

# RESTORING THE BALANCE IN BILATERAL INVESTMENT TREATIES: INCORPORATING HUMAN RIGHTS CLAUSES\*

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## Abstract

*Bilateral Investment Treaties are agreements made in order to promote foreign investment in a specific country. Although foreign investment is a positive force to promote development, in some cases the interests of foreign investors can collide with the human rights of those living in the host country. It is in these cases that the state needs to justify the measures it takes based on its human rights obligations in order not to be found responsible for breaching its obligations under an investment treaty. This paper examines the consequences of the prospect of human rights norms being included into bilateral investment treaties, as well as the possibility of investment tribunals accepting human rights arguments of non-investment law issues when there are no direct references to human rights law in the investment treaty, in order to demonstrate that investment treaties must include explicit human rights provisions to protect the capacity of states to take appropriate measures based on its human rights obligations.*

**Keywords:** Bilateral Investment Treaties, Human Rights, International Law.

## Resumen

*Los tratados bilaterales de inversión son acuerdos realizados con el fin de promover la inversión extranjera en un país; aunque la inversión extranjera es una fuerza positiva para promover el desarrollo, en algunos casos el interés de inversionistas extranjeros puede causar fricciones con los derechos humanos de quienes viven en el país de acogida. Es en estos casos, cuando los Estados necesitan poder justificar las medidas tomadas con base en su obligación de proteger los derechos humanos de sus ciudadanos y no ser encontrados responsables por el incumplimiento de sus obligaciones en virtud de los tratados de inversión. Este documento analiza la inclusión de normas de derechos humanos en los tratados bilaterales de inversión, así como los casos en los cuales tribunales de arbitramento han tomado en consideración argumentos de derechos humanos cuando los tratados bilaterales de inversión no tienen referencia directa a estos, con la finalidad de establecer la necesidad de incluir cláusulas específicas de derechos humanos en ellos.*

**Palabras clave:** Acuerdos Bilaterales de Inversión, Derechos Humanos, Derecho Internacional.

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## 1. INTRODUCTION

Bilateral Investment Treaties are agreements made between two sovereign states. The capital-importing country has the basic purpose of attracting Foreign Direct Investment. The capital-exporting country, in turn, seeks to protect investors from political risk and instability and, in a more general sense, safeguard the investment made by its nationals within the territory of another state.

Foreign investment is a positive force to promote development in a country. Traditionally, host governments have taken various measures to direct investment towards national development needs. Such measures have included protecting infant industries by restricting the entry of foreign investors, protecting domestic economy against the entry of certain forms of investment, or demanding from investors the use of certain local materials, to transfer technology and skills, or to undertake joint ventures with local enterprises. Provided they have been part of an overall coherent and comprehensive investment strategy, such measures have, in the past, had beneficial impacts on national development (United Nations Conference on Trade and Development, 1999).

In certain situations, governments need to introduce or reinforce complementary measures to investments, such as competition policies, environmental protection standards, taxation measures and regulation towards the fulfillment of humans rights; in such cases, when the interests of foreign investors can potentially cause friction with the human rights of those living in the host country, the host country will need to rely on its international human rights obligations in order to justify the measures it takes against foreign investors, and to not be found responsible for the breach of its obligation under the Bilateral Investment treaty.

Quite often, bilateral investment agreements do not include clauses related to human rights in which states can rely in order to impose obligations upon investors to respect minimum rights standards, or

in which they can rely in order to enjoy the ability to justify certain nondiscriminatory treatment of foreign investors based in its international obligation to protect the human rights of its citizens. In this light, investment law needs to evolve and be interpreted consistently with international law, including human rights; however states need to start including human rights provisions in the celebration of bilateral investment treaties.

In this paper, the prospect for human rights norms to be injected into bilateral investment treaties, as well as the possibility of investment tribunals accepting human rights arguments of non investment law issues when there are no direct references to human rights law in the investment treaty will be analyzed, in order to demonstrate that investment treaties must include explicit human rights provisions in order to protect the ability of states to take appropriate measures under its human rights obligations.

## 2. BILATERAL INVESTMENT TREATIES

### 2.1. Overview

Bilateral investment treaties (BITs) were developed in an effort to complement the slender protections afforded by customary international law to aliens (Subedi, 2008). BITs provide greater certainty and clarity as to legal rules which would apply, at least with respect to the investment flowing between a given set of countries.

