Reimagining the International Legal Order

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and Ankit Malhotra

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

20 Public interest in investment arbitration: The rapid ascent of human rights, labour law and environmental law

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Introduction

Much of the thinking on the relevance of human rights law in investment arbitration has arisen in the context of reflections on what has been referred to as a "systemic crisis" or "legitimacy crisis"[1] in the system of investment arbitration, albeit questions concerning the extent to which States' human rights or environmental obligations may come into play in arbitration under International Investment Agreements, have attracted interest in the literature since the early 2000s.[2]

A tension between an understanding of the arbitral process in investment arbitration as fundamentally concerned with private, merely consensual rights (the commercial arbitration model)[3], as opposed to one that discerns "the

1 See for example, T. Landau, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), pp. 367–372, p. 367, in "Flaws and Presumptions Rethinking Arbitration Law and Practice in a New Arbitral Seat". The Mauritius International Arbitration Conference 2010, Papers from the joint conference of the Government of Mauritius UNCITRAL, PCA, ICSID, ICC, ICCA and LCIA held in Mauritius on 13 and 14 December 2010; M. Toral and T. Schultz, "The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations", pp. 577–602, in M. Waibel, A. Kaushal, K.-H. Liz Chung and C. Blachin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law, The Hague, 2010); B. Simma, "Foreign Investment Arbitration: A Place for Human Rights?" ICLQ, vol. 60 (July 2011), 573–596, p. 575; T. Gazzini, "States and Foreign Investment: A Law of the Treaties Perspective", pp. 23–48 in S. Lalani and R. Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (Brill Nijhoff, 2015), p. 23.

2 United Nations Conference on Trade and Development, *Selected Recent Developments in IIA Arbitration and Human Rights,* IIA Monitor No. 2 (2009) International Investment Agreements, United Nations, 2009. UNCTAD/WEB/DIAE/IA/2009/7, p 2-3. In particular note the work, for example, of the United Nations High Commissioner for Human Rights (High Commissioner for Human Rights, Liberalization of Trade in Services and Human Rights, 25 June 2002, (E/CN.4/Sub.2/2002/9) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/141/14/PDF/G0214114.pdf?OpenElement> accessed on 20 November 2021; UN High Commissioner for Human Rights, Report on Human Rights, Trade and Investment, 2 July 2003 (E/CN.4/Sub.2/2003/9)<(https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement> accessed on 20 November 2016.

3 See Van Harten's observation that "there is a general tendency in investment treaty arbitration in favour of a commercial arbitration approach", G. Van Harten, *Investment Treaty Arbitration*

DOI: 10.4324/9781003388821-24

international law" (in a pivotal role), and what have been called the public law strands, in addition to the commercial strand in the arbitral process, runs through the literature on the relationship between investment law and human rights, as a leitmotiv.

As pointed out by Christopher Greenwood, "[i]n marked contrast to 'ordinary' commercial arbitration", in which the legal basis for the arbitrators' jurisdiction is usually an agreement between the two parties to the arbitration, in investment treaty arbitration that jurisdiction is derived from a treaty between two States to which the investor is not a party."[4] In other words, even if seen as possessing a *sui generis* or a hybrid character,[5] investment arbitration is essentially grounded in a treaty and the "interpretation of the extent of the arbitrator's jurisdiction and the rules which the treaty enjoins them to apply, requires recourse to the public international law rules on treaty interpretation rather than the contractual principles with which many arbitrators will be more familiar".[6]

Seen from a practical perspective on the other hand (i.e. the arbitrator's point of view), in investment arbitration, as put by Toby Landau, your mandate "unlike commercial arbitration" is "to review the exercise of discretion by a sovereign by way of its executive, its legislative even its judiciary".[7] In this exercise moreover, "[y]ou are tasked [...] with applying extremely broadly worded standards".[8] Often investment treaties would be silent about human rights. Yet, the "beyond the immediate parties" elements of investment arbitration can be well summarized in Landau's own observations:

> You are supposedly to rule upon the interest of an individual investor and yet in doing so, you may well impact upon a whole community. If you are going to rule that a carbons emission quota system is contrary to a Bilateral Investment Treaty ("BIT"), in order to safeguard the interest of a particular coal-fired power plant in a country, then, you may well be

and Public Law (OUP 2007), 121 as cited in R. Castro de Figueiredo, "Fragmentation and Harmonization in the ICSID Decision-Making Process", pp. 506–530, in J E. Kalicki and A. Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century* (Brill Nijhoff 2015), p. 511.

