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Bridging Separate Worlds— Application of Human Rights Law in Investment Treaty Arbitration

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Bridging Separate Worlds— Application of Human Rights Law in Investment Treaty Arbitration

*Raymond Yang Gao**

Abstract

With the proliferation of investor-state treaty arbitration, international investment law has been increasingly caught in a “legitimacy” crisis, with concerns looming large over resultant disruptive effects on human rights. Amid existing scholarship seeking to recalibrate the balance between investment protection and public interests, what is relatively undertheorized is a public international law dimension. In this regard, this Article explores the role of human rights law in integrating human rights considerations into investment tribunals’ decision-making, bridging the normative divide between international investment law and human rights. It makes three contributions. First, it systemizes the normative tensions and potential conflicts between international investment law and human rights, analyzing the primary manifestations and root causes thereof. Second, from the position of a respondent state, this Article typologizes the application of human rights law to investor-state treaty disputes, providing legal grounds to alleviate the potential conflicts between investment protection and human rights. In so doing, it also provides a clearer clarification of the relationship between international investment law and human rights law. Third, this Article evaluates the relative strengths and weaknesses of these human rights arguments, shedding light on how international investment agreements could be reformed to better balance investment protection with noneconomic issues.

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I. INTRODUCTION

International investment agreements (IIAs) are international treaties that provide substantive protections and procedural rights to foreign investors and investments—including, most notably, the right to bring international arbitral claims against the host state for monetary compensations arising from breaches of investment protection obligations.¹ In recent decades, investment treaty arbitration has evolved from a rather peripheral area to a most vibrant dispute settlement mechanism of international law. With the sharp increase of IIAs and investor-state treaty arbitration, arbitral tribunals are facing more complex legal questions when assessing the compliance of regulatory measures with an IIA. Such a dispute could become highly controversial, when a foreign investor challenges regulatory measures adopted to promote and protect human rights, or when a respondent state raises defenses or claims that the conduct of the investor breaches human rights norms.² These human rights include: (i) first-generation rights of civil and political liberties (contained in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)); (ii) second-generation rights, which include economic, social and cultural rights (provided in the UDHR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)), core labor standards, and indigenous people's rights; and (iii) third-generation rights, such as the emerging rights to a clean and healthy environment and economic development.³

¹ Jason Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L. J. 392, 392 (2012); see Kenneth J. Vandavelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 631-32 (1998).

While the language of new-generation IIAs has become more sophisticated and balanced over time, most existing investor-state arbitrations are premised on older-generation IIAs.⁴ However, the majority of the latter generally contain no reference to human rights in their texts.⁵ Rather, they typically use terse, broadly-worded, and open-textured language to define core concepts of investments protection, remaining silent on how

² Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 678, 678-79 (Christina Binder et al. eds., 2009); UNCTAD, *Selected Recent Developments in IIA Arbitration and Human Rights*, UNCTAD/WEB/DIAE/IA/2009/7, at 2-3, 12 (2009), https://unctad.org/en/Docs/webdiaeia20097_en.pdf; Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration*, 113 *AJIL UNBOUND* 33, 33 (2019).

³ UNCTAD, *supra* note 2, at 12; James Fry, *International Human Rights Law in Investment Arbitration—Evidence of International Law’s Unity*, 18 *DUKE J. COMP. INT’L L.* 77, 80 n. 13 (2007) (noting that these rights are three “generations of human rights,” with each “having a different level of acceptance in the international community”); see MANFRED NOWAK, *INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME* 23-25 (2003). On the right to environment, see Malgosia Fitzmaurice, *Environmental Degradation*, in *INTERNATIONAL HUMAN RIGHTS LAW* 596-99 (Daniel Moeckli et al. eds., 2014).

⁴ See, e.g., UNCTAD, *REVIEW OF ISDS DECISIONS IN 2019: SELECTED IIA REFORM ISSUES 1* (2009), https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf (“Most arbitral decisions rendered in 2019 concerned cases that were based on provisions in old-generation treaties signed in the 1990s or earlier.”).

⁵ Barnali Choudhury, *Investor Obligations for Human Rights*, 35 *ICSID REVIEW* 82, 86, 87 (2020); Clara Reiner & Christoph Schreuer, *Human Rights in International Investment Law and Arbitration*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 84 (Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni eds., 2009). ERIC DE BRABANDERE, *INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW* 129 (2014). For instance, major multilateral investment treaties, such as the North American Free Trade Agreement’s investment chapter and the Energy Charter Treaty, make no mention of human rights in their texts.

to balance investment protection with noneconomic issues.⁶ For a long time, conventional wisdom held that international investment law and international human rights law were separate branches of international law without substantial overlap.⁷ Though investor-state tribunals have not turned a blind eye to external rules of public international law, a “disintegrative inclination” had long prevailed among adjudicators in investment treaty arbitration, which became more prominent with respect to rules in more specialized fields of international law—particularly international human rights law.⁸

That is, investment tribunals generally showed reluctance to engage with human rights considerations. In investment awards, tribunals’ references to human rights of those who may be adversely impacted by foreign investments are rare and unusual; in contrast, most of their substantive references to human rights concern investors’ “human rights,” employing human rights law as supplementary interpretive tools to inform and strengthen the interpretation of investors’ rights.⁹ To the extent that tribunals considered the human rights of the affected local population, arbitrators oftentimes acknowledged the relevance of such noneconomic issues *in abstracto* before disregarding, sidestepping, or discounting them in their analyses *in concreto*.¹⁰ In its extreme form, this approach tends to regard

⁶ UNCTAD, *supra* note 4, at 3; *see also* Silke Elrifai, *Equity-Based Discretion at the Anatomy of Damages Assessment in Investment Treaty Law*, 34 J. INT’L ARB. 835, 836 (2017).

⁷ Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 5, at 45; *see* Simma & Kill, *supra* note 2, at 679.

⁸ Moshe Hirsch, *Conflicting Obligations in International Investment Law: Investment Tribunals’ Perspective*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 331 (Tomer Broude & Yuval Shany eds., 2008); Simma & Kill, *supra* note 2, at 679.

⁹ Tomer Broude & Caroline Henckels, *Not All Rights Are Created Equal: A Loss-Gain Frame of Investor Rights and Human Rights*, 34 LEIDEN J. INT’L L. 93, 94, 100, 101 (2021) (“[I]t appears that investment arbitrators are far from unaware of international and regional human rights implications for investment law, and they are prepared to revert to them in the context of supporting investor rights.”); BRABANDERE, *supra* note 5, at 129-30 (“[M]any (investment) arbitral tribunals have, despite their reluctance to assess human rights considerations raised as a circumstance precluding wrongfulness, in fact relied on the jurisprudence of the European Court of Human Rights (ECtHR), in determining whether the rights of the investor have been breached. . . . [Investment tribunals’] references to human rights courts’ decisions, most often in assessing whether or not an expropriation has taken place, . . . show not only the close relation between both branches of law, but also the fact that arbitral tribunals can as a matter of principle consider human rights [law].”).

¹⁰ Barnali Choudhury, *International Investment Law and Noneconomic Issues*, 53 VAND. J. TRANSNAT’L. L. 1, 15-16 (2020). BRABANDERE, *supra* note 5, at 129 (noting that investment tribunals “remain relatively reluctant to engage in human rights arguments brought by one of the parties, despite the sometimes obvious relevance of human rights issues and the general importance of human rights compliance by host states”); Ionna Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Rights Norms*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 5, at 339-40.

investment treaty arbitration as a somehow depoliticized, self-contained regime: as it is “splendidly isolated from the dynamics and tensions of the rest of the legal universe,” international investment law should remain relatively immune from the influence of non-investment legal norms, particularly human rights law.¹¹

Concerns were expressed that by downplaying or dismissing noneconomic issues, investment treaty arbitration would impinge on human rights, public health, and environment protection, and unduly constrain a host state’s right to regulate, making international investment law a threat to sustainable development.¹² As such, the normative tensions and potential conflicts between international investment law and international human rights law, as two seemingly segmented branches of international law, manifest prominently in investment treaty arbitration, plaguing the legitimacy of international investment law as a whole.¹³

Such normative tensions become even more problematic in the current global COVID-19 pandemic. Given that many countries have enacted a variety of emergency regulatory measures to contain, mitigate, and respond to the spread of COVID-19, investor-state treaty claims may be on the rise.¹⁴ As such, striking a proper balance between investment protection and public interests obtains new significance and becomes more pressing.

In the “hard-case” scenarios where the underlying IIAs have not dealt with human rights, how to appropriately address such non-economic issues becomes more important. While in recent years the intersection between international investment law and human rights has attracted growing attention, investment tribunals are still in search of a proper framework to bridge the normative divide in international investment law. Though more than a decade old, the observation that “connecting human rights considerations to investment arbitration is still in its infancy” might still hold true even today.¹⁵ Thus far, commentaries have been increasingly coalesced

¹¹ Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 ICLQ 573, 576 (2011); see Fabio Santacroce, *The Applicability of Human Rights Law in International Investment Disputes*, 34 ICSID REV. 136, 140 (2019).

¹² See, e.g., Choudhury, *supra* note 10, at 1; Choudhury, *supra* note 5, at 86-87.

¹³ Mehmet Toral & Thomas Schultz, *The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 577, 589 (Michael Waibel et al. eds., 2010) (arguing that the current investor-state arbitration system “seems to be leaning toward separation of human rights and investor’s rights like oil and water”); see also Simma, *supra* note 11, at 573.

¹⁴ Lucas Bento & Jingtian Chen, *Investment Treaty Claims in Pandemic Times: Potential Claims and Defenses*, KLUWER ARBITRATION BLOG (Apr. 8, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/04/08/investment-treaty-claims-in-pandemic-times-potential-claims-and-defenses/>.

¹⁵ See Jasper Krommendijk & John Morijn, “Proportional” by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION, *supra* note 5, at 446.

around a constellation of “public law” prescriptions—most notably, a proportionality test, standards of review (or the notion of deference), and public law analogies and principles developed under domestic law—to recalibrate the balance between investment protection and public interests.¹⁶ By comparison, what is relatively undertheorized is a public international law dimension.

Founded on IIAs that provide the consent of states to arbitration and which are public international law instruments themselves, investor-state treaty disputes are fundamentally concerned with states’ international legal obligations and responsibilities under public international law.¹⁷ In essence, investment treaty arbitration is a dispute settlement model embedded in public international law as the background normative framework.¹⁸ In principle, the applicable law governing the merits of an investor-state treaty dispute includes public international law, which encompasses international human rights law.¹⁹ Could human rights law itself play a role in addressing the normative divide between international investment law and human rights? What are the relative strengths and weakness of these human rights arguments, and what insights does this approach bring on how best to reform IIAs?

From the position of a respondent state (i.e., the host state), this Article explores the role of human rights law in integrating human rights considerations into investment tribunals’ decision-making. When human rights law *directly* applies to the substance of the disputes, it could be invoked to ground an affirmative defense against state liability or a counterclaim to enforce investor responsibilities. In parallel, in treaty interpretation, human rights law could *indirectly* function as a source of interpretive aid, enabling

¹⁶ Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 47, 66-67 (2013); José E. Alvarez, *Is Investor-State Arbitration Public?*, 7 J. INT’L DISP. SETTLEMENT 534, 537-40 (2016); José E. Alvarez, *Beware: Boundary Crossings—A Critical Appraisal of Public Law Approaches to International Investment Law*, 17 JWIT 171, 188-91 (2016). For scholarship delving into these “public law” prescriptions, see, e.g., Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, IILJ WORKING PAPER 2009/6, https://ilj.org/wp-content/uploads/2016/08/Kingsbury-Schill-Investor-State-Arbitration-as-Governance-IILJ-WP-2009_6-GAL.pdf; Stephan Schill, *Deference in Investment Treaty Arbitration: Re-Conceptualizing Standard of Review*, 3 J. INT.’L DISP. SETTLEMENT 577 (2012); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 282 (2010); Alex Stone Sweet & Giacinto Della Canadea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez*, 46 NYU J. INT’L L. & POL. 911 (2014); Stephan Schill, *International Investment Law and Comparative Public Law—An Introduction*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 3, 29-35 (Stephan Schill ed., 2010).

¹⁷ BRABANDERE, *supra* note 5, at 1-2, 11; Roberts, *supra* note 16, at 60-63, 68.

¹⁸ BRABANDERE, *supra* note 5, at 2.

¹⁹ See *infra* Section III.A.

tribunals to engage in “systemic integration” to construe an IIA provision in harmony with a state’s human rights obligations. Either independently or cumulatively, these grounds could license investor-state tribunals to accommodate human rights interests implicated, address investor misconduct with respect to human rights, or consult relevant human rights law as an interpretive tool. In this way, even absent explicit treaty language on human rights, human rights law could help to alleviate the normative conflicts between investment protection and human rights, enhancing the legitimacy and rule-of-law attributes of international investment law.

The remainder of this Article proceeds as follows. Part II reviews the normative tensions and potential conflicts between international investment law and human rights. Part III delves into the application of international human rights law to investor-state treaty disputes, and develops a typology of human rights arguments. Part IV evaluates the pros and cons of this approach, and looks to new IIA provisions for potential solutions. Part V draws concluding remarks.

II. THE NORMATIVE CONFLICTS BETWEEN INTERNATIONAL INVESTMENT LAW AND HUMAN RIGHTS

This Part sets the stage for the discussion. Section A reviews major manifestations of the so-called “normative conflicts” between international investment law and human rights. Section B analyzes the underlying reasons that cause or aggravate such normative conflicts. Section C then briefly posits a judicial approach based on international human rights law to bridge the normative divide, and discusses the jurisdiction of investor-state tribunals to consider human rights in investment treaty arbitration.

A. A Case of “Normative Conflicts”?

Amid a growing backlash, investment treaty arbitration has increasingly been caught in a legitimacy crisis. Among various critiques mounted, a vocal strand stands out that centers on the normative tensions and potential conflicts between international investment law and human rights.²⁰ Concerns were widely expressed that with the growing invocations of investor-state treaty arbitration, it has increasingly become the case that a host state’s human rights-motivated regulatory measures would be challenged by a foreign investor before an international arbitral tribunal.²¹ This can result in

²⁰ See JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 455-68 (2011).

²¹ See, e.g., Choudhury, *supra* note 5, at 86 (noting that “[a]s the UN Special Rapporteur on Business and Human Rights has observed, the expanding legal rights of firms and foreign investors have created ‘instances of imbalances between firms and States that may be detrimental to human rights’ since IIAs enable ‘investors to take host States to binding international arbitration . . . for . . . damages resulting from . . . legislation to improve domestic social and environmental standards’”); Gus Van Harten et al., *Public Statement on the International Investment Regime—31 August 2010*, YORK U., <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010>.

significant detrimental impacts on human rights on three major fronts.

First, invocations of investment arbitration under an IIA may prevent a host state from adopting measures that are necessary to fulfill, protect and promote “widely accepted human rights values or obligations.”²² Since an IIA empowers a foreign investor to directly bring a host state to binding international arbitration to challenge domestic measures regulating public welfare, investment treaty arbitration may create “instances of imbalances” detrimental to human rights.²³ As noted by Barnali Choudhury:

Investors have used investment arbitration to challenge a State’s racial discrimination redress policies (i.e., affirmative actions programmes designed to promote racial equality); measures used to address the human rights implications arising out of a financial crisis; measures designed to ensure citizens’ right to water; measures used to reduce citizens’ tobacco consumption; measures designed to protect indigenous rights; measures intended to protect cultural rights; and measures designed to protect public health . . . [as well as] environmental measures.²⁴

As a result, a host state is often mired in a legal dilemma: it typically has to choose between its IIA obligations and human rights commitments.²⁵ Had it opted to regulate human rights, the state may be brought to investor-state treaty arbitrations that increasingly result in costly damage awards. Should the state choose to honor its IIA commitments, this can deter the government from pursuing remedial regulatory measures designed to further human rights. Often characterized by a tough binary choice as such, this dilemma reveals the normative tensions and potential conflicts between investment treaty arbitration and human rights (particularly, the evolving set of positive international obligations under the ICESCR).

Notably, investment treaty arbitration may interfere with a host state’s sovereign right to regulate human rights, resulting in “regulatory chill.”²⁶ For states attempting to avoid undermining their international reputation by breaching an IIA, paying out a large sum of monetary damages, and incurring heavy arbitration fees and legal costs, binding, enforceable commitments under IIAs to foreign investors may refrain the governments from adopting welfare-enhancing regulatory measures.²⁷ As such, investment treaty arbitration could curtail the host states’ policy space to pursue human rights

²² ALVAREZ, *supra* note 20, at 458.

²³ Choudhury, *supra* note 5, at 86.

²⁴ *Id.*; see also ALVAREZ, *supra* note 20, at 458-59.

²⁵ Choudhury, *supra* note 5, at 87.

²⁶ ALVAREZ, *supra* note 20, at 459.

²⁷ See Christian Bellak & Markus Leibrecht, *Do Economic Crises Trigger Treaty-Based Investor-State Arbitration Disputes?*, 24 J. INT’L ECON. L. 127, 153 (2021).

and public welfare. Alternatively, even without a formal IIA claim, multinational corporations may leverage threats of investment treaty arbitration to exert pressures on a host state during informal, confidential negotiations, forcing the government to back off from regulatory measures standing in the way of their commercial interests.²⁸ In this way, investors could delay, discourage or even thwart public interest-driven regulations.²⁹ By strategically deploying investment treaty arbitration to secure favorable yet undisclosed settlements from a state, foreign investors may end up substantially adjusting the regulatory framework to their favor.³⁰ Either way, by increasing the risks and costs for regulatory interventions, investor-state arbitration claims (or the threats thereof) could generate regulatory chill, potentially impeding states' regulatory initiatives aimed at regulating public interests and advancing human rights.

The second major manifestation of such normative conflicts relates to the “diversion effects” of investor-state arbitral awards. If an investor prevailed on an IIA claim, the enormous amount of monetary compensations awarded might significantly strain the material resources of a host state that could have been used to further public interests and human rights.³¹ In this regard, as commented on by Mark Chinen:

[w]hen a state has fewer resources and the award is high, it is possible that its citizens will feel their impact . . . the direct and indirect transfers a state makes in satisfaction of its horizontal obligations to other states (or diagonal obligations in the case of payments to private parties) may well interfere with its ability and duty to meet its vertical obligations to its citizens. Monies paid to satisfy an obligation to another state or the private parties associated with the other state are monies that will not go towards medical care, education, and the like, things that have been recognized as international human rights or are emerging as

²⁸ Choudhury, *supra* note 5, at 87; Kevin Gallagher, *Investment Arbitration and Developing Countries: A Re-Appraisal*, GLOBAL DEV. ENV'T INST. WORKING PAPER NO.11-01, at 8 (2011); Adam Bradlow, *Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims Through Investor-State Dispute Settlement Mechanisms*, 43 YALE J. INT'L L. 355, 356 (2018).

²⁹ Choudhury, *supra* note 5, at 5 (“New Zealand delayed the introduction of its tobacco plain packaging laws until the Philip Morris arbitration on the same issue with Australia had been decided, while Indonesia prevented its new environmental laws that banned open-pit mining from applying to foreign investors when the investors threatened investment arbitration.”).

³⁰ Choudhury, *supra* note 5, at 87; Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework*, IILJ WORKING PAPER 2017/1, 60 (2017), https://www.iilj.org/wp-content/uploads/2017/04/Howse_IILJ_2017_1-MegaReg.pdf.

³¹ See Mark Chinen, *Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility*, 25 EUR. J. INT'L L. 703 (2014).

rights.³²

Such a tension becomes all the more prominent for a developing country with modest financial revenues or under a national emergency (such as an economic crisis or a public health crisis).³³ For less developed economies, huge compensations awarded by an investment tribunal could impose a substantial financial burden, straining their limited material resources to regulate and promote public welfare.³⁴ For instance, in a 2019 ICSID award over a mining dispute, an investor-state tribunal ordered Pakistan to pay the claimant investor USD 5.8 billion, which almost matched the USD 6 billion loan offered by the IMF two months earlier to assist it to cope with an economic crisis and which amounted to one-eighth of Pakistan's total governmental budget for 2019-2020.³⁵

In particular, this tension would be exacerbated in an economic crisis. However, economic crises are often the “situations when government interventions in the market process are desirable from a social welfare perspective,” creating strong demand for regulatory policy actions to contain and combat the emergency.³⁶ Since emergency regulatory measures addressing an economic crisis tend to be broad in scope and often cover the whole economic sector (or even the entire economy), these regulations may significantly affect a myriad of foreign investors, potentially triggering a large number of investor-state treaty arbitrations.³⁷ As a result, it is no coincidence that IIAs are generally “more likely to be breached during major [crises].”³⁸ Such challenges become even more problematic in the current global COVID-19 pandemic, given the potential investor-state treaty claims, the public interests at large, and states' diminished economic capacity.³⁹

³² *Id.* at 707.

³³ See Orhan Bayrak, *Economic Crises and the Fundamental Change of Circumstances in Investment Arbitration*, 35 ICSID REV. 130, 130-31 (2020); for investment treaty arbitrations brought against Argentina, see *Investment Policy Hub*, UNCTAD (2021), <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina/investor>.

³⁴ Bellak & Leibrecht, *supra* note 27, at 128.

³⁵ Kyla Tienhaara, *World Bank Ruling Against Pakistan Shows Global Economic Governance Is Broken*, THE CONVERSATION (July 23, 2019), <https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414>; Elena Mazneva et al., *Barrick and Antofagasta Win \$5.8 Billion Pakistan Ruling*, BLOOMBERG (July 15, 2019), <https://www.bloomberg.com/news/articles/2019-07-15/antofagasta-jumps-on-5-8-billion-damages-award-against-pakistan>; see *Tethyan Copper v. Pakistan*, ICSID Case No. ARB/12/1, Award, ¶ 1858 (Jul. 12, 2019).

³⁶ Bellak & Leibrecht, *supra* note 27, at 129.

³⁷ *Id.* at 132; see Bayrak, *supra* note 33, at 131.

³⁸ Moshe Hirsch, *Compliance with Investment Treaties: When Are States More Likely to Breach or Comply with Investment Treaties?*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, *supra* note 2, at 869; Bellak & Leibrecht, *supra* note 27, at 152-53.

³⁹ Martin Paparinskis, *A Case Against Crippling Compensation in International Law of*

Third, while IIAs have created robust, enforceable rights for foreign investors against a host state, there is no equivalent mechanism in investment treaty arbitration to hold investors accountable for their wrongdoings in the local communities. However, recent years have increasingly witnessed “environmental disasters and human rights damages that are directly or indirectly connected to investors’ misconduct.”⁴⁰ In some instances, it is an investor’s wrongdoings in terms of human rights and the environment that provoked the measures of the host state challenged in investment treaty arbitrations.⁴¹ When regulating such misconduct of foreign investors, developing countries could be constrained by their inadequate domestic judicial institutions, limited institutional capacity, and a lack of quality legal services, such that their domestic legal and administrative institutions may be unable to provide an effective legal remedy.⁴²

To make things more complicated, a foreign investor is often able to shield itself from claims levied against the misconduct of their local enterprises or subsidiaries in the host state, due to “the principle of separate corporate legal personality under domestic law.”⁴³ Indeed, the “practice of multinational corporations segregating potentially ‘risky’ activities through corporate restructuring” in domestic law has long been controversial.⁴⁴ However, investment treaty arbitration further aggravates the imbalance of power between an investor and a host state, since its special arrangement of shareholder claims for reflective loss enables a foreign investor to directly claim for damages suffered by their local enterprises and investments, without being held accountable for the latter’s misconduct.⁴⁵

On the other hand, while the provisions of IIAs typically stipulate investors’ various enforceable rights, they rarely create investor obligations that could be enforced in investor-state arbitration, except for limited outliers.⁴⁶ At present, a majority of existing IIAs contain no provisions imposing binding obligations or enforceable responsibilities on foreign investors.⁴⁷ Rather, as noted by commentators, provisions in IIAs that

State Responsibility, 83 MOD. L. REV. 1246, 1249 (2020).