Efforts to develop a single multilateral agreement on investment have failed consistently, often in the face of concerted opposition from civil society groups suspicious of the motives underlying such initiatives (Peterson, 2009)<sup>1</sup>. Human Rights non-governmental organizations (NGOs) were at the forefront of opposition to the proposed Multilateral Agreement on Investment (MAI) being negotiat-

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<sup>1</sup> But see James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*.

ed by the Organization for Economic Cooperation and Development (OECD), as well as a later initiative by WTO member-governments (Peterson, 2009).

The opposition from human rights NGOs is based on the concern that these agreements would undermine the ability of governments to regulate economic activity for broader objectives such as the promotion and protection of human rights, and would extend the legal protection to property and assets of the investors (Peterson, 2009). Since the conclusion of the first Bilateral Investment Treaty (BIT) between Germany and Pakistan in 1959, foreign investment has been governed even more by either BITs or by Regional or Bilateral Trade Agreements, which include a chapter on investment protection, such as the North American Free Trade Agreement (NAFTA) (NAFTA Secretariat).

Although BITs differ from one another, especially depending on the provisions each state wishes to include, they usually contain general standards of treatment. They provide for protection against direct and indirect expropriation, require fair and equitable treatment of the investor, provide for national treatment, full protection and security, free transfer of funds, and usually contain a most favored nation clause (MFN) (Dugan, 2008).

Even though bilateral investment treaties should be formulated in a way in which they regulate the rights and obligations of both parties, it often happens that these investment treaties tend to protect foreign investors and their assets rather than imposing duties or legal responsibilities on them (Peterson, 2009). In terms of Human Rights, BITs usually do not make references to commitments of the parties in this arena.

## **2.2. Dispute Settlement**

The most chosen forum for investment arbitration is the International Centre for Settlement of Investment Disputes (ICSID) (Reed,

Paulsson, & Blackaby, 2004), but arbitration also takes place under other rules, e.g. the United Nations Commission on International Trade (UNCITRAL) or the International Chamber of Commerce (ICC) rules. The ICSID was created in 1965 under the auspices of the World Bank with the goal of fostering private capital flows to developing countries ('international cooperation for economic development'<sup>2</sup>).

Usually, ICSID publicly registers details of disputes before its panel as well as some of its decisions, even though Article 48 (5) of the ICSID Convention requires the consent of the parties for an award to be published<sup>3</sup>. However, other arbitral awards are not publicly disclosed. For instance, the Arbitrations rules of the International Chamber of Commerce, the Stockholm Chamber of Commerce and the United Nations Commission on International Trade Law (UNCITRAL), all of which are incorporated in some number of BITs, provide no such requirements for arbitrators to be made a matter of public record (Peterson & Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, 2003).

As we see, transparency is a problem for investment arbitration, because arbitral awards are often kept confidential. States are generally not aware of the substantive rules of international investment law that the tribunal will apply. This situation should be corrected in the future; wherever human rights and other public interests are concerned, transparency should be an important principle, of course taking into account the legitimate commercial confidentiality.

### *The Law governing the dispute*

Tribunals interpret the provisions of the treaty in accordance with the applicable law agreed upon by the parties or, by default, as

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<sup>2</sup> See Preamble of the ICSID Convention.

<sup>3</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Mar. 18, 1965, 17 U.S.T. 1270, 1286, 575 U.N.T.S. 159 (entered into forced Oct. 14, 1966); NAFTA Article 1131 has a similar provision that tribunals can decide disputes before them "in accordance with this Agreement and applicable rules of international law." North American Free Trade Agreement, U.S. Can.-Mex., art 1131, Dec. 17, 1992, 32 I.L.M 605 (1993).

specified in the arbitration rules. Some investment treaties provide for the application of public international law in addition to national law, and the provisions of the agreement (Schreuer, Reinisch, Sinclair, & Malintoppi, 2001).

Where the investment treaty does not specify the applicable law, the arbitrator will typically look to ascertain if the parties have reached consensus as to the applicable law. Whenever there is no consensus between the parties, it is necessary to look to the guidance of the specific arbitral rule (ICSID, UNCITRAL, ICC, etc).

