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12 Pigeonholing Human Rights in International Investment Arbitration: A Claim or a Defense?

Violeta Beširević[*]

12.1 What We Talk About When We Talk About Human Rights?

Dominance of human rights discourse is not a passing trend of the last or this century. Although it is a common understanding that the rights talk is a recurring feature of the Western culture since the Enlightenment, the history of human rights indicates that the Spanish theologists used the vocabulary of rights in the sixteenth century as well as Grotius in the seventeenth century.[1]

However, it was the adoption of the Universal Declaration of Human Rights in 1948 which made human rights a principal tool in an individual's fight against state oppression worldwide. Since then, not only that national and international legal orders revolve around human rights protection to a large extent, but whole 'generations' of new human rights have been codified at the international and implemented at the domestic level.[2]

Despite human rights proliferation, issues related to nature and recognition of human rights are still debatable. In particular, human rights scholars have never had anything like complete control over the definition of human rights. Broadly speaking, there are those who think of rights in moral/orthodox terms and those who conceive human rights in political terms.[3]

Among a large number of questions associated with the recognition of human rights, one deserves particular attention: whether each claim that improves the well-being of an individual deserves to be legally recognized as a human right? Although human

* This chapter is written within the project 'Advancing Serbia's Competitiveness in the Process of EU Accession', no. 47028, financed by the Serbian Ministry of Education, Science and Technological Development.

1 For more, *see* M. Koskenniemi, 'Rights, History, Critique', in A. Etinson (Ed.), Human Rights: Moral or Political? Oxford University Press, Oxford, 2018, pp. 41-51.

2 Particularly important are the set of 'second-generation' rights embodied in the International Covenant on Economic, Social and Cultural Rights and the 'third-generation' rights, including the right to peace, the right to development and the right to clean environment, although the design of these rights suffers from some uncertainness. On this account, *see* C. Tomuschat, Human Rights: Between Idealism and Realism, 2nd edn, Oxford University Press, Oxford, 2008, pp. 54-60.

3 For the latest moral/orthodox-political rights debate *see* Etinson 2018.

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flourishing naturally calls for recognition of new rights, a constant quest to label almost every human need or desire a *human right* threatens to undermine the credibility of human rights. Take, for example, the proposals to recognize the right to tourism,[4] the right to sleep,[5] the right to globalization,[6] or the already recognized right to access to placement of services.[7] One cannot but with the extortion of language assert that these rights carry out significant moral/political claims, which warrant human rights label. Milan Kundera illustrated well how rhetoric of rights promoted illusions:

> The more the fight for human rights gains in popularity, the more it loses any concrete content, becoming a kind of universal stance of everyone toward everything, a kind of energy that turns all human desires into rights […] the desire for love the right to love, the desire for rest the right to rest, the desire for friendship the right to friendship, the desire to exceed the speed limit the right to exceed the speed limit, the desire for happiness the right to happiness, the desire to publish a book the right to publish a book, the desire to shout in the street in the middle of the night the right to shout in the street.[8]

Now, apart from the proposals to recognize new human rights, there are parallel quests to identify new actors against whom human rights may be asserted including, for example, transnational corporations, and to label some already existing non-human rights *human rights*, as well. While the former makes sense from the human rights perspective, the latter may lead to devaluation of human rights ideas, similar to the one already described.

This chapter traces the emerging trend in international investment law that tends to incorporate human rights discourse in international investment arbitration instituted

4 The idea that the right to tourism should be labeled as human right was suggested by the World Tourism Organization. *See* in P. Alston, 'Conjuring Up Human Rights: A Proposal for Quality Control', The American Journal of International Law, Vol. 78, No. 3, 1984, p. 611, n. 14.

5 The right to sleep is a scholarly construction. *See* J. Galtung & A. H. Wirak, 'On the Relationship between Human Rights and Human Needs', UNESCO Doc. SS-78/CONF.630/4, 1978, p. 48, quoted in Alston 1984, p. 610, n. 8.

6 M. Pendleton, 'A New Human Right – the Right to Globalization', Fordham International Law Journal, Vol. 22, No. 5, 1999, pp. 2052-2095.

7 *See* Art. 29 of the EU Charter of Fundamental Rights.

8 M. Kundera, Immortality, Harper Perennial, New York, 1992, p. 140.

upon bilateral investment treaties (BITs). What is discernable here is the inclination of the host states to build their defense strategy on the human rights grounds to justify the policy measures affecting the implementation of the investment. Besides, there is an emerging scholarly approach advocating that rights in trade agreements and investor rights are human rights in themselves or that investor protection should be conceptualized in human rights terms.[9]

In the chapter that follows I will make two assertions. First, I will assert that a host state has a legitimate right to adopt regulatory measures to protect, promote, or provide conditions for realization of human rights, even though its policy measure may affect the realization of the investment. Second, I will argue that rights granted to the investors in the BITs are not *human rights* although they tend to echo human rights.

To enter my views into perspective, I will first explain the relationship between human rights and investment law.

12.2 What Brings Human Rights into International Investment Arbitration?

Bilateral investment treaty is "an international legal instrument through which two countries set down rules that will govern investments by their respective nationals in the other's territory."[10] These treaties are about promises of economic growth, stable market, job openings, and rapid economic development in both the developed and developing countries.

Although BITs are concluded between the states, they primarily affect third parties – the investors. According to the BITs, the investors should deliver means to materialize promises mentioned earlier and in exchange will enjoy substantive and procedural protection in the form of enforceable rights envisaged in the treaty provisions. Common rights conferred upon the investors in BITs usually include claims against expropriation, the right to fair and equitable treatment, full protection and security,

9 The first approach, mostly connected with rights granted in trade agreements, is advocated by Ernst-Ulrich Petersmann. *See* E. U. Petersmann, 'Human Rights and International Trade Law: Defining and Connecting Two Fields', in T. Cottier et al. (Eds.), Human Rights and International Trade, Oxford University Press, Oxford, 2005, pp. 29-94. His approach has been the subject of heavily criticism, most notably by Phillip Alston. *See* P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', European Journal of International Law, Vol. 13, No. 4, 2002, pp. 815-844. Nikolas Klein advocates and discusses the alternative approach according to which investor protection should be framed in human rights terms. *See* N. Klein, 'Human Rights and International Investment Law: Investment Protection as Human Right?', Göttingen Journal of International Law, Vol. 4. No. 1, 2012, pp. 199-215.