4 C. Greenwood, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), pp. 373–378, p. 373 in "Flaws and Presumptions Rethinking Arbitration Law and Practice in a New Arbitral Seat". The Mauritius International Arbitration Conference 2010, Papers from the joint conference of the Government of Mauritius UNCITRAL, PCA, ICSID, ICC, ICCA and LCIA held in Mauritius on 13 and 14 December 2010.

5 Z. Douglas "The Hybrid Foundations of Investment Treaty Arbitration" British Yearbook of International Law, 2003, vol. 74 (issue 1), 151–289, p 151.

6 C. Greenwood, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), op cit, p. 374.

7 T. Landau, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), op cit, p. 367.

8 Ibid.

> impacting upon a whole environment policy of an entire nation. If you are going to rule on the rights of an investor in the water system of Tanzania, you may well be affecting 350 000 water users in Dar Es Salaam. If you are going to question and rule upon South Africa's policy in favour of black economic empowerment, in order to safeguard the interest of the individual mining interest before you the wider impact is obvious. And, you do so with the ability to impose damages unlike many public law municipal systems and those damages may be significant. You have the power to affect the most extraordinary allocation of public funds.[9]

Against that backdrop, it is not surprising that arbitrators with jurisdiction over international investment disputes are increasingly confronted with human rights arguments.

This chapter looks into the growing incidence of human rights (including labour rights) and environmental protection issues in the context of investment claims. It takes my original reflections surrounding the question "Are human rights arbitrable within an investment claim?" addressed in a 2016 article entitled "Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris vs. Uruguay"[10] a stage further. I submit that the investment arbitration regimes are coming of age in their communication with "other laws" (to borrow a term used by the International Law Commission). The "right to regulate" environmental protection, human rights and labour rights is likely to be increasingly present in trade agreements as the new generation of trade agreements shows. If the question in the past put simply, in the words of former ICJ Judge Bruno Simma, was "are a State's obligations to its own population to be weighed against investor rights under BITs?",[11] today it is rather the various manners by which "other law" becomes relevant in the decision-making of arbitral tribunals. What follows is a sketchy discussion of some of the different ways in which human rights, environmental protection and public interest issues may be subject to determination in the context of investment arbitration cases

A new wave of Bilateral Investment Treaties and Free Trade Agreements

A new generation of Bilateral Investment Treaties and Free Trade Agreements is seeking to expressly enforce human rights law, environmental law and other relevant public law in the context of investment law. As noted by Briercliffe et al., for example, "a number of "new-generation" [International Investment Agreements] (or proposed International Investment Agreements) are starting

9 Ibid., 367–368. Footnotes omitted.
10 Journal of International Arbitration, vol. 34, issue 4 (2017), 601–630.
11 B. Simma, op cit, p. 591.

to include direct and binding human rights obligations on companies".[12] Notable instances, as observed, are the 2012 South African Development Community Model bilateral investment treaty, the 2016 draft Pan-African Investment Code, and the 2016 Morocco-Nigeria BIT. Specific references to human rights obligations assist an arbitral tribunal in the interpretation of investment treaties in harmony with those primary rules. Further examples in which human rights and environmental obligations are set out for investors in an investment instrument can be seen in Annex II of the Brazilian-Angolan Co-operation Agreement for the Promotion of Investments as follows:

> Investors and their investments will use their best efforts to observe the following voluntary principles and standards for responsible and consistent business conduct with the laws adopted by the State Party receiving the investment:
>
> i. Respect the protection of the environment and sustainable development and encourage the use of technologies that do not harm the environment, in accordance with the national policies of the Parties, in order to encourage economic, social and environmental progress;
> ii. Respect the human rights of those involved in the activities of these companies, in accordance with the international obligations and commitments of the receiving Party.[13]

The same applies to environmental protection.

Ways in Which Human Rights, Environmental Protection and Other Public Law Areas May Be Brought into the Realm of Investment Law Treaty

There are at least three ways in which human rights, environmental protection and other public law areas are being brought into the realm of investment law via this new generation of treaties. By way of (1) preambular dispositions; (2) protecting the "right to regulate" using general exception clauses; and (3) carving out these areas.