ICC Arbitration Rules provide that, in the absence of an agreement between the parties, the tribunal will have the discretion to apply the law it deems appropriate. However, UNCITRAL rules state that, in the absence of an agreement between the parties, the tribunal will apply the law determined by the conflict-of-law rules that the tribunal considers appropriate. ICSID on the other hand, states that in the absence of an agreement between the parties, the tribunal 'will apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law that may be applicable.'<sup>4</sup> This reference to rules of international law was elucidated in the Report of The World Bank Executive director on the (ICSID) Convention<sup>5</sup>, as being in the sense of Article 38 of the Statute of the International Court of Justice<sup>6</sup>.

In fact, there is no discussion that it is possible to apply rules of international law in order to interpret some of the provisions of the

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<sup>4</sup> Art 42(1) of the ICSID Convention.

<sup>5</sup> Report of the World Bank Executive Directors on the Convention, Doc. ICSID/2, 1 ICSID Reports 31, para 40.

<sup>6</sup> Article 38 International Court of Justice: "The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a). international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b). international custom, as evidence of a general practice accepted as law;

c). the general principles of law recognized by civilized nations;

d). subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicist of the various nations, as subsidiary means for the determination of rules of law".

BITs, however there is still uncertainty in the scope of the rules of the international laws which would be applied; this will be analyzed in depth in session 4.

### *Appointment of Arbitrators*

Ordinarily each party selects one arbitrator for their dispute and the two parties will agree on a third. There are no specific requirements<sup>7</sup> in relation with the area of expertise within law of the arbitrators, for example in human rights law, environmental law, etc.

This is one of the main concerns within arbitration cases in which it has been necessary to address issues related to international human rights law or environmental law. In the majority of cases, arbitrators do not have the appropriate expertise or the sensibility in these topics in order to confront the arguments of the parties with the law of investment arbitration.

### *The Doctrine of Precedent in investment disputes*

In investment disputes, tribunals try to rely on previous decisions of other tribunals whenever they can. At the same time, it is also well known that the doctrine of precedence, in the known sense of common law, does not apply, i.e. tribunals in investment arbitrations are not bound by previous decisions of other tribunals. Moreover, each tribunal is constituted ad hoc for any particular case. Tribunals have pointed out repeatedly that they are not bound by previous cases. In the annulment proceeding in *Amco v Indonesia*, the ad hoc committee stated:

44. Neither the decisions of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the Klockner ad hoc Committee are binding in this ad hoc Committee.

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<sup>7</sup> In some BIT's signed by Canada there are an exception of these rules, they provide that arbitrators selected for "disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service in dispute".

The absence, however, of a rule of stare decisis in the ICSID arbitrations system does not prevent this ad hoc Committee from sharing the interpretation given to Article 52(1)(e) by the Klockner ad hoc Committee. This interpretation is well founded in the context of the Convention and in harmony with applicable international jurisprudence. Therefore this ad hoc Committee does not feel compelled to distinguish strictly between the ratio decidendi and obiter dicta in Klockner ad hoc Committee decision. (*Amco v Indonesia*, Decision on Annulment, 1986)

Tribunals operating under NAFTA, in the framework of the ICSID Additional Facility, have reached the same result. For instance, the Tribunal in *Feldman v Mexico* said:

[...] This Tribunal has also sought guidance in the decisions of several earlier NAFTA Chapter 11 Tribunals that have interpreted Article 1110. The Tribunal realizes that under NAFTA Article 1136(1), 'An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case,' and that each determination under Article 1110 is necessarily fact-specific. However, in view of the fact that both of the parties in this proceeding have extensively cited and relied upon some of the earlier decisions, the Tribunal believes it appropriate to discuss briefly relevant aspects of earlier decisions [...] (*Feldman v Mexico*, Award, 2002).

The doctrine of precedence, as is conceived in the common law system, exists to provide guidance, predictability, efficiency, uniformity and impersonality to the system. Within a unified legal system, a consistent application of precedence provides fairness and equality as like cases are treated alike. As said above, this doctrine does not apply in arbitration tribunals; even though arbitral tribunals do try to take into account what previous rulings determined, the system in investment treaty arbitration is not unitary, in the sense tribunals sitting under the same source of jurisdiction (Schereuer, 2008).