⁴⁰ Xuan Shao, *Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law*, 24 J. INT’L ECON. L. 157, 158 (2021).

⁴¹ *Id.* at 158; *see, e.g.*, *Renco v. Peru (I)*, ICSID Case No. UNCT/13/1, Claimant’s Memorial on Liability (Feb. 20, 2014); *Chevron v. Ecuador*, UNCITRAL, PCA Case No. 2009-23, First Partial Award on Track I (Sept. 17, 2013).

⁴² Ishikawa, *supra* note 2, at 34-35; Shao, *supra* note 40, at 158, 167.

⁴³ Shao, *supra* note 40, at 173-74.

⁴⁴ *Id.* at 174; *see* David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565 (1991).

⁴⁵ Shao, *supra* note 40, at 173-74; *see* Vera Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 U. PA. J. INT’L L. 189, 208-21 (2018).

⁴⁶ Shao, *supra* note 40, 173-74. For these “outliers” in recent IIAs, *see infra* Section IV.B.

⁴⁷ Jean-Michel Marcoux & Andrea Bjorklund, *Foreign Investors’ Responsibilities and*

establish investor responsibilities typically are permissive; oftentimes, they adopt broad, open-textured language, are crafted in non-binding terms, and are directed to states (as opposed to investors).⁴⁸

To be clear, the asymmetric structure of an IIA was originally designed to address the *perceived* power imbalance between a foreign investor and a host state once substantial costs have been expended to establish an investment (the “hold-up” issue), and thus is at least to some extent justified.⁴⁹ However, given the significant impacts of investment treaty arbitration on public interests and the *actual* imbalance of power in the investor-state relationship,⁵⁰ this traditional rationale is increasingly under attack.⁵¹ As such, a normative gap is created between the lack of effective mechanisms to hold foreign investors accountable for their wrongful conduct in investment treaty arbitration and the extensive substantive protections afforded to them under an IIA.⁵²

This has increasingly fueled the critique that the IIAs are “unbalanced” by design, undermining the rule-of-law attributes and legitimacy of international investment law.⁵³ And the argument goes that the asymmetries of investment treaty arbitration system manifest a “structural bias” in favor of multinational corporations’ commercial interests at the costs of the human rights of the host state.⁵⁴ Moreover, that a foreign investor is entitled to bring direct claims of international arbitration under an IIA without investor obligations may not only impede regulatory efforts to address investor misconduct in terms of human rights, but further disincentivize investors from adopting measures to ensure that their enterprises and business practice are socially responsible.⁵⁵

Such a gap could barely be filled by international human rights law as

Contributory Fault in Investment Arbitration, 69 INT’L COMP. L. Q. 877, 894 (2020).

⁴⁸ Kabir A.N. Duggal & Nicholas J. Diamond, *Human Rights and Investor-State Dispute Settlement Reform: Fitting a Square Peg into a Round Hole?*, 12 J. INT’L DISP. SETTLEMENT 291, 302-03 (2021) (noting that “[c]urrently, investors do not have *direct* obligations regarding human rights on the international plane”; arguing that “the lack of substantive, binding obligations in IIAs directed to investors” makes it unlikely for such investor obligations to “support the realization of second- and third-generation human rights” or to generate substantial effect in “counterbalancing the asymmetric structure of (the investment treaty arbitration system)”).

⁴⁹ Charles N. Brower & Sadie Blanchard, *What’s in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT’L L. 689, 712-13; see Howse, *supra* note 30, at 68.

⁵⁰ See *supra* notes 22-48 and accompanying text.

⁵¹ Shao, *supra* note 40, at 157-58, 178; Choudhury, *supra* note 5, at 5-6.

⁵² Ishikawa, *supra* note 2, at 33.

⁵³ *Id.* at 33-34; Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13 J. WORLD INV. TRADE 349 (2012).

⁵⁴ Shao, *supra* note 40, at 157-58.

⁵⁵ *Id.* at 158, 174.

it currently stands. Being vertical in nature, international human rights law primarily imposes legal obligations on states to fulfill, respect, and protect human rights, but generally lacks direct, enforceable legal effects upon individuals, corporations, and private entities as a matter of international law.⁵⁶ Moreover, as of now, the international instruments seeking to establish standards of conduct for business enterprises operating abroad have yet to deliver formal, binding treaties, but are of an informal, “soft law” nature.⁵⁷ Despite the efforts spent, the current initiatives to make a legally binding and enforceable international instrument on multinational corporations and business enterprises in terms of human rights lack political support from key developed countries—most notably, the United States, the EU, Japan—as well as the international business community.⁵⁸ Though these instruments reflect social expectations on corporate responsibility to respect human rights, the soft law nature of them raises important questions on their capacity to “create an actual sense of obligation for business enterprises,” particularly their applicability in investment treaty arbitration.⁵⁹

B. The Underlying Reasons for the Normative Conflicts

To begin with, it bears noting that the notion of “conflict” used here refers to a *contingent* conflict in the application of international legal obligations *in concreto*, rather than an *intrinsic* conflict between two sets of international norms (i.e., one set of international norms is mutually exclusive or inherently incompatible with another *ipso facto*).⁶⁰ Indeed, there are no automatic conflicts or inherent incompatibility between human rights norms and IIA provisions.⁶¹ Yet, through the process of norm application and implementation, real conflicts might arise *a posteriori* between a host state’s obligations to safeguard and advance human rights and its obligations to protect foreign investors.⁶² For instance, while paying compensations to a

⁵⁶ Eric De Brabandere, *Human Rights Considerations in International Investment Arbitration*, in THE INTERPRETATION AND APPLICATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS: LEGAL AND PRACTICAL IMPLICATIONS 189-90 (Malgosia Fitzmaurice & Panos Merkouris eds., 2012) (noting that strictly speaking, human rights have “no direct horizontal effect . . . as a matter of *international law*, in relations between individuals and/or corporations”). A rare exception is a set of peremptory norms of general international law (*jus cogens*). Duggal & Diamond, *supra* note 48, at 298 (noting that “[o]n the international plane, States are responsible for their own human rights violations, as well as abuses by businesses that occur within their territory”).

⁵⁷ Marcoux & Bjorklund, *supra* note 47, at 894-96.

⁵⁸ Ishikawa, *supra* note 2, at 34.

⁵⁹ Marcoux & Bjorklund, *supra* note 47, at 896; see VAUGHAN LOWE, INTERNATIONAL LAW 95-96 (2007).

⁶⁰ VALENTIN JEUTNER, IRRESOLVABLE NORM CONFLICTS IN INTERNATIONAL LAW: THE CONCEPT OF A LEGAL DILEMMA 31-32 (2017) (distinguishing between norms that intrinsically conflict (“intrinsic conflicts”) and norms that only conflict when specific factual circumstances arise (“contingent conflicts”). BRABANDERE, *supra* note 5, at 136-37.

⁶¹ Yannick Radi, *The ‘Human Nature’ of International Investment Law*, 10 TRANSNAT’L DISP. MGMT. 1, 3-4 (2010); BRABANDERE, *supra* note 5, at 136-37.

⁶² See Radi, *supra* note 61, at 4 (terming such a conflict a “conflict of interests” rather

foreign investor may not be very difficult for a wealthy state with sufficient resources at hand, when a state has fewer resources and the damages awarded are particularly high, the government's capacity to protect and promote human rights may be significantly strained. Consequently, in a specific situation, compliance with an IIA may make it difficult or even impossible for a state to fulfill certain positive social and economic rights (particularly, the core minimum standards of the ICESCR) towards its citizens, and *vice versa*.⁶³

At a fundamental level, the normative tensions and potential conflicts between IIAs and human rights stem from the lack of coordination and reconciliation between different branches of international law. Under a traditional Westphalian model of international law, it is a state (rather than a private entity) that bears formal, binding international legal obligations to protect foreign investors under IIAs and to comply with human rights obligations.⁶⁴ Primarily focused on states as the violators, international human rights law in principle does not directly bind foreign investors.⁶⁵ Rather, it is a state that is legally obliged to ensure protection for human rights within its jurisdiction, including protection from the misconduct of foreign investors and the fulfillment of positive social and economic rights.⁶⁶ Thus, a state, when assuming multiple roles simultaneously, might occasionally find itself caught between conflicting obligations in a concrete investor-state dispute, potentially creating a conflict of interest scenario.

To be sure, this problem is nothing new: in international law, it has long been the case that “any complete coordination between systems of international law” is absent.⁶⁷ So are international investment law and human rights law, as two different, yet intersecting, branches of international law. Nonetheless, the normative conflicts between IIAs and human rights norms have been substantially amplified and exacerbated by four notable

than a “conflict of norms”).

⁶³ Under the ICESCR, the fulfillment of the core minimum standards requires the state to use all of its resources and make best efforts to progressively achieve those norms. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3, art. 2(1) [hereinafter ICESCR] (the ICESCR now has more than 170 member states); see also BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS* 146-50 (2014).

⁶⁴ Brabandere, *supra* note 56, at 188-91; Ari MacKinnon, *Why Haven't We Seen More International Human Rights Law Issues in International Investment Arbitration?*, in 40 *UNDER 40 INTERNATIONAL ARBITRATION* 323-36 (Carlos González-Bueno ed., 2018).

⁶⁵ MacKinnon, *supra* note 64, at 323-36. A very limited exception is a set of *jus cogens* norms.

⁶⁶ BRABANDERE, *supra* note 5, at 136-37; Choudhury, *supra* note 5, at 84 (“[A]s part of their obligation to protect, States have a duty to prevent corporations and other non-State actors from violating human rights and for providing remedies when those preventative measures fail.”).

⁶⁷ Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 *EUR. J. INT'L L.* 753, 761 (2002).

developments.

The first is the emerging economic, social, and cultural rights that increasingly impose positive obligations on states to respect, protect, and fulfill human rights.⁶⁸ Unlike traditional civil and political rights, implementation of these norms (such as the rights to health, life, water, and education) requires a state to take positive measures to progressively achieve the full realization of them.⁶⁹ This takes not only expenditures and material resources, but also active initiatives and regulatory measures. The second is the dramatic proliferation of investment arbitrations and the substantial increase in monetary damages and arbitration costs.⁷⁰ With the sharp growth of investment arbitral jurisprudence, investor-state treaty arbitrations today tend to involve increasingly expansive investor rights, challenge wider regulatory measures, and implicate more diverse stakeholders and greater public interests.⁷¹

Thirdly, the tensions between foreign investors' private interests and a host state's regulatory autonomy became more prominent with the advent of modern "welfare" states. Compared with the early nineteenth century *laissez-faire* society theory whereby the main function of a state was merely to protect private property, a modern "welfare" state often serves increasingly

⁶⁸ See, e.g., ICESCR, art. 2(1); SAUL, KINLEY & MOWBRAY, *supra* note 63, at 1; Simma, *supra* note 11, at 579; Chinen, *supra* note 31, 705-06.

⁶⁹ ICESCR, art. 2(1), *supra* note 63, at 5; SAUL, KINLEY & MOWBRAY, *supra* note 63, at 1.

⁷⁰ Daniel Behn, Malcolm Langford & Laura Létourneau-Tremblay, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, 21 J. WORLD & INV. & TRADE 188 (2020) (based on an empirical study of all investment arbitration cases with known amounts awarded (up to February 1, 2019), finding that in investment treaty arbitration, the mean monetary compensation is USD 482.5 million and the median compensation is USD 31 million (after adjusting values inflation to 2018); that in six cases, the investor is awarded more than USD 1 billion; that the total of monetary compensations (excluding awards over 1 billion) is more than USD 10 billion (up to 2017 and non-inflation-adjusted); and that the average claimant costs are more than USD 6 million and average respondent costs are more than USD 5 million). See DIANA ROBERT, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, THE STAKES ARE HIGH: A REVIEW OF THE FINANCIAL COSTS OF INVESTMENT TREATY ARBITRATION (2014), <https://www.iisd.org/system/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf>. See also Papanikis, *supra* note 39, at 1247 ("In investment law, in addition to *ConoccoPhillips* [(that ordered Venezuela to pay damages of about USD 8.7 billion)] . . . investor-State dispute settlement mechanisms have rendered USD one billion-plus awards in 2014 (against Russia), 2015 (against Ecuador), 2016 (against Venezuela), 2018 (against Egypt), and 2019 against Pakistan and (reportedly) Russia.").

⁷¹ GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC 89 (2006) (arguing that the open-ended and vague treaty terms have endowed investment arbitrators with too much discretion, and that investment arbitral jurisprudence has transformed "fair and equitable treatment" into "an all-encompassing guarantee of highly flexible notions of fairness, equity, and due process"); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment?*, 78 N.Y.U. L. REV. 30 (2003) (criticizing overly expansive interpretive approaches to "regulatory takings" in investment arbitral awards made under the investment chapter of the North American Free Trade Agreement).

broad regulatory purposes, “interfering daily in all imaginable realms of private activities by all imaginable measures and procedures.”⁷² Such an expanded regulatory role by a state in modern economies has engendered increasing tensions between private property interests and pervasive sovereign regulatory powers.⁷³

The fourth is the rising wave of “privatization” of public services in the process of economic globalization. Through concession agreements and lease contracts, foreign investors have been increasingly embedded in the public sectors of host states, such as energy, mining, water, sewage, waste management, and other public utilities.⁷⁴ Conflicts might arise between a state’s obligations regarding its citizens’ economic and social rights and its IIA obligations towards foreign investors *in concreto*.⁷⁵ In particular, during an economic crisis, given that a host government typically feels compelled to deploy regulatory interventions to address the emergency, adversely affected foreign investors may file for investment treaty claims to seek compensation for the losses incurred.⁷⁶

Indeed, such normative conflicts could have been ameliorated by the realization of IIAs’ policy goals to attract foreign investments, prosper the economy, and create a virtuous welfare-improving circle in the host state. This is what many capital-importing states that concluded IIAs in droves in the 1990s had hoped for,⁷⁷ as well as what many advocates of IIAs would contend.⁷⁸ However, this claim is not well grounded in empirical evidence. While some studies found a modest link between the conclusion of IIAs and some types of foreign direct investment inflows, others found no meaningful correlation or only a marginal link between them, or suggested that it was unclear whether IIAs’ impacts on foreign direct investments constituted a benefit from the host state’s perspective.⁷⁹

⁷² John H. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT’L L. 243, 251-52 (1941); Ying Zhu, *Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space?*, 60 HARV. INT’L L. J. 377, 385-86 (2019).

⁷³ See Zhu, *supra* note 72, at 386; Barry Appleton, *Regulatory Takings: The International Law Perspective*, 11 N.Y.U. ENVTL. L.J. 35, 46 (2002).

⁷⁴ Brabandere, *supra* note 56, at 183-84.

⁷⁵ BRABANDERE, *supra* note 5, at 136-37.

⁷⁶ Bellak & Leibrecht, *supra* note 27, at 152-53.

⁷⁷ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67, 77-78 (2005).

⁷⁸ See, e.g., Brower & Blanchard, *supra* note 49, at 755; Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT’L ORGS. 1, 25-26, 30-31 (2011).

⁷⁹ Roberts, *supra* note 16, at 90. See Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT’L L. 397 (2010); see also JONATHAN BONNITCHA, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, *ASSESSING THE IMPACTS OF INVESTMENT TREATIES: OVERVIEW OF THE EVIDENCE* 15 (2017), <https://www.iisd.org/system/files/publications/assessing-impacts-investment-treaties.pdf>.

Substantially adding to the controversies is an overly liberal approach to investor protection and state liability adopted by some tribunals. As noted, most investment treaty disputes arose under older-generation IIAs, which typically are short, vague, and full of gaps, without explicitly addressing the policy space of states regarding human rights, public health, and environmental protection.⁸⁰ Notably, this interpretive approach tends to fill gaps and resolve interpretive ambiguities in an IIA in favor of investor protection by default, thereby subordinating legitimate regulatory goals to investor protection.⁸¹ In the extreme, this interpretive presumption may treat investor protection in almost absolutist terms akin to “a rights-based trump card,” and hence can systemically advance an expansive adjudicatory approach to issues of jurisdiction, standards of review, and state liability.⁸² As such, investor protection risks becoming an end in itself (rather than a means to broader goals of development ideals), capable of overriding regulatory interventions at odds with it.⁸³ This partly explains why few investment tribunals have explicitly and genuinely engaged with noneconomic issues in their analyses, and why too many of them tended to disregard, discount, or sidestep these complex issues, though recognizing their relevance in general.⁸⁴ In this way, this approach may significantly aggravate the tensions between a host state’s obligations to protect foreign

⁸⁰ See *supra* notes 4-6 and accompanying text in Part I.

⁸¹ VAN HARTEN, *supra* note 71, at 137-38; see, e.g., *Société Générale S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 116 (Jan. 29, 2004) (articulating this presumption: “The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ‘to create and maintain favorable conditions for investments by investors of one Contracting Party in the territory of the other.’ It is legitimate to resolve uncertainties in its interpretation so as to favor the protection of covered investments.”).

⁸² VAN HARTEN, *supra* note 71, at 137, 139; Broude & Henckels, *supra* note 9, at 95-100 (noting the prevalent predisposition of arbitrators, counsel, and scholars to treat investor claims as *rights claims* in general and *property claims* in particular, “even if the normative basis for this formulation is undertheorized, imperfect and imprecise”).

⁸³ VAN HARTEN, *supra* note 71, at 139 (“But behind the investor rights approach is a normative construction of investor protection as something so vital, so dominant, as to be treated an end in itself, or at least as something that benefits states and their people more or less as a rule without the need for any detailed inquiry into the implications of particular interpretations for governments.”) For a different view, see Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT’L L.J. 1, 12-13 (2014); see also Choudhury, *supra* note 10, at 1, 3-4 (arguing that investment protection is just a means to economic prosperity, economic development, and sustainable development, rather than an end in itself).

⁸⁴ Choudhury, *supra* note 10, at 1, 15-16 (arguing that the reason is because tribunals have misconstrued the purpose of IIAs as investment protection, rather than development ideals). For another account focusing on institutional reasons, see Hirsch, *supra* note 8, at 331-39 (listing the factors of the inter partes model, ad hoc tribunals with limited jurisdiction, transparency and public participation, law-making authority of states and tribunals, global rifts and bilateral solutions, asymmetries, and conceptual divide).

investments and to honor the human rights of its local population, intensifying the legitimate crisis that already plagued international investment law.⁸⁵

C. Searching for a Normative Bridge

Absent explicit treaty language, balancing competing investor rights and human rights is largely at the realm of treaty interpretation and application by investment tribunals, which typically enjoy considerable discretion in their decision-making.⁸⁶ From the perspective of applicable law, this rebalancing could be achieved by applying international human rights law to integrate considerations of human rights into tribunals' decision-making. As will be detailed in Part III, there is significant room for tribunals to leverage this international law-based judicial approach to reconcile and alleviate the potential conflicts between investor protection and human rights, without overly relaxing the standards of investment protection.

To be clear, this article does not advance a normative claim that investment tribunals *could* or *should* serve as human rights courts in one way or another. Neither does it suggest that investor-state arbitrators may engage in some sort of adjudicatory "activism," or could *ex officio* address the relationship between investment protection and human rights without the disputing parties' submissions to that effect. In a consensual arbitration process grounded on the parties' consent to arbitrate investment disputes, these positions inevitably risk departing from arbitrators' limited mandate under the IIAs, thereby opening the doors to challenge the recognition and enforcement of arbitral awards or to annulment proceedings.⁸⁷ Rather, this article focuses on a specific scenario where a respondent state raises human rights arguments (whether as defenses or claims) in investment arbitration premised on IIAs that remain silent on this matter.⁸⁸ It argues for a modest judicial approach that investment tribunals should, in such circumstances, take international law seriously, effectively address these arguments, and remain sensitive to the human rights interests implicated, as opposed to shunning away from or giving short shrift to them. Through the application

⁸⁵ For a critique on the tendency of investor-state tribunals expansively interpreting investor rights far beyond what was originally intended under IIAs, see Van Harten et al., *supra* note 21; see also THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Savant and Lisa E. Sachs eds., 2009).

⁸⁶ Elrifai, *supra* note 6, at 836.

⁸⁷ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10, 1958, 330 U.N.T.S. 3; U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL LAW, art. 34, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf; Convention on the Settlement of International Disputes Between States and Nationals of Other States, art. 52, 14 Oct. 1966, 575 U.N.T.S. [hereinafter ICSID Convention].

⁸⁸ To be clear, this article does not address human rights arguments invoked by claimant investors or third parties (*amici curiae*).

of public international law (which includes international human rights law), international adjudicators may find a normative bridge to reconcile competing interests and order the relationship between international investment law and human rights.

Before proceeding to the question of applicable law, it is worth asking whether, and to what extent, investor-state tribunals have *jurisdiction* to consider human rights arguments in investment arbitration. As a matter of law, jurisdiction is distinct from the applicable law governing the substance of a dispute.⁸⁹

In investment treaty arbitration, the breadth of a tribunal's jurisdiction depends on the formulation of the investor-state arbitration provision (i.e., the jurisdictional clause) in an IIA, or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), whereby the states have granted their consent to arbitration.⁹⁰ Depending on the specific language, the scope of these provisions varies. In the case of a *broad* jurisdictional clause, treaty parties may consent to arbitrate "any legal dispute concerning an investment" or "all disputes concerning investment" between an investor and the host state.⁹¹ Likewise, article 25 of the ICSID Convention extends the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID) to "any legal dispute arising directly out of an investment."⁹² A typical *narrow* jurisdictional clause often exclusively covers disputes concerning an investor's claims of violations of IIA obligations by a host state.⁹³ In the extreme, the jurisdictional clause could be designed as narrowly as covering only one or a few of the substantive investment protective standards provided under an IIA.⁹⁴

⁸⁹ Study Group of the Int'l Law Comm'n, Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Fifty- Eighth Session, U.N. Doc. A/CN.4/L.682, ¶ 45 (2006), https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf [hereinafter ILC Report on Fragmentation].

⁹⁰ Reiner & Schreuer, *supra* note 5, at 83; Filip Balcerzak, *Jurisdiction of Tribunals in Investor-State Arbitration and the Issue of Human Rights*, 29(1) ICSID REV. FOREIGN INV. L.J. 216, 221-22 (2014).

⁹¹ See, e.g., Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Reciprocal Promotion and Protection of Investments, Fr.-Arg., art. 8, Jul. 3, 1991, 1728 U.N.T.S. 278; Agreement between the Polish People's Republic and the Republic of Austria on the Support and Protection of Investments, Pol.-Austria, art. 8, Nov. 24, 1988, 1549 U.N.T.S. 61; Balcerzak, *supra* note 90, at 221.

⁹² ICSID Convention, art. 25(1).

⁹³ See, e.g., North American Free Trade Agreement, Can.-Mex.-U.S., ch. 11, art. 1116, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]; Energy Charter Treaty, art. 26(1)-(2), Dec. 17, 1994, 2080 U.N.T.S. 95 [hereinafter ECT]; Balcerzak, *supra* note 90, at 221.

