

Dr Taida Begić Šarkinović\*

## HUMAN RIGHTS ISSUES IN INVESTMENT ARBITRATION CASES: A NEW PERSPECTIVE?

**Abstract:** *This article addresses recent human rights matters in the context of treaty-based investment arbitration. After having analyzed two recent arbitral awards, Urbaser v. Argentina and Bear Creek v. Peru, the article argues that host states' counterclaims on the basis of human rights can serve as an effective vehicle for rebalancing investors' rights and regulatory powers of host states. Both cases illustrate a more progressive approach of investment arbitral tribunals when dealing with human rights issues. Host states' counterclaims can also provide a door for arbitrating corporate-related human rights violations in the sense that they can ensure the application of international human rights law in investment arbitration cases. International investment promotion for sustainable development requires rebalancing the rights and obligations of states and investors which could help ensure corporate human rights accountability. In this regard, international investment treaties have to be renegotiated in order to include more human rights content targeting investors' human rights conduct and in that way provide a more balanced approach when disputes arise.*

**Key words:** treaty-based investment arbitration, human rights law, international investment law, counterclaims, investor obligations.

### 1. INTRODUCTION

The debate on business and human rights is receiving increased attention and this article aims to contribute to research on this topic. It focuses on the increasing role of human rights-related issues in investment arbitration cases. Human rights obligations in investment treaty arbitration are entering a new dimension since, at least recently, more emphasis is being placed on the relevance of this field.<sup>1</sup>

\* External Lecturer, Modul University Vienna; e-mail: taida.sarkinovic@modul.ac.at; taidabegic@hotmail.com

1 See generally, Amado, J. D., Kern, J. S., Doe, R. M, 2018, *Arbitrating the Conduct of International Investors*, Cambridge University Press; Baltag, C., 2018, *Human Rights and Environmental Disputes in International Arbitration*, Kluwer Arbitration Blog (24 July),

States bind themselves by both international investment agreements (IIAs) and human rights instruments. It is well established that under international human rights treaties states (including all their organs) have an obligation to respect, protect and fulfill human rights. The obligation to protect individuals against eventual human rights violations by private entities such as corporations is, of course, included. Such an obligation should be materialized through domestic laws and policies of the respective states, including the concept of corporate social responsibility and due diligence processes. The global framework for corporate social responsibility is provided by several legally non-binding international instruments.<sup>2</sup>

Treaty-based investment arbitration (or investment treaty arbitration) relates to disputes that concern an alleged breach of international investment agreements that provide investment protection (mostly bilateral investment agreements (BITs) and free trade agreements (FTAs) with investment chapters) that typically contain investor-state dispute settlement (ISDS) provision. It involves two diverse parties, a sovereign state (the host state as a recipient of foreign investment) and a private party, i.e. foreign investor (frequently multinational corporations). The primary task or mandate of investment arbitral tribunals is to assess the legality of state actions towards foreign investors. The main objective of (old) IIAs was to provide a stronger mechanism for investment liberalization, high standards for investment protection and effective dispute settlement procedures, i.e. a treaty-based system of international investment promotion and protection. Old-styled IIAs do not contain any direct reference to human rights nor do they impose any direct obligations upon investors.<sup>3</sup>

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(<http://arbitrationblog.kluwerarbitration.com/2018/07/24/human-rights-and-environmental-disputes-in-international-arbitration>); Simma, B., 2011, Foreign Investment Arbitration: A Place for Human Rights? *International & Comparative Law Quarterly*, Vol. 60, No. 3, pp. 573–596; Arcuri, A., The Great Asymmetry and the Rule of Law in International Investment Arbitration, in: Sachs, L., Johnson, L., Coleman, J. (eds.), 2018, *Yearbook on International Investment Law and Policy*, Oxford University Press.

- 2 OECD Guidelines for Multinational Enterprises, the ten principles of the United Nations Global Compact, the United Nations Guiding Principles on Business and Human Rights, the ISO 26000 Guidance Standard on Social Responsibility, and the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy. See also Cassel, D., 2010, Opinion: Progress in the Newest UN Draft Treaty on Business and Human Rights, ([https://www.business-humanrights.org/en/blog/progress-in-the-newest-un-draft-treaty-on-business-and-human-rights/?mc\\_cid=48b31d1ae9&mc\\_eid=a53d2c8cc7](https://www.business-humanrights.org/en/blog/progress-in-the-newest-un-draft-treaty-on-business-and-human-rights/?mc_cid=48b31d1ae9&mc_eid=a53d2c8cc7)). Unfortunately, as it now stands, the draft Treaty excludes the language of human rights violations by corporations.
- 3 The UNCTAD noted that “IIAs are concluded in a specific historic, economic and social context and respond to the then-existing needs and challenges”, UNCTAD, World Investment Report 2015: Reforming International Investment Governance,

Thus, the international legal framework does not provide legally binding human rights obligations for corporations. In this context, a primary consideration of the investment arbitral practice has been the infringement of investors' property rights (including contractual rights). The reason behind this is that the old generation of IIAs had, traditionally, investment protection as its sole policy concern and that fact shaped the legal contours of an investment case before the tribunal in both jurisdictional and substantive terms. Investment arbitral tribunals therefore operate in a system that does not necessarily include non-investment concerns such as human rights. At the same time, the European Court of Human Rights, for instance, has recognized that corporations (as private entities and non-state actors) have human rights and can bring the case and raise their claim while "an individual alleging a violation of his or her rights by a private law company cannot effectively raise his or her claims".<sup>4</sup> Therefore, the right to an effective legal remedy is not available to the individual.