One example of how this particular condition is inconvenient would be the expropriations doctrines approach in investment arbitrations,

in which tribunals favor either of two doctrines, namely “sole effect” or “police power” (Subedi, 2008). Under the “sole effect” doctrine, investors enjoy more strict protection, making governments more liable on the consequences of their actions: “the crucial factor in determining whether an indirect expropriation has occurred is solely the effect of the government measure on the property owner; the purpose of the government measure is irrelevant in making that determination.” (Peterson & Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, 2003).

The “police power” doctrine gives more relevance to the principles of international customary law and establishes, particularly in cases of indirect expropriation, that compensation may not be payable for standard regulatory acts. Therefore, consideration is given to context, a state’s intention and possibly the proportionality of the measure: “As a general rule of international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, into alias, a foreign investor or investment is not deemed expropriation and is not compensatory” (*Methanex corporation v United States of America*, 2005). Some tribunals have not necessarily opted for one doctrine over the other, yet they have indicated one carries more weight. For example, in *Tecmed v. Mexico*, the tribunal said that the “government’s intention is less important than the effects of the measures on the owner of the assets” (*Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, 2003).

In this light, it is important to start working in the creation of mechanisms which can give more uniformity to the system; even though some FTAs are started to stipulate regulations framework<sup>8</sup>, it is necessary to analyze if this is the more efficient method to address this issue.

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<sup>8</sup> NAFTA Art 1131(2): “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section”.

### 3. STATES OBLIGATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

The Human Rights system of the UN consists of the 1948 Universal Declaration of Human rights and the two 1966 UN Covenants which are comprised today in the "International Bill of Rights". On top of these conventions, there are a number of specialized agreements protecting the rights of especially vulnerable groups, such as women or children (Kedzia, 2003).

All human rights are equally important, however there is a clear distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other hand, and also within those groups (Rosas & Scheinin, 1999). The level of obligation of the states to implement human rights, as well as the way to enforce those obligations, are different between these groups.

It is also important to establish that even though all states are parties to at least one human rights convention, and bound by the customary international law principles of the Universal Declaration on Human Rights, all states have different obligations. States can in occasion make reservations to human rights treaties,<sup>9</sup> and in some cases the treaties allow for the restriction of some human rights in case of emergency<sup>10</sup> or when it is necessary for the protection of certain public policy interests.<sup>11</sup> Furthermore, the enjoyment of human rights may be restricted by other peoples' enjoyment of human rights. For example, the freedom of speech is limited by the right to privacy and personal integrity of another person. The criterion used to balance the scope of both rights is the principle of proportionality (Schreiber, 2008).

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<sup>9</sup> For an overview on existing reservations to UN human rights instruments see <http://www.ohchr.org/english/countries/ratification/index.htm>.

<sup>10</sup> International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, 993 UNTS 3, available at <http://www.ohchr.org/english/law/cescr.htm>, Art. 4.

<sup>11</sup> Id. Art. 8 (2).

Ultimately, the responsibility of enforcing compliance with human rights falls on the states, and it is they who have to protect individuals against violations of their human rights from the part of foreign investors or any other third parties. The obligation to respect, protect and implement human rights rests with State authorities and this obligation has its source first and foremost in the treaties they have ratified.

Article 103 of the UN Charter provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.<sup>12</sup> According to this and to Article 56, which imposes obligations on the part of the organization and on its member states to contribute to the fulfillment of achieving international cooperation to promote and encourage respect for human rights and for fundamental freedoms, it is concluded that whenever there exists a conflict between international obligations and the obligation to respect and protect human rights, the latter should prime over the former (Schutter, 2008).

The Interamerican Court of Human Rights has expressed that:

[...] modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.<sup>13</sup>

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<sup>12</sup> Charter United Nations available at <http://www.un.org/aboutun/charter/pdf>.

<sup>13</sup> Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into force*

The Committee on Economic, Social and Cultural rights has adopted a classification of those obligations as the obligations to respect, protect and fulfill human rights.<sup>14</sup>

- a. The obligation to respect: To abstain from measures which negatively impact on the enjoyment of human rights.
- b. The obligation to protect: To take measures which regulate the activities of private actors in order to ensure that they do not negatively impact on human rights.
- c. The obligation to fulfill: To take measures to realize human rights, either by facilitating, the exercise of such rights by individuals, or by providing goods or services (Schutter, 2008).