⁹⁴ For example, such a jurisdictional clause may merely cover a dispute involving expropriation or "the amount of compensation for expropriation." See Agreement Between the Government of the People's Republic of China and the Government of the Mongolian

Under a delegated and limited mandate to resolve investment disputes, investor-state tribunals in principle lack the competence to serve as general human rights adjudicators. Thus, if an investor raised an independent claim for breach of its human rights, such a claim should generally fall outside a tribunal's jurisdiction, unless the relevant jurisdictional clause provides otherwise.⁹⁵ Nevertheless, even in case of a narrow jurisdictional clause, a tribunal's jurisdiction is broad enough to cover invocation of human rights obligations by the host state to challenge the jurisdiction or admissibility of the underlying investment claims, to justify its alleged breaches of the treaty, or to mitigate its legal liability.⁹⁶ As such, tribunals possess the jurisdiction to consider human rights arguments to the extent that they are *connected* with or *incidental* to an informed decision of an investment claim.⁹⁷ Therefore, despite the confined jurisdiction of investment tribunals, human rights may come to the forefront of investor-state treaty arbitration at the jurisdictional, merits (liability), and quantum phases.

Moreover, in case of a broad jurisdictional clause, an investment tribunal may have competence to accept a human rights-grounded counterclaim raised by the host state. In this regard, a notable example is the *Urbaser v. Argentina* decision, whereby an ICSID tribunal found within its competence Argentina's counterclaim premised on the investors' alleged breach of human rights obligations external to the IIA.⁹⁸ As reasoned by that tribunal, such a jurisdictional basis is due to that the IIA's jurisdictional clause was broad enough to cover a counterclaim and that both the principal claim and the counterclaim arose directly out of an investment.⁹⁹ This

People's Republic Concerning the Encouragement and Reciprocal Protection of Investments, China-Mong., art. 8(3), Aug. 25, 1991. Balcerzak, *supra* note 90, at 221.

⁹⁵ See, e.g., *Biloune v. Ghana Investments Centre*, Award on Jurisdiction and Liability, 95 I.L.R. 184, 183, 188, 203 (1989).

⁹⁶ Balcerzak, *supra* note 90, at 227.

⁹⁷ *Id.*; Santacroce, *supra* note 11, at 140; Reiner & Schreuer, *supra* note 5, at 84; Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. INT'L DISP. SETTLEMENT 277, 280 (2015).

⁹⁸ See, e.g., *Urbaser v. Argentina*, ICSID Case No. ABR/07/26, Award, ¶¶ 1143-55 (Dec. 8, 2016). See also *Aven et al. v. Costa Rica*, ICSID Case No. UNCT/15/3, Award, ¶ 740 (Sept. 18, 2018) (the tribunal found that the jurisdictional clause referring to "an investment dispute" was "in principle wide enough to encompass counterclaims," and not exclusively reserved for investors' claims).

⁹⁹ *Urbaser*, ¶¶ 1143, 1151 (According to the tribunal, "[i]t results clearly from these provisions that either the investor or the host State can be a party submitting a dispute in connection with an investment to arbitration. Arbitral decisions invoked by Claimants when arguing that counterclaims are generally dismissed in actual practice are all based either on more narrowly drafted arbitration clauses or on a lack of close connection of counterclaims based on domestic law... (in this case) ... Both the principal claim and the (counterclaim) are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession."); see Agreement for the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic, Spn.-Arg., art. X(1)-(3), Oct. 3, 1991 [hereinafter Spain-Argentina BIT]; ICSID Convention, arts. 25(1), 46.

decision echoed *Inmaris v. Ukraine*, where the tribunal upheld its jurisdiction over a counterclaim, on the ground that the IIA's jurisdictional clause was broadly worded to cover disputes "with regard to investments between" the investor and the host state.¹⁰⁰ This reading is consistent with the ordinary meaning of the treaty language (such as "disputes with regards to/arising out of/relating to an investment," or other equivalents), as well as the object and purpose of a typical IIA (i.e., to promote the economic development of the treaty parties).¹⁰¹

In addition, a more flexible approach holds that the ICSID Convention alone can endow a tribunal with jurisdiction to hear counterclaims, regardless of the exact formulation of an IIA's jurisdictional clause. Under this view, where a host state provides its consent to ICSID arbitration via an IIA, the consent to arbitrate any "counterclaims arising directly out of the subject-matter of the dispute"—as stipulated under article 46 of the ICSID Convention—should be automatically imported to the investment treaty arbitration arising under the IIA.¹⁰² This means that even for a narrow jurisdictional clause of an IIA, the treaty parties' consent to arbitrate their disputes under the ICSID Convention would provide an independent jurisdictional basis for a tribunal to adjudicate counterclaims that arise directly out of the same dispute.¹⁰³ Far from being merely theoretical, this approach was relied on and applied by the *Goetz v. Burundi II* tribunal to uphold the jurisdiction over a counterclaim.¹⁰⁴

While rare in practice, these investor-state decisions (from *Urbaser v. Argentina* to *Goetz v. Burundi II*) evince the jurisdictional basis for a host state to mount a counterclaim to enforce external human rights obligations on an investor.

¹⁰⁰ *Inmaris v. Ukraine*, ICSID Case No. ARB/08/8, Award, ¶¶ 431-32 (Mar. 1, 2012).

¹⁰¹ Shao, *supra* note 40, at 166-67. For a minority view, see Marco Gavazzi and Stefano Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability (Apr. 21, 2015) (the tribunal declined jurisdiction over a counterclaim raised by Romania, based on a narrow interpretation of a broadly crafted jurisdictional clause); see also Agreement between the Government of the Italian Republic and the Government of Romania on the Mutual Promotion and Protection of Investments, It.-Rom., art. 9(1), Dec. 6, 1990.

¹⁰² *Roussalis v. Romania*, ICSID ARB/06/01, Partial Dissent of Michael Reisman (Dec. 7, 2011). ICSID Convention, art. 46 ("Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."). This view, however, was not adopted by the tribunal majority in *Roussalis v. Romania*. See *Roussalis v. Romania*, ICSID ARB/06/01, Award, ¶¶ 868, 872 (Dec. 7, 2011).

¹⁰³ Brower & Blanchard, *supra* note 49, at 714-15.

¹⁰⁴ Antoine Goetz et al. v. Burundi (II), ICSID Case No. ARB/01/2, Award, ¶¶ 278-79 (Jun. 21, 2012) (relying on Reisman's dissenting opinion in *Roussalis v. Romania*, the tribunal held that despite the lack of an IIA's explicit provision on counterclaims, the host state granted its consent to counterclaims when consenting to the ICSID Convention in the IIA, which the investor had accepted by invoking the states' consent to arbitration at ICSID).

III. APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW AS THE *LEX CAUSAE*

This Part discusses the scenario whereby human rights law itself becomes the applicable law governing the merits of investment treaty disputes. Section A lays out the legal basis to import international human rights law as the applicable law governing the substance of an investor-state treaty dispute (the *lex causae*). It then proceeds to address *direct* application of human rights law, including its invocations to ground an affirmative defense (Section B) and to establish a counterclaim (Section C). Section D examines *indirect* application of human rights law as an interpretive tool for tribunals to inform their interpretations of an IIA's substantive provisions.

A. Importing Human Rights Norms as the Applicable Law

In investment treaty arbitration, the substantive law governing the merits of a dispute (*lex causae*) in principle is determined by the choice-of-law provisions of the underlying IIAs (or arbitral institutional rules); or, failing that, by arbitral tribunals.

In many IIAs—whether bilateral, plurilateral, or multilateral—there are choice-of-law provisions stipulating that international law shall govern the resolution of investor-state disputes that arise under the treaty—either exclusively or in conjunction with other laws.¹⁰⁵ Further, as provided by the ICSID Convention (under whose auspice the majority of investment arbitrations are conducted), a tribunal shall apply “such rules of international law as may be applicable” (among others), absent the parties’ selection of the choice of law.¹⁰⁶ As determined by these choice-of-law provisions, the applicable law governing the substance of investor-state treaty disputes includes public international law.

In the absence of such a choice-of-law provision at work, an investment tribunal then must determine the applicable law governing the merits of the disputes. In this regard, the weight of arbitral jurisprudence and commentaries likewise suggests that international law should apply to the substance of investor-state treaty disputes.¹⁰⁷

In nature, investor-state treaty arbitration is not only created by

¹⁰⁵ See, e.g., 2012 U.S. Model Bilateral Investment Treaty, art. 30(1) [hereinafter 2012 U.S. Model BIT]; NAFTA, ch. 11, art. 1131(1); ECT, art 26(6).

¹⁰⁶ ICSID Convention, art. 42(1).

¹⁰⁷ Vivendi Universal v. Argentina, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 121 (Jul. 3, 2002); Phoenix v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶¶ 77-78, (Apr. 15, 2009); MTD v. Chile, ICSID Case No. ARB/01/7, Award, ¶ 204 (May 25, 2004) [hereinafter MTD (Award)]. MTD v. Chile, ICSID Case No. ARB/01/7, Decision on Annulment, ¶¶ 61, 72 (Feb. 16, 2007) [hereinafter MTD (Annulment)]; Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 208, 210 (Katia Yannaca Small ed., 2010); HEGE ELISABETH KJOS, APPLICABLE LAW IN INVESTOR-STATE ARBITRATION 235 (2013); BRABANDERE, *supra* note 5, at 125-26; Christoph Hölken, *Conflicts Between International Investment Law and Domestic Law*, in INTERNATIONAL INVESTMENT LAW AND ITS OTHERS 213, 216 (Rainer Hofmann and Christian J. Tams eds., 2012).

international treaties, but also is primarily concerned with the invocation of IIAs to establish state responsibility for alleged breaches of these treaties.¹⁰⁸ Importantly, it is international law that shall govern the interpretation and application of an IIA and determine the establishment of state responsibility.¹⁰⁹ Though a treaty may opt out of *certain* rules of public international law (other than peremptory norms of *jus cogens*), neither an IIA nor investor-state treaty arbitration could opt out of *all* of the rules of general international law, since they are created by and operate within the normative framework of public international law.¹¹⁰ As a result, to the extent that an investor grounds its claims on sources of international law, general international law—composed of customary international law and general principles of law—should serve as the default rules governing the merits of investment treaty disputes, unless the treaty parties otherwise agreed.¹¹¹

As part of the broader corpus of international law, international human rights law may be imported as the applicable law governing the substance of investor-state treaty disputes (*lex causae*), to the extent that it is relevant to address the concrete legal issue in a particular case.¹¹² This could occur through two ways.

First, as noted above, even absent a choice-of-law provision, relevant rules of general international law could govern the merits of an investment treaty dispute, to the extent that the underlying IIA does not contract out their application. It follows that international human rights law embedded within the corpus of general international law (either as part of customary international law or general principles of law) may become applicable to investment treaty arbitration (scenario 1).

The second scenario is where the IIA contains a choice-of-law provision referring to “applicable rules of international law.”¹¹³ As is customary for international dispute resolution, the term “international law” should be

¹⁰⁸ Banifatemi, *supra* note 107, at 208, 210; see KJOS, *supra* note 107, at 235.

¹⁰⁹ Banifatemi, *supra* note 107, at 208, 210; see KJOS, *supra* note 107, at 235; BRABANDERE, *supra* note 5, at 1-2, 125-26.

¹¹⁰ See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95(3) AM. J. INT’L L. 535, 536-37 (2001) (making a similar point regarding the relationship between WTO law and public international law: “Each new state, as well as each new treaty, is automatically born into general international law. The treaty must exclude the rules of general international law that the parties do not want to apply with respect to the treaty, not the reverse”).

¹¹¹ KJOS, *supra* note 107, at 235; see Raymond Yang Gao, *The Role of Public International Law in Integrating Human Rights Considerations in Investment Treaty Arbitration*, 16 ASIA J. WTO & HEALTH L. & POL’Y 275, 284-88 (2020) (arguing that “[i]n investment treaty arbitration, the normative relationship between an IIA and public international law likewise determines the applicability of public international law to govern the interpretation and application of an IIA”); see also *id.*

¹¹² Santacroce, *supra* note 11, at 141-42; Bree Farrugia, *The Human Right to Water: Defences to Investment Treaty Violations*, 31 ARB. INT’L 261, 263-64 (2015).

¹¹³ See, e.g., 2012 U.S. Model BIT, art. 30(1); Canada-Peru Free Trade Agreement, Can.-Peru, ch. 8, art. 837, May 29, 2008; NAFTA, ch. 11, art. 1131.

construed under article 38(1) of the Statute of the International Court of Justice.¹¹⁴ Thus, in addition to general international law, a human rights treaty between the host state and home state (i.e., treaty parties) may also constitute the applicable law (scenario 2).

That said, three major conditions should be satisfied in order to qualify external international human rights law as the *lex causae*. First, the international human rights norms to be imported shall be directly *binding* on the treaty parties.¹¹⁵ This means that in scenario 1, the human rights norms must have been crystalized into “general principles of law” or “customary international law.” In scenario 2, a human rights treaty needs to bind both the treaty parties.¹¹⁶ Further, to be imported as the *lex causae*, the human rights norms, at a minimum, must not be excluded by the treaty parties in the IIA’s choice-of-law provision.¹¹⁷

Second, the imported human rights norms shall be “*relevant*” to the legal issue arising in a particular dispute. Thus, external human rights norms apply only to the extent that they are pertinent to the specific claims or defenses raised in a concrete dispute, based on “their self-determined scope of application.”¹¹⁸

Third, there needs to be a “norm” or a “rule” in actuality.¹¹⁹ While seemingly self-explanatory, this condition may impose an important hurdle. As stated, to the extent that it creates formal, binding legal obligations (as “hard law” norms), international human rights law is, in principle, addressed to states, rather than private entities.¹²⁰ In addition, current international norms of corporate responsibility predominantly exist in a “*soft law*” form with a non-binding nature.¹²¹ Therefore, most of human rights law may lack direct “bite” on an investor in investment treaty arbitration.

¹¹⁴ Reiner & Schreuer, *supra* note 5, at 85; see Statute of the International Court of Justice, art. 38(1) (“The Court, whose function is to decide in accordance with *international law* such disputes as are submitted to it, shall apply: (a) *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states*; (b) *international custom, as evidence of a general practice accepted as law*; (c) *the general principles of law recognized by civilized nations...*”) (emphasis added).

¹¹⁵ Santacroce, *supra* note 11, at 142.

¹¹⁶ This notwithstanding, where only the host state (but not the home state of the investor) is bound by a human rights treaty, it is still possible for an investment tribunal to take into account such an instrument as a supplementary means to inform their interpretation of IIA provisions. See *infra* Section III.D.

¹¹⁷ Santacroce, *supra* note 11, at 142; see Urbaser, ¶ 1202 (the tribunal found that art X(5) of the Spain-Argentina BIT or the ICSID Convention underlying IIA did not contain “any exclusion in respect of international law”).

¹¹⁸ Urbaser, ¶ 1202.

¹¹⁹ Simma, *supra* note 11, at 585 (making a similar point when explaining the elements for applying article 31(3)(c) of the Vienna Convention on the Law of Treaties).

¹²⁰ See *supra* notes 56-59 and accompanying text in Section II.A.

¹²¹ Farouk El-Hosseny & Patrick Devine, *Contributory Fault under International Law: A Gateway for Human Rights in ISDS?*, 35 ICSID REV. 105, 114-16 (2020); Marcoux & Bjorklund, *supra* note 47, at 894-96.

The applicability of international human rights law was explicitly confirmed by the tribunal in *Urbaser v. Argentina*, whereby the choice-of-law provision of the IIA referred to (i) “another treaty” between the treaty parties and (ii) “a general principle of international law.”¹²² When reviewing the merits of the counterclaim raised by Argentina, the tribunal found that an international human rights law obligation—provided as part of (i), or representing (ii)—may become the applicable law governing the merits of the dispute.¹²³

Yet, it is worth noting a caveat here. That an investment tribunal *can* have recourse to human rights law does not necessarily mean that it *must* apply a specific human rights rule as part of the applicable law. If the tribunal does not consider a human rights norm as directly bearing on the core issues of the dispute, it may decide not to apply it.¹²⁴ In other words, tribunals have *discretion* to determine whether to import human rights to a given dispute, and which specific human rights norms, rules, or instruments should be applied as part of the *lex causae*.

B. Human Rights Arguments as Defenses Against State Responsibility

Given the applicability of human rights law as the *lex causae*, the question then arises as to how a host state could invoke its human rights obligations as a defense against state responsibility. Such a defense may be mounted throughout the jurisdictional, merits, and quantum phases. The remainder of this section analyzes its three major forms: jurisdiction/admissibility defense, compensation defense, and conflict of norms defense.

(A) Jurisdiction/Admissibility Defense

1. Legality Requirement

Foreign investors may engage in unlawful conduct in the host state. To a varying degree, such conduct may adversely impact the human rights interests of the host states, either directly or indirectly. A question arises as to whether, and to what extent, such conduct should disqualify foreign investors from invoking the protections of an IIA. Through arbitral practice, investment tribunals have developed an important mechanism to that effect—the legality requirement. On this basis, a tribunal may find that the investor’s misconduct in breach of human rights should deprive the jurisdiction to hear the investment claims or render those claims inadmissible.¹²⁵

¹²² Urbaser, ¶ 1204. See Spain-Argentina BIT, art. X(5).

¹²³ Urbaser, ¶ 1207.

¹²⁴ Duggal & Diamond, *supra* note 48, at 302.

¹²⁵ Commentators’ views on whether this is a matter of jurisdiction or admissibility differ greatly. See Martin Jarrett, Sergio Puig & Steven Ratner, *Investor Accountability: Indirect Actions, Direct Actions by States, and Direct Actions by Individuals*, ACADEMIC FORUM ON ISDS CONCEPT PAPER 2021/1, at 6 (June 2021), https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/16_investor-accountability.pdf.

Many IIAs require foreign investments to be made “in conformity with” or “in accordance with” the law of the host state (the “legality requirement”).¹²⁶ Most typically, this legality requirement is provided in an IIA’s definition of covered investments.¹²⁷ Also, some other IIAs incorporate this requirement into the substantive provisions on investment protection or admission of investments.¹²⁸ Investment tribunals generally construed such a treaty provision as designed to preclude the IIA from protecting illegal investments, granting access to investor-state treaty arbitration only to investments made in accordance with the host state’s law.¹²⁹ In this way, a tribunal established under an IIA may deny jurisdiction to an investor’s claims if the disputed investments were made in breach of this legality requirement.

Yet, not all illegality in investor’s conduct per se would necessarily deprive the jurisdiction of investment tribunals. Rather, to successfully invoke the legality requirement, tribunals generally required the satisfaction of three major conditions.¹³⁰ The first concerns the timing of the investor’s conduct. Through arbitral decisions, tribunals made it clear that the legality requirement typically should only concern investor’s conduct when the investment was made (i.e., at the establishment phase), and in most cases, cannot extend to subsequent operation or performance of the investment.¹³¹

¹²⁶ Rahim Moloo & Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 *FORDHAM INT’L L.J.* 1473, 1476 (2011).

¹²⁷ Jarrett, Puig & Ratner, *supra* note 125, at 4 (finding that as shown by UNCTAD’s treaty mapping project, 1648 out of 2577 mapped IIAs contain such a requirement in the definition of investments). See UNCTAD, Mapping of IIA Convent, <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping>.

¹²⁸ Michael Polkinghorne & Sven-Michael Volkmer, *The Legality Requirement in Investment Arbitration*, 34 *J. INT’L ARB.* 149, 149 (2017); see, e.g., Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, Ger.-Phil., art. 2(1), Apr. 18, 1991 (Promotion and Acceptance: Each Contracting State shall “admit such investments in accordance with its Constitution, laws and regulations.”).

¹²⁹ *Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, ¶ 115 (Jul. 14, 2010) (noting that “the Contracting Party cannot be deemed to have given its consent to arbitrate the dispute under . . . the BIT,” if the investment was not “established in conformity with” the host state’s laws and regulations as required by the definition of “investment” under the IIA); *Saluka v. Czech Republic*, UNCITRAL, Partial Award, ¶ 204 (Mar. 17, 2006); Moloo & Khachaturian, *supra* note 126, at 1478.

¹³⁰ For a critique on these limitations of the legality requirement, see Jarrod Hepburn, *In Accordance with Which Host State Laws? Restoring the “Defense” of Investor Illegality in Investment Arbitration*, 5 *J. INT’L DISP. SETTLEMENT* 531 (2014).

¹³¹ Jarrett, Puig & Ratner, *supra* note 125, at 4. See, e.g., *Quiborax v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 266 (Sept. 27, 2012). The tribunal based its decision to limit application of the legality requirement provision to the establishment phase on the wording of the Bolivia-Chile BIT, since the “[t]reaty refer[red] to the legality requirement in the past tense by using the words investments ‘made’ in accordance with the laws and regulations of the host State”; see also *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case

The second one relates to the nature and extent of investor's illegal conduct, even at the establishment phase. Investment tribunals have been less consistent with respect to this condition. Some tribunals required a finding of serious or grave illegality by the investors, apparently adopting a "minor errors" test.¹³² Other tribunals held that the legality requirement cannot be invoked against investors' "good faith" mistakes.¹³³ Finally, there are tribunals adopting a tripartite approach to examine the proportionality condition. This was evinced in *Kim v. Uzbekistan*, where the tribunal articulated three elements to assess. These include: (i) "the significance of the obligation with which the investor is alleged to not comply"; (ii) "the seriousness of the investor's conduct"; and (iii) whether the investor's conduct in breach of the law would undermine a host state's significant interest, such that a *proportionate* response is to preclude the investment outside the IIA's protection.¹³⁴

The third condition concerns estoppel by the host state. Some tribunals found that the host state should be estopped from raising the investment's illegality, if it knew of that illegality yet still endorsed the investment.¹³⁵

Importantly, even where the IIA contains no such an explicit provision on the legality requirement, some investment tribunals found an *implicit* legality obligation under the IIA, holding that the treaty cannot grant substantive protection to investments made in breach of the domestic law and/or international law.¹³⁶ A notable example is *Plama v. Bulgaria*, where

No ARB/10/3, ¶ 193 (Oct. 4, 2013). For a minority approach, see *infra* note 375.

¹³² Moloo & Khachaturian, *supra* note 126, at 1494-95; see, e.g., Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 83 (Apr. 29, 2004) (finding that precluding treaty's protection based on "minor errors"—such as defects in documents filed by the investor with the host state government with respect to the investment—would contravene the object and purpose of the IIA).

¹³³ Fraport v. Philippines, ICSID Case No. AR1/03/25, Award, ¶ 396 (Aug. 16, 2007) (adopting a "good faith" test: indicators of "a good faith error" might be "the failure of a competent local counsel's legal due diligence report to flag that issue," or "the offending arrangement was not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected profitability"). Desert Line v. Yemen, ICSID Case No. ARB/05/17, Award, ¶¶ 116, 117 (Feb. 6, 2008) (referencing Fraport's good faith test, and holding that the investor's failure to obtain a particular certificate from the respondent state needs not preclude the investment from invoking the BIT. Instead, the tribunal reasoned that the question should be "is the likelihood that the investor would have received a certificate if he had believed it was necessary and requested it?").

¹³⁴ Vladislav Kim et al. v. Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶¶ 406-08 (Mar. 8, 2017).

¹³⁵ Moloo & Khachaturian, *supra* note 126, at 1497-99 (noting that likewise, a host state's affirmative statement ratifying the investment (e.g., recognition that the contracts at issue are valid) may lead the tribunal to find against a violation of domestic law in the first place); see Fraport, ¶ 346; Desert Line, ¶ 119; Inmaris v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, ¶ 140 (Mar. 8, 2010).