10 J. W. Salacuse & N. P. Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', Harvard International Law Journal, Vol. 46, No. 1, 2005, p. 109.

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prohibition of discriminatory treatment, and procedural right to institute arbitration procedure regarding 'any legal dispute arising directly out of an investment.'

The fact that there are 2344 bilateral investment treaties currently in force[11] may indicate that, in general, investment flow is a successful strategy for economic growth.[12] Moreover, the standard assumptions that a state is either capital exporter or capital importer and that BITs are concluded only between a developed state (a home state) and a developing state (a host state) are no longer valid. More countries, like China and the United States, have become both capital exporters and capital importers, which in a treaty language means that they are both home states and host states.[13] Finally, a previously existing sharp division between the developed and the developing countries over the establishment of a New Economic Order and also ideological differences regarding the property protection have ceased to exist.[14]

Now, the issue is what brings human rights into international investment arbitration. As previously mentioned, the BITs are unique in that they grant the investor the procedural right to institute arbitration procedure regarding 'any legal dispute arising directly out of an investment.' Generally, international investment arbitration is initiated either upon ICSID Convention rules or the UNCITRAL Arbitration Rules. These rules oblige arbitration tribunals to apply the law chosen by the parties to the dispute.[15] Accordingly, there are three possible ways in which human rights could come into play in international investment arbitration.

The first, which is the most obvious, implies the explicit reference to human rights by the parties in BITs. Yet, initially, investment law was not focused on human rights at all. The first treaty of this kind concluded between Germany and Pakistan in 1959 did not include human rights provisions.[16] This is also valid for the bulk of BITs currently in force, although this general pattern has slowly begun to change with the conclusion of some BITs containing provisions on corporate social responsibility. The provisions of this sort specify that investors will comply voluntarily with different principles and standards

11 *See* at https://investmentpolicyhub.unctad.org/IIA.

12 However, there is also an emerging trend of accelerating departure of several states from their international investment treaties. *See* B. Choudhury, 'Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International investment Agreements', University of Pennsylvania Journal of International Law, Vol. 38, No. 2, 2017, p. 477.

13 J. E. Alvarez, 'The Once and Future Foreign Investment Regime', in M. Arsanjani et al. (Eds.), Looking to the Future: Essays on International law in Honor of Michael Reisman, M. Nijhoff, Leiden, Boston, 2010, p. 634.

14 S. W. Schill, 'International Investment Law and Comparative Public Law – An Introduction', in S. W. Schill (Ed.), International Investment Law and Comparative Public Law, Oxford University Press, Oxford, 2010, p. 5.

15 B. Simma & T. Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology', in C. Binder et al. (Eds.), Essays in Honour of Christoph Schreuer: International Investment Law for the 21st Century, Oxford University Press, Oxford, 2009, p. 680.

16 For more on the first BIT *see, e.g.,* A. P. Newcombe & L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment, Kluwer Law International, The Netherlands, 2009, p. 42.

of responsible business, including the compliance with human rights law.[17] For the time being, an explicit reference to human rights appears to be offered only in model BITs.[18]

The second way to consider human rights argumentation in international investment disputes, and a usual one, refers to a possibility for the parties or the arbitrators to invoke human rights law as a part of 'relevant rules applicable in the relationship between parties' within the meaning of Article 31 (3)(c) of the Vienna Convention. In this sense, human rights arguments can be invoked either as a state defense against an investor claim or as the rights claimed by the investor.

Finally, arbitration tribunals can invoke human rights *sua sponte* in their decisions. Let us consider some examples.

In 2016 Argentina, subjected to international arbitration due to its emergency measures in the financial crisis, alleged that the investor that supplied water failed to provide the necessary level of investment and thus violated the right to water.[19] In the international arbitration case initiated in 2011 against the United States, the investors belonging to indigenous people claimed that the term 'investment,' as well as the fair and equitable treatment clause, had to be interpreted by taking into account indigenous peoples' rights.[20] In *Micula v. Romania,* decided in 2008, the arbitration tribunal noted that it would be 'mindful' to Article 15 of the Universal Declaration of Human Rights when deciding on the legality of the deprivation of nationality.[21]

From the perspective of human rights law, some of these approaches are not disputable, while some, especially one that attempts to categorize the investor rights as *human rights*, I consider wrong and threatening for the integrity and credibility of human rights tradition. In support of these assertions, I turn now to show (a) why a host state defense grounded in human rights is compelled by international human rights law and domestic constitutions and (b) why investors' rights are not human rights.

17 *See, e.g.,* Art. 16 of Serbia-Canada BIT, Art. 15 of Brazil-Guyana BIT and Art. 11 of Nigeria-Singapore BIT.

18 For example, the 2012 Model BIT of the Southern African Development Community in Art. 15(1) calls the investors "to respect human rights in the workplace and in the community and State in which they are located," and envisages that "investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights," and that "investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife."

19 ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Case No. ARB/07/26, Award 8 December 2016.

20 UNCITRAL, *Grand River Enterprises Six Nations Limited and ors v. United States*, IIC 481 (2011), Award 12 January 2011.