Even though states have international responsibilities, they have started to forget their international obligations within the celebration of BITs, and by looking to give security to the international corporations, they have started to include clauses which deter the fulfillment of these obligations, in such a manner that nationals suffer the consequences of many concessions given to foreign investors within the celebration of IIA.

#### 4. ROLE OF INTERNATIONAL LAW IN INVESTMENT DISPUTES

As tribunals with limited jurisdiction<sup>15</sup>, the function of arbitrators is usually limited to finding and determining whether there exist breaches on a particular investment treaty. Therefore, they are not empowered to look into whether human rights have been violated. Institutionally, the majority of investment disputes are settled by an ICSID tribunal. That tribunal is procedurally governed by the

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of the American Convention of Human Rights (Art 74 and 75), Advisory Opinion OC-2/82, September 24, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982), at para .29.

<sup>14</sup> See, e.g., E/C. 12/2002/11, paras 21-29.

<sup>15</sup> See, e.g., Alan Redfern et al., *Law and Practice of International Commercial Arbitration* 255 (4<sup>th</sup> ed. 2004).

ICSID Convention as *lex arbitri*, which sets the procedural frame for investments disputes. Art. 42 (1) of the ICSID Convention provides: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.” The UNCITRAL Arbitration rules,<sup>16</sup> which may also be used according to most of the IIAs, provide in Art. 33(1) that “the arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute”. Thus, the UNCITRAL Arbitration Rules also refer back to the IIAs provision in investment disputes.

Regarding the substantive rules, it is relevant to take into account that they are not provided by the ICSID or other conventions; the parties are free to choose the applicable substantive law the tribunal should apply to solve the dispute. Even though a tribunal may not be able to arbitrate on human rights grounds, this does not mean that arbitrators might not use human rights norms as a way to interpret substantive provisions of an investment treaty.

As BITs are International Law instruments<sup>17</sup>, International Law is also applicable by virtue of the Vienna Convention on the Law of Treaties (VCLT), which provides that treaties are “governed by International Law” and must be interpreted in light of “any relevant rules of international law applicable”<sup>18</sup>. Therefore, arbitrators in international investment disputes can interpret BITs by considering non-investment law via Art. 31 (3) (c) of the VCLT<sup>19</sup>.

Earlier ICSID Tribunals have had no difficulty in holding that a host state’s defense of its treatment of the investor would be based in its

<sup>16</sup> UNCITRAL Arbitration Rules, 31 UN GAOR Supp No 17, UN Doc A/31/17 (1976).

<sup>17</sup> See generally Antonio Parra, “Applicable Substantive Law in ICSID Arbitration Initiated Under Investment Treaties”, 16 ICSID Review No.1, at pg.21.

<sup>18</sup> Vienna Convention of the Law of Treaties Vienna, 23 May 1969, in force 27 January 1980, 1155 United Nations Treaty Series 331; 8 International Legal Materials (1969) 679.

<sup>19</sup> Id. Articles 2(1)(a) and 31 (3)(c)

obligations imposed by other international conventions in which it is part of (Peterson & Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, 2003). In the case of *SPP v. Egypt*, the Tribunal took seriously the argument that a host state's failure to interfere with an investment might have been contrary to its international law commitments under a UNESCO Convention on the protection of cultural antiquities (*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, 1993). In this particular case, the human rights argument was not persuasive; however it signaled that ICSID tribunals may take the state's broader international law commitments into account, in order to establish that state's compliance with its investment treaties commitments to foreign investors (Peterson & Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, 2003).

However, In *CME v Czech Republic* (*CME v Czech Republic*, Final award, 2003), while referring to a provision on applicable law in a bilateral investment treaty, the tribunal stated that the basic mandate of the Treaty obligates the Tribunal to "decide on the basis of law", which is a self explanatory confirmation of the basic principle of law to be applied in international arbitration according to which the arbitral tribunal is not allowed to decide *ex aequo et bono* without given authorization by the parties.<sup>20</sup>

There are quite a few principles of international human rights law, international environmental law and other branches of international law that can be regarded as being *jus cogens* in character. Furthermore, there are many rules of customary international law or universally accepted general principles of international law that are binding on all states except for those which are subsequent and persistent objectors (Cassese, 2005). An investment tribunal operating on the basis of public international law would be expected to have

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<sup>20</sup> See Art. 33(2) UNCITRAL Arbitration Rules and Art. 17(3) ICC Arbitration Rules). Article 42(3) of the ICSID Convention is to the same effect.

regard for such principles when issuing its awards (Subedi, 2008)<sup>21</sup>. The ICSID tribunal in the *Methanex* case went on to assert that “as a matter on international constitutional law a tribunal has an independent duty to apply imperative principles of law of *jus cogens* and not to give effect to parties’s choices of law that are inconsistent with such principles” (*Methanex corporation v United States of America*, 2005).