¹³⁶ Moloo & Khachaturian, *supra* note 126 at, 1482-83 (arguing that absent an explicit legal requirement provision in an IIA, precluding the treaty's protection to an investor is a

the investment claims invoked the Energy Charter Treaty (ECT) containing no express legality requirement provision. In that case, the tribunal held that “the substantive protections of the ECT cannot apply to investments that are made contrary to law,” since the treaty should be interpreted in ways consistent with its fundamental goal of “strengthen[ing] the rule of law on energy issues.”¹³⁷ With respect to the legality at issue, the tribunal found that the investment was made through fraudulent and deceptive misrepresentations in serious violation of Bulgarian law and international law (most notably, the good faith principle).¹³⁸

Likewise, in *Hamster v. Ghana*, the tribunal held that an IIA shall not provide protection to investments created through corruption or fraudulent conduct, in breach of national or international principles of good faith, or the host state’s domestic law.¹³⁹ Though the Bilateral Investment Treaty (BIT) contains a legality requirement provision, the tribunal clarified that such an implicit legal requirement was required by general principles of law, independent of an IIA’s specific language to this effect.¹⁴⁰

Other investment tribunals have also found in favor of such an implicit legality requirement that an IIA would not protect investments made or obtained in breach of national law or international principle of good faith, and recognized that it existed as a general principle of law even in the absence of an express treaty provision.¹⁴¹

2. Declining Investors’ Claims for Their Violations of Human Rights

Thus far, investment tribunals have mostly invoked the implicit legality requirement to deny IIAs’ protection to investments that were illegally obtained through corruption, bribery, as well as fraudulent and deceptive

matter of *admissibility* at the merits stage, rather than that of *jurisdiction*).

¹³⁷ *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 139 (Aug. 27, 2008).

¹³⁸ *Id.* ¶¶ 143, 144 (noting that the good faith principle was a part of Bulgarian law and international law, and holding that providing ECT’s protection here would run contrary to the principle of *nemo auditur propriam turpitudinem allegans* and a basic notion of international public policy—that “a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal”).

¹³⁹ *Hamster v. Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 123 (Jun. 18, 2010).

¹⁴⁰ *Id.* ¶ 124. Yet, in that case, the tribunal eventually found that the respondent state had failed to fulfill its burden of proof with respect to the investor’s alleged fraudulent act when making the investment. *Id.*

¹⁴¹ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA, ¶¶ 1351-52, n. 1773 (Jul. 18, 2014) [hereinafter *Yukos v. Russia*]; *SAUR v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 308 (Jun. 6, 2012) (translated: “[the tribunal] is aware that the finality of the investment arbitration system is to protect only lawful and bona fide investments. Whether or not the BIT between France and Argentina mentions the requirement that the investor act in conformity with domestic legislation does not constitute a relevant factor. The condition of not committing a serious violation of the legal order is a tacit condition, inherent to any BIT as, in any event, it is incomprehensible that a State offer the benefit of protection through arbitration if the investor, in order to obtain such protection, has acted contrary to the law.”).

conduct.¹⁴² Outside of these specific scenarios, tribunals have yet to address investors' violations of human rights. Though untested in practice, extending this approach to violations of human rights in a more general sense is not only a logical move from the perspective of the applicable law, but also a desirable development from the policy perspective.

In *Plama v. Bulgaria* and *Hamester v. Ghana*, the tribunals, aside from confirming an implicit obligation to comply with the law of the host state, also assessed the investors' conduct under international law as a precondition for invoking an IIA.¹⁴³ This approach is logical, in that international law serves as the substantive law governing an investor-state treaty dispute, regardless of the existence of an explicit choice-of-law provision.

Yet, rather than requiring an investor's compliance with international law as a general matter, these tribunals focused on the fundamental international legal principle of good faith.¹⁴⁴ Even so, it may be argued that "any knowing violation of international legal obligation" could equally violate the principle of good faith.¹⁴⁵ Indeed, the decline of treaty protection for illegality under international law should be applied equally, and "there is no good reason to prioritize one violation of the law over another."¹⁴⁶ Thus, just like investments obtained through corruption, bribery, as well as fraudulent and deceptive conduct, investments made illegally in serious violation of applicable substantive international law obligations—including international human rights norms and environmental norms—could likewise be deprived of an IIA's protection.¹⁴⁷ In this way, tribunals could decline the treaty's protection to investments established in serious violation of human rights, even without a treaty provision incorporating the legality requirement. As to the nature and extent of illegality, the *Kim v. Uzbekistan* tribunal's tripartite approach to proportionality seems to provide a more transparent, coherent, and principled approach. Notably, this approach enables tribunals to balance the need to grant investment protection and the necessity of disciplining illegal investments through a proportionality test.¹⁴⁸ To understand how this test will be applied *in concreto*, it is worth noting the tribunal's practice in *Cortec v. Kenya*, which arose under the U.K.-Kenya

¹⁴² See, e.g., *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 179 (Oct. 4, 2006); *Plama*, ¶¶ 139, 143, 144.

¹⁴³ See *supra* notes 137-40 and accompanying text.

¹⁴⁴ *Moloo & Khachaturian*, *supra* note 126, at 1487.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; Choudhury, *supra* note 5, at 16.

¹⁴⁸ Jarrett, Puig & Ratner, *supra* note 125, at 8 (cautioning the risk: "A broadly worded provision that made any violation of national law grounds for denial of access to arbitration could allow the state to circumvent key IIA protections (obligations)"). The same could be said of tribunals' interpretation and application of the implicit legality requirement, as an overly broad approach risks defeating the object and purpose of an IIA.

BIT containing no explicit legality requirement.¹⁴⁹

In that case, the tribunal found in favor of an implicit legality obligation requiring the investor to comply with Kenya's domestic law. As held by the tribunal, this is because "[t]he text and purpose of the BIT and the ICSID Convention are not consistent with holding host governments financially responsible for investments created in defiance of their laws fundamental protecting public interests such as the environment."¹⁵⁰ As required by Kenyan law, the investor was obliged to conduct an environmental impact assessment, which it failed to fulfill.¹⁵¹ When assessing whether this illegality should preclude the investor from invoking the BIT, the tribunal followed the *Kim v. Uzbekistan* tribunal's tripartite test. First, it found that those regulatory obligations "were of fundamental importance in an environmentally vulnerable area."¹⁵² Second, the tribunal considered that the investor's conduct "showed serious disrespect for the fundamental public policies of the host country in relation to the environment and resource development."¹⁵³ Third, it concluded that the investor's failure to obtain the environmental license was "of considerable weight" and constituted "'significant' prejudice to the host state," such that denying the protection of the BIT and ICSID Convention could be a proportionate response under international law.¹⁵⁴

Investment tribunals may follow the approach of *Kim v. Uzbekistan* and *Cortec v. Kenya* to hold investors accountable for their unlawful conduct with respect to human rights in the host state. When an investor failed to comply with international human rights law (or alternatively, the host state's domestic law incorporating such norms), tribunals may dismiss the investment claims, provided that such obligations are important to the host state, the investor's conduct is serious or grave, and the resultant prejudice to the host state's interest is so important that it is proportionate to deny an IIA's protection.¹⁵⁵

The above discussion deals with the invocation of human rights law in general, which remains largely untested in investment treaty arbitration, despite the legal basis and policy rationale supporting this approach. It bears noting that if certain human rights can be considered as part of international peremptory norms of *jus cogens*, the applicability of such norms to ground a jurisdiction/admissibility defense would be relatively clear-cut, as arbitrators and commentators tend to share a consensus on that.¹⁵⁶ For example, the tribunal in *Phoenix v. Czech* stated that ICSID protection should not "be

¹⁴⁹ See Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya, U.K.-Kenya, Sept. 13, 1999.

¹⁵⁰ *Cortec v. Kenya*, ICSID Case No. ARB/15/29, Award, ¶ 333 (Oct. 22, 2018).

¹⁵¹ *Id.* ¶ 365.

¹⁵² *Id.* ¶ 346.

¹⁵³ *Id.* ¶ 349.

¹⁵⁴ *Id.* ¶¶ 362, 365.

¹⁵⁵ Choudhury, *supra* note 5, at 16.

¹⁵⁶ UNCTAD, *supra* note 2, at 15.

granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.”¹⁵⁷ Thus, at a minimum, when an investor egregiously breached these peremptory norms in relation to the investment in dispute, an investment tribunal may decline the investor’s IIA claims.¹⁵⁸

(B) Compensation Defense

1. Doctrine of Contributory Fault in International Law

At the merits or quantum phase, even in the face of a treaty breach, the host state may raise a defense against the monetary damages awarded to the investor. By invoking the doctrine of contributory fault, the host state could argue that the investor’s illegal or wrongful conduct with respect to human rights should lead the tribunal to apportion liabilities between the disputing parties, and accordingly deduct the compensation awarded to reflect the investor’s own contributory fault in causing its own injury.

Rooted in the law of state responsibility (as part of generational international law), the doctrine of contributory fault requires international adjudicators to consider victims’ own fault giving rise to or exacerbating their injury suffered, enabling a corresponding reduction of damages.¹⁵⁹ Historically, this doctrine first emerged as “a corollary of the full reparation principle”: reparation must “wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” as far as possible.¹⁶⁰ By implication, the compensation due should only address the injuries caused by the breaching party, and shall not exceed the loss actually suffered by the victim.¹⁶¹ In this regard, as provided by article 39 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (generally considered as a codification of customary international law):

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom

¹⁵⁷ ICSID Convention, at ¶ 78.

¹⁵⁸ Hirsch, *supra* note 8, at 326 (noting that alternatively, arbitrators may assert jurisdiction yet declare that IIA provisions protecting the investment are inapplicable or void for conflicting with *jus cogens* in a particular dispute).

¹⁵⁹ El-Hosseny & Devine, *supra* note 121, 107; *see* International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), art. 39, Commentary, ¶ 1 [hereinafter ILC Articles on States’ Responsibility].

¹⁶⁰ Permanent Court of International Justice, *Chorzów Factory*, 1928 PCIJ, Series A, No 17 (Merits); ILC Articles on States’ Responsibility, *supra* note 159, art. 31.

¹⁶¹ MARK KANTOR, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE 104 (2008).

reparation is sought.¹⁶²

Yet, not every form of behavior of the victim is relevant for this purpose. Instead, only “willful” or “negligent” actions or omissions that “manifest a lack of due care on the part of the victim for his or her own property or rights” qualify for invoking contributory fault under article 39.¹⁶³ Though undefined by the ILC, the notion of “negligence” needs not be “serious” or “gross”—rather, its relevance depends on “the degree to which it has contributed to the damage as well as the other circumstances of the case.”¹⁶⁴ As commented on by Sergey Ripinsky and Kevin Williams, “negligence” could be assessed by “a test of reasonableness,” requiring a context-specific inquiry to consider various “factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.”¹⁶⁵

To be clear, investment tribunals enjoy wide discretion to take into account claimants’ contributory fault, but may decide not to apply this doctrine in a given case based on their appreciation of the factual situation. To successfully claim a set-off, tribunals tend to require that the contribution of investor wrongdoings in provoking the disputed measures should be “material and significant,” with a “sufficient” causal link between that misconduct and the prejudices suffered.¹⁶⁶

In investment arbitral jurisprudence, there is a salient trend that investment tribunals have increasingly relied on contributory fault (as codified in article 39) to set off damages awarded to an investor to reflect the latter’s own fault resulting in its own injury. In this regard, the factual patterns generally fall into two scenarios: (i) though unrelated to the wrongdoing of the host state, the misconduct of the investor had contributed to its losses suffered, and (ii) the investor misbehavior had provoked the disputed measure of the host state, thus contributing to the latter’s wrongdoings.¹⁶⁷

As for the first scenario, an exemplary case is *MTD v. Chile*, where the tribunal found that the investors had contributed to their own injury through their lack of due diligence and bad business judgment when making the investment. In that case, the tribunal noted that the investors (two real estate development firms) had accepted an exorbitant land valuation on the future assumptions that the required development permits would be issued, without seeking “adequate professional advice in the urban sector” or relevant

¹⁶² ILC Articles on States’ Responsibility, *supra* note 159, art. 39.

¹⁶³ *Id.* ¶ 5.

¹⁶⁴ *Id.*

¹⁶⁵ SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 315 (2008); *see* ILC Articles on States’ Responsibility, *supra* note 159, art. 39, Commentary, ¶ 5.

¹⁶⁶ *See, e.g.*, *Yukos v. Russia*, ¶¶ 1600, 1599, 1615; *Occidental v. Ecuador*, ICSID Case No ARB/06/11, Award, ¶ 687 (Oct. 5, 2012).

¹⁶⁷ *Yukos v. Russia*, ¶¶ 1604, 1605.

contractual protections.¹⁶⁸ Emphasizing that “BITs are not an insurance against business risk,”¹⁶⁹ the tribunal found the investors’ bad business judgment had “increased their risks in the transaction,” such that their own fault had contributed to the injuries suffered, irrespective of the host state’s breach of the fair and equitable (FET) treatment.¹⁷⁰ On this basis, the tribunal concluded that the investors should bear responsibility for their own negligence as experienced businessmen, and accordingly reduced damages by fifty percent.¹⁷¹

In the subsequent ICSID annulment proceeding, the annulment committee confirmed such findings on contributory fault, holding that the investors were faulty in failing to “safeguard [their] own interests rather than a breach of any duty owed to the host [s]tate.”¹⁷²

Regarding the second scenario, the following cases are the most relevant ones. In *Occidental v. Ecuador*, the tribunal found the investors’ failure to obtain a mandatory ministerial authorization before their transfer of certain contractual rights had breached the Ecuadorian hydrocarbon law, and that such “grave mistakes” and “negligence” had contributed to Ecuador’s breach of the FET treatment (in cancelling the concession agreement).¹⁷³ In the exercise of its discretion, the tribunal reduced the damages by twenty-five percent, as a result of the investors’ “material and significant” wrongdoings contributing to that degree of the injury suffered.¹⁷⁴

In *Yukos v. Russia*, the tribunal reduced the compensation awarded by twenty-five percent for the investors’ contributory fault of tax avoidance schemes.¹⁷⁵ While finding the disputed Russian measures in breach of the ECT, the tribunal noted that two instances of the investors’ tax avoidance arrangements had materially and significantly contributed to their own prejudices.¹⁷⁶ Relying on articles 31 and 39 of the ILC Articles on States’ Responsibility, the tribunal found that the claimants must pay a price for their “material and significant misconduct,” despite the fact that Russia’s subsequent measures were disproportional and constituted expropriation.¹⁷⁷ On this basis, the tribunal used its discretion to apportion fault between the

¹⁶⁸ MTD (Award), ¶¶ 168, 178. In this way, the investors had substantially invested in a land project that was already subject to an existing zoning regulation by the government.

¹⁶⁹ *Id.* ¶ 178 (stressing that BITs do not insure against any business risks that the investor assumed irrespective of the host state’s conduct).

¹⁷⁰ *Id.* ¶ 242 (noting that “[a] wise investor would not have paid full price up-front for land valued on the assumption of the realization of the Project; he would at least have staged future payments to project progress, including the issuance of the required development permits”).

¹⁷¹ *Id.* ¶¶ 178, 243.

¹⁷² MTD (Annulment), ¶¶ 99, 101.

¹⁷³ *Occidental*, ¶¶ 662, 680, 681.

¹⁷⁴ *Id.* ¶ 687.

¹⁷⁵ *Yukos v. Russia*, ¶¶ 1592, 1596-98, 1633, 1637.

¹⁷⁶ *Id.* ¶¶ 1615, 1621, 1634.

¹⁷⁷ *Id.* ¶¶ 1634, 1637.

disputing parties, and reduced the damages due by twenty-five percent.¹⁷⁸

Likewise, the *Goetz v. Burundi II* tribunal reduced the compensation due to one of the expropriated assets by thirty percent for the investor's misconduct that triggered the measures of expropriation.¹⁷⁹

2. Investors' Wrongdoings with Respect to Human Rights

In addition to investors' lack of due diligence and violations of domestic law, contributory fault may equally apply to their wrongdoings with respect to human rights of the local communities.

In *Copper Mesa v. Ecuador*, the tribunal, after finding the host state violative of the Canada-Ecuador BIT for termination of the investor's mining concessions, proceeded to examine the investor's wrongdoings with respect to its own injury under the rubric of contributory fault.¹⁸⁰ In that regard, the tribunal emphasized the investor's "sustained act of folly" in "recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands" through its local agents.¹⁸¹ In the view of the tribunal, these acts "had substantially reduced [the investor's] chances of turning its . . . concessions into a commercial success," making the situation far worse for itself (such that the project was bound to fail).¹⁸² On this basis, the tribunal assessed the investor's faulty contribution to its own injury to be thirty percent, and correspondingly deducted the damages awarded.¹⁸³

Specifically, in that case, the tribunal found several of the investor's local senior personnel (in the host state) "guilty of directing violent acts committed on its behalf, in violation of Ecuadorian criminal law."¹⁸⁴ Stressing that "[t]heir subterfuge and mendacity aggravated those acts," the tribunal noted that the "adverse response from members of the local communities, already hostile, was inevitable."¹⁸⁵ Further, the tribunal found the investor's senior management in Canada (i.e., the home state) *negligent* with respect to the planning and execution of these acts, though no evidence suggested they were fully privy to such misconduct.¹⁸⁶ But the tribunal reasoned that, had it based its decision of contributory fault on the aforementioned Canadian management's *willful* conduct, the consequences

¹⁷⁸ *Id.* ¶¶ 1592, 1596-98, 1633, 1637.

¹⁷⁹ *Goetz*, ¶ 299; Elrifai, *supra* note 6, at 867.

¹⁸⁰ *Copper Mesa v. Ecuador*, PCA Case No. 2012-2, Award, ¶ 6.98 (Mar. 15, 2016) ("[T]he issue is whether, and if so, to what extent, the Claimant's worsening situation as the concessionaire in the Junín area was caused (in whole or in part) by its own acts or omissions.").

¹⁸¹ *Id.* ¶ 6.99.

¹⁸² *Id.*

¹⁸³ *Id.* ¶ 6.102.

¹⁸⁴ *Id.* ¶ 6.100.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

under article 39 would have been be much graver.¹⁸⁷

Another seminal decision in the human rights context is *Bear Creek v. Peru*. In that case, the tribunal split over whether the investor had contributed to the social unrest that provoked the host state's measures in violation of the IIA (i.e., a decree terminating the investor's right to operate its mining concessions). The majority of the tribunal did not support such a finding, but instead downplayed the investor's lack of sufficient relationship-building and consultation with the affected local community.¹⁸⁸ Finding that the investor had comported with all legal requirements on this matter, the majority refused to apply contributory fault to reduce damages.¹⁸⁹

In contrast, dissenting arbitrator Philippe Sands found that the investor's failure to obtain a "social license" to operate in the local community had contributed in a material and significant way to the local social unrest that provoked Peru's responsive measures.¹⁹⁰ Though recognizing that the International Labour Organization (ILO) Convention 169 (addressing the rights of indigenous and tribal peoples) imposed obligations only on states, Sands considered that this instrument was not "without significance or legal effects" for a private investor: under the Convention, an investor shall effectively engage in consultation with all potentially affected local communities to deal with their concerns over the investments, and obtain a "social license" to operate.¹⁹¹ In the view of Sands, due to its own negligence, the investor had failed to carry out its obligation under the Convention to properly "give effect to the aspirations" of the local indigenous people, whose rights were not lesser rights under international law.¹⁹² On this basis, Sands concluded that the investor's contributory fault with respect to its own injury made it equally liable as the host state, and thus reduced the damages by half.¹⁹³

In a recent ICSID arbitration (*Gabriel Resources Ltd. v. Romania*) concerning a USD 3.2 billion claim, the host state raised arguments building on *Copper Mesa v. Ecuador* and *Bear Creek v. Peru*, contending that the investor's contributory fault in failing to obtain a social license to operate should reduce its damages (if any).¹⁹⁴ It awaits to be seen whether and how

¹⁸⁷ *Id.*

¹⁸⁸ *Bear Creek v. Peru*, ICSID Case No ARB/14/21, Award, ¶¶ 664-67 (Nov. 30, 2017).

¹⁸⁹ *Id.* ¶¶ 567, 668.

¹⁹⁰ *Bear Creek*, ICSID Case No ARB/14/21, Partially Dissenting Opinion of Philippe Sands, ¶ 4 (Nov. 30, 2017) ("The Respondent has clearly established the Claimant's contributory responsibility, by reason of its acts and omissions, to the social unrest that left the Peruvian government in the predicament it faced, and the need to do something reasonable and lawful to protect public well-being.") [hereinafter Sands' Dissenting Opinion].

¹⁹¹ *Id.* ¶¶ 10, 37.

¹⁹² *Id.* ¶¶ 11, 36.

¹⁹³ *Id.* ¶¶ 1, 39.

¹⁹⁴ *Gabriel Resources Ltd. v. Romania*, ICSID Case No. ARB/15/31, Claimants' Reply and Counter-Memorial on Jurisdiction, ¶¶ 113, 147-78 (Nov. 2, 2018).

this tribunal will address such arguments and enter into a judicial dialogue with these precedents.

Nevertheless, not all tribunals are consistent in relying on contributory fault.¹⁹⁵ For instance, in *South American Silver v. Bolivia*, the tribunal rejected the contributory fault argument raised by the host state.¹⁹⁶ In that case, Bolivia based this argument on the claimant's alleged "violations of human and indigenous rights, the social conflict and the infringement of other laws of Bolivia."¹⁹⁷ The tribunal noted that it shall construe the IIA in accordance with the ILO Convention 169 (ratified by Bolivia) in order to "guarantee the protection of the Indigenous Communities"¹⁹⁸ and that Bolivia's "sovereign decision to expropriate the Mining Concessions was the result of a severe and prolonged social conflict that originated with the [investment] Project."¹⁹⁹ However, the tribunal eventually found that the treaty breach arose from Bolivia's failure to compensate for expropriation (rather than from the act of expropriation itself), and thus was not attributable to the investor, despite recognizing that the investor had contributed to the social unrest leading to the expropriation.²⁰⁰ While this view may be criticized for taking too strict a view of causation (seemingly suggesting that all unlawful expropriations might be unable to invoke contributory fault), it reveals the inconsistency in tribunals' application of this doctrine under general international law. To address such uncertainties and inconsistency, treaty parties could use carefully crafted IIA provisions to clarify the conditions for invoking contributory fault.

Further, the decisions of *Copper Mesa v. Ecuador* and *Bear Creek v. Peru* are not without controversies. In *Copper Mesa v. Ecuador*, the tribunal concluded that the investor's Canadian senior management was negligent, though not willful, with respect to the hired local agents' criminal activities, without providing any benchmark to examine the conduct.²⁰¹ Likewise, in *Bear Creek v. Peru*, Sands' approach is unconventional in holding the investor accountable for its failure to carry out the recommendations and guidelines of international "soft law," which are generally deemed non-binding.²⁰² At a deeper level, these instances reflect a broader dilemma of

¹⁹⁵ Marcoux & Bjorklund, *supra* note 47, at 892-94.

¹⁹⁶ *South American Silver v. Bolivia*, UNCITRAL, PCA Case No 2013-15, Award, ¶ 875 (Nov. 22, 2018).

¹⁹⁷ *Id.* ¶¶ 788, 381 (The respondent claimed that the claimant's local subsidiary "committed several abuses that led to an unsustainable escalation of violence that endangered the life and rights of the Local Communities and the public officials and forced the State, after having supported the continuity of the Project, to decree Reversion as an ultima ratio.").

