Part 3 – CROSS-CUTTING ISSUES

Chapter 3.2
Investment Law and Human Rights

by Julian Scheu and Lisa Schoettmer

A. INTRODUCTION

International investment law is part of the international legal order. It does not function as a self-contained regime but interacts with general public international law and other legal regimes, especially those concerning rights and obligations of the parties to investment disputes, i.e. states and investors. The relationship between investment law and human rights, in particular, has been topic of a large debate in academia as well as in arbitration practice. As human rights considerations become more prominent and public interest rises regarding the obligation of states and private actors to uphold human rights, the interaction between international investment law and human rights is intensifying.

This is not only reflected in ample academic research and arbitration practice by tribunals, but also by an increasing number of investment treaties concluded that show evidence of human rights considerations.

This chapter aims to give an overview over the relationship between human rights and investment law by giving communalities and differences in a first step (B.), before analyzing the three scenarios of interaction between the two (C.). Starting with the reinforcement of investment protection by human rights (C.I.), continuing with the scenario of conflict (C.II.), and coming finally to the abuse of investment protection at the cost of human rights (C.III.), this chapter then will conclude with a short overview of human rights considerations in current investment treaties (D.).

B. COMMUNALITIES AND DIFFERENCES BETWEEN INVESTMENT LAW AND HUMAN RIGHTS

Before analyzing the different ways investment law and human rights interact with each other, it is important to establish in which ways both regimes are conceptually compatible and what the main differences are. This distinction is important especially when tribunals weigh arguments based on both regimes against each other.

I. Communalities

Investment protection and human rights share the idea that the granting of enforceable rights under international law promotes positive development of societies and individuals. Both regimes complement each other in that regard, given that human rights protect the individual and the social groups it forms, whereas investment law incites economic and social development of the States in which these individuals and social groups live and do business.

Both regimes promote human, social and economic development. Although they have different natures, both investment protection and human rights have the same core goal in their conception. How this symbiotic relationship is reflected in the practice of investment protection depends on the interaction between both. Investment – if done right – can promote human and social development. However, it can also put those objectives in jeopardy. Investment – if done wrong – can pose a threat to human rights of the population of the host state. While both regimes have a symbiotic relationship in theory, their practical interaction in case of an investment dispute is much more complex.

II. Differences

The main difference between human rights and rights granted on the basis of investment treaties is the nature of those rights. While human rights are inalienable, and are discovered, not created by international human rights law, investment protection is guided by a more functional approach. The objective of investment protection is not the recognition of the dignity of investors, but to attract investment flows by creating legal incentives and mitigating sovereign and political risks in the host State. Thus, investment protection is a policy tool and does not, in contrast to human rights law, stem from inalienable rights.

C. Investment Law and Human Rights in Investor-State Dispute Resolution (ISDS)

The goal of investment protection is ultimately to create economic impulses that promote economic and social development in the host state for the benefit, inter alia, of its population.[1] In order to fulfil its capital-attracting function, investment protection must be practically effective to ensure the trust of investors. At the same time, in order to promote sustainable development, the host state must be able to exercise regulatory powers. This ensures the protection of public interests, while giving a standard of protection to investors that gives incentives for further investment in the economy. In consequence, investment protection can very much be related to the realisation of human rights.[2]

The interaction of both regimes in disputes arising between investors and host states depends on the circumstances. These can be divided into three different scenarios that will be discussed as first, the reinforcement of investment (I.), second, the conflict between the two systems (II.), and third, the abuse of investment protection (III).

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1 See for a development-based perspective on investment law: Alschner and Tuerk, *The Role of International Investment Agreements in Fostering Sustainable Development*, in Baetens (ed.), *International Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press, Cambridge 2013), pp. 217 ff.

2 Such a policy perspective on international investment protection leads to the conclusion that both regimes are in principle complementary. See, e.g., Scheu, *Trust Building, Balancing, and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration* (2017) 48(2), Georgetown Journal of International Law, 449, 452 ff.