Preambular disposition

An example of a preambular disposition in which environmental protection is brought into the ambit of the treaty so that this is interpreted consistently with sustainable development and environmental protection and conservation

12 N Briercliffe et al, "Human Rights-based Claims by States and "New Generation" International Investment Agreements (Kluwer Arbitration Blog, 1 August 2018).

13 Author's translation. In Portuguese, in the original <https://www.acerislaw.com/wp-content/uploads/2021/04/Brazilian-Angola-Investment-Agreement.pdf> accessed on 4 June 2022.

is the Australia-Chile Free Trade Agreement (FTA) of 2008 which entered into force on 6 March 2009. The relevant passage in the preamble reads:

> "Implement this Agreement in a manner consistent with sustainable development and environmental protection and conservation"[14]

Another example in the same vein, is the preamble of the 2018 EU-Singaporean Free Trade Agreement[15], which provides that the parties must "regard to the principles articulated in The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948".[16]

The preamble of a treaty sets out the object and purpose of the treaty and thus it is relevant for the interpretation of the treaty as per the Vienna Convention on the Law of Treaties.[17]

General exception clause

An example of introducing "right to regulate" powers, including with respect to environmental matters, is Article 12(3) of the United States Model Bilateral Investment Treaty (BIT) of 2012:

> The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.[18]

Carve-out

By contrast to the above, some trade agreements rather carve-out from the spectrum of possible breaches, measures intended to ensure human rights obligations, environmental protection, labour obligations and other rights

14 Available here <https://www.dfat.gov.au/trade/agreements/in-force/aclfta/fta-text-implementation/Pages/preamble> accessed on 3 June 2022.

15 <https://www.acerislaw.com/wp-content/uploads/2021/04/2018-EU-Singaporean-Free-Trade-Agreement.pdf>.

16 Ibid.

17 Vienna Convention on the Law of Treaties, art 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

18 Available here < https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed on 5 June 2022.

to regulate matters. An example of a carve-out provision is contained in the Belgium/Luxembourg-Colombia BIT (Article IX(Expropriation and Compensation) (3)(c)) as follows:

> Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non- discriminatory measures of a Party that are designed and applied for public purposes or with objectives such as [...] environment protection, do not constitute indirect expropriation.[19]

Labour rights in international trade law instruments

The inclusion of labour law provisions within international trade law instruments is also now a growing phenomenon, in the protection of transnational labour rights. The Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), a treaty between the Central American countries and the Dominican Republic with the United States, is instructive in that sense. The *USA vs. Guatemala*[20] dispute under CAFTA-DR, was "the first instance in which a labor law complaint was disputed under the arbitration mechanisms of a free trade agreement".[21] It was the first case of breach of labour rights that was aired within the framework of a free trade agreement.

In the CAFTA-DR treaty (in force since 2005) the economic, commercial, social and labour objectives constitute an inseparable whole, and all its commitments are mandatory. The commitments assumed in labour matters as well as in the environmental aspect are not accessory or secondary issues of the agreement, but aspects whose good progress affects the other aspects contemplated in the agreement, among them, trade and access to markets.

Guatemala assumed commitments in labour matters and even before the entry into force of CAFTA-DR its authorities recognized several of the necessary changes to be made and received international cooperation for so doing.

The treaty states that both Parties "reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and Its*

19 BLEU (Belgium-Luxembourg Economic Union)-Colombia BIT (2009), Available on <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/342/download> accessed on 8 July 2022.

20 CAFTA-DR Panel Report, *In the Matter of Guatemala- Issues Relating to the Obligations Under Article 16.2.1 (a) of the CAFTA-DR.*

21 Phillip Paiement, "Leveraging Trade Agreements for Labour Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute", Georgetown Journal of International Law, vol. 49, pp. 675–692. Available on: <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2018/08/GT-GJIL180022.pdf accessed on 1 May 2022>.