¹⁹⁸ *Id.* ¶ 199.

¹⁹⁹ *Id.* ¶ 875.

²⁰⁰ *Id.*; see El-Hosseny & Devine, *supra* note 121, at 127.

²⁰¹ *Copper Mesa*, ¶ 6.100.

²⁰² El-Hosseny & Devine, *supra* note 121, at 123-26, 128. Though the right to consultation (provided by the ILO Convention 169) had been incorporated into Peru's domestic law (as argued by Sands), both the Convention and the Peruvian law (Resolution 26253) only impose

applying international human rights law. Namely, given that most binding human rights norms are of a vertical nature and primarily regulate the conduct of sovereign states (rather than private entities), it is difficult to directly assess investors' conduct by applying human rights law itself.²⁰³

In response, tribunals could follow the *MTD v. Chile* tribunal's approach to address investor misconduct, adopting a "due diligence" test to determine whether an investor has properly safeguarded its own interests. Indeed, investor wrongdoings under the rubric of contributory fault need not be equated with *illegality* per se, but may also include "willful" or "negligent" acts or omissions that fail to exercise due care with respect to its own rights or interests.²⁰⁴ Determination of the latter could entail "a test of reasonableness" to examine what a reasonable business enterprise/businessman would do to take care of its own interests, in light of all relevant factors capable of affecting compensation in a given case.²⁰⁵ These factors may include the investor's level of sophistication and available resources (a large, resourceful multinational firm or a small and medium enterprise), the degree of deviation of investor's conduct from widely recognized international standards of responsible business practice (including industry-specific soft law obligations regarding environmental assessments, prior consultation with local communities, and a "social license" to operate), the nature of the investments (environmentally friendly or exploitive), the potential adverse effects of the investments to the local communities and the environment, and the situation of the local communities (such as to what degree vulnerable indigenous and tribal peoples are affected), among others.

Under this approach, Sands' decision to give effect to the investor's failure to comply with a soft law norm to obtain a "social license" could be better justified on a doctrinal basis: as a sophisticated multinational mining company, the investor ought to take appropriate steps to safeguard its own interests in a specific case. However, while aware of the soft law obligation to engage in prior consultation and obtain a social license, Bear Creek still failed to effectively fulfill this requirement, resulting in the social unrest that provoked the government's revocation of its mining rights.²⁰⁶ Given these context-specific circumstances, the investor's wrongdoing (though not illegality per se) may constitute its "negligence" that materially and significantly contributes to its own injury. Likewise, under the same test,

such obligations on the state, rather than private investors or business enterprises.

²⁰³ Brabandere, *supra* note 56, at 189-90; see Marcoux & Bjorklund, *supra* note 47, at 895. An exception is a set of peremptory norms (*jus cogens*), which also bind individuals, firms, and private entities.

²⁰⁴ ILC Articles on States' Responsibility, *supra* note 159, art. 39, Commentary, ¶ 5. El-Hosseny & Devine, *supra* note 121, at 128-29. Gao, *supra* note 111, at 309.

²⁰⁵ RIPINSKY & WILLIAMS, *supra* note 165, at 315. See ILC Articles on States' Responsibility, *supra* note 159, art. 39, Commentary, ¶ 5. Gao, *supra* note 111, at 309.

²⁰⁶ Sands' Dissenting Opinion, ¶¶ 12, 38, 39.

Copper Mesa’s Canadian senior management could be found negligent in failing to exercise an appropriate level of due diligence over its major business operation abroad, evincing its fault with respect to the human rights violations in Ecuador.

Further, under this approach, the degree of investor’s fault also matters for invoking contributory fault, such that there are different consequences for negligence, serious or gross negligence, or willfulness (the greater the fault, the bigger the ratio of damages reduced).²⁰⁷ Likewise, in the presence of both a lack of due diligence and illegality (such as violations of international hard law, domestic law, or investment contract) on the part of the investor, tribunals may further increase the level of fault for which an investor should be responsible.²⁰⁸

In short, *MTD v. Chile*, *Copper Mesa v. Ecuador*, and *Bear Creek v. Peru* demonstrate the potentials of applying contributory fault to discipline investor wrongdoings in investment arbitration, thus holding them accountable for their misconduct with respect to human rights in the host state. Whether through the test of illegality or “due diligence,” the doctrine of contributory fault provides an important mechanism to give effect to international human rights norms (soft law or not) in this process. This could not only contribute to a more balanced system of investment treaty arbitration, but may incentivize and pressure foreign investors to comply with human rights requirements, even those non-binding standards, in the first place.

(C) Conflict of Norms Defense

Thirdly, human rights law may be invoked at the merits phase to preclude a finding of state responsibility. A distinction needs to be drawn here. Indeed, human rights may be invoked with respect to a specific element of an investment protection standard or an affirmative defense under general international law. For instance, when defending against an expropriation claim, the host state may argue that its measure was adopted to safeguard human rights as a legitimate public purpose, in efforts to invoke the police powers doctrine. In this way, the host state, however, still needs to address other elements necessary for invoking the police powers doctrine, including due process, non-discriminatory and good-faith application, and proportionality.²⁰⁹ In addition to this scenario, human rights could also be

²⁰⁷ See *Copper Mesa*, ¶ 6.100 (In *obiter dicta*, the tribunal reasoned that if its decision on contributory fault was based on investor’s *willful* conduct (rather than *negligence*), the legal consequences under article 39 would become much graver.).

²⁰⁸ See *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Brigitte Stern’s Dissenting Opinion, ¶¶ 7-8 (Sept. 20, 2012) (arguing that rather than reducing the damages by 25 percent, “[a] split 50/50 would have been even more justified, as the Claimants have acted both very imprudently and illegally”) (emphasis added). See also Gao, *supra* note 111, at 309.

²⁰⁹ Catharine Titi, *Police Powers Doctrine and International Investment Law*, in GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 14-15 (Filippo Fontanelli et al eds., 2018), https://papers.sitern.com/sol3/papers.cfm?abstract_id=3050417.

invoked as an *independent* defense against a breach of an IIA, precluding a state's responsibility in its own right.

This sub-section focuses on the latter scenario in the form of a "conflict of norms" defense. Namely, the host state may contend that its investment protection obligations under an IIA should be superseded by an applicable international human rights obligation in conflict with the former. As a matter of law, this conflict of norms argument is different from the treaty interpretation argument that tribunals should read an IIA in harmony with human rights norms (in Section III.D).²¹⁰

To resolve a conflict of norms as such, the first step is to establish whether two norms actually contradict with each other. Under the prevailing view in international law, a "conflict" is narrowly defined as "direct incompatibility" between two norms, arising "only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties."²¹¹ While IIAs and human rights law may impose conflictual obligations simultaneously *in concreto*, a finding of conflict of norms may not be a straightforward case, since international law adopts a general presumption of coherence against a conflict between different rules.²¹² Given the lack of legal hierarchy between existing and new rules of international law (other than *jus cogens*), a new treaty is generally assumed to generate effects that are consistent with existing rules of international law, at least absent clear evidence to the contrary.²¹³ In most cases, potential conflicts may be "interpreted away" by interpreting an IIA in harmony with other human rights obligations.²¹⁴ A genuine legal conflict should be rare, as it only arises when a harmonious interpretation is not feasible.²¹⁵

Thus, to raise a conflict of norms defense, firstly, a host state bears the burden of proving the existence of a "conflict": namely, adherence to an IIA will inevitably lead to a breach of its international human rights obligations in the specific factual circumstances, which cannot be harmonized by treaty interpretation. Then, a tribunal should apply traditional conflict resolution rules under international law, including *lex superior*, *lex specialis*, and *lex posterior*, in order to determine which norm should prevail.²¹⁶ In addition, ascertaining the intention of the treaty parties could also play a role as a

²¹⁰ See *infra* Section III.D.

²¹¹ C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 426 (1953). Erich Vranes, *The Definition of "Norm Conflict" in International Law and Legal Theory*, 17 EUR. J. INT'L L. 395, 395 (2006).

²¹² Pauwelyn, *supra* note 110, at 550-51.

²¹³ *Id.* at 550; Simma, *supra* note 11, at 583; Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 67 (1949).

²¹⁴ See *infra* Section III.D; see also Pauwelyn, *supra* note 110, at 550-51.

²¹⁵ See *infra* Section III.D; see also Pauwelyn, *supra* note 110, at 550-51.

²¹⁶ Santacroce, *supra* note 11, at 151-53.

conflict resolution rule.²¹⁷ However, as noted earlier, most IIAs simply did not deal with human rights issues,²¹⁸ making it difficult to determine states' intentions on this matter.

In practice, Argentina has raised this line of conflict of norms arguments, among others, in relation to its people's human right to water in several investment arbitrations challenging its emergency measures adopted to address a national economic crisis around 2000.²¹⁹ Such conflict of norms arguments in essence contended that since the economic crisis undermined the basic human rights of its citizens, an IIA should not prevail over emergency measures taken to remedy the effects of the crisis and to preserve the basic human rights of its people.²²⁰ However, in most of these decisions, the tribunals did not uphold such defenses, instead generally showing reluctance to effectively engage with the human rights that were allegedly in conflict with investors' rights.²²¹

In *Azurix v. Argentina* (a dispute arising from a concession to provide water and sewerage services), Argentina argued that there was a conflict between the BIT at issue and human rights treaties protecting consumers' rights.²²² One of Argentina's experts maintained that "a conflict between a BIT and human rights treaties must be resolved in favor of human rights because the consumers' public interest must prevail over the private interest of service provider."²²³ The tribunal avoided a finding of incompatibility of the BIT with human rights treaties *in concreto*, noting that "(t)he matter has not been fully argued" and that the services to consumers continued without interruption.²²⁴ Likewise, in *Siemens v. Argentina*, Argentina argued that given its social and economic conditions, upholding the claimant's property rights "would constitute a breach of international human rights law" incorporated into its constitution.²²⁵ The tribunal considered that this argument had not been properly developed by Argentina, and that "without the benefit of further elaboration and substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of the case."²²⁶

²¹⁷ *Id.* at 153; Moshe Hirsch, *Interactions Between Investment and Non-Investment Obligations in International Investment Law*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 160 (Peter Muchlinski et al. eds., 2008).

²¹⁸ See *supra* notes 5-6, and accompanying text.

²¹⁹ Argentina typically raised the conflict of norms defense in conjunction with a "necessity" defense (by either invoking the "non-precluded measures" clauses under the BITs or the customary necessity doctrine codified in the ILC Articles on State Responsibility). This subsection focuses on the conflict of norms defense only.

²²⁰ BRABANDERE, *supra* note 5, at 143.

²²¹ *Id.* Choudhury, *supra* note 10, at 18-19.

²²² *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, ¶ 254 (Jul. 14, 2006).

²²³ *Id.*

²²⁴ *Id.* ¶ 261.

²²⁵ *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, ¶¶ 75, 79 (Jan. 17, 2007).

²²⁶ *Id.* ¶ 79. See BRABANDERE, *supra* note 5, at 144 (noting that this is "a rather cryptic

In *Suez v. Argentina*, the tribunal took note of Argentina's defense that its human rights obligations to assure its population the right to water should trump its IIA obligations.²²⁷ However, the award rejected this argument, finding that "Argentina is subject to both international obligations, i.e., human rights and (investment) treaty obligations, and must respect both of them equally."²²⁸ In the view of the tribunal, "Argentina could have respected both types of obligations," since under "the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive."²²⁹

The *Suez* decision resonates with *CMS v. Argentina*, an earlier case involving a private utility firm operating a gas transmission business. In that case, Argentina argued that an IIA was not above its constitution and that "as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights."²³⁰ The tribunal found no such collision, reasoning that "the [c]onstitution carefully protects the right to property, just as the treaties on human rights do" and "there is no question of affecting fundamental human rights when considering the issues disputed by the parties."²³¹

In retrospect, these unsuccessful invocations of the conflict of norms defense suggest three important hurdles preventing these arguments from prevailing. The first is the reluctance of the host state itself to fully articulate such a human rights defense. While these arbitral decisions have been widely criticized as being insensitive to the underlying human rights obligations, it is common that Argentina's human rights arguments only emerged briefly and obliquely, and were couched in general and vague terms, but a well-elaborated defense based on Argentina's specific human rights obligations were not made.²³² Moreover, while the *Suez* and *CMS* tribunals' decisions may be critiqued for their hasty conclusions of no conflict without giving due consideration to the human rights implicated, it is unclear how Argentina has satisfied the burden of establishing a genuine "conflict" of norms in the specific factual circumstances from the outset. In an arbitration process heavily reliant on the arguments raised by the disputing parties, this means that investment tribunals are less likely to take human rights considerations seriously, but may regard them as empty references or just a pretext in an

statement that seems to imply that the Tribunal considered that it had no jurisdiction over the question").

²²⁷ *Suez v. Argentina*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262 (Jul. 30, 2010).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *CMS v. Argentina*, ICSID Case No. ARB/01/8, Award, ¶ 114 (May 12, 2005).

²³¹ *Id.* ¶ 121.

²³² ALVAREZ, *supra* note 20, at 455-56.

attempt to disguise breaches of IIAs.²³³

While Argentina's attitude as such seems counter-intuitive for a litigant in a contentious proceeding, it bears noting that raising full-blown human rights arguments may result in political consequences that are undesirable from the eyes of the government. To do so could not only confirm certain positive human rights obligations which presently manifest a degree of nebulousity that a state is more comfortable with, but also embolden domestic human rights activists contrary to the government's intention.²³⁴ Indeed, human rights arguments are normally raised by private parties against a state; yet having a state mount a human rights defense in investment treaty arbitration would reverse the conventional role of human rights.²³⁵ Such sensitive political considerations may explain the half-hearted ways in which Argentina had pleaded the human rights defense, generating a practical hurdle hindering a conflict of norms argument from playing a more important role.

Second, the unsettled existence and normative content of certain human rights norms will impose a doctrinal hurdle. Recall that though investment tribunals have recourse to apply human rights as part of the applicable law, whether to import human rights to a particular dispute and which specific norms to apply are largely at their discretion.²³⁶ As emerging norms that have yet to become crystalized into general principles of international law or get codified into widely accepted treaties, many second- and third- generation human rights norms, such as the rights to water or an adequate living standard, are nebulous in scope, ambiguous in normative substance, and evolve over time.²³⁷ It should come as no surprise that, generally, the more unsettled the existence, scope, and content of a human rights norm, the more difficult it is for investor-state arbitrators (many of whom do not have human rights expertise or background) to grasp the exact contours of its substance, let alone to apply it to overrule relatively clear-cut investment protection standards. This partly explains investment tribunals' tendency to downplay, sidestep, and discount such human rights-arguments in their analyses.

For instance, the right to water was a cutting-edge notion in international human rights law, at least at the time of those Argentina arbitrations. Albeit

²³³ Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and Investment Treaty Arbitration* 29 (Apr. 2003) (Working Paper prepared for the Swiss Ministry for Foreign Affairs), https://www.iisd.org/system/files/publications/investment_int_human_rights_bits.pdf.

²³⁴ Simma & Kill, *supra* note 2, at 680 n.11.

²³⁵ Christoph Schreuer, *Book Review: E. De Brabandere, Investment Treaty Arbitration as Public International Law*, 62 NETH. INTL L. REV. 167, 170 (2015).

²³⁶ See *supra* note 124 and accompanying text in Section III.A.; see also Duggal & Diamond, *supra* note 48, at 302 (arguing that "[t]his uncertainty directly impacts the degree to which second- and third- generation human rights can play a role in the resolution of the dispute").

²³⁷ Fry, *supra* note 3, at 80.

gaining momentum across the international community over time, it has yet to become a standalone human right in international treaties—at best, it is characterized as an “emerging” independent right that imposes specific obligations on states.²³⁸ Though it may inform arbitrators’ treaty interpretation, “the reading of the obligations . . . developed by the Covenant Committee” in General Comment 15 of the ICESCR concerning the right to water is not “legally binding per se” on states’ parties.²³⁹ As such, the uncertainties surrounding this norm would make it difficult for an investor-state tribunal to directly apply it to a concrete dispute, not to mention in ways as Argentina had suggested (i.e., to function akin to a blanket exception that would effectively annul IIAs’ obligations and eviscerate any investment claims).

Third, traditional conflict resolution norms under international law may be unable to provide a clear answer as to which norm should prevail. To begin with, other than *jus cogens* norms, international law contains no rules that establish a normative hierarchy between different treaties or rules.²⁴⁰ Thus, except for a rare scenario where an IIA collides with peremptory norms, the principle of *lex superior* will be of little avail for resolving a conflict between an IIA obligation and a human rights norm.

In contrast, the principles of *lex posterior* and *lex specialis* would be more helpful, but only to a limited extent. First, these principles apply when two conflicting obligations cover the same subject matter, but an IIA provision and a human rights norm may not relate to the same subject matter.²⁴¹ While the subject matter of an IIA provision may be the treatment of certain foreign investor that a host state should guarantee in a given situation, a human rights norm may concern the rights of individuals (such as citizens, local community, and indigenous people) that a government should protect and promote as its subject matter. As such, it is unclear whether an IIA provision and a human rights norm cover the same subject matter, though application of one of them might somehow implicate another. Even under a broad construction of the “subject matter,” many difficulties and uncertainties persist when applying these two principles to resolve a conflict. The *lex posterior* principle, codified in article 30 of the Vienna Convention on the Law of Treaties (VCLT) (entitled “Application of successive treaties relating to the same subject matter”), generally requires that in case of a conflict, a later treaty between the same parties should prevail over an earlier one (*lex posterior derogat anteriori*).²⁴² But this principle cannot address the situation where the parties to the treaties are not

²³⁸ Meshel, *supra* note 97, at 277.

²³⁹ Simma, *supra* note 11 at 590-91.

²⁴⁰ Brabandere, *supra* note 56, at 194; Santacroce, *supra* note 11, at 151.

²⁴¹ Brabandere, *supra* note 56, at 195-96; Santacroce, *supra* note 11, at 152.

²⁴² Vienna Convention on the Law of Treaties, art. 30, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

identical.²⁴³ In that case, application of *lex posterior* would be contrary to the *inter partes* effects of international treaties.²⁴⁴ Even assuming that the conflict of norms was between the same treaty parties, “in many cases it may be difficult to ascertain which norm is more recent in time.”²⁴⁵ Given that a state is obliged to *progressively* “respect, protect, and provide” social, economic and cultural rights and should implement them *step-by-step* in light of many context-specific variables, it is often difficult (if not infeasible) to pinpoint a precise moment when these human rights obligations become effective.²⁴⁶

Likewise, the *lex specialis* principle (i.e., more specific norms prevail over generic norms) is unable to address every conflict between human rights law and an IIA. Indeed, in many situations an IIA provision may be more specific than a human rights norm. But this might not always be the case.²⁴⁷ Given that the degree of specificity of the norms in conflict should be evaluated based on the circumstances of a given case, sometimes a human rights norm may relate to a factual scenario more specifically (in obliging the state to adopt a measure that an IIA only prohibits by implication or in generic terms).²⁴⁸ In other times, it may be that the level of specificity of the conflicting norms seems so similar that it is “impossible, or overly artificial to consider one norm as more specific than the other.”²⁴⁹ In addition, a difficult case may arise when using different metrics (e.g., “the substantive coverage of a provision or ... the number of legal subjects to whom [a norm] is directed”) would lead to different conclusions as to which norm is “particular” or “general.”²⁵⁰ Finally, the principle of *lex specialis* also has an unclear relationship with the *lex posterior* principle, further adding to the difficulties in their application.²⁵¹

In short, due to these inherent uncertainties and ambiguities of the conflict resolution norms under general international law, it is often difficult for a tribunal to conclude with a straightforward answer as to which norm should prevail. To be sure, the above is not to deny the validity of the conflict of norms defense per se. Rather, the above analysis explains why this line of arguments only played a rather peripheral role thus far and almost never succeeded in investment treaty arbitration, revealing the major hurdles to

²⁴³ ILC Report on Fragmentation, *supra* note 89, ¶ 243; JAN KLABBERS, TREATY CONFLICT AND THE EUROPEAN UNION 87 (2009).

²⁴⁴ Brabandere, *supra* note 56, at 195.

²⁴⁵ Santacroce, *supra* note 11, at 152; see JORGE E VINALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW 147 (2012).

²⁴⁶ Santacroce, *supra* note 11, at 152; see Asbjørn Eide, *Adequate Standard of Living*, in INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 3, at 198.

²⁴⁷ Brabandere, *supra* note 56, at 196.

²⁴⁸ Santacroce, *supra* note 11, at 152.

²⁴⁹ *Id.*

²⁵⁰ ILC Report on Fragmentation, *supra* note 89, ¶ 58.

²⁵¹ *Id.*

overcome for such a defense to prevail. At the end of the day, for this conflict of norms argument to gain traction in investment arbitration, these three factors need to be properly addressed.

That said, as human rights law evolves into more concrete shape with clearer legal status in general international law over time, had a host state determined to defend bona fide regulations furthering legitimate human rights goals made such arguments more elaborately and forcefully, investor-state tribunals may need to engage in a sophisticated conflict of norms analysis to determine whether, and to what extent, an extraneous human rights rule could supersede an IIA provision. If upheld, this human rights defense may serve to constrain, modify, or even preclude an investor's rights under the IIA in effect. In this way, it may be that "some investor-[s]tate claims will become vehicles for potentially innovative decisions concerning how [s]tates are supposed to comply with both their human rights and their (IIAs) obligations."²⁵²

Alternatively, if a host state government fails to take this argument seriously for political concerns, other stakeholders adversely affected by the investments, civil societies, and NGOs could step in and participate in investment arbitration as third parties (*amici curiae*), in order to voice human rights concerns and articulate the conflict of norms arguments. Further, to address the ambiguities of human rights norms and conflict resolution norms, treaty parties may come up with carefully crafted treaty provisions *ex ante*—such as a supremacy clause—to clarify under what conditions which interest could prevail over another. If well formulated, such provisions could help to better safeguard a state's regulatory autonomy to advance public interests and remove uncertainties in resolving a conflict of norms.

C. Counterclaims Invoking Human Rights Obligations

The preceding Section discussed how human rights law may be invoked *defensively* to import an extrinsic rule to counter a claim by an investor. This Section proceeds to a parallel situation. Namely, where the IIA's jurisdictional clause allows, international human rights law could be invoked *offensively*, establishing a counterclaim to enforce external obligations on investors.

While Section II.C has already discussed the jurisdictional basis to accept counterclaims, another issue facing an investor-state tribunal is a matter of admissibility (i.e., whether it is appropriate for adjudicators to hear the counterclaims), on which it enjoys a wide discretion.²⁵³ To be admissible, it is generally required that a counterclaim should be sufficiently connected, both legally and factually, to the primary claim.²⁵⁴ It is worth noting that the

²⁵² ALVAREZ, *supra* note 20, at 456.

²⁵³ YUVAL SHANY, QUESTIONS OF JURISDICTION AND ADMISSIBILITY BEFORE INTERNATIONAL COURTS 47-53 (2016). Shao, *supra* note 40, at 168-69.