Furthermore, the texts of IIAs do not generally incorporate provisions that would recognize host state human rights obligations. In this context, the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) attempt to recognize potential clashes between human rights obligations and investment protection obligations and, to some extent, emphasize the existing imbalance between investors' rights and host states' (normal) regulatory powers:

*"States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives*

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p. 121. See also Gordon, K., 2008, *International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues*, in *OECD International Investment Law: Understanding Concepts and Tracking Innovations* (<http://www.oecd.org/daf/inv/investment-policy/40471550.pdf>); Choudhury, B., 2020, *Investor Obligations for Human Rights*, *ICSID Review: Foreign Investment Law Journal* (forthcoming), ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3500991](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500991)).

- 4 Council of Europe, Resolution 1757 (2010) of the Parliamentary Assembly – Human Rights and Business, Art. 4: "The Assembly is also concerned about the existing imbalance in the scope of human rights protection between individuals and businesses. While a company may bring a case before the Court claiming a violation by a state authority of its rights protected under the European Convention on Human Rights (ETS No. 5, the Convention), an individual alleging a violation of his or her rights by a private company cannot effectively raise his or her claims before this jurisdiction." It also notes "that many of the alleged human rights abuses by businesses occur in third countries, especially outside Europe, and that it is currently difficult to bring extraterritorial abuses by companies before national courts or the European Court of Human Rights (the Court)", (<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=17903>). See, for instance, ECtHR, *Pine Valley Developments Ltd and Others v. Ireland*, no. 12742/87, (ser. A) 1991, para. 222.

*with other States or business enterprises, for instance through investment treaties or contracts.*<sup>5</sup>

Treaty-based investment arbitration has significant public policy implications and consequences. Today, both developed and developing countries are expressing interest in maintaining domestic policy space in order to pursue their own legitimate public policy objectives since IIAs have been used by foreign investors as instruments to challenge changes to the wide ranging regulatory measures (labor and social security rights, public health regulations and policies, environmental protection, climate change policies, etc).

This introductory part of this article has explained the general relationship between human rights and investment protection. It has identified arguments and counter-arguments within the current setting of international law. Since human rights have undoubtedly emerged in investment treaty arbitration, this article asserts in the sections that follow that rebalancing the rights and obligations of states and investors could help ensure corporate human rights accountability. It argues that treaty-based investment arbitration has the potential to secure a much needed balance between private and public interests. In that light, the article first discusses counterclaims as a potential tool that could address human rights issues in investment treaty arbitration. Second, the article focuses on investors' obligations towards host states (or rather lack thereof) as a way to rebalance the existing asymmetry and, correspondingly, provide the possibility to arbitrate corporate-related human rights violations. The foregoing analysis will be preceded by general observations on the nature of the international investment regime, including some recent developments in IIAs.

## 2. THE INTERNATIONAL INVESTMENT REGIME AND ITS IMPACT

The international investment regime has been constructed under neoliberal principles and policies. Kate Miles unequivocally points to the colonial origin of the international investment regime noting that “under

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5 United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (2011) Principle 9, p. 11. See also the commentary to Principle 9: “For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.” UN Guiding Principles, p. 11.

the formal equality that assumes the two parties have the same power of negotiation when in reality, one (the developed) imposes over the other (the developing) with the legitimacy given by the international legal framework that has been sculpted by the economic and geopolitical interest of the West over the rest of the world.”<sup>6</sup> In her view, the international investment law enforces and legitimizes an unfair economic and global political system in this manner.<sup>7</sup> Other scholars argue that the current system of investment treaty arbitration has considerably contributed to the development of rule of law and good governance in the host states (mostly less-developed, capital-importing countries).<sup>8</sup> In that light, it is often described as a rule-based international investment regime. Focusing on internal human rights law diversity, Cotula asserts that “more than investment law, human rights norms also present ideational diversity, because different rights (e.g. the right to property, peoples’ right to freely dispose of their natural resources) originate from diverse intellectual and political histories, and human rights have contested and evolving meanings.”<sup>9</sup>

International investment disputes sometimes bring specific problems and challenges. Interestingly, today’s debate in many developed, industri-

6 Miles, K., 2013, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital*, Cambridge University Press, Part I; See also Pistor, K., 2019, *The Code of Capital: How the Law Creates Wealth and Inequality*, Princeton University Press; Schneiderman, D., 2014, Kate Miles. The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital, *European Journal of International Law*, Vol. 25, Issue 3, Cambridge University Press, pp. 942–945.

7 *Ibid.*, pp. 386–389.

8 Schill, S., 2009, *The Multilateralization of International Investment Law*, Cambridge University Press; Franck, S., 2007, Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, *Pacific McGeorge Global Business & Development Law Journal*, Vol. 19, Issue 2; Kingsbury, B., Schill, S., Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality, in: Schill S. W., (ed.), 2010, *International Investment Law and Comparative Public Law*, Oxford University Press. But see also, Schultz, T., Dupont, C., 2014, Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study, *European Journal of International Law*, 25, p. 1147.