I. Reinforcement of Investment Protection by Human Rights

Under international investment law, legal protection is granted to any individual or company that fulfils the conditions defined in the applicable investment treaty.[3] From this moment, such individuals or companies are considered as 'protected investors' in the sense of the treaty. They may, however, also be entitled to protection under international human rights law. Many human rights are relevant to economic activities such as the enjoyment of property, non-discrimination, or the access to justice. Many human rights treaties recognize not only the right of the individual human being, but also the protected status of companies in their capacity as legal persons.[4]

A disputed host state measure – such as a seizure of property of a protected investor – may breach the investment treaty. It could, at the same time, constitute a breach of the human right to property. Because foreign investors can also be human rights subjects, they can be protected by both investment law and human rights treaties.

1. The Interaction of Reinforcement

In many situations, investment protection and human rights of investors share the intention to protect private subjects from abusive state power. Thus, host State measures that infringe on investment protection may also violate human rights norms. Therefore, investors can be protected against abusive state conduct not only by the applicable investment treaty, but also through relevant human rights obligations of the host state. In this circumstance, both regimes reinforce each other in protecting the investor from measures taken by the host state.

2. Integrating the Investor's Human Rights into the Interpretation of International Investment Agreements (IIAs)

Like any other treaty, IIAs and Bilateral Investment Treaties (BITs) have to be interpreted according to their object and purpose (Art. 31 (1) Vienna Convention on the Law of Treaties (VCLT)). This opens the door to customary international law and more specifically to human rights considerations.[5] As the object and purpose of investment protection has the same trajectory as human rights norms (see above), arbitral tribunals have the opportunity to integrate human rights into their reasoning and interpretation of the relevant investment treaty.

In a first step, the relevant human rights obligations of the host state have to be established. If the purpose of an investment treaty is to grant effective protection that inspires trust of investors, then the standards of protection must at least be in line with the human rights standards which would apply to host state conduct even in the absence of the investment treaty. As a

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3 See also Chapter 2.1 on the definition of "investor" and "investment".

4 For the example of the European Convention on Human Rights and Fundamental Freedoms (ECHR), see Kulick, *Corporate Human Rights?* (2021), 32, EJIL 537-570, 545 ff.

5 In any event, in view of Art. 53 VCLT, the interpretation of the investment treaty must be in line with all human rights which are part of preemptory norms of general international law (jus cogens).

consequence, the human rights obligations of the host state inform the interpretation of investment standards in the sense of Art. 31 (1) VCLT because they establish a minimum standard. As a second step, these treaties and norms have to be integrated into investment protection. This integration can take place by interpreting the investment treaty so that the tribunal can bring in human rights considerations at different stages of the dispute settlement process.

3. Jurisdiction and Admissibility

One possibility for the tribunal to integrate human rights considerations is in the determination of its jurisdiction, i.e. whether it is looking at a claim by a foreign investor and, therefore, whether the claim is admissible. It was pointed out by the arbitrators in the *Yukos Universal Limited v. Russia* case, that they had jurisdiction to evaluate possible human rights violations. However, the tribunal recalled, in view of being constituted under an investment treaty, that it was not competent to hear isolated human rights claims.[6] As shown in several arbitral awards, human rights considerations can play an important role in guiding the tribunal in questions of jurisdiction and admissibility.

One example is *Pey Casado v. Chile*, where the host state had ratified the American Convention on Human Rights (ACHR)[7] before concluding the relevant BIT. Under Art. 20 (3) of the ACHR, no one shall be arbitrarily deprived of the right to change his or her nationality. Consequently, the tribunal accepted the individual's change of nationality which led to it being considered a *foreign* investor in the sense of the treaty.[8] Similarly, in *Micula v. Romania*, the tribunal recognized Article 15 of the Universal Declaration of Human Rights (UDHR)[9] in determining the nationality of the investor, even though the UDHR is not a legally binding treaty. The underlying understanding in this context was that human rights norms can create legitimate considerations in relation to the interpretation of jurisdictional aspects.[10]

4. Substantive Investment Protection Standards

As mentioned above, human rights considerations can also become relevant in the context of substantive protection standards as those standards protect the investor against abusive host state conduct. Investment protection standards therefore have the same directionality as human

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6 *Yukos Universal Limited v. Russia,* UNCITRAL, PCA Case No. AA 227, Award, (18 July 2014), para 765.

7 Inter-American Convention on Human Rights (22 November 1969) 1144 UNTS 123.

8 *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award (french) (8 May, 2008), para 313; see also Scheu, *Trust Building, Balancing, and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration* (2017) 48(2), Georgetown Journal of International Law, 449, 471 f.