²⁵⁴ Anne K. Hoffmann, *Counterclaims in Investment Arbitration*, 28 ICSID REV. 438, 445-53 (2013); Andrea Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17

legal connection and factual connection are not two “cumulative” elements—rather, a tribunal should holistically examine the overall connection between a counterclaim and a principal claim, taking into account both factors.²⁵⁵

In terms of the legal connection, counterclaims grounded on an identical IIA are indeed strongly connected to an IIA claim by an investor.²⁵⁶ Even when a counterclaim is grounded on a different legal basis (such as international human rights law), it may be found admissible, where its factual connection to the primary claim is sufficiently strong—for example, the disputed measure was intended to respond to an investor’s alleged misconduct.²⁵⁷ This is the case in *Aven v. Costa Rica*: the host state there adopted several measures to address the investors’ alleged breach of its environmental laws, and the tribunal found admissible the counterclaims grounded on international environmental law and domestic environmental law.²⁵⁸ However, where the counterclaims and primary claims arise out of different factual situations or their factual bases are of a different nature, it is difficult to establish a sufficient factual link between them.²⁵⁹

With the satisfaction of the jurisdictional and admissibility conditions, the next issue is to identify a substantive legal basis to establish a counterclaim. In the absence of IIA provisions stipulating investor obligations, applicable general sources of international law, such as international human rights law, could be relied on to fill the gap. In that regard, a remarkable decision is *Urbaser v. Argentine*. In that case, the investors, as shareholders of a concession responsible for the supply of water and sewerage services, claimed that their water concession was unlawfully terminated by Argentina.²⁶⁰ Argentina contended that the termination was adopted to address the claimants’ alleged failure to comply with the requirements under the concession agreement.²⁶¹ In the investment treaty

LEWIS & CLARK L. REV. 461, 571-73 (2012); Pierre Lalive & Laura Halonen, *On the Availability of Counterclaims in Investment Treaty Arbitration*, 2 CZECH Y.B. OF INT’L L. 141 (2011).

²⁵⁵ KJOS, *supra* note 107, at 150.

²⁵⁶ See Shao, *supra* note 40, at 169-70.

²⁵⁷ Shao, *supra* note 40, at 170. See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, 274-75, ¶¶ 322-27 (Dec. 19, 2005) (holding that a counterclaim based on the Vienna Convention on Diplomatic Relations (VCDR) was admissible in relation to a primary claim grounded on the law of use of force, since the former bore a strong factual connection with the latter (i.e., the alleged breach of the VCDR was claimed to result from the use of force)).

²⁵⁸ *Aven et al.*, ¶¶ 93-181, 698-715, 742-47 (the tribunal eventually refused to exercise jurisdiction over the counterclaim on other procedural grounds—i.e., the host state had failed to meet the requirements of articles 20 and 21 of the UNCITRAL Arbitration Rules).

²⁵⁹ Shao, *supra* note 40, at 171-72. See, e.g., *Oxus Gold v. Uzbekistan*, UNCITRAL Award, ¶ 956 (Dec. 17, 2015) (finding a factual link wanting, since the primary claim related to the ways the investment was *established* while the counterclaim concerned the circumstances in which the investment was *operated*).

²⁶⁰ *Urbaser*, ¶ 34.

²⁶¹ *Id.* ¶¶ 848-950.

arbitration, Argentina mounted a counterclaim, alleging that the investors' failure to provide the necessary level of investment in the water supply services had breached the international human right to water of the local communities.²⁶² In other words, Argentina argued that the challenged measure was taken to respond to the investors' misconduct in terms of the local population's human right to water, suggesting a strong factual link between the counterclaim and principal claim. In the view of the tribunal, not only was the factual link manifest, but the legal connection was "also established to the extent the [c]ounterclaim [wa]s not alleged as a matter based on domestic law only."²⁶³

Though the tribunal upheld the jurisdiction and admissibility to accept the counterclaim, it eventually rejected it at the merits stage, on the ground that it was a state (rather than an investor) that bore *positive* international legal obligations to fulfill the right to water and to provide sanitation to its citizens.²⁶⁴ According to the tribunal, the right to water and sanitation was an international human right imposed on states, as opposed to investors: it was the host state's international legal obligation to fulfill the human right to water of its citizens, while the investors were only obliged by the concession contract—rather than international law—to supply water and sanitation services.²⁶⁵ In other words, based on the host state's domestic law (rather than international law), the counterclaim was, in essence, a contractual claim in the disguise of an international human rights law claim. On this basis, the tribunal dismissed the counterclaim on the merits.²⁶⁶

That said, the tribunal admitted in *obiter dicta* that the *negative* obligation not to violate the human right to water may directly bind private parties and individuals.²⁶⁷ It noted that the "situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake[,]” which “can be of immediate application . . . equally to individuals and other private parties.”²⁶⁸ Therefore, had the investors violated the negative obligations of the right to water, they could be held accountable via the counterclaim mounted.²⁶⁹

Despite the dismissal of Argentina's counterclaim, this instance yields two points to note. First, the failure of the counterclaim is not out of an inherent conflict between an IIA and human rights norms *ipso facto*, but

²⁶² *Id.* ¶ 1165.

²⁶³ *Id.* ¶ 1151.

²⁶⁴ *Id.* ¶ 1210.

²⁶⁵ *Id.*

²⁶⁶ *Id.* ¶ 1221.

²⁶⁷ *Id.* ¶ 1210.

²⁶⁸ *Id.*

²⁶⁹ STEFANIE SCHACHERER, INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT: KEY CASES FROM THE 2010s 26 (Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch eds., 2018), <https://www.iisd.org/library/international-investment-law-and-sustainable-development-key-cases-2010s>.

rather due to the vertical effects of international human rights law itself, whose positive legal obligations are primarily imposed on states (rather than corporations, individuals, and private entities). This limitation may largely hinder international human rights-based counterclaims from prevailing.

Second, the decision sheds light on the untapped potential of invoking newer IIA provisions that explicitly impose investor responsibilities in relation to human rights, which could provide the necessary “bite” to hold investors accountable. When the jurisdictional clauses allow, had a tribunal found a claimant investor in breach of such obligations directly related to the investment at issue, it may deduct the compensation awarded by the amount of the counterclaim upheld, thereby disciplining investor wrongdoing in this process. If this prevailed, an investor can be directly held accountable for its misconduct with respect to the local population’s human rights.

Even if dismissed on the merits, the presence of counterclaims could bring human rights issues to the forefront of tribunals’ deliberations, potentially prompting them to give more interpretive weight to the public interest implications when assessing investors’ claims.²⁷⁰ The following section proceeds to explore the latter scenario.

D. International Human Rights Law as Interpretive Tools

As the *lex causae*, international human rights law not only could *directly* apply to the substance of disputes without the filter of treaty interpretation, but also may *indirectly* function as interpretive tools to guide tribunals’ interpretations of IIA’s obligations. When interpreting an IIA provision, tribunals could take into account external international human rights norms to *inform* their construction of an investment protective standard, with a view to avoiding conflicts between an IIA and human rights. This can be achieved by applying the principle of systemic integration—a canon of treaty interpretation enshrined in article 31(3)(c) of the VCLT.

(A) Application of the Principle of Systemic Integration

Reflecting a customary principle of treaty interpretation, article 31(3)(c) of the VCLT allows consideration of “any relevant rules of international law applicable in the relations between the parties” along with the context of a treaty.²⁷¹ Importantly, this principle could serve as a customary interpretive tool for international adjudicators to bring in external interpretive materials of human rights norms to guide their treaty interpretation.²⁷² Its application involves a two-step process. Step one assesses whether an extrinsic rule is *admissible* for treaty interpretation; step two proceeds to determine the *interpretive weight* to be accorded to that rule.²⁷³

²⁷⁰ Choudhury, *supra* note 10, at 21, 56.

²⁷¹ VCLT, art. 31(3)(c).

²⁷² Simma, *supra* note 11, at 584-86; See Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 279, 285 (2005).

²⁷³ See Jürgen Kurtz, *Building Legitimacy Through Interpretation in Investor-State*

As regards the first step, a strictly doctrinal approach requires that the “rules of international law” to be taken into account shall be “*relevant*” (i.e., they shall bear on “the same facts as the treaty under interpretation”) and “*applicable*” (namely, the rules shall remain in force between the treaty parties).²⁷⁴ The “applicability” condition generally requires that the rules should either constitute general principles of law/customary international law, or be part of binding international treaties between the treaty parties.

Bruno Simma and Theodore Kill provided a more flexible and non-dogmatic approach. According to them, the license of systemic integration is malleable, enabling tribunals to take an *evolutionary* approach of treaty interpretation to consider relevant rules that exist at the time of treaty interpretation, not only when the IIA was concluded.²⁷⁵ Further, the *relevant* rules to be taken into account could be broad enough (i.e., they need not address the same subject matter as the IIA), and could include international obligations that apply to only one of the parties, as well as *erga omnes* obligations (which include most human rights norms).²⁷⁶ Under this approach, these rules may even extend to the “soft law” norms that are not legally binding on the treaty parties, including, for instance, the ICESCR Covenant Committee’s comments clarifying the normative content of the convention rights (such as the rights to water and health).²⁷⁷ In short, when interpreting an IIA, the external rules to be taken into account need not be limited to the human rights obligations that formally bind a host state, but could cover more general (and even softer) human rights norms that are generally deemed applicable among states. Likewise, other commentators argued that as all UN members are bound by human rights obligations, IIAs in general shall be presumed to be in harmony with the relevant human rights obligations, requiring “human rights friendly interpretations” to international investment law.²⁷⁸

In step two, adjudicators need to decide how much weight to give to the extrinsic rules. Two interpretive presumptions may come into play.²⁷⁹ The first is a positive presumption: for issues that a treaty does not “resolve in express terms or in a different way,” general principles of law or customary international law shall apply in default, serving an important “gap-filling”

Arbitration, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW 280-81 (Zachary Douglas et al. eds., 2014).

²⁷⁴ ILC Report on Fragmentation, *supra* note 89, ¶ 416; McLachlan, *supra* note 272, at 315.

²⁷⁵ Simma & Kill, *supra* note 2, at 683-86. See Simma, *supra* note 11, at 583.

²⁷⁶ Simma, *supra* note 11, at 586; Simma & Kill, *supra* note 2, at 678, 695.

²⁷⁷ Simma, *supra* note 11, at 591 (arguing that investment tribunals shall consider these human rights norms when interpreting the “health” or “environment” exception clauses of investment treaties).

²⁷⁸ Vivian Kube & E.U. Petersmann, *Human Rights Law in International Investment Arbitration*, 11 ASIA J. WTO & HEALTH L. & POL’Y 65, 99 (2016).

²⁷⁹ ILC Report on Fragmentation, *supra* note 89, ¶ 465; McLachlan, *supra* note 272, at 311.

function to “defragment” different sub-systems of international law.²⁸⁰

The second is a negative presumption: when undertaking treaty obligations, contracting parties are presumed not to act inconsistently with general international law and existing treaty obligations that are already binding upon them.²⁸¹ In other words, absent clear evidence to the contrary, a treaty in dispute should be construed in harmony with other extrinsic international obligations binding on the treaty parties. This presumption resonates with a canon of treaty interpretation: a treaty shall not be presumed to deviate from or conflict with fundamental principles of international law, unless the parties use explicit language to that effect.²⁸²

Either way, an IIA provision should be construed in harmony with relevant human rights law to the extent possible. In case of an alleged conflict between a human rights norm and an open-textured IIA provision that permits several interpretations, if a harmonious interpretation is possible (within the realm of treaty interpretation and short of modifying the treaty language), this interpretation should be preferred.²⁸³ Therefore, when there are multiple reasonable interpretations of a treaty provision, adjudicators should adopt the one that best avoids a conflict with other relevant external norms.²⁸⁴ In short, to the extent that treaty interpretation allows “ample room for maneuvering,” a tribunal should interpret a broadly-worded IIA provision in light of applicable human rights law, with an eye to avoiding a normative conflict.²⁸⁵

(B) Interpreting IIAs’ Substantive Guarantees in Harmony with Relevant Human Rights Obligations

Through the process of systemic integration, investment tribunals may interpret substantive investment protection standards in harmony with relevant international human rights obligations, alleviating the normative conflicts between them. Application of systemic integration would be particularly relevant to guide tribunals’ interpretation of core IIA concepts that are often broadly termed in ambiguous, open-textured language.²⁸⁶ Due

²⁸⁰ McLachlan, *supra* note 272, at 311.

²⁸¹ *Id.*; see, e.g., Case Concerning the Right of Passage over Indian Territory (Portugal v. India), Judgment (Preliminary Objections), 1957 I.C.J. 125, 142 (Nov. 26, 1957).

²⁸² See Simma, *supra* note 11, at 582-83; Lauterpacht, *supra* note 213, at 67.

²⁸³ Santacroce, *supra* note 11, at 142 (“if a given provision ‘A’ in an international investment agreement can be taken to mean ‘x’, ‘y’ and ‘z’, and the meanings ‘x’, ‘y’ and ‘z’ can be placed in a scale where ‘x’ is the meaning that is most consistent with a relevant human rights norm ‘B’, the tribunal should take the provision ‘A’ to mean ‘x’, rather than ‘y’ or ‘z’); See Pauwelyn, *supra* note 110, at 550-51 (discussing a similar scenario in the context of the WTO).

²⁸⁴ Stratos Pahiš, *Bilateral Investment Treaties and International Human Rights Law: Harmonization through Interpretation*, International Commission of Jurists 10 (2012), <https://www.icj.org/wp-content/uploads/2012/06/treaties-law-interpretation-thematic-report-2012.pdf>; Santacroce, *supra* note 11, at 142.

²⁸⁵ See Pauwelyn, *supra* note 110, at 551.

²⁸⁶ ALVAREZ, *supra* note 20, at 464-66; see also Santacroce, *supra* note 11, at 143, 149.

to the inherent elasticity of IIAs' substantive guarantees, these standards may be sufficiently malleable to accommodate a range of diverging interpretations, depending on the particular circumstances of a dispute.²⁸⁷ As a general matter, this interpretive approach could rebut an overly pro-investor interpretive presumption that prioritizes investor protection on top of other non-economic regulatory interests. This is instrumental to achieving a more balanced interpretation of IIAs that is more accommodative of a state's right to regulate in the public interests and its responsibilities to comply with external human rights obligations.

In concreto, this interpretive approach of systemic integration may be most relevant to contextualize the interpretations of FET and non-discriminatory treatment guarantees under an IIA in light of relevant human rights norms.

The FET standard is one of the most controversial substantive protective guarantees under an IIA. As foreign investors' "most preferred route" to bring investment treaty arbitration, this standard "constitute[s] the bulk of successful investment arbitration claims" in human rights and environment-related contexts.²⁸⁸ Also, the formulation of the FET standard in an IIA often uses key terms that are imprecise, undefined, and open to interpretation (e.g., "fair" and "equitable"), offering little meaningful guidance as to its normative content.²⁸⁹ Through arbitral case law, investment tribunals often focus on a set of constitutive elements, including the investors' legitimate expectations, the stability and predictability of the host state's legal framework, transparency and procedural fairness, among others.²⁹⁰ Among these elements, the principle of legitimate expectations not only is seen as a substantive component of the FET standard, but typically serves to inform tribunals' interpretations of other substantive elements.²⁹¹

Investment tribunals have approached these elements inconsistently. In some decisions, tribunals tended to require the host state to maintain a stringent, high standard of good governance, potentially exposing them to liability for public interest regulations. For instance, in *Tecmed v. Mexico*, the tribunal held that the investor could reasonably expect the host state to "act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments."²⁹² While not

²⁸⁷ ALVAREZ, *supra* note 20, at 464-66.

²⁸⁸ Choudhury, *supra* note 10, at 45-46; Bellak & Leibrecht, *supra* note 27, at 132.

²⁸⁹ Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation/Assessing Liability Under Investment Treaties*, 29 BERKELEY J. INT'L L. 1, 38 (2011).

²⁹⁰ *Id.* at 39-41.

²⁹¹ *Id.* at 40.

²⁹² *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003); see also *Metaclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 27, 76 (Aug. 30, 2000) ("all relevant legal requirements for the purpose of initiating, completing and successfully operating investments should be capable of being readily known to all affected

prohibiting the exercise of the right to regulate by a host state, this approach in fact requires an almost unrealistically high level of transparency and procedural fairness that only a few (if any) states could ever achieve.²⁹³ Further, in *Enron v. Argentina*, *CMS v. Argentina*, and *Suez v. Argentina*, tribunals found Argentina violative of the FET standard for making regulatory changes that altered the legal framework relied on by the investors.²⁹⁴ These instances led to concerns that investors' legitimate expectations can be treated as something akin to a stabilization clause or a right of immutability, enabling investors to "reasonably" expect the legal framework to be "frozen" since investment is made.²⁹⁵

Application of the principle of systemic integration could bring in the host state's human rights obligations to qualify and counterbalance investors' legitimate expectations, preventing the latter from unduly impeding the state's right to regulate public interests. Indeed, an investor's "legitimate expectations" should reflect what it is "only reasonably entitled to assume" in a particular context, and in light of a host state's concurrent obligations of human rights towards its own population.²⁹⁶ And it is questionable that the host state has silently and implicitly "traded away their inherent rights to regulate in the public interest" simply by ratifying an IIA.²⁹⁷ In times of a public emergency or when knowing a new health peril, a host state cannot be reasonably expected to promise not to regulate in the public interests and to adapt its legal framework to the new circumstances, since such an expectation is neither reasonable nor legitimate. By integrating relevant human rights obligations into the notion of "legitimate expectations," tribunals could balance investors' economic interests with a host state's right to regulate in the public interests.²⁹⁸ In essence, this approach requires adjudicators to accord due interpretive weight to the human rights obligations of the host state when assessing the "legitimate expectations" of both parties. Under this approach, a host state can more forcefully defend its regulatory measures deployed to comply with its human rights obligations.

This sensitive approach to the "legitimate expectations" doctrine is manifested in *Urbaser v. Argentina*. In response to the FET claim that the changed regulatory framework had violated investors' legitimate

investors of a Party and that there should be no room for doubt or uncertainty on such matters").

²⁹³ Zachary Douglas, *Nothing If Not Critical for Investment Arbitration: Occidental, Eureko, Methanex*, 22 ARBITRATION INT'L 27, 28 (2006) (arguing that this approach imposed too stringent a standard, as it enabled investors to expect "perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain").

²⁹⁴ *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, ¶¶ 259-68 (May 22, 2007); *CMS*, ¶¶ 273-81; *Suez*, ¶¶ 222-48; see also Choudhury, *supra* note 10, at 46-47.

²⁹⁵ Choudhury, *supra* note 10, at 47.

²⁹⁶ ALVAREZ, *supra* note 20, at 465.

²⁹⁷ *Id.*

²⁹⁸ Michele Potesta, *Legitimate Expectations in Investment Treaty Law*, 28 ICSID REV. 88, 122 (2013).

expectations, the tribunal found that under the FET standard the investors cannot reasonably expect the regulatory framework (prevailing when the investment was made) to remain absolutely unchanged, save for the existence of specific commitments made to the investors to that effect.²⁹⁹ Instead, according to the tribunal, the investors' legitimate expectations should be determined in the context of the host state's economic and social environment, taking into account the state's "leeway to issue regulations for reason of public order or interest."³⁰⁰ Moreover, the tribunal underscored Argentina's human rights obligations to "ensure the population's health and access to water and to take all measures required to that effect."³⁰¹ It further reasoned that when a state took measures to implement such a fundamental right to water, these measures "cannot hurt the fair and equitable treatment standard because their occurrence must have been deemed to be accepted by the investor[s] when entering into the investment," and hence are within the latter's legitimate expectations.³⁰² Therefore, the tribunal concluded that Argentina's human rights obligations to ensure the right to water constituted "part of the investment's legal framework" that the investors should have already reasonably assumed, such that the latter cannot "invoke the protection of [their] own interests as a prevailing objective."³⁰³

Another entry point for human rights norms may be found in the national (or most-favored-nation) treatment standard under an IIA. This standard requires the host state to grant foreign investors and their investments treatment no less favorable than that accorded to comparable domestic investors and their investments.³⁰⁴ In this determination, a tribunal is typically required to (1) identify the relevant domestic entities considered to be "in like circumstances" with the foreign investor for comparison, and (2) assess whether the foreign investor received less favorable treatment than the domestic comparators.³⁰⁵ The key question is often whether implementation of the disputed measure is based on a legitimate public policy objective: if there is a legitimate policy ground for the state to distinguish the investor from its domestic comparators, then they are not "in like circumstances" (such that this claim should fail).³⁰⁶ In this inquiry, a state's human rights obligations could become highly relevant to inform the "in like

²⁹⁹ Urbaser, ¶¶ 591-92.

³⁰⁰ *Id.* ¶ 594.

³⁰¹ *Id.* ¶ 622.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ RUDOLF DOLZER & CHRISTOPHER SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 178-86 (2008).

³⁰⁵ Moloo & Jacinto, *supra* note 289, at 57; *see, e.g.*, Pope & Talbot v. Canada, UNCITRAL, Award on the Merits of Phase 2, ¶¶ 73-104 (Apr. 10, 2001).

³⁰⁶ Moloo & Jacinto, *supra* note 289, at 57; DOLZER & SCHREUER, *supra* note 304; Pope & Talbot, ¶ 79; S.D. Myers, Inc. v. Canada, UNCITRAL, Partial Award (Nov. 13, 2000), ¶ 250.

circumstances” analysis, since they may provide legitimate public policy grounds to accord differential treatment.

A case in point is *Foresti v. South Africa*. In that case, the investors (several Italian and a Luxembourg granite firms) challenged South Africa’s black economic empowerment (BEE) policies (i.e., affirmative action measures designed to address racial inequalities arising from the post-apartheid era), posing novel questions of how to reconcile IIA commitments with a state’s human rights obligations towards historically disadvantaged groups.³⁰⁷ The investors claimed for violation of national treatment, among others, apparently arguing that the state’s BEE measures (imposing mandatory quotas for hiring black management personnel in the mining sector) had *de facto* discriminated against foreign investors, since domestic black-owned enterprises that had already satisfied such obligations would obtain more favorable treatment.³⁰⁸ It bears noting that, as with the BITs between South Africa and other European countries, the underlying BITs contained no express language in the national treatment provisions dealing with human rights or ensuring the policy space to adopt such affirmative action measures.³⁰⁹

While this case had eventually been settled, it is still worth pondering how to reconcile competing norms in this specific scenario. Despite the treaties’ silence on human rights, it is important to engage in systemic integration to construe the national treatment provisions in light of relevant human rights law, with an eye to achieving a harmonious interpretation. Under international human rights law (including the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination), affirmative actions are not illegal, and are even required by the principle of equality, to the extent that they are necessary to correct discrimination towards historically disadvantaged persons.³¹⁰ As such, “certain preferential treatment in specific matters as compared with the rest

³⁰⁷ Piero Foresti et al. v. South Africa, ICSID Case No. ARB/07/1, Award (Aug. 4, 2010); Annika Wythes, *Investor-State Arbitrations: Can the “Fair and Equitable Treatment” Clause Consider International Human Rights Obligations?*, 23 LEIDEN J. OF INT’L L. 241, 243-44 (2010); Luke Eric Peterson, *South Africa’s Bilateral Investment Treaties: Implications for Development and Human Rights*, 27-28 (Nov. 2006), <http://library.fes.de/pdf-files/iez/global/04137-20200117.pdf>.

³⁰⁸ Peterson, *supra* note 307, at 27-28; Wythes, *supra* note 307, at 243-44.

³⁰⁹ See Agreement between the Government of the Republic of South Africa and the Government of the Italian Republic on the Promotion and Protection of Investments, S. Afr.-It., art. 3(1)-(2), Jun. 6, 1997; Agreement between Belgium—Luxembourg Economic Union and the Republic of South Africa Concerning Reciprocal Encouragement and Protection of Investments, B.L.E.U.-S. Afr., art. 3(2)-(3), Aug. 14, 1998; Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of South Africa and the Kingdom of the Netherlands, S. Afr.-Neth., art. 3(2), (6), May 9, 1995.