9 Cotula, L., 2020, (Dis)integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties, *Journal of International Economic Law*, Vol. 23, Issue 2, p. 445, “Human rights law is centered on global and regional multilateral treaties that connect rights to human dignity, while investment law primarily protects commercial interests through reciprocal treaties aimed at facilitating cross-border investment. These different framings have concrete implications: human rights jurisprudence has recognized the sociocultural dimensions of the relation between people and territory and tied that relation to self-determination and the realization of socio-economic rights, while investment protection norms primarily conceptualize natural resources as commercial assets, the value of which is expressed in monetary terms.” *Ibid.*, p. 446.

alized countries is arguably influenced by the new economic realities of investment flows. It focuses on the still predominantly contested issue of the asymmetry between the host state's right to regulate and a state's investment treaty obligations (due to its regulatory restrictive substantive standards), suggesting a need for more sustainable international investment.<sup>10</sup> Those policy shifts focusing on public interest issues were preceded by heated political and legal debates about their impact on both international and national spheres. The reason is that the power and influence (not only in economic terms) of some multinational corporations has grown over time and they acquired quasi-sovereign power. The debate emphasizes the need for an independent international dispute settlement system that will benefit both parties (host states and investors). States are under pressure from third parties, i.e. individuals and/or local communities, that might be (or are) affected by corporate interests while at the same time not having access to effective legal remedies as potential victims of corporate-related human rights violations. Foreign direct investment, as proclaimed in IIAs, should contribute to the development of host states, but empirical evidence suggests that some corporate behavior actually contributed to environmental harms and noncompliance with international human rights norms.<sup>11</sup>

Some newer (recently negotiated) international investment agreements contain references to human rights obligations although in different forms and with different formulations (e.g. the preamble of the

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10 For instance, the recent high-profile tobacco case *Philip Morris Asia v. Australia* raised concerns about the impact of investment treaty arbitration on the states' ability to exercise their regulatory functions (concretely, public health measures). *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 (<http://www.italaw.com/cases/851>).

11 Jorgenson, A. K., 2016, The sociology of ecologically unequal exchange, foreign investment dependence and environmental load displacement: summary of the literature and implications for sustainability, *Journal of Political Ecology*, Vol. 23, No 1. Jorgenson concludes that "the sociology of ecologically unequal exchange considers how particular aspects of international trade – especially the 'vertical flow' of exports – allow more-powerful / more-developed nations to externalize at least some of their environmental impacts to less-developed / less-powerful nations, leading to increases in various forms of environmental harms in the latter, including deforestation, loss of biodiversity, industrial water pollution, and greenhouse gas emissions. Resource consumption levels of the less-developed countries often remain suppressed, well below globally sustainable thresholds, with significant public health implications. This research also suggests that relationships have become increasingly ecologically unequal through time.", p. 345; See also, Pohl, J., 2018, Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence, *OECD Working Papers on International Investment* ([www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements\\_e5f85c3d-en](http://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en)).

Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA).<sup>12</sup> Colombia's 2017 Model BIT includes a section on the right to regulate and investment-related obligations.<sup>13</sup> Thus, some new IIAs attempt to extend the scope of IIAs, focusing not only on investment protection but also on legitimate public policy objectives in order to balance commercial and public interests. When it comes to investor obligations, some investment treaties require investors to comply with domestic laws and/or refer to international voluntary standards of corporate social responsibility.<sup>14</sup> For instance, the 2019 Netherlands Model BIT in Article 7(1) states: "Investors and their investments shall comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws."<sup>15</sup>

The 2016 Morocco-Nigeria BIT in Article 18 ('Post-Establishment Obligations) uses mandatory language and explicitly refers to states' international obligations:

*"(1) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and*

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- 12 Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (signed 30 October 2016, provisionally entered into force 21 September 2017); See generally Gordon, K., Pohl, J., Bouchard, M., 2014, Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey, *OECD Working Papers on International Investment*, Issue 1, p. 16; Coleman, J., Johnson, L., Sachs, L., Gupta, K., International Investment Agreements, 2015–2016: A Review of Trends and New Approaches, in: Sachs, L., Johnson, L., (eds.), 2016, *Yearbook on International Investment Law and Policy 2015–2016*, Oxford University Press, paras. 2.81–2.88.
  - 13 Article 7 of Colombia's 2017 Model BIT focuses on corporate social responsibility. It refers to international standards of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and Recommendation CM/REC(206).
  - 14 2016 Nigeria-Singapore BIT (not yet in force) in Article 11 focuses on corporate social responsibility. It provides: "1. Singapore reaffirms the importance of encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by Singapore. 2. Nigeria is to encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies such as statements of principles that have been endorsed or supported by Nigeria. These principles address issues such as labour, the environment, public health, human rights, community relations and anti-corruption."
  - 15 The new model text is available at <https://www.internetconsultatie.nl/investeringsakkoorden>.



*high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard. (2) Investors and investments shall uphold human rights in the host state. (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 which circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties.”<sup>16</sup>*

In addition, Chapter 4 of the Draft Pan-African Investment Code from 2016 includes provisions focusing on investors’ obligations.<sup>17</sup>

Just like traditional IIAs focusing exclusively on investment protection in both substantive and procedural terms helped countries to improve their regulatory and institutional frameworks, the same rationale may apply to inclusion of investment-related obligations into future IIAs. Namely, such provisions would ensure more space for public interests considerations, address current gaps in international law and certainly help improve corporate governance.