Follow-Up (1998) (ILO Declaration)" and "shall strive to ensure that such labour principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law",[22] which includes provisions relating to right of association, collective bargaining, forced labour, child labour, acceptable working conditions regarding minimum wages, hours of work and security and occupational health. The treaty also states that each Party "shall not fail to effectively enforce its labor laws" (Article 16.2.1(a)) In addition, the signatory countries undertake not to fail to effectively apply their labour legislation, in a way that affects trade between the Parties (Art. 16.2.1).[23]

That is to say, Guatemala undertook to respect its own legislation contained in the Political Constitution, in the international conventions that it has ratified and in national legislation, and to ensure adequate administrative and judicial mechanisms so that workers have access to fair and transparent procedures. However, as argued by the unions, "it has severely failed to comply with these elementary obligations for a long time. According to Chapter 20 of DR-CAFTA, the State of Guatemala assumed the consequences of a sustained or recurring breach of its own labour legislation, which can cause significant monetary sanctions and even suspension of tariff benefits".[24]

Since 2008, unions (from different employment sites in sectors including shipping, agriculture and textile manufacturing) have filed several cases alleging that Guatemala has failed to effectively enforce its domestic labour laws with regard to freedom of association, the right to organize and bargain collectively and acceptable working conditions.[25] As put by Ricardo Changala, the adviser to the unions that initiated the process, "after a long process of promises from the Governments of the day to make the necessary changes to meet the commitments assumed in the DR-CAFTA, on 9 August 2011, the United States requested the establishment of an arbitration panel (Arbitration Group) under article 20.6 in relation to the lack of effective application of labour legislation by the Guatemalan government".[26] The lack of progress since that date, led to the fact that on 26 April 2013, the governments of the United States and Guatemala signed the 18-point Execution Plan, which included concrete actions with specific deadlines with which Guatemala had to comply within six months, so as to improve the application of labour legislation. Among other commitments, Guatemala had promised to strengthen labour inspections, streamline and simplify the process of sanctioning employers, increase compliance with labour legislation by companies involved in export activities,

22 Art 16.1.1.

23 <https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf >.

24 Interview with Ricardo Changala, adviser to the unions that filed the complaints (2008) that originated the process (date of the interview, 25 May 2015).

25 Ibid.

26 Ibid.

improve supervision and compliance with court orders, reinstate workers fired for trying to organize unions, publish labour information and legislation and establish mechanisms to ensure that workers are paid when factories close.[27]

Finally, on 3 November 2014, the United States presented the formal claim to be examined by an arbitration panel that was formed and that, since that date, was receiving arguments from both parties but also from non-governmental organisations interested in the matter.[28]

In April 2015, the unions presented their Memorial. On 14 June 2017, the panel issued a report deciding on the case.[29] As noted by Parliament, "while the United States was successful in demonstrating that the Guatemalan government had failed to enforce its labor laws on a number of occasions and at a number of enforcement sites, the United States ultimately failed to prove that these actions affected trade between the two countries, and thus lost the dispute".[30]

While Parliament observes that the arbitral panel's decision in the Guatemalan example demonstrates "the limitations that arbitration poses for the participation of labour advocates and the constraints that arise from the 'affecting trade' provisions in [Free Trade Agreements]",[31] the trend today shows that the direction of travel, however, is towards the inclusion of labour matters in Free Trade Agreements. By way of example, see the Republic of Korea-EU BIT.[32] In a recent arbitration arising from labour related matters under that BIT, Korea cited as authority the labour dispute under the Dominican Republic-Central America- US Free Trade Agreement seen above, and argued that "[t]hat panel in essence took the view that the failure to comply with or enforce labour laws does not necessarily and automatically result in trade diversions or distortions or affect trade flows".[33] The arbitral tribunal, however, found otherwise, and held that the Republic of Korea was in breach of labour commitments under the Free Trade Agreement with the European Union (EU). In its reasoning, the Tribunal *inter alia* stated:

> 65. The language of 'fundamental rights' in the context of the ILO Constitution and 1998 Declaration directly conflicts with Korea 's contentions in relation to a 'trade-relatedness' limitation: '(u)niversality of its standards is a fundamental part of the ILO's approach'. In replicating the

27 Ibid.

28 All the documentation known to date in relation to the claim can be found on the following website <http://portaldace.mineco.gob.gt/node/89>.

29 CAFTA-DR Panel Report, *In the Matter of Guatemala- Issues Relating to the Obligations under art 16.2.1 (a) of the CAFTA-DR.*

30 Phillip Paiement, op cit, p. 676.

31 Ibid., 676–677.

32 Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement. Report of the Panel of Experts (Jill Murray, Professor Laurence Boisson de Chazournes, Professor Jaemin Lee), 20 January 2021 <https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf> accessed on 15 June 2022.