Article 53 of the Vienna Convention on the Law of Treaties provides that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”; and Article 64 of the same Convention notes that “if a new peremptory norm of general international law emerges, any existing treaty which has conflict with that norm becomes void and terminates”.

It is clear then that when there exists a BITs which falls in conflict with such principles of international human rights law considered as *jus cogens*, it is possible for the states to breach the BIT treaty in order to comply with its human rights obligations. The actual problem is that there are many human rights principles which are not considered to be *jus cogens*; furthermore, they are considered as second-generation human rights; such are the ones usually implicated in investment disputes, and it is in these situations in which the measures taken by the state would be found by the arbitrator tribunal to be in violation of its BIT obligations, this being a consequence of the absence of explicitness in the BITs, which allow states to take required measures in order to comply with its human rights obligations (Schutter, 2008).

In conclusion, arbitral tribunals can take into consideration the rules of International law in order to apply and interpret the BITs. However, they are not in total capacity of justifying the breach of a BIT on ground of the State’s compliance with human rights obligations,

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<sup>21</sup> See generally William Michael Reisman, “The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold”, 15 ICSID Review (2000).

especially when the breach of the treaty has not been in consideration of one of those principles that had been considered *jus cogens*; however in some cases the States can justify certain measures as included in the exception of public purpose.

Recently, some BITs are starting to recognize the importance of establishing the rights of states to take certain measures related with environment concerns<sup>22</sup>, however there are not BITs which have the same sort of exceptions related with measures to protect human rights for those living in the host state.

## 5. INTERNATIONAL ARBITRATION CASES CONCERNING HUMAN RIGHTS GROUNDS.

In several occasions, investment arbitrations awards have referred to human rights jurisprudence in order to support substantive or procedural rules, or to deal with alleged conflicts between human rights and international investment law (Fry, 2007).

In the *Mondev v. United States* case under NAFTA, a Canadian real estate developer made a claim before the tribunal in which it objected to its treatment on the part of US courts. While ruling on *Mondev's* claim that it had not received "treatment in accordance with international law", the tribunal examined the case-law of the European Court of Human Rights with respect to Article 6(1) which provides, among other things, a right to a court hearing (*Mondev International Ltd. v. USA*, 1999). In other arbitration cases, including the *Tecmed v. Mexico* case, arbitrators have looked to human rights case-law for assistance in interpreting the BIT obligations owed to investors in relation to expropriation of property.

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<sup>22</sup> The provisions in Art 10.12 of the FTA between Chile and the US, read as follow "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns".

One case in which can be said that the arbitral tribunal tried to take into account the human rights obligations of the host states was the tribunal in the *Methanex v United States*. The NAFTA tribunal said: [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulatory government to the then putative investors contemplating investment that the government would refrain from such regulations.

Lately, the majority of the cases which have arisen are in relation with the right to the availability of water; ten of such cases have been brought against Argentina, and two others were brought against Bolivia and Tanzania respectively (Peterson, "Human Rights and Bilateral Investment Treaties" mapping the role of human rights law within investor-state arbitration: Rights and Democracy, 2009). In these cases, governments have started to base their arguments on human rights ground; that is why whenever the arbitrator previously tried to avoid the direct analysis of these arguments, now they have started to give relevance and importance in the arbitration procedure.

In the *Aguas Argentina* case (pending of award), in a response of a petition for *amicus curiae*, the arbitral tribunal established that "the tribunal focused on the fact that the dispute centered around water services provided to millions of people, and thus may have raised a variety of complex public and international law questions, including human rights considerations" (Suez, et al.v. Argentina, Order in response to a petition for transparency and participation as *amicus curiae*, 2005).