9 UN General Assembly, *Universal Declaration of Human Rights* (December 1948), 217 A (III).

10 Scheu, *Trust Building, Balancing, and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration* (2017) 48(2), Georgetown Journal of International Law, 449, 471 f.

rights of the investor. This can be seen in the different substantive protection standards set out by investment treaties.

One example is the standard on indirect expropriation in international investment treaties.[11] Protection from unlawful (direct or indirect) expropriation can be found in almost every investment treaty and is also part of customary international law.[12] However, the term expropriation is usually not defined in those treaties, which leaves the tribunals to interpret the term. One approach widely accepted in arbitral practice is to take account of the legitimate expectations of the investor. These legitimate expectations are influenced by relevant human rights treaties, as the host state's human rights obligations regarding private property also create legitimate expectations of investors. This influence of human rights treaties is reflected by cases such as *Saipem v. Bangladesh,* where the tribunal referenced the European Court of Human Rights (ECtHR) jurisprudence as guidance for interpreting the term 'indirect expropriation'.[13]

Another example is the interpretation of the fair and equitable treatment (FET) standard. Generally, the legitimate expectations of the investor in regard to a stable regulatory framework are considered as the starting point for establishing the content of this standard.[14] In this context, human rights obligations of the host state are part of the regulatory framework on which investors can rely on as legitimate expectations.[15] This is especially relevant in the clarification of due process and the right to a fair trial under the FET standard. Due process and fair trial are an integral part of many human rights treaties, as Art. 14 of the International Covenant on Civil and Political Rights (ICCPR)[16], Art 6 (1) of the ECHR, or Art. 8 of the ACHR illustrate. In addition, there is ample jurisprudence on the interpretation of those principles from international human rights courts.[17] Investment tribunals can refer to this case law when interpreting the same standards enshrined in international investment treaties.[18]

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11 For further analysis, see Chapter 2.2.

12 Dolzer and Schreuer, *Principles of International Investment Law* (2012). p. 89.

13 *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para. 130.

14 Scheu, Trust Building, Balancing, and Sanctioning: *Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration* (2017) 48(2), Georgetown Journal of International Law, 449, 476 f.

15 *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award (5 September 2008), para. 261.

16 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

17 Paulsson, *Denial of Justice in International Law* (2005), p. 133. See also Chapter 2.3.4.

18 See, e.g., with respect to Art. 14 ICCPR: *Al-Warraq v. Indonesia*, UNCITRAL, Final Award (15 December 2014), paras. 561, 621.

5. Damages

Finally, human rights considerations can play a role in the determination of damages. Lacking specific norms in investment treaties, damages are usually assessed by tribunals relying on customary international law. Starting point for this assessment is the ruling of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case, which provides for the principle of full reparation.[19] However, tribunals have wide discretion over the amount of damages awarded to the investor. This discretion can also be used to take into account human rights law in the assessment of damages. This can be seen for example in the *ADC v. Hungary* case, where the tribunal had to assess the relevant time for the calculation of damages and relied on rulings of the ECtHR on the matter.[20]

II. Conflict Between Human Rights and Investment Protection

From a policy perspective, scenarios where both regimes conflict with each other are more relevant than scenarios of mutual reinforcement. This is the case in situations where the host state has an obligation to protect human rights but is also required to observe conflicting obligations under investment law. If the protection of human rights creates adverse effects for foreign investments, the host state is confronted with a legal dilemma. In this scenario, the investors' rights under the investment treaty might be infringed due to policy decisions the host state made in order to protect its citizen's human rights.

1. The Interaction of Conflict

This conflict is created by obligations of the host state in both regimes. States not only have the obligation to uphold human rights in their actions, but also to protect human rights against threats in their territory.[21] This results in the obligation of host states to protect their citizens from threats that could either be inferred through actions of other states, natural disasters, or even actions from private persons. In turn, such an obligation to protect might collide with international investment treaties. Even though the investor is not responsible for the human rights violation or may not even be connected to it in any way, the host state might be forced to violate the investor's rights to safeguard human rights.

In this scenario, both legal regimes collide with each other, as the host state cannot comply with the one without violating the other. Protecting human rights *and* the foreign investment are both legitimate objectives but have to be weighed against each other. Since in many cases both types of obligations will originate from international treaties, the conflict cannot be resolved by

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19 *Factory at Chorzow* (Germany v. Poland), Award, (13 September 1928) P.C.I.J. (ser. A) No. 17, 47.