33 Ibid., as per Korea's arguments, para 58.

> language of the 1998 Declaration, the Parties give direct expression to this universality principle. For example, the text of Article 13.4.3 refers to 'the elimination of all forms of forced or compulsory labour', which is unequivocal in its universal scope. The key principle of the fundamental right of freedom of association is that every worker and employer has the right to join an association of their own choosing, with only limited exceptions as determined through the relevant processes of the ILO. The Parties have drafted Article 13.4.3 in such a way as to exclude the possibility that this domestic commitment to achieve or work towards these key international labour principles and rights exits only in relation to trade related aspects of labour.
>
> 66. One outcome, if Korea's position were correct, would be that Article 13.4.3 would permit a Party to institute a form of slavery or child labour for workers who were deemed not to fall within the category of 'trade-related labour'. This is clearly antithetical to the unambiguous meaning of the text of Article 13.4.3, which refers to elimination of such practices with no express exceptions.[34]

As per the EU's publicising of this decision, "The independent panel concluded that the Republic of Korea needs to adjust its labour laws and practices and to continue swiftly the process of ratifying four fundamental International Labour Organization (ILO) Conventions in order to comply with the agreement."[35]

The panel of experts found that the Republic of Korea had "to adjust its labour laws and practices to comply with the principle of freedom of association" and "agreed that the commitment to take steps towards the ratification of fundamental ILO Conventions requires ongoing and substantial efforts".[36]

Interpretative route

The "master key" to international law (or the principle of systemic integration)

But even treaties in which there is no mention of human rights or the environment (or other law) may require engaging with such topics. Public interest via primary rules of human rights or environmental law may be relevant to the interpretation of investment treaties if one is to conceive investment law as part of a system.

To the question: are substantive human rights standards within the BIT necessary for an arbitral tribunal to be competent to rule on human rights

34 Report of the Panel of Experts op cit, paras 65, 66.

35 European Commission, "Panel of Experts confirms the Republic of Korea is in breach of labour commitments under our trade agreement", 25 January 2021 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203>.

36 Ibid.

issues or environmental issue? The answer would be yes; unless "those [rights] related to the protection of the investor's property may at the same time constitute a breach of a particular treaty obligation and hence fall within the realm of the tribunal's competence",[37] or "if and to the extent that the human rights violation affects the investment, it will become a dispute "in respect of" the investment and must hence be arbitrable".[38]

Two key questions in that context are: Is there a presumption of coherence within existent international law even if "to be handled with care, and on a case by case basis"?[39] Moreover, does party autonomy have a limit (i.e. *jus cogens*, multilateral obligations owed to third parties)? These two fundamental questions underline some of the thinking on the subject produced by Simma. He remarked in that sense that whilst Article 31 (3) (c) of the Vienna Convention on the Law of Treaties (VCLT)[40] would indeed enshrine this presumption of coherence within existent international law, a principle held in the *Oil Platforms* case[41] by the ICJ,[42] party autonomy would find its limits "in the presence of *jus cogens* (as was the case in *Oil Platforms*) or of certain multilateral obligations owed to third parties".[43]

The interpretative gate draws on from the work of the International Law Commission (ILC)[44] on "Fragmentation of International Law", which termed

37 C. Reiner and C. Schreuer, "Human Rights and International Investment Arbitration" in PM Dupuy, F Francioni & EU Petersmann (eds), *Human Rights in International Investment Law and Arbitration*, p. 83. As in *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 95 ILR 184 (27 October 1989).

38 C. Reiner and C. Schreuer, op cit, p. 84.

39 B. Simma, op cit. p 584.

40 art 31 of the VCLT reads:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:
   [...]
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) **any relevant rules of international law applicable in the relations between the parties** (emphasis added).

41 *Oil Platforms (Islamic Republic of Iran v United States of America)* Judgment [2003] ICJ Rep paras 73–78. See, in particular, para 41 of the judgement citing VCLT art 31(3)(c)

42 B. Simma, op cit, pp. 583–584.

43 ibid584. As noted by McNair, indeed "It is difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever to freedom of contract", *Lord A.D. McNair, The Law of Treaties* (Oxford: Clarendon 1961), 213–214.

44 ILC, "Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law", Report on the Study Group of the International Law Commission (Finalized by Martti Koskenniemi), para 37, A/CN4/L682 (13 April 2006).