### 3. HOST STATES’ COUNTERCLAIMS ON THE BASIS OF HUMAN RIGHTS

The ongoing debate that focuses on international law fragmentation turns around international law’s legitimacy and efficiency.<sup>18</sup> Existing arbi-

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16 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (3 December 2016, not yet in force) (<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>). Furthermore, Article 14 of the BIT provides: “Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.” For a discussion, see Gazzini, T., 2017, Nigeria and Morocco Move Towards a “New Generation” of Bilateral Investment Treaties in: *EJIL Talk*, ([www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties](http://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties)).

17 UN, (2016), Economic Commission for Africa, Draft Pan-African Investment Code; See Mbengue, M. M., Schacherer, S., 2017, The “Africanization” of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime in: *The Journal of World Investment & Trade*, Vol. 18, No. 3, pp. 414–448.

18 For a discussion, see Aaken, A. van, 2008, Fragmentation of International Law: The Case of International Investment Protection, *Finnish Yearbook of International Law*, Vol. XVII, pp. 91–130; Peters, A., 2017, The Refinement of International Law: From



tral jurisprudence, in principle, tends to interpret the two fields as distinctive and the current international legal system as fragmented.<sup>19</sup> There are a number of ways in which human rights –related issues might potentially be legally applicable in investment treaty arbitration. One suggested way is through submitting a counterclaim<sup>20</sup> focusing on investor misconduct, i.e. its alleged non-compliance with human rights law within the scope of its investment activity in the host state. Counterclaims thus also became part of the general reform efforts of the international investment regime.<sup>21</sup>

The investor-state dispute settlement system provided in IIAs permits foreign investors to lodge a claim directly against host states for breaches of substantive standards of investment protection provided in those treaties. Majority of IIAs do not provide for (counter)claims by the host state (e.g. the limited scope of dispute resolution clauses). Major obstacles encountered by host states also relate to substantive treaty rights since investment treaties are mostly silent on the issue of investors' obligations or human rights. IIAs, in principle, focus on the mistreatment of foreign investors or the investment. Investment arbitral tribunals were reluctant to accept coun-

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Fragmentation to Regime Interaction and Politicization, *International Journal of Constitutional Law*, Vol. 15, Issue 3, pp. 671–704; Dupuy, P. M., Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law, in: Dupuy, P. M., Francioni, F., Petersmann, E. U., (eds.), 2009, *Human Rights in International Investment Law and Arbitration*, Oxford University Press, pp. 45–62.

- 19 For a comprehensive survey of publicly available arbitral awards in which at least one of investment disputes actors (namely, host state, foreign investor, third party interveners, arbitral tribunal) invoked human rights arguments, see Kube, V., Petersmann, E.U., 2016, Human Rights Law in International Investment Arbitration, *AJWH*, Vol. 11, Issue 1.
- 20 The tribunal in *Urbaser v. Argentina* noted that according to Rule 40(2) of the ICSID Rules of Arbitration, a counterclaim must be submitted no later than the counter-memorial (para. 1150), and that Argentina respected this condition. Furthermore, the precise requirements or criteria for its admissibility in treaty-based arbitration are still a matter of discussion (e.g. connection between the counterclaim based on human rights and the initial investment treaty-based claim, the requirement of consent, possibility for the counterclaim provided by the arbitration rules (e.g. ICSID Convention, Article 46 and ICSID Arbitration Rules, Rule 40, etc.). For elaboration, see De Brabandere E.C.P.D.C. 2018 *Human Rights Counterclaims in Investment Treaty Arbitration*, (<https://oxia.oupplaw.com/page/723>).
- 21 “Allowing counterclaims to be heard together with the initial claim in one set of proceedings by the same arbitral tribunal could enhance procedural efficiency and may avoid multiple proceedings in different forums involving the same parties.”, UNCITRAL Group III (Investor-State Dispute Settlement Reform): Possible reform of investor-State dispute settlement (ISDS) – Multiple proceedings and counterclaims, (<https://undocs.org/en/A/CN.9/WG.III/WP.193>). In this context, one should stress the relevance of the distinction between contractual claims (contract-based arbitrations) and treaty (e.g. BIT) claims.

terclaims mostly because of the lack of parties' consent and, accordingly, state counterclaims against foreign investors were outside of the tribunal's jurisdiction. Moreover, a lack of legal basis for such counterclaims i.e. substantive, treaty-based cause of action, made their efforts unsuccessful, i.e. they have been dismissed on merits. Thus, there are significant challenges to the facilitation of counterclaims in treaty-based arbitration.

In recent times host states relied on human rights with some frequency in their replies, counter-arguments or counter-memorials during the proceedings. They attempted to defend themselves against investors' claims that challenged their (regulatory) actions. Furthermore, some tried to enforce investors' obligations in relation to human rights or the protection of the environment. Their human rights defense references should be perceived as an effort to counterbalance the existing imbalance in the system itself, both in procedural and substantive terms.