21 ICSID, *Micula v. Romania*, Case No. ARB/05/20, Award 11 December 2013.

12.3 Building a Defense Case on Human Rights Grounds

12.3.1 A State's Duty to Do What?

Investor protection, a mandatory element of every BIT, has emerged as the most effective means to secure, on the one hand, the economic development of the host state and, on the other hand, to limit the state's actions toward investors. To repeat, the BITs permit investors to bring an arbitral claim directly against a host state if they find that their rights provided in the treaty have been violated. Accordingly, there is a strong presumption that it is a host state measure rather than the investor conduct that needs to be checked. Nonetheless, this presumption has been occasionally questioned,[22] most notably by the arbitration tribunal in *Urbaser v. Argentina*: against the investors claim that "the asymmetric nature of the BIT means that this Treaty does not provide for any right of the host State and, correspondingly, does not impose any obligation upon the investor," the tribunal concluded that "there is no provision stating that the investment's host State would not have any right under the BIT."[23] Having said that, the fact is that neither of three international arbitration cases initiated by the host state in the whole history of ICSID has been instituted upon an investment treaty.[24] In other words, in international arbitration disputes, states usually assume the role of respondents rather than claimants.

Now, although the whole philosophy of BIT is more or less reduced to the investment protection, during the realization of the investment at stake, the host state obligations do not extend only to foreign investors. One should have in mind that the foreign investments are embodied in the public order of the host states which per se implies a different kind of obligation both for the investors and for the host states. At the same time, apart from BIT provisions, the host states remain also bound by the specific obligations undertaken under other international treaties or international customary law. The obligations arising from human rights figure among most prominent of all the obligations the host states have toward anyone within its jurisdiction. To understand why in international investment arbitration a host state is at liberty either to introduce a claim against investors for human rights breaches or to build its defense on human rights grounds, it is necessary first to specify state duties associated with human rights.

In human rights law, rights are usually identified separately from the state's duties regarding the realization of the recognized rights. Although the state obligations associated with human rights are not amenable to any general framework because they

22 *See, e.g.,* S. M. Schwebel, 'A BIT about ICSID', ICSID Review – Foreign Investment Law Journal, Vol. 23, No. 1, 2008, pp. 1-9.

23 *Urbaser v. Argentina*, paras. 1182-1183.

24 G. Laborde, 'The Case for Host State Claims in Investment Arbitration', Journal of International Dispute Settlement, Vol. 1, No. 1, 2010, p. 102.

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depend on the specific source of law, it is generally accepted that under the international human rights law, the state core obligations toward human rights include the obligation to respect, to protect and to fulfill human rights.[25] Initially used to interpret the right to adequate food in the International Covenant on Social, Economic and Cultural Rights, this tripartite dimension of the state duties is now used as a tool for defining state duties toward all human rights.[26] For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms asks from the states to secure the rights and freedoms defined to everyone within its jurisdiction, while the International Covenant on Civil and Political Rights demands from the states to respect and to ensure the rights enunciated in the Covenant. There is a further wrinkle here. States may be responsible not only for their own conduct amounting to violation of human rights, but also for not imposing obligations on non-state actors in relation to human rights. In the famous view of Inter-American Court of Human Rights:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention […]The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[27]

Finally, an ongoing trend of 'internationalization' of national constitutions made most of the national constitutions international, as the rights included in them reflect international human rights. Besides, international human rights have been continuously incorporated into the domestic system through judicial interpretation. This means that a host state obligation not to harm human rights and its duty to provide conditions for their realization also flow from its domestic constitutional law.

25 For elaboration *see, e.g.*, O. D. Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', Human Rights Quarterly, Vol. 34, No. 4, 2012, pp. 1090-1096; *see also* M. Hakimi, 'Toward a Legal Theory on the Responsibility to Protect', Yale Journal of International Law, Vol. 39, No. 2, 2014, pp. 268-280.

26 M. Fung, 'The Right to a Healthy Environment: Core Obligations Under the International Covenant of Economic, Social and Cultural Rights', Willamette Journal of International Law and Dispute Resolution, Vol. 14, No. 1, 2006, p. 112.

27 *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, Judgment of 29 July 1988, paras. 172, 174.

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In short, under international human rights law and national constitutions, states have committed themselves to respect, protect and fulfill human rights. My principal claim here is that state obligations of this sort limit the investor protection. As a consequence, in international investment arbitration, a host state may introduce claims against investors for human rights violations or may build their defense on human rights arguments to justify its policy measures with adverse effects on the investment.

Basically, a state will take up human rights argumentation in the following situations: first, when it has to prevent a violation of *jus cogens* norms; second, to prevent human rights violations within its territory; and third, to materialize its duty to promote human rights. While the first two situations are necessarily connected with a state responsibility to prevent breaches of human rights by the investors, the third may arise independently from the investor's conduct. Consider the following.

12.3.1.1 Defense Based on Duty to Prevent Violation of Jus Cogens Norms

Although, to date, no known investment cases are revolving around a violation of *jus cogens* norms,[28] theoretically, an investment dispute may involve a violation of *jus cogens* norms and a clear corresponding state duty to prevent it. Article 53 of the Vienna Conventions on the Law of Treaties stipulates that a treaty is void if it conflicts with *jus cogens*. According to Articles on Responsibility of States for Wrongful Acts prepared by the International Law Commission, states are under the obligation to bring to an end any serious breach of *jus cogens* and shall not recognize as lawful a situation created by such a violation, nor render aid or assistance in maintaining such situation.[29] This duty is not only imposed on a state that breaches *jus cogens* norms, but also on the third states which have a positive duty to cooperate in order to bring to an end such serious breaches.

In *Phoenix Action Ltd. v. the Czech Republic*, the arbitration tribunal transposed this obligation into investment world:

> […] nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments in pursuance of torture or genocide on in support of slavery or trafficking of human organs.[30]

28 UNCTAD, Selected Developments in IIA Arbitration and Human Rights, IIA MONITOR No. 2, UNCTAD/WEB/DIAE/IA/2009/7, 2009, p. 14.