Article 31 (3) (c) of the VCLT to be "the *master key to international law*",[45] or the solver of "a systemic problem – an inconsistency, a conflict"[46] between different rules, often as a consequence of the emergence of the functional specialization of regulatory regimes in international law (i.e. "trade law", "human rights law"). The ILC held in that sense that "[i]n International Law, there is a strong presumption against normative conflict".[47]

There are four fundamental propositions which relate to the notion of "the master key to international" from the work of the International Law Commission (ILC) on fragmentation of international law. These are: (a) conflict-resolution and interpretation cannot be distinguished from each other; (b) International law is understood as *a system*; (c) All international law exists in a systemic relationship with other law (therefore in interpreting a rule one ought to look into the *normative environment* of a treaty); and (d) A limited jurisdiction does not imply a limitation of the scope of the law applicable in the interpretation and application of the treaty. I shall look at each one in turn.

(a) Conflict resolution and interpretation cannot be distinguished from each other

As pointed out by the ILC, Article 31 of the VCLT "has helped to place the problem of treaty relations in the context of treaty interpretation".[48] Although authors like Simma himself have warned "[a]s against such enthusiasm, I would advise keeping in mind what the provision was designed to be, namely a principle for the interpretation of treaties, nothing more",[49] and stated "[w]hat can article 31 (3) (c) yield as an entry point for international human rights law in the interpretation of an investment treaty? [...] it can only be employed as a means of harmonization *qua* interpretation, and not for the purpose of modification, of an existing treaty",[50] the fact is that the mere notion of "conflict" implies already an *interpretation* exercise.

Thus, the ILC has stated in that regard that "contrary to what is sometimes suggested, conflict resolution and interpretation cannot be distinguished from each other. [...] Rules appear to be compatible or in conflict *as a result of* interpretation".[51]

45 Ibid., para 420. As noted by Simma, the "term was coined by the ILC member (now ICJ Judge) Xue Hanqin during a more recent commission debate on the significance of art 31 (3) (c)". B. Simma, op cit, p 584.

46 ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, para 420.

47 Ibid., para 37.

48 UN Report of the International Law Commission, Fifty-seventh session (2 May–3 June and 11 July–5 August 2005), GA Sixtieth session, A/60/10, para 467.

49 B. Simma, op cit, p 584.

50 Ibid.

51 ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, op cit, para 412.

(b) International law understood as a system

Article 31 of the VCLT would be a reflection of the principle of "systemic integration" or "a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law—in other words, international law *understood as a system*".[52] The question of the relationship of different rights or obligations "could only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole".[53]

(c) All international law exists in systemic relationship with other law

The ILC noted that "[i]t is sometimes suggested that international tribunals or law applying (treaty) bodies are not entitled to apply the law that goes "beyond" the four corners of the constituting instrument or that when arbitral bodies deliberate the award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute or the relevant *compromise*. But if, [...], *all international law exists in systemic relationship with other law*, no such application can take place without situating the relevant jurisdiction endowing instrument in its normative environment."[54] In the words of the ILC, this means that "although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret* and *apply* that instrument in its relation to its normative environment- that is to say "other international law".[55]

An instructive example of the application of such a principle when looking into State obligations under two different regimes, such as investment law and human rights law, can be found in the *Sawhoyamaxa Indigenous Community v. Paraguay*,[56] a case adjudicated by the Inter-American Court of Human Rights, in which the State alleged obligations under a BIT as a defence for breaches of the American Convention. The Court stated in that regard:

> 140. Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, **according to the State, said convention allows for capital investments made by a contracting party to the condemned or nationalized for a "public purpose or interest", which could justify land restitution to indigenous people. Moreover, the**

52 UN Report of the International Law Commission, Fifty-seventh session (2 May–3 June and 11 July–5 August 2005), GA Sixtieth session, A/60/10, para 467.

53 ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, para 414.