The ICSID arbitral tribunal in *Urbaser v. Argentina*<sup>22</sup> accepted for the first time in investment treaty arbitrations a jurisdiction over a counterclaim based on human rights. It accepted that a host state may bring the counterclaim based on human rights violations since Argentina argued that the Claimant (the investors) had violated their human rights obligations, namely the human right of access to water.<sup>23</sup> The investment arbitral tribunal found that the disputing parties had consented to arbitrate the counterclaim in the applicable BIT:<sup>24</sup>

*“Indeed, when both parties are entitled to lodge a claim, it cannot happen that in acting first one party could prevent the other from raising its claim. This can be avoided only by admitting the possibility of a counterclaim.”*<sup>25</sup>

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22 ICSID, *Urbaser S. A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partz-uergoa v. The Argentine Republic*, Case No. ARB/07/26, Award of 8 December 2016 ([https://www.italaw.com/sites/default/files/case-documents/italaw8136\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf)).

23 Para. 36.

24 In the view of the tribunal, a broad formulation of Article X of the Spain–Argentina BIT (1991) and its dispute settlement clause allowed such finding, including Article 46 of the ICSID Convention: „The Tribunal observes that Claimants explain their basic position by the asymmetric nature of BITs, which in their view prevents a host State from invoking any right based on such a treaty, including through the submission of a counterclaim. The Tribunal finds that this submission conflicts with the simple wording of the dispute resolution provisions of Article X of the BIT invoked in the instant case.” Indeed, Article X(1) provides: “1. Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.” This provision is completely neutral as to the identity of the claimant or respondent in an investment dispute arising “between the parties.” It does not indicate that a State Party could not sue an investor in relation to a dispute concerning an investment.” para. 1143.

25 Para. 1144.

The tribunal also specified that the applicable BIT “has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.”<sup>26</sup>

The Claimant, Urbaser, asserted that non-actors and private business entities such as corporations do not have enforceable human rights obligations under international law since international law rules are directly binding only for states.<sup>27</sup> However, in its human rights counterclaim Argentina relied on international law rules and obligations arguing that the human right to water is also applicable to private business entities, i.e. corporations.<sup>28</sup> The tribunal continued to extensively discuss corporate human rights obligations under international law. It referred to several international instruments such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and International Labor Office’s Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy.<sup>29</sup> In this context, the tribunal departed drastically from the previous approaches and positions of investment arbitral tribunals by discussing corporate liability under international law for violations of human rights:

*“On a preliminary level, the Tribunal is reluctant to share Claimants’ principled position that guaranteeing the human right to water is a duty that may be born solely by the State, and never borne also by private companies like the Claimants. When extended to human rights in general, this would mean that private parties have no commitment or obligation for compliance in relation to human rights, which are on the States’ charge exclusively. A principle may be invoked in this regard according to which corporations are by nature not able to be subjects of international law and therefore not capable of holding obligations as if they would be participants in the State-to-State relations governed by international law. While such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals.”<sup>30</sup>*

In this ICSID case, Argentina’s counterclaim was dismissed on the merits, but it opened a door for human rights counterclaims in investment

26 *Ibid.*, para. 1200. The tribunal also observed the following: “Beyond these sources of law, it remains to be examined, in light of the openly framed provision of Article 31 § 3(c) of the Vienna Convention, whether other parts of international law may be relevant in the instant case. This leads to the question whether the human right to water and sanitation as part of the general notion of human rights is pertinent in the instant case.” para. 1204.

27 Para. 1129.

28 Paras. 1158–1163.

29 Paras. 1196–1198.

30 Paras. 1193–1195.

arbitration cases which favors the respondent state's access to investment treaty arbitration. A broad jurisdictional clause included in the applicable BIT enabled such a finding. It also suggests that explicit reference to counterclaims in investment treaties facilitates the possibility of admitting counterclaims against the investors in treaty-based arbitration. Even more significantly, this case analysis demonstrates the willingness of the investment arbitral tribunal to discuss and recognize human rights-related obligations for corporations (investors) under international human rights law.<sup>31</sup> Finally, counterclaim strategy based on human rights may provide an avenue for integrating different international law fields which may in turn give more balanced interpretations to IIAs.<sup>32</sup> In this way, investment arbitral tribunals can examine corporate behavior and, correspondingly, eventually enforce human rights obligations on corporations.

#### 4. INVESTOR OBLIGATIONS FOR HUMAN RIGHTS

A declared need for more sustainable international investment requires the rebalancing of investor rights and obligations, and, correspondingly, introducing corporate human rights accountability. Protection of human rights is primarily the responsibility of the state but corporations (i.e. businesses) have an increasing and important role as well. A number of existing international instruments contain provisions that focus on the conduct of corporations, but such instruments are mostly legally non-binding (e.g. Guiding Principles on Business and Human Rights) or simply require states to adopt adequate domestic laws and policies in order to regulate business activities within their territory with the objective of preventing corporate human rights abuses.

In treaty-based investment arbitration, respondent host states have mostly raised human rights arguments in order to defend against investors' claims for breaches of substantive treaty obligations. *Bear Creek Mining*

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31 See Santacroce, F. G., 2019, The Applicability of Human Rights Law in International Investment Disputes, *ICSID Review – Foreign Investment Law Journal*, Vol. 34, Issue 1, pp. 136–155. In the context of environmental counterclaim, see *Burlington v. Ecuador* ICSID case where environmental counterclaim filed by Ecuador has been successful in terms that the arbitral tribunal held that the investor is liable for environmental harm. Noteworthy is that both parties to this dispute explicitly consented to jurisdiction over Ecuador's counterclaim (Decision on Counterclaims, 7 February 2017, paras. 60–62), *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (<https://www.italaw.com/cases/181>).