20 *ADC Affiliate Ltd. V. Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal (2 October 2006), para. 497.

21 Special Representative of the U.N Secretary-General, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/11/13 (22 April 2009), para 13.

merely applying the hierarchy of norms.[22] The conflict can therefore only be resolved by balancing.

In balancing the human rights of the local population with the rights of the investor, the underlying presumption is that neither human rights nor investment protection grant absolute protection. Both can be outweighed by other considerations in view of the specific circumstances. In order to balance both objectives, many tribunals undertake a proportionality analysis (2), which, in turn, might influence the scope of substantive investment protection norms (3), or the evaluation of damages (4).

2. Proportionality Analysis in Investor-State Arbitration

A proportionality analysis is a widely accepted method to evaluate two conflicting legal obligations. It consists of three main elements: suitability, necessity, and proportionality *stricto sensu*.[23] These criteria rely on the idea that the state is acting to protect legitimate purposes, in this case the protection and promotion of relevant human rights. In a first step, the tribunal has to establish that the host state acted with a legitimate purpose in mind, or at least in promotion of such purpose. In case of human rights, the establishment of a legitimate purpose is not likely to pose any difficulty. The tribunal then needs to deliberate on the three elements described above, starting with the suitability of the measure taken by the host state to protect human rights. In other words, the measure must be suitable to protect the relevant human rights brought forward by the state, it must at least contribute meaningfully to their protection, i.e. be a step in the right direction. This was in question, for example, in the *Genin v. Estonia*, *Metaclad Corporation v. Mexico* and *Tecmed* cases, where the tribunals found that the measures taken in breach of FET were not suitable to promote the legitimate purposes upheld by the states.[24] As proportionality analysis is three-stepped, the threshold for suitability of the measure should not be too high in order not to second-guess the political decisions of the host state.[25]

In the second step, the tribunal needs to establish that the measure was necessary to promote the legitimate public purpose. Thus, there cannot be any less restrictive measure that would be readily available and similarly effective as the chosen measure.[26]

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22 As Art. 53 VCLT clearly illustrates, the situation would be different in case of a conflict between investment treaty provisions with human rights as part of peremptory norms of general international law (jus cogens).

23 See Stone Sweet and della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez* (2014), 46, NYU J. Int'l. L. & Pol. 911, 917-918.

24 *Genin v. Estonia*, ICSID Case No. ARB/99/2 Award (25 June 2011), paras 364-365, 370; *Metalclad Corp. v. Mexico*, ICSID Case No. ARB (AF)/97/1, Award (English) (30 August 2000), paras 90-98; *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB/00/2, Award (English) (29 May 2008), paras 154, 157-158, 164, 166, 172-173.

25 Add FN: Esme Shirlow, Deference in ISDS

26 Otherwise known as the necessity-test, see *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award (13 November 2000), paras. 51-53, 66; Jans, *Proportionality Revisited* (2000), 27 Legal Issues Econ. Integration 239, 240.

Finally, the measure needs to be proportional to the public purpose in light of all the circumstances of the specific case in order to prevent an unbearable restriction on the investment.

3. Substantive Investment Protection Standards

Proportionality can come into effect by interpreting substantive protection standards. One example are legitimate expectations of the investor as a core element of FET. Accordingly, any measure of the host state to protect human rights will not violate the FET standard if it is considered to be proportional or reasonable. This has to be established on a case-by-case basis.[27]

Another point of conflict arises in relation to the standard of full protection and security (FPS). Host states must not only refrain from harming foreign investments but are also obliged to actively protect the investment from being harmed by third parties. An example concerns civil protestors acting against a foreign investor like in the *Tecmed* case.[28] As shown in this case, the obligation of the host state to protect human rights (here the rights to protest of its citizens) can influence the scope of the state's duty to protect the foreign investor under the full protection and security standard.[29]

Further instances of conflict might arise in relation to the non-discrimination standard. In general, foreign investors have to be treated equal to local investors in a comparable situation.[30] If they are not treated equally, then the measure constitutes discrimination. On the other hand, it is recognised by tribunals that foreign investors can be treated differently to domestic investors to safeguard public interests.[31] Such public interests again can lie in human rights considerations, for example concerning cultural heritage sites.[32]

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27 Kingsbury and Schill, *Public Law Concepts to Balance Investors' Rights*, in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford, 2010), pp. 75, 96; Kläger, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, Cambridge, 2011), p. 39; Behrens, *Towards the Constitutionalization of International Investment Protection* (2007), 45, Archiv des Völkerrechts 153, 176-177.