29 *See* Arts. 40 and 41 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001. The text of the Articles is reproduced in the annex to General Assembly Resolution 56/83, 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

30 ICSID, *Phoenix Action Ltd. v. Czech Republic*, Case No. ARB/06/5, Award 15 April 2009, para. 78.

12.3.1.2 Defense Based on Duty to Protect Human Rights/Prevent Violations

In an international investment dispute involving human rights, a foreign investor's conduct most often violates human rights norms that are not *jus cogens*. A host state defense is usually built on its obligation to protect human rights and prevent their violations within its jurisdiction.

Potential violations that have been raised as an issue or considered in international investment arbitrations include, for example, the right to water,[31] the right to health,[32] the right to fair trial,[33] indigenous people's rights,[34] etc. Not surprisingly, the recurrent disputes initiated under BITs are closely connected with water supply services, sewage systems, and waste management, because, on the one hand, states own basic welfare to its citizens, while on the other hand, water supply services, sewage systems, and waste management are in many countries privatized and managed by foreign investors.[35] To respond to their obligations toward human rights, the host states started to build their defense in international investment arbitrations on human rights arguments gradually, first as a part of public policy argumentation and then with a direct reference to human rights law.[36]

Despite a solid legal foundation, until recently, employing human rights argumentation as a defense strategy turned not to be much successful. As a rule, neither the states constructed the argumentation of this sort coherently and convincingly, nor arbitration tribunals were eager to accept them.[37] As to the tribunals, some even found that human rights law and the state obligations under investment law operate on different levels.[38] At best, they recognized that BIT's obligations and human

31 ICSID, *Urbaser v. Argentine*, 2016; *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, Case No. ARB/05/22, Award 24 July 2008; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award 14 July 2006; *Aguas del Tunari, sa v. Bolivia*, ICSID Case No. arb/02/3, Decision on Respondent's Objections to Jurisdiction 21 October 2005.

32 ICSID, *Técnicas Medioambientales Tecmed, S.A. v. United Mex.* States, Case No. ARB(AF)/00/2, Award 29 May 2003; *Methanex Corp. v. United States*, UNCITRAL, NAFTA Investor-State Arbitration, Final Award 3 August 2005.

33 ICSID, *The Loewen Group Inc. v. United States*, Case No. ARB(AF)/98/3, Award 26 June 2003.

34 UNCITRAL, *Glamis Gold, Ltd. v. United States*, NAFTA Ch. 11 Arb. Trib. Award 8 June 2009.

35 E. Brabandere, Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications, Cambridge University Press, Cambridge, 2014, p. 141.

36 For a detailed discussion *see, e.g.,* E. Brabandere, 'Human Rights Considerations in International Investment Arbitration', in M. Fitzmaurice & P. Merkouris (Eds.), The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications, Leiden, Martinus Nijhoff/Brill, 2012, pp. 183-215; V. Kube & E. U. Petersmann, 'Human Rights Law in International Investment Arbitration', Asian Journal of WTO and International Health Law and Policy, Vol. 11, No. 1, 2016, pp. 80-86.

37 For a deeper analysis *see, e.g.,* S. Steininger, 'What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration', Leiden Journal of International Law, Vol. 31, No. 1, 2018, pp. 33-58.

38 ICSID, *SAUR International SA v. Republic of Argentina*, Case No. ARB/04/4, Decision on Competence and Liability 6 Jun 2012, para. 331.

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rights must be respected equally, without explaining their mutual relationship in the first place.[39]

However, things began to change when in the case of *Urbaser v. Argentina* the arbitration tribunal set out a promising approach, although on that occasion its ultimate finding was not a breach of any particular human right by the investors. This award deserves a closer look for twofold reasons: (a) for the first time an arbitration tribunal accepted jurisdiction to hear a counterclaim based on human rights consideration and (b) the tribunal recognized that international human rights law establishes separate obligations for the investors.[40]

Facts first. Before Urbaser, Argentina was submitted to 59 (known) investment international arbitrations, all connected with the measures it undertook during a dramatic financial meltdown in the early 2000s.[41] While in some of these disputes Argentina did formulate its defense on human rights grounds, it substantiated human rights argumentation most convincingly in Urbaser. The dispute arose out of the termination of a concession for water and sewage services in the Province of Buenos Aires granted to (Spanish) investors. A purpose of the concession was the 'imperative need to expand the drinking water and sewage services' of the Province. To respond to the severe financial crisis in 2001-2003, Argentina adopted different emergency measures, including 'the pesification' of tariffs. According to the investors who initiated the ICSID arbitration under Spain-Argentina BIT, the measures taken by Argentina violated several treaty provisions, including the prohibition on unfair and discriminatory measures, obligation to provide fair and equitable treatment, and the prohibition on expropriation.[42]

Argentina's counterclaim, based on human rights argumentation, was twofold. First, it justified its measures by the state of necessity and its obligation to prevent human rights abuses within its territory:

> The measures adopted by the Argentine Republic prevented the human right to water from being adversely affected and, with it, the right to an adequate standard of living, food and housing. A water price increase in those conditions would have been impossible to afford. For the poor, the tariff adjustment to the new dollar levels, and the inflation thereof, would have resulted in a desperate situation […] There is no obligation, either under domestic or international law, which may override Argentina's duty to

39 ICSID, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Case No. ARB/03/19, Decision on Liability 30 July 2010, para. 262.

40 The counterclaim was based on a broad jurisdictional clause.

41 L. Choukroune, 'Global Litigation as International Law Re-Unifier', in L. Choukroune (Ed.), Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and the Economics, Springer, Singapore, 2016, p. 190.

42 *Urbaser v. Argentina*, paras. 34-37.

