations, other obligations, including human rights obligations, can also be invoked and these two types of obligations are not contradictory.

However, due to the failure of international investment contracts between private investor and host countries to establish obligations for an investor in international treaties, the

¹⁵¹ As I explained in the "Consistency or inconsistency between human rights and investment obligations" part of this thesis.

development of international investment arbitration is at the center of attention. Moreover, according to the usual silence of private investment contracts about the rights of non-investors, arbitration of investment disputes is one of the best ways that can promote human rights by review and analysis of the provisions of the agreement. In this process, arbitration can use these methods and examine violations of the human rights of the host country. However, for the arbitrator to have the opportunity to assess the subject, the definition of an investment should be interpreted broadly, in that case, claims fall within the definition of investment and will be part of the investment project.

In the end, even though I emphasize the profound link between arbitration and the promotion of human rights obligations and have that ambition that arbitrators should pay attention to these investors obligation and think outside the box, it is long run and sometimes arbitrators could not overcome these challenges only by referring to the mentioned principles. There should be other protections as well and arbitrators' duty as I mentioned are just a piece of these puzzles.

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