32 Choudhury, B., 2020, Investor Obligations for Human Rights, *ICSID Review: Foreign Investment Law Journal* (forthcoming), Ch. V ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3500991](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500991)).

*Corp v. Republic of Peru*<sup>33</sup> is a clear example of the interplay between human rights norms and investment protection norms. This ICSID case deals with substantive standards of investment protection and the rights of local, indigenous communities. The Claimant, a Canadian company, instituted arbitration proceedings against the host state, the Republic of Peru, under the investment chapter of the Free Trade Agreement between Canada and Peru, arguing that government actions breached the provisions of applicable treaty and international law and, therefore, constituted an indirect expropriation.<sup>34</sup> An investor, Bear Creek Mining Corporation, sought to invest in the Santa Ana mining project. Such investment project required explicit authorization (a public necessity Supreme Decree) from the Peruvian government in accordance with the Peruvian Constitution since it was located within the border zone with Bolivia.<sup>35</sup> The authorization itself has been disputed between the parties.<sup>36</sup> The Santa Ana project was not well received by the local, neighboring communities, who claimed that it had an adverse environmental impact and disregarded their indigenous rights, which ended in violent protests and social unrest.<sup>37</sup> As a consequence, Peru decided to revoke Supreme Decree 083 and the government's declaration of a public necessity, which in turn eliminated the legal prerequisite for the investor's ownership of mining concessions within the border zone.<sup>38</sup>

After having confirmed its jurisdiction, the tribunal discussed the merits of the case and found that Decree 032 from 2011 issued by the new Peruvian government (and which revoked former Decree 083) constituted an unlawful indirect expropriation of the investor's right to operate the Santa Ana mining concession.<sup>39</sup> The tribunal noted that the concept of 'social license' has no clear definition in international law, but "all relevant

33 ICSID, *Bear Creek Mining Corp v. Republic of Peru*, Case No. ARB/14/21, 30 November 2017, Award (<https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>); See generally, Paine, J., *Bear Creek Mining Corporation v. Republic of Peru: Judging the Social License of Foreign Investments and Applying New Style Investment Treaties*, 2018, *ICSID Review-Foreign Investment Law Journal*, Vol. 33, Issue 2, Oxford University Press, pp. 340–348; Krajewski, M., (2020), *A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application*, *Business and Human Rights Journal*, Vol. 5, Issue 1, pp. 105–129.

34 *Bear Creek Mining Corp v. Republic of Peru*, paras. 1, 9, 112; FTA Article 837: Governing Law provides: "1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

35 *Ibid.*, para. 124.

36 Paras. 125–150.

37 Paras. 152–201.

38 Para. 202.

39 See the tribunal's reasoning, paras. 368–370.

international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities.”<sup>40</sup> In this context, the tribunal referred to Art. 32 of the United Nations Declaration on the Rights of Indigenous Peoples. However, in the view of the tribunal, the social unrest did not justify the derogation of Supreme Decree 083.<sup>41</sup> It, therefore, concluded that Supreme Decree 032 as Peruvian regulatory action constituted an indirect expropriation<sup>42</sup> and was inconsistent with a legitimate exercise of the state’s police powers.<sup>43</sup>

The host state argued that the investor had significantly contributed to the violent situation, including the social unrest that took place in the spring of 2011 and required the tribunal to consider any contributory fault on the side of investor and, accordingly, reduce the amount of damages.<sup>44</sup> A majority of the tribunal disagreed here and concluded there was no contributory fault or liability in the actions of the Claimant. One of the arbitrators, Philippe Sands, in his Partial Dissenting Opinion, requested a reduction of the amount of damages “by reason of the fault of the Claimant in contributing to the unrest”<sup>45</sup> while agreeing on the host state’s liability for breaching the FTA provisions.<sup>46</sup> In his view and on the basis of evidence provided (including *amicus curie* submissions), “the Project collapsed because of the investor’s inability to obtain a “social license”, the necessary understanding between the Project’s proponents and those living in the communities most likely to be affected by it, whether directly or indirectly [...] If nothing else, the absence of transparency at that early stage of the Project can only have contributed to an undermining of the conditions necessary to build trust over the longer term. The discontent that followed, expressed by many members of the affected local communities, was foreseeable.”<sup>47</sup>

In the context of corporate human rights obligations, the tribunal discussed the Indigenous and Tribal Peoples Convention (ILO Convention 169) and both parties to the dispute agreed that the ILO Convention is applicable to the indigenous peoples situated in the area of the Santa Ana Project. The tribunal stressed that the ILO Convention does not impose

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40 Para. 406.

41 Para. 414

42 Para. 429.

43 Paras. 450–478.

44 Paras. 560, 564.

45 *Bear Creek Mining Corp v. Republic of Peru*, Partial Dissenting Opinion Professor Philippe Sands QC, Para. 4 ([http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf)).