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> guarantee the free and full exercise of the rights of all persons who are subject to its jurisdiction.[43]

Second, Argentina claimed that under the international human rights law, the investors, all of them being transnational corporations, also had duties related to human rights.[44] More specifically, Argentina asserted that the investors failed "to provide the necessary investment into the Concession, thus violating its commitments and its obligations under international law based on the human right to water."[45]

The tribunal accepted the relevance of the right to water, confirmed that it was recognized in international human rights documents, and explained that the states had a primary duty not only to protect this right but also to safeguard the conditions for its realization:

> […] human right to water and sanitation [. . .] has as its corresponding obligation the duty of States to provide all persons living under their jurisdiction with safe and clean drinking water and sewage services.[46]

Moreover, in what followed, the Urbaser tribunal went a step further and made a novel conclusion that corporations might have negative obligations under international human rights law, meaning that they had to refrain from human rights violations.[47] The tribunal first emphasized that both Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights established a right to water, and then concluded that, "in order to ensure that such rights be enjoyed by each person, it must necessarily also be ensured that no other individual or entity, public or private, may act in disregard of such rights."[48]

However, while the arbitration tribunal ruled that states had a duty to fulfill the realization of the right to water, it found no corresponding obligations on the side of the corporations.[49] Despite accepting that the consideration of international human rights obligations was within its competence, the tribunal concluded that the investors had not breached any applicable human rights obligation and dismissed the counterclaim.[50]

If before Urbaser the arbitration tribunals were reluctant to take up human rights violations in considering a host state defense and its counterclaims, the award in

43 Id., paras. 702, 706.
44 Id., paras. 1187-1192.
45 Id., para. 36.
46 Id., para. 1205.
47 Id., para. 1199.
48 Id., para. 1196.
49 Id., para. 1208.
50 Id., para. 1220.

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Urbaser indicates that in future cases arbitration tribunals may take a different approach and address effectively the defenses of the host states grounded on human rights. The award in *Veolia v. Egypt* discussed below confirms this presumption.

12.3.1.3 Defense Based on Duty to Promote Human Rights

The last situation, urging a host state to invoke human rights argumentation as a justification for the measures taken, may arise independently from the foreign investor's conduct. Although its award remains confidential, the recent arbitration dispute between Egypt and the French investor (a multinational corporation), involving labor rights, illustrates well this point.

Following the Arab Spring revolution, Egypt enacted legislation to increase the minimum standard of wages allegedly without adjusting the concessions for waste management.[51] *Veolia*, a French multinational corporation, which signed a contract in 2000, to provide waste management services for 15 years, initiated international arbitration under France-Egypt BIT, claiming that

> the changes to Egypt's labor laws – including increases to minimum wages – have negatively affected the company's investment, and that Egypt has violated its contract and the BIT's investor protections by not helping the corporation offset such costs.[52]

It took six years for the arbitration tribunal to decide the case, but at the end, it ruled against the investor.[53]

Although details of the award are not open to the public, the case indicates that the host states have the right to improve labor rights independently from what can be a particular interest of the investors. The broader point here is that a state duty to promote human rights does not cease to exist with the existence of BITs, under which some state obligations regarding basic needs of its population may be transferred to foreign investors. The fact that the investor lost the case in *Veolia* also indicates that the objective of host state measures, amounting to the state obligations toward human rights, will in the future play more important role for tribunals' assessment of potential BIT breaches than it has played before.

51 Kube & Petersmann 2016, p. 84.
52 www.schwaab.ch/wp-content/uploads/2015/05/egregious-investor-state-attacks-case-studies.pdf.
53 https://isds.bilaterals.org/?veolia-loses-isds-case-against.

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12.4 Investor Rights and Human Rights: Similarities and Differences

12.4.1 Background

Far more controversial from the issue of attaching human rights argumentation to a host state defense strategy is a proposal to frame investor protection in human rights terms.[54] On this view, since arbitration tribunals are ready to invoke human rights law to resolve investment disputes, invoking investor rights in human rights terms would give them "conceptual tool to effectively balance investment protection with other human rights that might be involved in the dispute."[55] In the same vein is an assertion that investor rights provided in international investment treaties and trade agreements are *in themselves human rights*.[56] I will now consider what motivates these views.

In the majority of investment disputes, foreign investors are transnational corporations, that is, juridical persons rather than individuals. Historically, investor protection under BITs originates in diplomatic protection of aliens, as individual rights do: diplomatic protection assumes that on the international plan a state represents the claim of its nationals and pursues it as its own.[57] However, for certain deficits of diplomatic protection and a need to avoid politicization of international arbitration, international investment treaties do not follow this pattern anymore.[58] Article 27 of the ICSID Convention clearly shows that an investment dispute does not belong to a realm of politics but the realm of law.[59] Yet, although in a modified version, the rule of nationality continues to be relevant in international investment law, meaning that in time of arbitration, the investor must be a national of the home state and must not be a national of the host state under BIT.[60]

Now, one of the most controversial issues regarding investor protection relates to the nature of rights conferred upon investors under BITs. The debate is termed in frame of

54 *See* Klein 2012.

55 Id., p. 215.

56 Petersmann 2005.

57 For more *see* B. Juratowitch, 'The Relationship between Diplomatic Protection and Investment Treaties', ICSID Review – Foreign Investment Law Journal, Vol. 23, No. 1, 2008, pp. 10-35.

58 *See* A. Peters, Beyond Human Rights: The Legal Status of the Individual in International Law, Cambridge University Press, Cambridge, 2016, p. 310; A. K. Pedersen, The International Legal Personality of the Individual, Oxford University Press, Oxford, 2018, p. 202.

59 Art. 27 of the ICSID Convention reads: "(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute."

60 C. Reiner & C. Schreuer, 'Human Rights and International Investment Arbitration', in P. M. Dupuy, F. Francioni, & E. U. Petersmann (Eds.), Human Rights in International Investment Law and Arbitration, Oxford University Press, Oxford, 2009, p. 95.