³¹⁰ U.N. Human Rights Comm., *General Comment 18: (Non-discrimination)*, 37th Sess., U.N. Doc. HRI/GEN/1/Rev.1., ¶ 10 (adopted Nov. 10, 1989); International Convention on the Elimination of All Forms of Racial Discrimination, United Nations Gen. Assembly, arts. 1(4), 2(2), Dec. 21, 1965, 660 U.N.T.S. 195, 216, 218 [hereinafter CERD].

of the population” could constitute “a case of legitimate differentiation” under international human rights law.³¹¹ A regulatory distinction based on such external human rights rules should be duly considered in an investment tribunal’s “in like circumstances” analysis,³¹² and thus could justify what would otherwise be an IIA breach. Otherwise, the IIAs invoked would make a state strictly liable for any *de facto* less favorable treatment of foreign investors, foreclosing the government’s bona fide exercise of the right to regulate to diminish or eliminate domestic discrimination.

IV. A CRITICAL REVIEW OF THIS APPROACH AND POTENTIAL SOLUTIONS IN NEW IIAS

Thus far, this article has studied application of human rights law as the substantive law, in efforts to integrate considerations of human rights in investment arbitration. This Part provides a critical review of this approach (in Section A) and turns to new IIA provisions for potential solutions (in Section B).

A. A Critical Reflection of This Approach

Not all human rights arguments are treated equally. Instead, investment tribunals seem more inclined to entertain the jurisdictional/admissibility defense and compensation defense. In contrast, successful instances of counterclaims are rare and exceptional—and in those cases, they were based on domestic law (rather than international law).³¹³ As of this writing, *Urbaser v. Argentina* seems to be the only case where a tribunal had ruled on the merits of a human rights-based counterclaim. Though it eventually dismissed the claim, the tribunal’s favorable findings on jurisdiction and admissibility, as well as its recognition in *obiter dicta* that negative obligations of human rights norms may also bind investors are a remarkable step forward. Yet, to the extent that international human rights law (particularly, social and economic rights) primarily binds sovereign states (as opposed to private actors), it seems difficult to envisage a successful human rights-based counterclaim, except for egregious violations of the negative obligations thereof.

As regards the conflict of norms defense and interpretive tools of human rights law, tribunals seem to have shown different attitudes. While arbitrators are generally more receptive to resorting to external human rights norms

³¹¹ CERD, *supra* note 310, at 216.

³¹² Alternatively, through application of the principle of systemic integration (enshrined in art. 31(3)(c) of the VCLT), the negative presumption thereunder directs a tribunal to interpret the national treatment provisions in ways that are consistent with South Africa’s international human rights obligations to correct racial discrimination. *See* Simma, *supra* note 11 at 585-86.

³¹³ Ishikawa, *supra* note 2, at 37 (“Even when jurisdiction over counterclaims is established, counterclaims have rarely succeeded on their merits, with the important exceptions of *Burlington v. Ecuador* and *Perenco v. Ecuador*. These cases are highly exceptional in that the claimant investors actually consented to jurisdiction over the host state’s counterclaims based on the former’s breach of its own domestic law.”).

(such as the right to water) as interpretive tools to contextualize and qualify investment protection obligations under IIAs, they have yet to show equivalent willingness to seriously engage with the conflict of norms defense that a given human rights norm should prevail.³¹⁴ When dealing with the latter defense, tribunals instead tended to sidestep and downplay the human rights of the host state's population, and typically found no normative conflicts in the first place, in that the host state should comply with both IIA and human rights obligations simultaneously.³¹⁵ Along with the host state's reluctance to fully develop this line of defense, this disinclination by investment tribunals to genuinely address such arguments makes it particularly difficult for human rights obligations to override relatively well-established investment protection standards.

Among the affirmative defenses examined, both the legality requirement (jurisdictional/admissibility defense) and contributory fault (compensation defense) provide important legal means to discipline investor misconduct, echoing the moral logic of the "clean hands" doctrine that "[h]e who seeks equity must come with clean hands."³¹⁶ Though the existence of the clean hands doctrine under general international law is controversial,³¹⁷ the implicit legality requirement and contributory fault doctrine function to hold investors seeking redress accountable for their own wrongdoings (including illegality per se and lack of due diligence) with respect to the subject matter, seemingly presenting concrete manifestations of the "clean hands" doctrine in international investment law.

Yet, there are important differences between these two doctrines. The legality requirement produces a binary outcome (either denial of IIA protections or not), and typically only applies to the establishment phase of the investments. In contrast, contributory fault not only applies to all phases, but also incorporates a notion of proportionality to apportion liability, thus providing a more nuanced approach to addressing investor misconduct. Further, the investor misconduct sanctionable under contributory fault includes not only unlawful acts in breach of international or domestic law, but also imprudent conduct evincing a lack of due diligence to take care of one's own rights or interests.³¹⁸ Given these differences, the legality requirement seems to be more suitable to deal with grave and serious violations of human rights by precluding IIAs' protections altogether. In contrast, contributory fault is a more flexible doctrine. By weighing the

³¹⁴ See *supra* Section III.B.(C) and Section III.D.

³¹⁵ Broude & Henckels, *supra* note 9, at 103-04. See *supra* Section III.B.(C).

³¹⁶ Aloysius Llamzon, *Yukos Universal Limited (Isle of Man) v. Russian Federation: The State of the "Unclean Hands" Doctrine in International Investment Law: Yukos as Both Omega and Alpha*, 30 ICSID REV. 315, 316, 325 (2015).

³¹⁷ John Dugard (Special Rapporteur on Diplomatic Protection), *Sixth Rep. on Diplomatic Protection*, U.N. Doc. A/CN.4/546, ¶ 18 (Aug. 11, 2004); Llamzon, *supra* note 316, at 317.

³¹⁸ See *supra* Section III.B(B).

proportion of each party's faulty contribution to the injury suffered, contributory fault is especially appropriate to address situations where all parties have engaged in some illegal conduct or wrongdoings.³¹⁹

In sum, by systemizing human rights-grounded affirmative defenses, counterclaims, and interpretive tools, this article seeks to provide a layered approach to integrating human rights considerations into investment arbitration. By giving effect to external human rights norms in investor-state treaty arbitration, this approach aims to discipline investor wrongdoings with respect to human rights, balance investment protection with public interests, and safeguard a host state's regulatory autonomy to advance human rights. As such, application of human rights law could help to alleviate the normative conflicts between competing interests, contribute to a more balanced and legitimate international investment law, and incentivize foreign investors to comply with human rights norms.

However, despite these potentials, this juridical approach is subject to its own constraints and limitations.

First, given that the normative content of certain rules of general international law is relatively unclear and ambiguous, their application may generate uncertainties and contestations, which would constrain their effectiveness. As noted earlier, due to the vagueness surrounding the principles of *lex posterior*, *lex specialis*, as well as their inter-relationship, traditional international rules on conflict of norms may provide insufficient guidance to determine whether a human rights norm could prevail over an IIA provision in a specific dispute.³²⁰ Partly owing to such a murky legal basis, a conflict of norms defense has yet to prevail in any publicly known investment arbitrations.

In addition, while generally favoring the applicability of the contributory fault doctrine, general international law fails to provide specific guidance on its invocation, leaving significant discretion to tribunals on its application. Given that some arbitrators might be less willing to apply contributory fault to discipline investor misconduct, this legal fuzziness has contributed to tribunals' inconsistent reliance on this doctrine and incoherent approaches to investor misconduct, undermining the predictability and certainty of investment law jurisprudence on this doctrine.³²¹

³¹⁹ See Andrew T. Bulovsky, *Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development*, 118 MICH. L. REV. 117 (2019) (arguing that invoking the legality requirement to deny an IIA's protections for investments made through corruption and bribery would eventually reward, if not incentivize, the host state government officials for soliciting or accepting bribes, as it unfairly shifts all of the adverse consequences on the bribe-giver, such that this is not a proper means to enforce investor obligations not to bribe).

³²⁰ See *supra* Section III.B(C) (discussing a conflict of norms defense).

³²¹ See Marcoux & Bjorklund, *supra* note 47, at 879-80, 888-900 (discussing tribunals' inconsistency in applying contributory fault, including their disagreement on whether this doctrine could preclude state liability or can only reduce

The second constraint relates to international human rights law itself. As noted earlier, international human rights law is vertical in nature, predominantly imposing legal duties on states (rather than private entities and individuals) to respect, protect, and fulfill human rights.³²² Moreover, due to significant political opposition, as of today international instruments seeking to establish standards of corporate conduct for business enterprises operating abroad remain informal “soft law” lacking binding legal effects.³²³ Taken together, it remains difficult for tribunals to directly enforce human rights obligations on investors in investment arbitration, whether through invocations of the legality requirement, contributory fault, or counterclaims. Even for arbitrators willing to give effect to investor misconduct, their hands might be significantly constrained by such legal lacunae at the international level. In short, absent binding investor obligations as a matter of applicable law, international human rights law seems to be too blunt a tool to adequately address investor wrongdoings in investment treaty arbitration.³²⁴

Further, as stated, some positive human rights obligations with respect to people’s social and economic rights are general in nature, nebulous in scope, and imprecise in normative content, compared with substantive investment protective guarantees under an IIA.³²⁵ In particular, for emerging human rights norms—such as the rights to water or health—investment arbitrators may find it difficult to grapple with their normative content, not to mention directly apply these external sources to supersede relatively settled investment protection obligations.³²⁶ This is all the more so for arbitrators who only specialize in commercial arbitration and private international law—yet, even public international lawyers focusing on international investment or trade law (but not human rights law) might feel uncomfortable interpreting such a novel human rights issue.³²⁷ Coupled with the uncertainties of certain cutting-edge human rights norms, such a mismatch of legal expertise can partly explain some arbitrators’ general hesitance to render a detailed discussion on human rights issues implicated.

Finally, the adjudicative powers of investment arbitral tribunals are subject to an inherent constraint—their limited mandate. After all, in an investment treaty arbitration system that is heavily reliant on issues raised by the disputing parties, whether and to what extent a tribunal could address the human rights issues concerned largely hinges on whether and how a

damages, their divergent positions on whether its application is at the merits or quantum phase or a matter of causation, some tribunals’ decisions not to rely on contributory fault when they should, among others); *compare* *Copper Mesa v. Ecuador*, *supra* note 180, *with* *South American Silver v. Bolivia*, *supra* note 196 (taking a too strict approach on causation).

³²² *See supra* Section II.A.

³²³ *Id.*

³²⁴ *See* El-Hosseny & Devine, *supra* note 121, at 112-13.

³²⁵ *See supra* Section III.B.(C).

³²⁶ *Id.*

³²⁷ ALVAREZ, *supra* note 20, at 467-68.

respondent state would make human rights arguments. Concerned with creating “a widely publicized legal precedent obligating them to respect such human rights as a matter of international law,” states, however, might hesitate to raise full-blown human rights defenses in investment treaty arbitration.³²⁸ Also, both investors and states “might have an interest in keeping this mechanism as a relatively expeditious, less expensive, and less politicized forum for the resolution of economic disputes.”³²⁹ While civil societies and NGOs can occasionally intervene as *amici curiae* to voice human rights concerns, that the respondent state itself keeps reticent on human rights issues or throws half-hearted human rights arguments could lead tribunals to doubt whether the challenged measures were genuine good faith efforts to pursue legitimate public interests in the first place. Instead, tribunals might be inclined to treat such human rights arguments as a pretext that merely attempt to shield the government from responsibilities for breaching investment protection standards.

Likewise, while tribunals indeed could engage in systemic integration to harmonize their interpretation of an IIA with human rights, in so doing they cannot exceed the confined boundary of treaty *interpretation*, which, by definition, is distinct from treaty *modification*.³³⁰ Otherwise, international tribunals risk overstepping and assuming the role of states as the treaty-makers, in the same ways that judges are acting like national legislators.³³¹ For instance, where the IIA explicitly stipulates that compensation should “be equivalent to the fair market value of the expropriated investment[s],”³³² it is controversial for tribunals to deviate from the full compensation formula but instead “invent” a formula designed to reflect the differentiated responsibilities of the host state commensurate with its current material resources and human rights obligations.³³³ Notwithstanding its normative and policy value, such an innovative proposal is better perceived to be within the province of treaty parties, given the proper demarcation of authorities between treaty parties and international adjudicators. Had states really intended to make such a new rule, they should explicitly establish it in an IIA *ex ante*. Going too far, tribunals may not only depart from their limited mandate, but also disrupt the power balance allocated between treaty parties and international adjudicators, generating excessive uncertainty and unpredictability to undercut the legitimate expectations of investors and

³²⁸ *Id.* at 467; see Simma & Kill, *supra* note 2, at 680 n.11; see also *supra* Section III. B.(C).

³²⁹ ALVAREZ, *supra* note 20, at 467.

³³⁰ See VCLT, *supra* note 271; compare arts. 31-32, with arts. 39-41.

³³¹ Particularly, Alvarez noted that some “arbitrators or judges see themselves as deciding only the narrow dispute before them and do not believe that they are authorized to serve as systemic law-makers for the international community.” See Alvarez, *supra* note 16, at 222-24.

³³² *E.g.*, NAFTA, ch. 11, art. 1110(2).

³³³ See ALVAREZ, *supra* note 20, at 460.

states.

Further, while a host state may nominally “win” a case, this might not mean that its regulatory powers are adequately safeguarded. Given that a prevailing state in investment treaty arbitration could only recover cost awards (which sometimes cannot even fully cover the litigation and arbitration costs spent), being dragged into investor-state proceedings (often criticized for being too long and costly) may result in a pyrrhic victory, as eventually a state might still have to spend significant costs to successfully defend public interest regulations.³³⁴ Moreover, as noted earlier, investors may strategize to threaten bringing investment claims as leverage, in attempts to obtain secret settlements to their favor, or to delay, discourage, or even thwart public interest regulations in the host state or third states.³³⁵ Such settlements may “involve either significant monetary relief for the investor . . . or significant adjustment of the regulatory framework to the benefit of the investor.”³³⁶ To the extent that these problems persist, it is difficult to envisage that the risk of “regulatory chill” could be readily dispelled by a judicial approach alone.

Therefore, under such institutional constraints identified, adjudicators’ *ex post* rebalancing of competing interests may still prove inadequate to eradicate conflicts arising from implementation of an IIA and human rights obligations in extreme situations. Despite tribunals’ sensitivity to human rights, where a state is limited by its financial means at disposal or is experiencing a grievous economic crisis (or a national emergency), application of an IIA may render it difficult for the government to fully realize the economic and social rights of its population.³³⁷

B. Potential Solutions in New IIAs

Given the limitations of general international law, international human rights law, and international adjudication, it is worth asking how carefully crafted IIA provisions could help to address these inadequacies and sharpen this human rights law-based judicial approach, both at the substantive and procedural levels. Focused on three notable trends of recent development, this Section turns to new IIA examples to look for potential solutions.

First, unlike the majority of IIAs predominantly focused on investment protection and state liability, there emerges a trend of new IIAs incorporating an element of investor responsibility into the treaty language. Though in most cases the treaty provisions used inspirational language to create “soft” standards,³³⁸ there are some IIAs that contained hardened investor

³³⁴ Choudhury, *supra* note 10, at 35-36 (noting that albeit prevailing in *Chemtura v. Canada*, Canada was only awarded USD 6 million in costs, a sum inadequate to cover its USD 9 million litigation costs). *Id.* (“Canadian taxpayers thus bore USD 3 million in costs for the government to defend its efforts to protect public health.”).

³³⁵ See *supra* Section II.A.

³³⁶ Howse, *supra* note 30, at 65.

³³⁷ See Paparinskis, *supra* note 39, at 1246-47.

³³⁸ Choudhury, *supra* note 10, at 53; see, e.g., Agreement between the Government of

obligations. A notable example is the draft Pan African Investment Code (PAIC).

In addition to requiring investors to comply with national “laws, regulations, administrative guidelines and policies,” article 22 of the PAIC provides that investors “shall . . . ensure that they do not conflict with the social and economic development objectives of the host [s]tates” and “shall contribute to the economic, social and environmental progress with a view to achieving sustainable development.”³³⁹ Further, the PAIC requires investors to “support and respect the protection of internationally recognized human rights” and to “ensure that they are not complicit in human rights abuses.”³⁴⁰ It also obliges investors to “protect the environment” and “take reasonable steps” to remedy damages caused by their activities to the environment “as far as possible,” as well as to “respect labour rights.”³⁴¹ Finally, the PAIC requires investors to respect the rights of local populations and prohibits investors from carrying out land-grabbing practices against local communities.³⁴²

A more comprehensive approach was adopted by the Morocco-Nigeria Bilateral Investment Treaty (Morocco-Nigeria BIT), which has established an elaborate system of investor responsibilities. In terms of pre-establishment duties, this treaty not only imposes anti-corruption obligations on investors,³⁴³ but also requires investors to “conduct a social impact assessment of the potential investment,” and to “comply with environmental assessment screening and assessment processes” in accordance with applicable laws of the home state or host state (whichever is more rigorous) prior to making an investment.³⁴⁴ Moreover, the agreement breaks new ground by establishing investors’ “post-establishment obligations”: article 18 obliges investors to “uphold human rights in the host state,” comply with the “core labour standards as required by the ILO Declaration on Fundamental

Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, Can.-Burk. Faso, art. 16, Apr. 20, 2015; Treaty between the Republic of Belarus and the Republic of India on Investments, Belr.-India, art. 12, Sept. 24, 2019; Model Text for the Indian Bilateral Investment Treaty, art. 12, Dec. 28, 2015 [hereinafter Indian Model BIT]; Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment, Arg.-Japan, art. 17, Dec. 1, 2018; Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China, Austl.-H.K., art. 16, Mar. 26, 2019; Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi, Braz.-Malawi, art. 9, Jun. 26, 2015; Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates, Braz.-UAE, art. 15, Mar. 15, 2019.

³³⁹ DRAFT PAN AFRICAN INVESTMENT CODE, art. 22, Dec. 2016 [hereinafter PAIC].

³⁴⁰ *Id.* art. 24.

³⁴¹ *Id.* arts. 37(3), 20(1).

³⁴² *Id.* art. 23.

³⁴³ Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, art. 17, Dec. 3, 2016 [hereinafter Morocco-Nigeria BIT].

³⁴⁴ *Id.* art. 14.

Principles and Rights of Work, 1998,” and refrain from managing or operating “the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties.”³⁴⁵ In addition, this treaty also requires investors to comply with “national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices,” and to implement local community liaison processes “in accordance with internationally accepted standards.”³⁴⁶

These provisions of the Morocco-Nigeria BIT seem to be largely modelled on the Economic Community of Western African States Supplementary Act on Investments (ECOWAS) and the Southern African Development Community Model Bilateral Investment Treaty (SADC Model BIT), each of which devoted a standalone chapter to providing similar investor obligations.³⁴⁷

Another approach is to incorporate external international soft law instruments into an IIA. In this regard, a rare, yet notable, example is the Netherlands Model Investment Agreement. As provided by article 23 of that treaty, investors’ compliance with its commitments under the UN Guiding Principles on Businesses and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) is a factor to be considered by tribunals when determining damages.³⁴⁸ Likewise, IIAs may incorporate more sector-specific international standards of conduct for business enterprises, such as the Extractive Industries Transparency Initiative and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.³⁴⁹ Alternatively, a host state could incorporate these international soft law instruments into investment contracts concluded with a foreign investor. By making compliance with these standards a factor to influence compensation or a condition for accessing international arbitration, these international soft law instruments could become hardened and enforceable.³⁵⁰

As such, these IIA provisions help to concretize the types of wrongdoings that could constitute the legal bases of counterclaims, contributory fault, and jurisdictional/admissibility challenges, providing

³⁴⁵ *Id.* art. 18(2)(3)(4).

³⁴⁶ *Id.* art. 19.

³⁴⁷ ECOWAS Supplementary Act on Investments, ch. III, arts. 11, 12, 13, 14, 18, Dec. 19, 2008 [hereinafter ECOWAS]; Southern African Development Community Model Bilateral Investment Treaty, Part 3, arts. 10, 11, 13, 14-16, Jun. 2012 [hereinafter SADC Model BIT].

³⁴⁸ Netherlands Model Investment Agreement, art. 23, Mar. 22, 2019 [hereinafter Netherlands Model Investment Agreement]; *see infra* note 359.

³⁴⁹ Jarrett, Puig & Ratner, *supra* note 125, at 8.

³⁵⁰ *Id.* (“[A]n investor’s access to arbitration might be conditioned on its having engaged in due diligence to identify human rights risks in its operations and respond to them, as required under UNGP Pillar II.”).

greater clarity for tribunals to assess the conduct of the investors.³⁵¹ Compared with current international human rights law, these investor obligation provisions incorporated in IIAs could provide more tailor-made rules to address investor misconduct, serving to fill the international governance gaps on this matter. Thus, though a multilateral business and human rights treaty is far from being politically feasible, incorporating investor duties into IIAs provides a more viable alternative to establishing binding and enforceable investor obligations with regards to human rights.³⁵² Through the legal means of the legality requirement, contributory fault, and counterclaims, these binding investor obligations could provide the “teeth” that can really “bite,” such that investor misconduct with respect to human rights could be directly sanctioned in investment arbitration. In the long run, given their direct legal enforceability, these rules could incentivize investors to voluntarily comply with their duties and contribute to responsible investments in aid of development goals.

Second, a growing number of new IIAs are beginning to elaborate on the legal consequences of investors’ failures to comply with their obligations, consolidating “built-in” avenues to directly discipline investor misconduct and enforce investor obligations in investment treaty arbitration. Most notably, these avenues include counterclaims, contributory fault, and the legality requirement.

As noted earlier, at least under a broad jurisdictional clause of an IIA, counterclaims brought against investors are within investment tribunals’ competence.³⁵³ To further remove uncertainties, an IIA can directly specify tribunals’ jurisdiction to hear counterclaims. For instance, the PAIC contains a separate provision permitting a host state to bring a counterclaim before an investment tribunal for damages or other relief arising from an investor’s breach of its obligations under the treaty (including international and domestic law obligations).³⁵⁴ Similar provisions can also be found in the ECOWAS and the SADC Model BIT.³⁵⁵ These provisions could dispel uncertainties over the jurisdictional basis of counterclaims. Given that these IIAs have also incorporated binding investor obligations, the admissibility requirement could also be met easily, since counterclaims based on an identical treaty are generally deemed to be strongly connected to an investor’s IIA claims.³⁵⁶

Regarding contributory fault, three major approaches are noteworthy.

³⁵¹ Marcoux & Bjorklund, *supra* note 47, at 903-04. For a different view cautioning risks, see Jarrett, Puig & Ratner, *supra* note 125, at 8 (“[G]iven the open-textured nature of some of the business responsibilities under Pillar II of the UNGPs . . . it may be difficult for a tribunal to determine whether an investor has truly complied with its responsibilities.”).

³⁵² Choudhury, *supra* note 5, at 20-21.

³⁵³ See *supra* Section II.C; see, e.g., Urbaser, ¶ 143.

³⁵⁴ PAIC, art. 43(2).

³⁵⁵ ECOWAS, art. 18(5); SADC Model BIT, art. 19.1.

³⁵⁶ See Shao, *supra* note 40, at 169-70.