28 *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB/00/2, Award (English) (29 May 2008).

29 Ibid., para 175; see also Scheu, *Trust Building, Balancing, and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration* (2017) 48(2), Georgetown Journal of International Law, 449, 487.

30 *Pope & Talbot Inc. v. Canada*, UNCITRAL, Awards on the Merits of Phase 2 (10 April 2000), para. 78-79; See DiMascio and Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?* (2008), 104 AM. J. INT'L L. 48, 66.

31 *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award (13 November 2000), para. 273.

32 See for example the *Parkerings-Compagniet AS v. Lithuania* case, where the construction was situated in a UNESCO cultural heritage site and the tribunal concluded that different treatment was not discriminatory. *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), paras 377, 392, 430.

4. Damages

An alternative approach to limiting investment protection standards in conflict with relevant human rights norms lies in the assessment of damages. As the tribunal has wide discretion on the distribution and calculation of damages,[33] it is possible to depart from the *Chorzów Factory* formula and award less or more damages. Several tribunals have been taken human rights considerations into account as relevant factor to lessen the burden on the host state.[34] One example of this approach can be found in *South Pacific Properties Limited v. Egypt*.[35] Here the tribunal noted that the hotel project, that was located near the Giza pyramids, was in breach of international human rights law after the ratification of the UNESCO Convention by Egypt. Ttherefore, the tribunal only awarded damages for expenses incurred before the ratification.[36]

III. Abuse of Investment Protection at the Expense of Human Rights

A third scenario entails the abuse of investment protection to the detriment of human rights. This is the case if the investor's conduct violates human rights of other private persons living in the host state. The host state has the obligation to protect its citizen's human rights. Therefore, the host state may decide to or even have to take action against the investor in the form of regulations, sanctions, or other policy decisions. As a reaction to such sanctions, the investor might file an investment claim under an applicable IIA. In contrast to the above situation of conflict between human rights and investment protection, the investor is not an innocent bystander but acting as a perpetrator who is responsible for the human rights violations.

1. The Interaction of Abuse

In consequence, the actions of the host state to protect human rights will directly target the foreign investor causing the human rights threat. Investment protection is supposed to promote economic, social, and human development. Against this background, it would be abusive and undermine the purpose of investment law if a human rights perpetrator could use the ISDS mechanism as a defence against host state regulation.[37]

In order to tackle this abuse, tribunals often refer to the concepts of 'good faith' and 'abuse of rights' to sanction the party threatening human rights.[38] Investors threatening human rights pose

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33 *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award (13 November 2000), para. 79; Ripinsly and Williams, *Damages in International Investment Law* (2008), pp. 91, 312.

34 See *Quiborax S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015), para. 330; Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State* (2017), 8, J. World Inv. & Trade 717, 729; Kulick, *Sneaking Through the Backdoor – Reflections on Public Interest in International Investment Arbitration* (2013), 29, Arb. Int'l 435, 451.

35 *South Pacific Properties Limited v. Egypt*, ICSID Case No. ARB/84/2, Award (20 May 1992).

36 *Ibid.*, para 191.

37 See *Phoenix Action Limited v. Czech Republic*, ICSID Case No. ARB/06/5, Award (18 July 2004), para. 78.

38 Even though their status as subjects of public international law is not undisputed, not only states, but also

a systemic harm to the society of the host state. It is therefore comparable to behaviour of investors in the context of corruption, as corruption has harmful effects on the society as a whole and adversely affects the human rights enjoyment of individuals.[39] Looking at the strict approach tribunals have taken with regards to corruption, it is hard to argue that human rights infringements by investors should not be handled in a similar way.[40]

In view of investment law's purpose of promoting sustainable development, tribunals have the authority, and even the duty to sanction investors whose conduct adversely affects the human rights situation in the host state. Therefore, sanctions by the host state are legitimate and in line with Art. 31(1) of the VCLT. No investor can legitimately expect that infringing on human rights and thereby actively undermining the sustainable development of the host state will remain without regulatory consequences.[41]

If the tribunal finds that a treaty claim is abusive in light of human rights violations committed by the claimant, there are different possibilities for sanctioning the investor. For one, the tribunal could find that it lacks jurisdiction to hear the claim or that the claim is inadmissible (2). The tribunal could also deny the claim of the investor on the merits (3). One option going even further would be a decision on possible counterclaims by the host state (4).