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'direct'/'derivate' rights and revolves around the issue of whether the investor has own rights streaming from BIT ('direct' rights) or these are rights of the home state which the investor can claim as its proxy against the host state ('derivative' rights).[61] To these, one should add a view which, starting from a difference between substantive and procedural rights, urges a contingent perspective: the substantive rights remain in the position of the home state in BIT, while the procedural right to institute arbitration against the host state is the investor own right.[62]

For the purpose of this discussion, it is not necessary to take the position against this background. Worth mentioning is a perception that in 'derivative'/'direct' rights debate more acceptable arguments are offered by the proponents of 'direct' rights.[63] For polemical purposes fundamental to this chapter is a related assertion that 'direct' rights of the investor should be understood as human rights in themselves or should be conceptualized as human rights. To have a sense of problem here, I will first briefly explain the investor rights in BITs and the existing overlaps with international human rights.

12.4.2 Interaction between International Human Rights and Investor Rights

Because changes in governmental policy may affect the property rights of the investor and jeopardies the investment itself, a key element of investor protection that is given preference in all BITs is the right of a foreign investor in claims concerning expropriation. Expropriation norms are accommodated in BITs differently, usually forbidding either direct or indirect expropriation of the investment, except for "public purposes," "in accordance with due process of law," "without discrimination,: and followed by "prompt, adequate and effective compensation."[64] Article 6 of the Kazakhstan-Singapore BIT of 2018 illustrates well this concept:

61 A debate is exemplified in the works of e.g., Z. Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', British Yearbook of International Law, Vol. 74, 2003, pp. 151-289; M. Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility', The European Journal of International Law, Vol. 24, No. 2, 2013, pp. 617-647; A. Gourgourinis, 'Investors' Rights qua Human Rights? Revisiting the "Direct"/"Derivative" Rights Debate', in Fitzmaurice & Merkouris (Eds.), 2012, pp. 147-182; B. Tillmann, 'Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law – An Inquiry Into the Nature and Limits of Investor Rights', Jean Monnet Working Paper 04/13, 2013; E. Lagrange, 'Investors Rights Short of Human Rights in a Constitutional Perspective', Völkerrechtsblog, 25 January 2016; Peters 2016, pp. 304-317.

62 A. Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights', Harvard International Law Journal, Vol. 56, No. 2, 2015, p. 355.

63 Peters 2016, p. 306.

64 For more on the expropriation provisions in BITs *see, e.g.,* J. Waincymer, 'Balancing Property Rights and Human Rights in Expropriation', in Dupuy, Francioni & Petersmann (Eds.), 2009, pp. 275-309; R. Dolzer & C. Schreuer, Principles of International Investment Law, Oxford University Press, Oxford, 2008, pp. 89-118.

1. Neither Party shall nationalize, expropriate or subject to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") the investments of investors of the State of the other Party unless such a measure is taken on a non-discriminatory basis, for a public purpose, in accordance with due process of law, and upon payment of compensation in accordance with this Article.
2. The expropriation shall be accompanied by the payment of prompt, adequate and effective compensation […].[65]

The link between the investor's right in claims regarding expropriation and international human rights is twofold. First, the wording in BITs reflects the concept of property defined in human rights law. Although in philosophical and legal discourse property rights are defined and justified differently, some level of property rights is protected by international human rights instruments, usually with a parallel indication that arbitrary deprivation of one's property is not allowed.[66] Second, to resolve the dispute arising from expropriation, some arbitration tribunals are prone to turn to the European Court of Human Rights expropriation cases for guidance in estimating the compensation owed to the foreign investors.[67] For example, in *Azurix v. Argentina*, arbitration tribunal emphasized that the ECHR case law offers "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation."[68]

Another viable link between international human rights and investor protection is standards of fair and equitable treatment and full protection and security. In BITs, they are usually formulated in a single provision, as in Article 2 (2) of the United Kingdom-Vietnam BIT of 2002:

> Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party […].[69]

65 The BIT is available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/5700.
66 Waincymer 2009, pp. 277-284.
67 For a detailed discussion *see, e.g.,* A. Reinisch, 'Expropriation', in P. Muchlinski, F. Ortino & C. Schreuer (Eds.), The Oxford Handbook of International Investment Law, Oxford University Press, Oxford, 2008, pp. 410-458.
68 *Azurix Corp. v. Argentine Republic*, paras. 311-312.
69 The BIT is available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/2376.

The fair and equitable treatment standard intends to bring a level of equity between the investor and the host state. To this end, different levels of treatment that correspond to the fair and equitable treatment are offered in BITs, which makes its content open to interpretation.[70] The usual understanding is that it includes the notions well-known in international human rights law like due process, good faith, non-discrimination, and proportionality.

The standard of full protection and security is also general in nature. Traditionally, it provides guarantees against physical infringements of the investment caused by state authorities and/or third parties.[71] Recent cases indicate that it also includes legal infringements the host state makes by its regulatory measures.[72] As such, it is akin to different human rights, including the right to physical integrity, right to property, and right to privacy.

Next, in investment law, difference in treatment may amount to discrimination, similarly as in international human rights law. Non-discrimination claims in investment disputes are common; they arise from national treatment clause and most-favored nation treatment standard or the prohibition of arbitrary and discriminatory treatment, all embodied in BITs to prohibit discrimination of the foreign investors based on nationality.[73] What is at stake here is a request for a host state not to treat foreign investors less favorable than its own investors. For example, Article 3 in Serbia-UK BIT of 2007 provides the following:

- Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.
- Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.[74]

Finally, the investor's right to institute arbitration proceedings is comparable with the right of an individual to access justice defined in international human rights law, with a significant difference that the investor does not have to fulfill the obligation of exhausting

70 For a discussion *see, e.g.,* I. Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms', in Dupuy, Francioni & Petersmann (Eds.), 2009, pp. 310-343; S. W. Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law', in S. W. Schill (Ed.), 2010, pp. 151-182; Dolzer & Schreuer 2008, pp. 119-149.