54 Ibid., para 423.

55 Ibid.

56 Inter-American Ct. of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs).

> **court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with State obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention,** which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend on reciprocity among States.[57] [Emphasis added]

The judgement of the Inter-American Court prompted Paraguay's passing Law No. 5194, which called for the expropriation of specific foreign-owned land, whilst providing for compensation to be set via an official appraisal. As two affected landowners sought a challenge to the constitutionality of the legislation, the matter was referred to Paraguay's Supreme Court, which found the transfer of the expropriated land to the indigenous community to be a "public interest purpose" for the purposes of the Paraguay Constitution.[58]

Coming back to the ILC work, it is to be noted that it emphasized that "[t]he way in which 'other law' is 'taken into account' is quite crucial to the parties and to the outcome of any single case".[59] But moreover, the principle of systemic integration would "look beyond the individual case" and make sure that "the outcome is linked to the legal environment".[60] In this analysis, the legal environment would be other obligations relevant to the interpret the investment law dispute. The dangers of "isolating" legal institutions from one another was referred to by the ILC as follows:

> To hold those institutions as fully isolated from each other and as only paying attention to their own objectives and preferences is to think of law only as an instrument for attaining regime-objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of 'systemic integration' it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or 'regime".[61]

(d) A limited jurisdiction does not imply a limitation of the scope of the law applicable in the interpretation and application of the treaty

57 Ibid., para 140.

58 Sentencia de la Corte Suprema de Paraguay, "Acción de Inconstitucionalidad: Kansol S.A. y Roswell Company S.A. C/ La Ley No 5194 que declara de interés social y expropia a favor del Instituto Paraguayo del Indígena (INDI), 30 Septiembre 2014<https://elaw.org/es/system/files/_caso-sawhoyamaxa-rechazo-de-inconstitucionalidad_0.pdf>.

59 ILC, Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, para 480.

60 Ibid.

61 Ibid., para 481.

Finally, from this perspective, whether a tribunal would be able to look into "other law" is not a jurisdictional matter but rather a matter of substantive law (law applicable in the interpretation and application of the treaty). The ILC asserted in that connection: "The jurisdiction of most international tribunals is limited to particular types of disputes or disputes arising under particular treaties. *A limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties.*"[62] The ILC noted, that in the WTO context, for example, "a distinction has been made between two notions, jurisdiction and applicable law".[63]

Having set out the above, I turn to some practical examples in which human rights and environmental law have arisen (in some cases, quite successfully so) in investment law claims.

Human Rights and Environmental Law in the Defence of a Claim via Interpretation of a Treaty

The tension between investment law and human rights has been particularly felt in the Latin American region. The last decades have witnessed what has been referred to as "an explosion in Latin American investment arbitration".[64] Latin America has, after all, more bilateral investment treaties than any other region in the world.[65] Some of these disputes have arisen from regulatory measures involving matters of public interest, such as health, environment or economy.[66] Take the case of *Metalclad*,[67] in which a waste management business sued Mexico for expropriation after it was denied permission to operate a landfill it had constructed. In its submissions, the government had described the claimant's landfill to be a "threat to health and safety" because it was in fact a hazardous waste landfill.[68] Furthermore, Mexico adopted an ecological decree declaring the area where the company was seeking to operate the waste landfill, to be a natural reserve. An arbitral tribunal constituted under Chapter Eleven of the North America Free Trade Agreement (NAFTA) found that the government had taken a measure tantamount to expropriation and ordered

62 Ibid.,, para 45 (emphasis added).

63 Ibid.

64 J. Hamilton, "A Decade of Latin American Investment Arbitration", pp 69–82, in M. Mourra and T. Carbonneau (eds), *Latin American Investment Treaty Arbitration: The Controversies and Conflicts* (Wolters Kluwer 2008),71.

65 As observed by Mourra by 2008, "Over the past two decades, Latin American States signed more than five hundred bilateral investment treaties with countries around the world". M. Mourra and T. Carbonnau (eds), *Latin American Investment Treaty Arbitration: The Controversies and Conflicts* (Wolters Kluwer 2008), 1.

66 Ibid., 2.

67 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000).

68 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Respondent's Countermemorial (22 May 1998) paras 32–33.

Mexico to pay nearly $16.7m—later reduced to $15.6m—in compensation. To some, this result was the "reverse of the established tenet of environmental policy: the principle that polluters should bear the cost of their pollution rather than be paid not to pollute".[69]

By contrast, the United States has been successful in a case against Canadian investors, *Glamis Gold v. United* States,[70] an arbitration under NAFTA, using as defence, the respect for the rights of indigenous peoples and environmental rights.