2. Jurisdiction and Admissibility

One severe action the tribunal can take to sanction the investor is to deny jurisdiction. As this leads to the tribunal not even hearing the investor's claim, this remedy has to be handled with care. Especially in light of a potential denial of justice, this remedy should only be used if there is a serious, irreversible, and beyond reasonable doubt identifiable infringement of human rights on the side of the investor.[42]

According to the Kompetenz-Kompetenz principle, the tribunal has the competence to decide on its own jurisdiction to hear the claim. This includes deliberations on the requirements of jurisdiction, namely jurisdiction *ratione voluntatis, personae, materiae or temporis*.[43] Particularly the

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private investors have to respect the obligation to act in good faith. See *Fraport AG Frankfurt Airport Serv. Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award (16 August 2007), para 402.

39 Kumar, *Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia* (2008), 16 Mich. St. J. Int'L L. 475, 502.

40 Karamanian, *Human Rights Dimensions of Investment Law*, in De Wet and Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (2012) pp. 236, 260.

41 *See Glamis Gold Ltd. v. United States*, UNCITRAL, Award (8 June 2008), paras. 779, 803-805.

42 Scheu, *Trust Building, Balancing, and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration* (2017) 48(2), Georgetown Journal of International Law, 449, 501.

43 Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, in Bungenberg et al (eds), *International Investment Law - A Handbook* (2015) pp. 1212-1264, paras 75-213; Kjos, *Applicable Law in Investor-State Arbitration the Interplay Between National and International Law* (2013) pp. 105, 112; Newcombe, *Investor*

aspect of jurisdiction *ratione materiae* is of relevance here. If the investor seeks protection for a venture that cannot fall under the relevant definition of investment, the tribunal lacks jurisdiction on the grounds of jurisdiction *ratione materiae*. There is no uniform definition of the term 'investment'.[44] However, some commonly accepted conditions exist for a venture to generally be considered an investment, namely the contribution of any kind of asset for a certain duration which includes the taking of a risk. In addition, a fourth criterion which is commonly considered an element of investment is the contribution to the host state's development. This last requirement is crucial. If an investment endangers human rights, it cannot be considered to contribute to the development of the host state.[45] Therefore, even if one argues that the development criterion set out by the *Salini* tribunal[46] is only an indicator for the existence of an investment, the conclusion has to be the same, as the violation of human rights has to be a strong negative indicator.

Further, the tribunal can deny its jurisdiction *ratione voluntatis* because of a bona fide obligation breach. The tribunal in *Phoenix Action Limited v. Czech Republic* noted that 'nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused.'[47] Following this, a tribunal may conclude that the investor acted in bad faith, if it is established that the claimant committed intentional and serious violations of human rights. Such a breach of the good faith principle would preclude jurisdiction *ratione voluntatis.*

If the effects of the violation seem reversible, the tribunal could find the claim to be inadmissible. This way, the claim could be brought in front of the tribunal again once the infringement is gone.[48] Such an approach could serve as an incentive for investors to remedy the harm caused to the host state population.

3. Substantive Investment Protection Standards and the Merits of a Claim

If the tribunal does in fact find that it has jurisdiction and the claim is admissible, the same considerations regarding substantive investment protection standards apply as seen in the conflict between investment protection and human rights considerations. In assessing the

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Misconduct: Jurisdiction, Admissability or Merits?, in Brown and Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (2011) pp. 187, 193.

44 For discussion, see above, Chapter 2.1.

45 Scheu, *Trust Building, Balancing, and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration* (2017) 48(2), Georgetown Journal of International Law, 449, 499.

46 *Salini Construttori S.P.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 52 (23 July 2001), 42 I.L.M. 609 (2003).

47 *Phoenix Action Limited v. Czech Republic*, ICSID Case No. ARB/06/5, Award (18 July 2004), para. 1352.