71 Dolzer & Schreuer 2008, p. 149.

72 Id.

73 For more *see, e.g.,* F. Ortino, 'Non-Discriminatory Treatment in Investment Disputes', in Dupuy, Francioni & Petersmann (Eds.), 2009, pp. 344-366.

74 The BIT is available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/4987.

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all domestic remedies before turning to international arbitration tribunals in seeking the protection. This right is not only guaranteed by the ICSID Convention and UNCITRAL rules, but is also further secured in BITs. Article 16(1) in Belarus-India BIT of 2018 serves as a good example:

> A disputing investor who meets the conditions precedent provided for in Article 15 may submit the claim to arbitration under:
> a) the ICSID Convention, provided that both the Parties are full members of the Convention;
> b) the Additional Facility Rules of ICSID, provided that either Party, but not both, is a member of the ICSID Convention; or
> c) the UNCITRAL Arbitration Rules.[75]

The investor can exercise this right freely, without any authorization of its home state or without been compelled by the home state to institute the arbitration proceedings.[76]

In sum, some similarities between human rights and investor rights do exist, but this does not make investor rights human rights. Bellow, I shall explain way.

12.4.3 Why Investor Rights Are Not Human Rights

As the UN General Assembly substantive standard for the identification of new human rights establishes, "human rights are only those rights that are of a fundamental character and derive from the inherent dignity and worth of the human person."[77] This criterion reflects the theory of natural rights and the presumption that human rights derive from human nature and the dignity of the human person, as emphasized, for example, in works of the French philosopher Jacques Maritain.[78] What follows from here is that one considers human rights to be general and universal, meaning that everybody is entitled to them.[79] Finally, human rights are not bestowed upon an individual by a

75 The BIT is available at https://investmentpolicyhub.unctad.org/Download/TreatyFile/5724.

76 For more on this right *see* Peters 2016, pp. 287-293.

77 General Assembly Resolution 41/120, 4 December 1986, para. 4(b).

78 "The human person possesses rights because of the very fact that it is a person, a whole master of itself and of its acts…. The dignity of human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the rights to be respected, is the subject of rights, possesses rights. There are things which are owed to man because of the very fact that he is a man." J. Maritain, The Rights of Man and Natural Law, Geoffrey Bles: The Centenary Press, London 1944, p. 37. The theory of natural rights, and in particular the work of Jacques Maritain, influenced the Universal Declaration of Human Rights. For more *see* A. Sajó & R. Uitz, The Constitution of Freedom: An Introduction to Legal Constitutionalism, Oxford University Press, Oxford, 2018, pp. 372-378.

79 A. Sajó, Limited Government, CEU Press, Budapest, 1999, p. 251.

state or international community; they are recognized by them. As such they are inalienable.

Accordingly, the first point to be underlined here is that investor rights are not general and universal. They are not linked to the quality of being a human being but to the quality of being an investor. Moreover, although investor rights are only granted to a particular interest group – the investors – not all investors are entitled to them. Thus, unlike the Universal Declaration on Human Rights which insists that everybody is entitled to human rights, without distinction of any kind,[80] contracting states in BITs confer rights only upon the investors who are their nationals.[81] Finally and more strikingly, the possession of investor rights is even more particularized: as Anne Peters observes, enforceable investor rights are only affordable to those investors who are wealthy enough to institute extremely costly arbitration proceedings.[82] Simply put, the idea of universality, closely tight to international human rights, is at odds with the philosophy of the investor protection.

Second, international human rights and investor rights have purposes of different types. While international human rights are granted for the sake of individual well-being and human development, investor rights are conferred upon investors for instrumentalist reasons: they aim to bolster economic development of the host state and stimulate the flow of private capital. In other words, investor rights are not an objective *per se*:

> The object and purpose of the BIT – the third interpretive criterion – is defined in its Preamble: the parties "desir[e] to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party" and recognize that the BIT "will stimulate the flow of private capital and the economic development of the Parties[…] Thus, the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy."[83]

Accordingly, different rights aimed to protect investors from risky actions of the host states, including expropriation and discrimination, stream from the need to promote foreign investment, and not from the request to respect the inherent dignity of the investors. To paraphrase Phillip Alston, there is nothing wrong with such

80 *See* Art. 2 of the Universal Declaration of Human Rights.
81 For more on nationality requirement, *see* Dolzer & Schreuer 2008, p. 46.
82 Peters 2016, pp. 320-321.
83 ICSID, *Joseph Charles Lemire v. Ukraine*, Case No. ARB/06/18, Decision on Jurisdiction and Liability 21 January 2010, para. 273.

instrumentalization, but this approach should not be equated with a human rights approach.

Third, the protection of international human rights and the protection of investor rights are subject to distinct regimes. A major issue here is the identity of the actors permitted to intervene in cases of the rights violations. International human rights reflect the values of the international community as a whole and as such create *erga omnes* obligations. In the International Court of Justice famous formulation:

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[84]

The Court's conclusion that all states have a legal interest in the protection of international human rights is further specified and reaffirmed in the 1989 Resolution of the Institut de Droit International on "The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States."[85]

To the contrary, investor rights are inherently linked to the bilateral investment treaties and oblige only the host state and the foreign investor *inter-se*.[86]

There is a related point here. Although international human rights courts, entrusted with the protection of international human rights, have been created, international human rights are primarily protected by national courts. To put it differently, states have the primary responsibility to enforce international human rights. By contrast, the protection of investor rights is entrusted only to international arbiters, without any obligation of the investor to seek protection in front of the national courts before turning to them. This difference has motivated some authors to claim that international human rights are 'domesticated' while investor rights are completely 'denationalized.'[87]

Finally, there is an issue of 'inalienability.' Namely, ever since the proclamation of the American Declaration of Independence, certain human rights are in principle deemed

84 Case concerning the Barcelona Traction, Light and Power Company, Ltd. (*Belgium v. Spain*), International Court of Justice, Judgment of 5 February 1970, para. 33.