46 Paras. 663, 668.

47 Partial Dissenting Opinion Professor Philippe Sands QC, para. 6.

any direct obligations on private companies, but only on states.<sup>48</sup> It stated the following

“[...]the indigenous communities, irrespective whether they were in favor of or against the Project, are not respondent party in this arbitration. Rather, the State of Peru and its Government are Respondent and it is their conduct which the Tribunal has to decide upon.”<sup>49</sup>

However, Sands made reference to the reasoning of the *Urbaser v. Argentina* tribunal and noted that it did not mean that the ILO Convention 169 “is without significance or legal effects for [private companies]” and in particular its Article 15 on consultation requirements.<sup>50</sup> In this context, he emphasized that Art. 15 of the ILO Convention recognizes various rights of the peoples concerned.<sup>51</sup> Therefore, “it is noteworthy that the Convention connects the right to be consulted with the right to participate in the benefits. It also to be noted that when Article 15 refers to “these peoples” it means all of “the peoples concerned”, not just some of them.”<sup>52</sup> He confirmed his conclusion by reference to *amicus curie* submissions asserting that “as an international investor the Claimant has legitimate interests and rights under international law; local communities of indigenous and tribal peoples also have rights under international law, and these are not lesser rights.”<sup>53</sup> Accordingly, he concluded that the investor’s “contribution [to the social unrest] was significant and material, and that its responsibilities are no less than those of the government”<sup>54</sup> and held that the amount of damages should have been reduced.

The *Bear Creek* case illustrates propositions currently discussed in two fields, namely international human rights law and investment law, which potentially may establish and create substantive obligations for investors. This is relevant, particularly, in the context of investors’ relationship with local and indigenous communities.<sup>55</sup> It is worth mentioning the

48 Para. 664.

49 Para. 666.

50 Partial Dissenting Opinion Professor Philippe Sands QC, paras. 10–11. In his view, the Claimant “had, at best, a semi-detached relationship to the vital rights set forth in this part of the Convention. It was not as fully prepared for the making of an investment in the lands of the communities of indigenous peoples – the peoples concerned by the project it was embarked upon – as it should have been.”, para. 12.

51 Para. 13.

52 *Ibid.*

53 Para. 36.

54 Para. 39.

55 See Páez-Salgado, D., *Four Key Takeaways of the Decision in Bear Creek Mining Corp v. Republic of Peru* (<http://arbitrationblog.kluwerarbitration.com/2017/12/16/bear-creek-mining-v-peru>).



discussion of the relevant international human rights treaties applicable in this case, notably the ILO Convention 169. In particular, the dissenting arbitrator extensively analyzed the Convention and the interaction of investors' rights and the rights of indigenous communities. The award is therefore relevant in the context of interpreting and applying the existing international instruments in the fields of foreign investment and human rights, as well as the possibility (or rather difficulty) to establish investor obligations. A lack of express reference to legally binding investors' obligations in relation to human rights makes it difficult to establish corporate liability. Such recognition therefore becomes crucial. Having in mind the current realities and proclaimed interest of sustainable development, the focus should be on legally binding obligations for investors (and not only on investors' rights) in order to ensure protection against eventual investors' human rights abuses. It also signals that the system itself is adaptable to new realities, i.e. it should (and may) provide different avenues for arbitrating business-related human rights abuses.

## 5. CONCLUSION

International law is very often perceived in terms of isolated branches of law. Tensions between the two branches, human rights law and international investment law, illustrate that perception. As such it cannot efficiently protect against potential investor misconduct (for instance, in cases of corporate human rights violations). In particular, this is the case where a non-discriminatory state's regulatory action focusing on a human rights objective may be found in breach of a host state's substantive investment obligations before a treaty-based investment arbitral tribunal. Instead of being solely preoccupied with an emphasis on obligations and commitments that improve investor protections, international investment law should also shed light on its public nature, i.e. on the host state's right to maintain its public interests in achieving its goals in sustainable development.

The 'progressive' approach of the arbitral tribunals in *Urbaser* and *Bear Creek* cases represent just a small step toward 'more' human rights considerations in investment arbitration cases, i.e. toward addressing human rights obligations in investment arbitration practice. They illustrate the potential of treaty-based investment arbitration to function as a mechanism to address and eventually enforce international human rights norms against foreign investors. Host states' human rights counterclaims can serve as the vehicle to facilitate and remedy the existing asymmetry in investment treaty arbitration offering the possibility for assessing the corporate eventual misconduct and, correspondingly, its accountability. Namely,

investment arbitral tribunals should provide more space for human rights matters in investment disputes. This, of course, requires a (re)balancing of parties' rights and obligations which in turn might ensure corporate human rights accountability and, correspondingly, proclaimed sustainable development objectives. It may certainly contribute to the legitimacy of international investment law and treaty-based investment arbitration. Finally, inclusion of legally binding investor obligations (in addition to investors' rights), not only in domestic laws but also into investment treaties, would certainly be a concrete step toward the increase of human rights protection in the field. It would establish clear expectations for foreign investors and provide the legal basis for host states counterclaims on the basis of human rights.

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## LJUDSKA PRAVA U INVESTICIONIM ARBITRAŽNIM SLUČAJEVIMA: NOVA PERSPEKTIVA?