48 See *Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008), para 64.

proportionality of the measure, the tribunal will take into account that, in case of an abuse, there is not only an infringement of human rights, but that it is deliberate on the part of the investor.

4. Counterclaims in International Investment Law

Counterclaims by host states are a relatively recent development. In more and more cases, host states not only defend their actions to promote human rights, but are also willing to file counterclaims against the investor, and to claim damages themselves.[49] The concept of counterclaims is highly disputed in international investment law, as most investment treaties are silent on whether such claims are admissible and whether the tribunal has jurisdiction to decide on them.

So far, counterclaims have been used by states to claim damages caused by investors in violation of domestic law in connection to the investment in dispute.[50] While the investor claims the state violated investment protection standards, the state responds with a claim that the investor previously or subsequently violated domestic environmental or human rights regulations. But states have also tried to establish obligations of the investor on the basis of international human rights directly. This can be seen, for example, in the *Urbaser v. Argentina* case. Argentina claimed that Urbaser infringed on the human right to water. The tribunal reasoned that corporate social responsibility (CSR) was enshrined in public international law to the effect that investors are bound to respect human rights in the territory of the host state.[51] However, this obligation must result from the relevant contracts. The tribunal eventually dismissed the counterclaim on the ground that Argentina did not substantiate the claim to the extent that such CSR on the part of Urbaser could be established.[52]

If sufficiently well argued, such counterclaims could lead the tribunal not only to dismiss the claim, but to go further and award the host state damages for the investor's actions. Even though this has not been seen in practice, the *Perenco v. Ecuador* and *Burlington v. Ecuador* cases show that tribunals are willing to award damages to the host state. In those two connected cases, the tribunals did uphold the claims of the investors, but also found the counterclaims to be substantiated. In consequence, both the original claim and the counterclaim were

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49 See for example *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Award (18 September 2018), *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017), *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2016), all claiming damages for violations of environmental norms closely connecting those norms to human rights obligations.

50 See especially *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2016); *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017).

51 See also Abel, *Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration* (Brill Open Law 2016) 61, 68-83.

52 *Urbaser SA, Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. Arb/07/26, Award (8 December 2016).

successful, and the tribunal awarded damages to both parties to the dispute respectively.[53] As a result, the damages awarded on both sides are subject to an offset. Consequently, counter-claims are a potentially efficient defense mechanism for states to hold investors accountable for harmful actions conducted in the home state. Whether the counterclaim is admissible will depend on how narrow or wide the jurisdictional clause of the applicable investment treaty is worded.[54]

D. INVESTMENT LAW AND HUMAN RIGHTS IN RECENT TREATY-PRACTICE

The concept that not only states are responsible to uphold human rights, but that corporations also have certain obligations under international is relatively new.[55] Although states still are the primary protector of human rights, public international law now also takes businesses into account. They have a 'baseline responsibility to respect human rights'[56], which derives from expectations from society on how a business should be conducted and operated. The UN Human Rights Council Framework *Protect, Respect and Remedy* relies on three principles to protect human rights: the obligation of the state to protect human rights from abuse, CSR of the investors to respect human rights, and the need for more effective remedies for victims. In particular, CSR plays an important role, as it does not only entail the negative obligation to respect human rights, but also the active obligation to prevent human rights violations through due-diligence.[57]

In the last 10 years, states increasingly included human rights provisions into investment treaties. First, human rights were mentioned in a very general way. Recently, states started to include more specific references to human rights in order to protect human health, labor conditions or anti-corruption policy.[58]

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53 See *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2016); *Burlington v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims (7 February 2017).

54 See further Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law* (2013), 17, Lewis & Clark L. Rev. 461-480.

55 See further Choudhury, *Investor Obligations for Human Rights* (2020), 35 ICSID Review pp. 82-104.

56 UN Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights* - Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5, (7 April 2008), para 54.

57 Ibid, at Guiding Principle 13. See also Emmert, *Corporate Social Responsibility in Comparative Perspective*, (CILP 2014), with several pertinent contributions.

58 See for example the Preamble, Art. 4, Art. 5 Cambodia-Turkey BIT (2018), Preamble of the Pacific Agreement on Closer Economic Relations Plus (2017); Art. 5 Austria-Tajikistan BIT (2010); Art. 8 Japan-Oman BIT (2015); Art 17 Colombia-Costa Rica FTA (2013). For further analysis see Chapter 6.2.