85 Art. 1(2) of the Resolution reads: "This international obligation, as expressed by the International Court of Justice, is erga omnes; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world." www.idi-iil.org/app/uploads/2017/06/1989_comp_03_en.pdf.

86 M. Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in Dupuy, Francioni & Petersmann (Eds.) 2009, p. 109.

87 *See*, Peters 2016, p. 321.

inalienable.[88] Although the meaning of 'inalienability' is subject to different interpretations, inalienability forbids even the holder of the right to alienate from the right, including the possibility to waive the right.[89] As the Superior trial court in Canada recently specified: "It has been well established that human rights…, inherent to the dignity of every individual, […] cannot be waived or contracted out of."[90] This general presumption is reflected in standards for humanitarian treatment in war: protected persons under Geneva Conventions cannot waive their rights under the conventions, because it is assumed that such waiver would be a product of pressure by the captor State.[91] The notion of inalienable rights figures beyond the war context, as well. In the *Dwarf* case, The French *Conseil d'Etat* held that the dwarf could not rely on the freedom of work and freedom of trade and industry to justify his voluntary participation in a show consisting of throwing a dwarf, because this show led to utilizing a physically handicapped person as an object and violated the dignity of human being.[92]

In investment law, the issue of a waiver is still unsettled. First, the contracting state parties may opt to rule out the possibility of a waiver in BIT explicitly. This is, then, the end of the story. However, BITs are usually silent on this issue. Second, both arbitral practice and scholars seem to be divided on this point.[93] According to one stance, an investor may waive his right to institute international arbitration.[94] However, there is also a competing view that "investors should not be allowed to permanently waive those rights and thus risk undermining the international legal structure between the contracting states."[95] For the purpose of this discussion, it is enough to stress that, apparently, reasons for paternalistic approach, present in international human rights law and humanitarian law, which would be an obstacle for an investor to waive its legal protection, do not exist.[96] Economic interests, which play the omnipotent role in

88 The relevant passage of the American Declaration of Independence reads: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men […]."

89 For more on the notion of inalienable rights, *see, e.g.,* C. A. Stern & G. M. Jones, 'The Coherence of Natural Inalienable Rights', UMKC Law Review, Vol. 76, No. 4, 2008, pp. 939-992.

90 *Webber Academy Foundation v. Alberta (Human Rights Commission)*, 2016 ABQB 442 (CanLII), para. 106.

91 All four Geneva conventions include a non-waiver clause providing that the protected persons "may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention." *See* Art. 7 of the Geneva Convention I, Art. 7 of the Geneva Convention II, Art. 7 of the Geneva Convention III, and Art. 8 of the Geneva Convention IV.

92 *See* Counseil d'Etat, Decision no. 136727, 27 November 1995.

93 For a detailed discussion *see* Pedersen 2018, pp. 215-219.

94 It seems that this stance prevails today. *See, e.g.,* J. V. Haersolte-van Hof & A. K. Hoffmann, 'The Relationship between International Tribunals and Domestic Courts', in Muchlinski, Ortino & Schreuer (Eds.), 2008, p. 1006.

95 J. W. Salacuse, The Law of Investment Treaties, 2nd edn, Oxford University Press, Oxford, 2015, pp. 433-434.

96 On the same line *see* Peters 2016, p. 328.

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coffering rights upon investors, cannot rise to the same importance human dignity plays in determining certain rights inalienable. Accordingly, the concept of 'inalienability' divides, rather than merges, international human rights and investor rights.

To sum up, investor rights conferred upon investors in BITs are not universal, nor inalienable; their purpose does not derive from the need to respect the inherent dignity of an individual, but from the need to promote the economic development of the host state and stipulate a flow of private capital. As such, investor rights are not human rights.

12.5 Conclusions

Human rights and international investment arbitration are not entirely at odds as previously thought. In essence, there are three ways of how human rights concerns may be employed in an investment dispute. First, an investment dispute may involve a breach of an explicit BIT provision aimed at fostering respect for human rights, what most of the BITs still do not contain. Second, the parties of the dispute may use the authority of human rights law to strengthen their position in the dispute, what happens to be an emerging trend. Third, the arbitration tribunals are more and more prone to refer to human rights case law seeking for the analogy in interpreting substantive provisions of BITs, although the reversible trend of human rights courts using references from the arbitrational practice in their decisions is still not discernable.

In this chapter, I have traced the potentials of human rights argumentation to advance the party positions in international investment arbitration. The view developed in this chapter considers that a host state defense or counterclaim strategy based on human rights grounds goes beyond rhetoric when it is used to justify state measures negatively affecting the investment but protecting the local population. Although host states, bound both by human rights law and BITs, may find themselves in a conflict of obligations, this conflict is not genuine. In a time of need, states must prioritize its human rights obligations because human rights, being universal and inalienable, possess normative authority higher than investor rights, which are instrumental rights, available only to a particular group of investors. The recent approach of the tribunals in *Urbaser* and *Veolia* confirms this conclusion.

Attention in this chapter was also drawn to emerging scholarly views that investor protection should be conceptualized in human rights terms and that investor rights in investment treaties and trade agreements are human rights in themselves. I have argued that investor rights are not human rights. An effort to promote them to human rights is based on the wrong assumption that the common good will be promoted through the protection of particular interests of investors. Investor rights are already enough protected as substantive claims arising from BITs and are enforceable by arbitration awards. Converging investor interests with human rights, to paraphrase Mary Ann

Glendon, would encourage the interest of the capital to place the self at the center of our moral universe. This idea would open a fundamental question of what human rights stands for, which is already an issue for different discussion. As is the issue of whether arbitration tribunals, established to resolve investment disputes, should decide human rights issues involved in a dispute in the first place, having in mind their limited mandate, lack of expertise, and legitimacy of a human rights body.

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