Taida Begić Šarkinović

### REZIME

Razmatranje pitanja ljudskih prava postaje sve značajnije i u kontekstu investicione arbitraže, tj. arbitraže na osnovu međunarodnih investicionih sporazuma (osobito bilateralnih investicionih sporazuma (BITs) i sveobuhvatnih sporazuma o slobodnoj trgovini (FTAs with investment chapters)). Kako je riječ o tzv. mješovitoj arbitraži, tj. arbitraži gdje je jedna strana država, a druga strana strani investitor (fizičko ili pravno lice, a najčešće velike kompanije i multinacionalne korporacije), aktualizira se i pitanje odgovor-

nosti ne samo države već i investitora (odnosno korporacija) za povrede ljudskih prava u državi prijema tokom investicione aktivnosti.

U uvodnom dijelu rada objašnjava se funkcioniranje međunarodnih instrumenata za zaštitu investicija koji imaju za cilj da obezbijede što veću pravnu zaštitu stranog ulaganja, te efikasno rješavanje sporova koji mogu nastati tokom investiranja, i to prvenstveno u vidu proceduralnog mehanizma međunarodne arbitraže. Dakle, primarni cilj ovih instrumenata je promocija stranih ulaganja i pravna zaštita investitora, odnosno investicija. Shodno tome, međunarodni investicioni sporazumi, najčešće, ne sadrže odredbe o obavezama investitora. Ukoliko država (*host state*) svojom intervencijom, odnosno regulacionom aktivnošću naruši prava investitora koja proističu iz ulaganja, utvrđuje se odgovornost države za kršenje međunarodnih obaveza proisteklih iz investicionih sporazuma (npr. BITs). Time se kapacitet, odnosno mogućnost države domaćina da regulira i donosi mjere usmjerene ka zaštiti javnog interesa u oblasti ljudskih prava (ali i zaštite životne sredine, zdravlja stanovništva itd.) može znatno smanjiti i onemogućiti.

Rad, takođe, daje uvid u kompleksan odnos ili, radije, tenzije, koje nastaju u primjeni međunarodnog investicionog prava i ljudskih prava. Tako se, zbog izrazite porasti moći i aktivnosti multinacionalnih korporacija, opravdano preispituje njihov međunarodnopravni subjektivitet, osobito u kontekstu zaštite stranih ulaganja i zaštite ljudskih prava. Dosađajna neobavezujuća načela uglavnom definišu šta bi države i korporacije trebalo da poduzmu kako bi se spriječila kršenja ljudskih prava od strane korporacija i ostalih privrednih subjekata (npr. Rukovodeća načela UN o biznisu i ljudskim pravima).

Kao predmet rasprave u meritumu investicionog spora najčešće se javljaju tužbeni zahtjevi investitora zasnovani na odgovornosti države za povrede nekih od odredaba investicionog sporazuma (npr. eksproprijacija bez odgovarajućeg postupka i naknade, „fer i pravedni“ tretman itd). Istovremeno, investiciona aktivnost može i u određenom broju slučajeva negativno se odražava na ljudska prava u državi u koju se investira. Države prijema stranih ulaganja, u namjeri da se „odbrane“ od tužbenih zahtjeva investitora, posežu za argumentima koji imaju uporište u instrumentima za zaštitu ljudskih prava. Zapravo, u nekim slučajevima obaveze koje proizilaze za državu iz investicionih sporazuma u direktnom su konfliktu sa obavezama koje proizilaze iz instrumenata za zaštitu ljudskih prava. U tom smislu, rad se fokusira na mogućnost da tužena država koristi protivtužbu (*counterclaim*) kao instrument/sredstvo za utvrđivanje odgovornosti stranih investitora zbog kršenja ljudskih prava. Iz te perspektive su analizirane dvije ICSID arbitražne odluke (*awards*) – *Urbaser protiv Argentine* i *Bear*

*Creek protiv Perua* – koje, po mišljenju autora, nagovještavaju progresivniji pristup arbitražnog tribunala pitanju mogućnosti podnošenja protivtužbe, kao i pitanju odgovornosti investitora za povrede ljudskih prava. Rad, naravno, ukazuje na probleme i izazove koji se javljaju u kontekstu mogućnosti upotrebe protivtužbe u ovoj vrsti investicionih sporova. Navedeni problemi su kako proceduralne tako i substantivne prirode (neophodnost saglasnosti stranaka, direktna veza između predmeta spora i protivtužbe, materijalnopravni osnov odgovornosti investitora za povredu ljudskih prava itd.). Za mnoge, riječ je o objektivnim ograničenjima investicione arbitraže. Shodno tome, rad ukazuje na važnost postojanja jasnih klauzula o obavezama investitora u investicionim sporazumima.

Konačno, iako je dosadašnja arbitražna praksa bila manje naklonjena mogućnosti razmatranja pitanja ljudskih prava u investicionim sporovima (prvenstveno iz razloga nadležnosti, ali i drugih), dojam je da se povećavaju izgledi za mogućnost korištenja protivtužbe u investicionoj arbitraži kao neophodnog mehanizma koji može 'izbalansirati' prava i obaveze strana u sporu. Takav pristup može doprinijeti ponovnom jačanju 'legitimiteta' međunarodne investicione arbitraže, kao i ciljevima održivog razvoja.

**Ključne riječi:** međunarodna investiciona arbitraža, ljudska prava, međunarodno investiciono pravo, protivtužba, obaveze investitora.

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