In the absence of specific human rights provisions, the preamble of a BIT or IIA remains the most common way to include human rights considerations in an investment protection context. Many treaties include formulations like the following:

> *Seeking to ensure that investment is consistent with the protection of health, safety and the environment, the promotion and protection of internationally and domestically recognized human rights, labour rights, and internationally recognized standards of corporate social responsibility.*[59]

While such formulations do not give specific obligations to investors, they do help tribunals to integrate human rights considerations in the interpretation of the investment treaty. The wording of the preamble thereby strengthens the tribunal's mandate to consider human rights in the context of a claim brought under the treaty.

More specific obligations to protect human rights can be found in treaties where it is specified that human rights standards should not be lowered to encourage foreign investment,[60] or even that human rights obligations can lead to exceptions to host state obligations.[61]

However, more direct and specific investor obligations to protect human rights have not yet found their way into investment treaties on a significant scale. Some states started to include a soft law approach into investment treaties, 'recommending' the parties to the agreement to 'encourage' foreign investors to adopt international CSR into their conduct.[62] Some other treaties include CSR either in preambles or as a substantive treaty provision. These clauses then refer to CSR principles set forth for example by the OECD and ask states to encourage the investor to comply with those CSR principles.[63]

Following these attempts of incorporating some degree of responsibility on the part of the investor, the Morocco-Nigeria BIT goes further and reads as follows:

> *(2) Investors and investments shall uphold human rights in the host state.*

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59 Preamble of the Belarus-Hungary BIT (2019).

60 For example found in Art. 2 Azerbaijan-Hungary BIT (2007); Preamble of the Cambodia-Japan BIT (2007).

61 See Art. 28.3 Canada-European Union: Comprehensive Economic and Trade Agreement (2017); Art. 33 Canada-China BIT (2012).

62 See Art. 14.17 USMCA (2018); Art. 12 Belarus-India BIT (2018); Art. 11 Nigeria-Singapore BIT (2016). Some treaties go further to include stronger wording as found in Art. 9 Brazil-Malawi BIT (2015).

63 *OECD Guidelines on Multinational Enterprises*, found for example in Art 15 Brazil-Chile BIT (2015); *UN Global Compact*, found for example in the Preamble of the Austria-Nigeria BIT (2013); *ILO Tripartite Declaration*, found for example in Art. 35 EU-Moldova BIT (2014); *UN Guiding Principles on Business and Human Rights*, found for example in Art. 7 Netherlands Model Investment Agreement (2018). For further analysis of investor obligations see Chapters 6.2 and 6.3.

> *(3) Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.*
>
> *(4) Investors and investments shall not manage or operate 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.*[64]

The Bangladesh-Denmark BIT even provides that the investor in breach of human rights norms has to pay the host state adequate compensation for loss, destruction or damages under domestic and international law.[65] Here, not only does the treaty include obligations of the investor, it also adds a second incentive to uphold human rights by adding an obligation for compensation.

E. CONCLUSION

Human rights and investment protection are not principally incompatible with each other. They both have the same final objective, namely the promotion of sustainable development. The way both regimes interact with each other very much depends on the specific circumstances. There are several instances in which investment and human rights obligations may collide. There is even the potential that ISDS is abused at the expense of human rights. However, the interpretative powers delegated to arbitral tribunals are sufficient to avoid abuses and resolve conflicts. However, due to vague or generally worded treaty terms, uncertainties remain. Today, it often depends on the approach adopted by individual arbitrators as to whether human rights are considered to be relevant or not. As recent examples show, there is a tendency of ensuring that tribunals will address human rights considerations in ISDS by adding unequivocal provisions to BITs and IIAs.

Such a development seems positive and necessary. In view of investment law's ongoing legitimacy crisis, it is crucial to carefully examine the interaction of both legal regimes. For ISDS to be recognized as a value-based system of dispute resolution, it is not enough to ensure a general level of respect for human rights. Going forward, investment law must become a tool which actively promotes CSR of international investors and helps to increase the level of human rights enjoyment in host state societies.

It is therefore crucial to systematically integrate human rights considerations into ISDS to ensure better cooperation of both regimes and minimize potential conflicts.

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64 Art. 18 (2)-(4) Morocco-Nigeria BIT (2016).

65 Art. 2(2) Bangladesh-Denmark BIT (2009).