In this case, a large consortium of foreign investors created a local entity (Aguas Argentina S.A.), along with local investors, to sign a 30 year contract whose purpose was to manage the water sewage concessions. Over the course of this investment, many differences

arose between the investors and local authorities, mainly because of host issues. In the midst of the Argentina financial crisis, the government ruled for a freezing in water prices charged to consumers, decision which was contested by Aguas Argentina, on the ground that the latter was contractually entitled to make modifications in the tariff rates charged to end users, to account for inflation and to ensure “economic equilibrium” of the project over time.

The Government of Argentina argued that Aguas Argentinas, which was a local company, was party to the concession contracts and that the foreign investors –who were not themselves signatory to such contracts– should not be able to bring an arbitration case which depends upon the alleged breach of those contractual commitments. Rather, it would have to be the local company the one to pursue the matter in the local courts. Furthermore, the Government countered that Aguas Argentinas has not met its contractual obligations in regards to water quality and supply. The foreign investors resorted to international arbitration, and on August 2006, an arbitration tribunal ruled that it held jurisdiction to examine the investors’ allegations on their merits (Suez Sociedad General de Aguas Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic, 2006).

This case should become of great importance once a final ruling takes place; even though there is no implementation of a doctrine of precedent in bilateral investment treaties, the way in which the arbitral tribunal bases the award should prove to be a point of reference in future BIT disputes involving human rights issues.

## 6. CONCLUSION AND RECOMMENDATIONS

Investment treaties must include explicit human rights provisions in order to protect the ability of states to take appropriate measures under their international human rights obligations. While it is expected that Tribunals would interpret BIT provisions in a manner that does not ignore a host state’s international obligations, under the actual rules of international arbitration there is no obligation for

arbitral tribunals to take into consideration the human rights arguments of host states when they are not directly related with *jus cogens* norms. At the same time, while the existing jurisprudence on states exercising their authority for public purpose gives way to the integration of regular regulations, the absence of human rights clauses within BITs has resulted in extreme interpretations of the permissibility of such actions under International Investment Agreements clauses.

If states start to include human rights clauses into Bilateral Investment Treaties, each of the investment clauses within the treaty would have to be interpreted in the light of the realization of the state's human rights obligations. Whenever there are no clear rules contained in investment treaties which would allow the state to take the required measures in order to comply with its international human rights obligations, the state may not be open to take the risk of being found in violation of former obligations, because of the arbitral award this would probably lead to.

The inclusion of this sort of clauses leads to the necessity of addressing issues such as the fact that arbitrators would need to have some level of expertise in this arena. As noted earlier, there are no specific requirements to arbitrators in relation with a specific area of expertise. One party might or might not select an arbitrator with some background in human rights issues, but there are currently no assurances that those selected to preside over disputes will display knowledge and sensitivity to human rights concern.

There is also necessity to define the best way to include these clauses; one way to accomplish this could be as exceptions, as the ones contained in Art. XX of the GATT 1994, or through a general clause allowing such agreements to be revised if it appears that they will conflict with the commitments of State towards fulfilling their human rights obligations. In any case, it is very important that the manner in which these clauses are to be included is studied and revised carefully; the objective needs to remain that states can rely on

these provisions, and not that their implementation or enforcement becomes impossible.

Substantive and procedural changes need to be made within the different rules which regulate the arbitral rules to address Investor-State arbitrators, and among the first and most important there is the necessity of giving more transparency to the process through the publication of arbitral awards, the inclusion of specific clauses allowing the participation of *amicus curiae* in the process and the implementation of a doctrine of precedent which gives more uniformity to the system.

There is no doubt that States may feel conscious to include these provisions in Bilateral Investment treaties, because it would make foreign direct investment less attractive, or because it could affect the State's competitive position on international markets. Thus, it is important to reconsider the idea of the creation of a Multilateral Agreement on Investment, which aside from including provisions related with human rights or environment issues, would ensure implementation to all the members in the same way.

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### **International Instruments**

North American Free Trade Agreement

Statute International Court of Justice

International Covenant on Economic, Social and Cultural Rights

United Nation Commission on International Trade Law arbitration rules

International Chamber of Commerce arbitration rules

Charter United Nations

Convention on the Settlement of Investment Disputes between States and  
Nationals of Other

States.