The first one is exemplified by the ECOWAS. As stipulated by article 18, when investors fail to comply with their pre-establishment impact assessment obligations or persistently breach their post-establishment obligations or corporate governance obligations, the tribunals should consider whether this breach is “materially relevant to the disputing issues,” and, “if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages award.”³⁵⁷ Likewise, the SADC Model BIT and PAIC contain similar provisions to that effect.³⁵⁸ Through explicit terms, these provisions require tribunals to consider application of contributory fault to offset damages awarded to an investor, and to factor in an investor’s failure to mitigate damages.

The second approach was featured in article 23 of the Netherlands Model Investment Agreement. As noted earlier, it stipulates that when determining the amount of compensation, tribunals are expected to take into account an investor’s non-compliance with its commitments under the UNGPs and the OECD Guidelines.³⁵⁹ Notably, the UNGPs provide that enterprises should refrain from infringing on others’ human rights and avoid causing or contributing to adverse human rights impacts.³⁶⁰ The UNGPs further stipulate that corporations should have in place human rights due diligence processes to prevent, mitigate, and remedy adverse human rights impacts of their activities.³⁶¹ Indeed, given the “soft law” nature, the UNGPs alone are unable to establish binding investors’ obligations under international law, and are legally unenforceable. However, when linked with application of contributory fault, these rules become part of the normative framework that tribunals should consider and implement, providing external standards to assess the investors’ misconduct. Under this provision of the Netherlands Model Investment Agreement, we may expect more frequent invocations of contributory fault to enforce investor obligations, as well as more precedents like *MTD, Copper Mesa*, and *Bear Creek*.

The third one was taken in the Indian Model Bilateral Investment Treaty (Indian Model BIT). Under article 26.3, the treaty provides that when calculating monetary damages, tribunals should reduce damages, taking into account mitigating factors (including any unremedied harm or damage caused by the investor to the environment or local community, and “other

³⁵⁷ ECOWAS, art. 18(2)(4).

³⁵⁸ SADC Model BIT, art. 19(1) (providing a similar provision addressing investors’ failure to comply with their obligations under this agreement); PAIC, art. 43(1) (providing a similar provision addressing investors’ failure to comply with their obligations under this instrument or other relevant rules and principles of domestic and international law).

³⁵⁹ 2019 Netherlands Model Investment Agreement, art. 23; see *supra* note 348.

³⁶⁰ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Human Rights Council, U.N. Doc. A/HRC/17/31/UNGP, arts. 11-13 (Mar. 21, 2011) [hereinafter UNGPs].

³⁶¹ *Id.* art. 15.

relevant considerations regarding the need to balance public interest and the interests of the investor”).³⁶² Though this provision itself does not provide a clear standard to assess the investors’ conduct, the treaty contains other provisions on investor obligations. Those provisions require investors to comply with domestic laws, and encourage them to voluntarily incorporate into their practices and internal policies international corporate social responsibility principles relating to labor, the environment, human rights, community relations, and anti-corruption.³⁶³

In a similar vein, article 19 of the 2018 Ecuadorian Model Bilateral Investment Treaty (Ecuadorian Model BIT) obliges an investor to respect “internationally recognized human and environmental rights and national legislation” in “all supply chains and investment processes,” the breach of which may entitle the host state to “proportional reparations” in accordance with relevant rules of international and domestic law.³⁶⁴ Notably, this provision not only mandates tribunals to apply contributory fault to enforce investor responsibility in terms of human rights and environmental issues, but also extends investors’ obligations to cover their supply chains. Such a “supply chains” obligation of investors is very novel and far-reaching among contemporaneous IIAs.³⁶⁵ Yet, given that what constitute “internationally

³⁶² Indian Model BIT, art. 26.3 n.4. *See also* 2018 Ecuadorian Model Bilateral Investment Treaty, art. 17 (requiring tribunals to consider investor’s fault when determining the damages caused (including environmental damage)) [hereinafter Ecuadorian Model BIT]. Javier Jaramillo, *New Model BIT proposed by Ecuador: Is the Cure Worse than the Disease?*, KLUWER ARB. BLOG (July 20, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/20/new-model-bit-proposed-e>.

³⁶³ Indian Model BIT, arts. 11-12. For a critical view, see Duggal & Diamond, *supra* note 48, at 307 (arguing that “the 2015 Indian Model BIT does *not* refer to any specific standard, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines. Therefore, the Indian approach will likely *not* give rise to concrete human rights obligations”) (emphasis added). Indeed, it is worth noting that the initial draft of the 2015 Indian Model BIT—2015 Draft Indian Model BIT—adopted a more sensitive approach to investor obligations with respect to human rights and environmental protection in the host state. For instance, article 12 of the 2015 Draft Indian Model BIT requires investors and investments to comply with the law of the host state, including the law relating to human rights, labor conditions, environmental protection, and conservation of natural resources, among others. This provision also obliges investors and investments to “recognize the rights, traditions and customs of local communities and indigenous peoples” in the host state. *See* Draft Model Text for the Indian Bilateral Investment Treaty, art. 12, Mar. 15, 2015; Duggal & Diamond, *supra* note 48, at 307 (noting that in contrast, the 2015 Indian Model BIT fails to make express reference to human rights, the environment, local communities, or indigenous peoples in its analogous provisions on investors’ obligations).

³⁶⁴ Tom Jones, *Ecuador Aims to Balance State and Investor Rights with Model BIT*, LATIN LAW. (Mar. 19, 2018), <https://latinlawyer.com/ecuador-aims-balance-state-and-investor-rights-model-bit>.

³⁶⁵ Duggal & Diamond, *supra* note 48, at 308-09 (noting that “the 2019 Dutch Model BIT . . . (also) indirectly address[es] the issue of supply chain management, as it specifically refers to the OECD Guidelines for Multinational Enterprises, which, in turn, oblige investors to avoid adversely impacting human rights through activities in their supply chain”). *See* Dutch Model Investment Agreement, art. 7; OECD Guidelines for Multinational Enterprises, at 24,

recognized human rights and environmental rights” is debatable, how this provision would be enforced remains to be seen, and may largely depend on the interpretation of this reference by tribunals, which might look to international hard law and soft law on this matter.³⁶⁶ Also, with respect to direct expropriation, the treaty provides that investors are entitled to obtain “adequate compensation,” taking into account any unremedied damage caused by the investment or investor to the environment or the local community as well as “any other relevant consideration to achieve an adequate balance between the public interest and the interests of the investment or investor.”³⁶⁷ In this way, the direct expropriation provision seems to have implicitly incorporated the element of contributory fault as part of the compensatory formula to be applied.³⁶⁸

To be sure, even without IIA provisions explicitly referencing contributory fault, tribunals could still apply this doctrine under customary international law. However, through express language, these IIA provisions *oblige* tribunals to apply contributory fault in appropriate cases to address investor misconduct, thereby removing a perceived notion that invocation of this doctrine is purely discretionary. This could help to avoid potential controversy and contribute to more consistency and coherence in tribunals’ reliance on this doctrine.³⁶⁹

Counterclaims and contributory fault arguments could enable a host state to obtain a “set-off” in the damages awarded to an investor if they prevailed. Coupled with the preceding trend of IIAs incorporating investor obligations, these legal avenues may help to mitigate the asymmetric structure of investment treaty arbitration by permitting the host states to enforce human rights, corporate social responsibilities, and environmental obligations on foreign investors, serving to bridge the “gap between the lack of effective mechanism to hold foreign investors accountable for their conduct and the extensive protection” provided under IIAs.³⁷⁰ Further, these built-in mechanisms could strengthen the rule-of-law elements of international investment law, including accountability, access to justice,

para. 17. Yet, article 7 of the Dutch Model Investment Agreement was crafted in aspirational language, stating that states “reaffirm the importance . . . to encourage investors . . . to voluntarily incorporate into their internal policies . . . OECD Guidelines for Multinational Enterprises.”

³⁶⁶ Duggal & Diamond, *supra* note 48, at 309.

³⁶⁷ *Id.* at 309; Javier Jaramillo, *New Model BIT Proposed by Ecuador: Is the Cure Worse than the Disease?*, KLUWER ARB. BLOG (Jul. 20, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/20/new-model-bit-proposed-ecuador-cure-worse-disease> (noting that an illustrative list provided in the Ecuadorian Model BIT includes “(i) the use of the investment; (ii) pending obligations of the investor; (iii) fault of the investor in the damage caused; (iv) any type of environmental damage”).

³⁶⁸ It should be noted that this treaty does not protect against indirect expropriations. See Jaramillo, *supra* note 362.

³⁶⁹ Marcoux & Bjorklund, *supra* note 47, at 901.

³⁷⁰ Ishikawa, *supra* note 2, at 33.

fairness, and substantive values of fundamental human rights.³⁷¹

Moreover, IIAs could further elucidate the conditions for invoking the legality requirement, for instance, by explicitly specifying the jurisdictional or admissibility prerequisites for accessing investment arbitration. Indeed, to reduce uncertainties on the interpretation of IIA provisions, treaty parties may *ex ante* determine whether a given conduct is so serious that the treaty should decline investor claims.³⁷² In this regard, the Ecuadorian Model BIT breaks new ground by expressly qualifying the definition of the term “investment.” In article 3(2), the treaty requires that a covered investment must make a positive contribution to the human rights and the environment in the host state.³⁷³ In this way, this agreement imposes a jurisdictional obstacle to preclude enterprises or companies in breach of human rights and environmental obligations from invoking treaty protection, a unique feature rarely seen in other contemporary IIAs.³⁷⁴ In addition, IIAs might even attach conditions to accessing international arbitration by requiring the investors to fulfill their obligations not merely at the establishment phase, but also throughout the course of the investment’s operation.³⁷⁵

Third, a growing number of recent IIAs have incorporated provisions designed to strike a better balance between investment protection and the sovereign right to regulate.

In the preambles, many IIAs have referenced the goals of sustainable development³⁷⁶ or specified that investment protection and promotion should not be achieved at the expense of human rights, public health, the environment, safety, and labor standards.³⁷⁷ In the operative parts, many IIAs

³⁷¹ *Id.*

³⁷² Jarrett, Sergio & Ratner, *supra* note 125, at 7-8.

³⁷³ Jones, *supra* note 364; Jaramillo, *supra* note 362 (noting that article 3(2) imposes additional requirement to establish the existence of an investment: “(i) respect for human rights obligations; (ii) respect for environmental obligations; and (iii) submission to national legislation, which is tied to the condition that there are no acts of corruption in order for the investment to exist”; and that “article 15(5) of the (BIT) includes the clean hands doctrine to prevent arbitration for investors who commit acts of corruption”).

³⁷⁴ Duggal & Diamond, *supra* note 48, at 308.

³⁷⁵ *Id.* See *Al Warraq v. Indonesia*, UNCITRAL, Final Award, ¶ 607 (Dec. 15, 2014) (despite finding a FET breach, the majority award held that this claim was *inadmissible* for the investor’s *post-establishment* breach of an IIA provision, which prohibits investors from violating domestic laws and committing acts that may disturb public order or undermine public interests). Admittedly, this position is a minority approach.

³⁷⁶ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Austl.-Brunei-Can.-Chile-Japan-Malay.-Mex.-N.Z.-Peru-Sing.-Viet., pmbl., Mar. 8, 2018, [2018] A.T.S. 23 [hereinafter CPTPP]; Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, Iran-Slovk., pmbl., Jan. 1, 2016. Likewise, article 1(2) of the Ecuadorian Model BIT provides that “[t]he respect for human rights and fundamental freedoms enunciated in the Universal Declaration of Human Rights and other international instruments . . . constitutes an essential element of this Treaty.” See Duggal & Diamond, *supra* note 48, at 308.

³⁷⁷ Comprehensive Economic and Trade Agreement, Can.-E.U, pmbl., Oct. 30, 2016; Free

have stipulated a separate provision on the host state's right to regulate. Such a provision may be crafted in the specific context of environmental regulations,³⁷⁸ or on a standalone basis—such as the Argentina-Qatar BIT stipulating that all provisions of investment protection should not affect the sovereign right to regulate “through measures necessary to achieve legitimate policy objectives.”³⁷⁹ Being declaratory in nature, these preambles and “right-to-regulate” provisions cannot be directly invoked to preclude application of investment protection provisions.³⁸⁰ However, they could provide useful context to inform tribunals' treaty interpretation when assessing investors' claims, since they indicate the treaty parties' intention to qualify the construction of IIA's substantive guarantees. In this way, these declaratory provisions could prompt arbitrators to accord greater interpretive weight to states' regulatory space to pursue public interests, making more leeway for bona fide regulations in investment treaty arbitration.³⁸¹

Further, to respond to the “diversion effects” of investor-state damage awards, developing states may negotiate and bargain for some “special and differentiated treatment” provisions in IIAs, which can require tribunals to give due regard to the host state's relative material resources, development levels, and other international obligations when determining breaches of IIAs or quantifying damage amounts.³⁸² For instance, an IIA could mandate tribunals to depart from the default rules to pay full compensation in extraordinary circumstances where strictly following that formula may result in crippling consequences to the host state's national economy, and instead provide that adjudicators *can*, if not *should*, factor in the state's human rights

Trade Agreement between the European Union and the Republic of Singapore, E.U.-Sing., pmbl., Oct. 19, 2018; Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria, Austria-Nigeria, pmbl., Apr. 8, 2013.

³⁷⁸ See 2012 U.S. Model BIT, art. 12(5); The Dominican Republic—Central America—United States Free Trade Agreement, Central America-Dom. Rep.-U.S., ch. 10, art. 10.11, Aug. 5, 2004; Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free trade Area, Oman-U.S., art. 10.10, Jan. 19, 2006.

³⁷⁹ Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar, Arg.-Qatar, art. 10, Nov. 6, 2016 (providing an illustrative list of public policy goals including “public health, safety, the environment, public morals, social and consumer protection”).

³⁸⁰ See AKATERINI TITI, *THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW* 104 (2014).

³⁸¹ Choudhury, *supra* note 10, at 44. See *Al Tamini v. Oman*, ICSID Case No. ARB/11/33, Award, ¶¶ 387-90 (Nov. 3, 2015); *Aven*, ¶ 412 (both tribunals interpreted the FET provisions in light of the environment-specific right-to-regulate provisions contained in the IIAs: finding that the former were essentially qualified by the latter, they concluded with more environmental regulation-friendly interpretations).

³⁸² Choudhury, *supra* note 10, at 59. Congyan Cai, *Balanced Investment Treaties and BRICS*, 112 AM. J. INT'L L. 191, 221 (2018).

obligations to its citizens when determining damages.³⁸³ Aiming at establishing differentiated levels of responsibility commensurate with differing national capacities (among others), such a provision could make for a more equitable approach to damage quantification, allowing greater room for a host state to pursue broader development goals towards its population.

Moreover, some IIAs have gone further by *ex ante* shifting certain types of regulatory measures from the decision-making of investment tribunals to that of “either host states individually or the treaty parties collectively.”³⁸⁴

In this regard, the Morocco-Nigeria BIT contains a “self-judging” right-to-regulate provision, stipulating that “non-discriminatory measures” adopted to comply with the host state’s “international obligations under other treaties shall not constitute a breach under this Agreement.”³⁸⁵ On such terms, this provision only allows tribunals to examine whether the disputed measure is adopted in good faith (i.e., non-discriminatorily), precluding them from assessing whether the adverse impacts on investors are proportionate to the policy goals aimed at.

Likewise, during the discussion of the UNCITRAL Working Group on investor-state dispute settlement reform, South Africa’s submission proposes the inclusion of “public interest” exceptions in IIAs to exempt “public interest laws, regulations and legislation” from investor-state arbitration claims, ensuring that “investors are not able to challenge legitimate public interest regulations.”³⁸⁶ It also advances the incorporation of a “supremacy clause” in IIAs to the effect that investment protection shall not prevail over “international social, environmental and human rights commitments” of a host state in case of a conflict between these rules.³⁸⁷

In a similar vein, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and some Singaporean IIAs contain a tobacco “carve-out,” refraining investors from bringing investor-state claims over a host state’s tobacco regulatory measures.³⁸⁸ The Canada-China investment agreement likewise provides that when a host state raises a

³⁸³ See *CME v. Czech Republic*, Separate Opinion on the Issues at the Quantum Stage by Ian Brownlie, ¶¶ 75-80 (Mar. 14, 2003). See also Paparinskis, *supra* note 39, at 1246-53; Martins Paparinskis, *Crippling Compensation in the International Law Commission and Investor-State Arbitration*, *ICSID Review*, ICSID REV. (forthcoming, 2022).

³⁸⁴ Roberts, *supra* note 16, at 82.

³⁸⁵ Morocco-Nigeria BIT, art. 23(3). See SADC Model BIT, art. 20.3.

³⁸⁶ Submission from the Government of South Africa: Possible Reform of Investor-State Dispute Settlement (ISDS), UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) Thirty-Eighth Session, Oct. 2019, UN Doc. A/CN.9/WG.III/WP.176, at 9, <https://undocs.org/en/A/CN.9/WG.III/WP.176>.

³⁸⁷ *Id.*

³⁸⁸ CPTPP, ch. 29, art. 29.5; Free Trade Agreement between the Government of Australia and the Government of the Republic of Singapore, Austl.-Sing., ch. 8, art. 22, Feb. 17, 2003; Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Singapore on the Promotion and Mutual Protection of Investments, Kaz.-Sing., 2018, art. 11(2), Nov. 21, 2018.

defense concerning financial services, the investor-state tribunal cannot rule on it, but should defer to the treaty parties' decision-making, or, failing that, to a decision by a state-to-state tribunal on this matter.³⁸⁹ Similarly, in its investment chapter, the Australia-China Free Trade Agreement exempts non-discriminatory regulatory measures for legitimate public welfare objectives from investor-state treaty arbitration, but requires the treaty parties to provide a binding decision to determine whether these measures are covered by this exception.³⁹⁰

In addition, many IIAs now stipulate treaty parties' joint interpretive mechanisms to issue binding interpretations on an IIA provision, and allow a non-disputing treaty party (i.e., the home state) to make submissions on issues of treaty interpretation in pending investor-state arbitral proceedings, thereby enabling treaty parties to play a more prominent role in interpreting their own treaties.³⁹¹ Commentators also proposed establishing control mechanisms to enable treaty parties to *ex ante* review arbitral awards (through a "notice-and-comment-like" mechanism) and even to *ex post* veto the awards (through a "legislative-veto-like" mechanism).³⁹²

In sum, these IIA provisions reviewed above indicate that many states, having changed their perception of the risks inherent in investment treaty arbitration, are re-contracting their treaties to correct the asymmetries of IIAs and rebalance investment protection and public policy goals. Indeed, if the normative conflicts between IIAs and human rights essentially reflect a lack of coordination between different subfields of international law, then states—as masters of their treaties—could and should strike a better balance between competing interests by recalibrating their treaties and reconfiguring their control over tribunals' decision-making authority. Compared with arbitral tribunals' reconciliation on an *ex post* and *ad hoc* basis, treaty parties are generally in a better position to rebalance public and private interests on an *ex ante* and systemic basis. These illustrative instances could offer useful templates, showing how investment treaty reforms could fix their own pathologies and enhance the legitimacy of the entire system.

³⁸⁹ Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, arts. 20(2), 33(3), Sept. 9, 2012 [hereinafter 2012 Canada-China IIA].

³⁹⁰ Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, Austl.-China, ch. 9, arts. 9.11.4-9.11.6, Jun. 17, 2015 (these policy goals include "public health, safety, the environment, public morals of public orders").

³⁹¹ Roberts, *supra* note 16, at 82-83. *See, e.g.*, 2012 Canada-China IIA, arts. 18(2), 27(2), 30; 2012 U.S. Model BIT, arts. 28(2), 30(3).

³⁹² *See, e.g.*, Yackee, *supra* note 1, at 434-44 (discussing the "notice-and-comment" control mechanism that allows treaty parties to provide comments on the proposal of the final award, which may influence the shape of the award, as well as the "legislative veto" control mechanism that permits treaty parties to annul or overrule an undesirable award). *See* 2012 U.S. Model BIT, art. 28(9)(a); ASEAN Comprehensive Investment Agreement, Brunei-Cambodia-Indon.-Laos-Malay.-Myan.-Phil.-Sing.-Thai.-Viet., art. 36(7)-(8), Feb. 26, 2009.

V. CONCLUSION

To address the backlash against investment treaty arbitration and achieve good governance, investment tribunals should not ignore or downplay non-economic issues, at least where the disputing parties raise human rights arguments in the arbitration processes. Otherwise, the “public-private” divide may continue causing normative disruptions, undermining the legitimacy of international investment law as a whole. In response, this article provides a human rights-based approach for investor-state tribunals to rebalance international investment law, reconciling competing private and public interests. In this endeavor, it makes three contributions to the existing literature.

First, different from the prevailing approach in search of “public law” prescriptions, this article focuses on a relatively undertheorized public international law dimension, exploring international law doctrines and legal techniques to alleviate the potential conflicts between investment protection and human rights. Through application of human rights law to investor-state treaty disputes, considerations of human rights could enter the legal bloodstream of investment treaty arbitration. Therefore, even if the underlying IIA has not dealt with human rights up front, application of human rights law can still enable tribunals to accommodate human rights interests implicated and address investors’ misconduct in relation to human rights, without overly relaxing the standards of investment protection.

Second, this approach reveals a new dimension of the relationship between international investment law and international human rights law. As part of public international law, international human rights law could constitute the applicable law governing the substance of investment treaty disputes, enabling human rights norms to productively interact with international investment law. In this way, an investment tribunal can directly apply human rights law to determine the merits of the dispute, either by establishing an affirmative defense against state liability or by addressing a counterclaim enforcing investors’ obligations. In particular, a host state could invoke human rights arguments as a jurisdiction/admissibility defense, a compensation defense, as well as a conflict of norms defense. Moreover, even short of direct applicability, international human rights law could indirectly serve as an interpretive tool to harmonize investment protection standards with the human rights implicated. Through the process of systemic integration, this interpretive approach could help ensure that investor protection does not work as an absolute trump card, but instead should be duly weighed against broader public interests concerned, thereby recalibrating IIAs’ commitments and flexibility in treaty interpretation.

Third, this article critically reflects on the limitations of this human rights law-based approach, with an eye to using carefully crafted IIA provisions to remedy these aspects. These shortcomings include, most notably, the ambiguities in some rules of general international law, the vertical effects of international human rights law, as well as the inherent limits of international adjudication. Given these inadequacies, states—as

masters of their own treaties—could and should play a more prominent role in re-contracting IIAs and reconfiguring their control over tribunals' decision-making authority. By examining recent treaty provisions as templates, this article sheds light on how IIAs can be improved to better address the international governance gap on investor responsibility and properly safeguard states' regulatory powers to pursue public interests, thereby achieving a more symmetric, balanced system of international investment law.

Ideally, international investment law and international human rights law could not only be reconciled, but also be mutually reinforcing. Indeed, they are by no means “separate worlds” in clinical isolation from each other, and investment treaty arbitration does not operate as a completely autonomous “self-contained” regime immune from the dynamics of human rights.³⁹³ However, given the increasing tensions between investment treaty arbitration and human rights, reconciling such normative conflicts *in concreto* requires international adjudicators and states to strike a better balance among investment protection, sovereign rights, and public interests at large. Grounded in the broader normative backbone of public international law (in which IIAs and investment treaty arbitration are embedded), this human rights law-based approach could provide a framework for adjudicators and states to better order the relationship between investment protection and human rights, thereby contributing to greater legitimacy, accountability, and rule-of-law attributes of international investment law.

³⁹³ Simma, *supra* note 11, at 576.