A turning point in investment arbitration in Latin America and the willingness of investment arbitration to engage with "other law" (i.e. human rights obligations) in the context of investment claims was yet to come much later with the case of *Philipp Morris v. Uruguay* case.[71] On 8 July 2016 the award in the *Philip Morris v. Uruguay* case was delivered. The case brought to centre stage the right to health in investment arbitration in the context of the examination as to whether tobacco-control measures introduced by Uruguay in compliance with international agreements amounted to expropriation under a BIT. Unlike earlier cases in which human rights arguments have been made but not dealt with centrally by the tribunals, the arbitral tribunal in this case directly engaged with the arguments raising the conflicting obligations of Uruguay under the BIT (the investors' rights) and the right to health of its population under external rules (other international agreements). In a majority vote, the Tribunal composed of Piero Bernardini (presiding), Gary Born and Judge James Crawford, found that Uruguay had not violated its international obligations under the BIT.

Another example of a successful defence raising environmental protection arguments is the case of *Pac Rim Cayman LLC v. Republic of El Salvador.*[72] The investor had sought a green light for the El Dorado mine, or approximately US$300 million in compensation in its arbitration claim. The Centre for International Environmental Law submitted an amicus in the case stating, "the implementation by the State of a normative framework designed to protect these rights against the risks posed by extractive industries is supported by international human rights obligations. Especially in a country like El Salvador, which suffers from high population density and scarcity of water resources, the application of legal requirements and administrative processes are indispensable tools for the State to safeguard the rights threatened by extractive industries".[73] The Tribunal did not engage with CIEL submissions.

69 "Private Rights, Public Problems: A Guide to NAFTA Controversial Chapter on Investor Rights", International Institute for Sustainable Development, Canada, 2001, p. 33, cited in UN High Commissioner for Human Rights, Report on Human Rights, Trade and Investment, 2 July 2003 (E/CN.4/Sub.2/2003/9), op cit at para 35.

70 *Glamis Gold LTD v. United States of America* before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement (8 June 2009).

71 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award (8 July 2016).

72 *Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No, ARB/09/12).*

73 Ibid., para 3.29.

Yet, El Salvador won the arbitration on the basis that the investor had failed to meet key regulatory requirements relating to environmental protection, namely (1) environmental impact study; (2) a feasibility study; and (3) land title and permission-to mine requirements.

The trend of cases in investment arbitration raising environmental issues is to continue and grow. Since 2012, "more than 60 investment disputes filed ... have had some environmental component".[74]

Investors bringing up public law (i.e. environmental protection) issues as part of their claim

At times, investors also resort to environmental law. In the case of *Allard v. Barbados*,[75] a Canadian investor argued that Barbados had breached its treaty obligations under a Canadian-Barbados BIT by failing to enforce environmental laws. Allard claimed that he had suffered loss and damage as a consequence of the environmental degradation at his eco-tourism site. The Tribunal found that there had not been any indirect expropriation, failure to protect foreign investment or unfair or inequitable treatment under the Canada-Barbados BIT. The case is nevertheless of note because environmental considerations may be at the basis of a potential investment claim, say in the context of harm caused by inaction within climate change scenarios. This could potentially be an area of dispute.

Take also the *Biloune v. Ghana* paradigm in which an investor requested redress also for violations of human rights in the context of an investment arbitration, as referred to before. The case concerning *Al Jazeera Media Network v. Arab Republic of Egypt*,[76] a $150m international arbitration claim arising from the enforced closure of Al Jazeera business in Cairo and the arrest and alleged harassment of its journalists, is a further example of investors' invoking human rights standards in an investment arbitration case.[77] Al Jazeera is alleging breaches of the Qatar-Egypt bilateral investment treaty, including breaches of human rights obligations, such as freedom of expression.[78]

Human rights and environmental law in a state counter-claim against investors in a claim initiated by an investor

The turning point discussed above, which was marked by the *Philip Morris v. Uruguay case*, has been taken further by the recent decision in *Urbaser v.*

74 Kate Parlett and Sarah Ewad, "Protection of the Environment in Investment Arbitration: A Double Edge Sword", Kluwer blog (22 August 2017).

75 *Allard and the government of Barbados*, PCA Case No 2012-06, Award (27 June 2016).

76 *Al Jazeera Media Network v. Arab Republic of Egypt*, ICSID Case No ARB/16/1 <http://investmentpolicyhub.unctad.org/ISDS/Details/700>.

77 "Al-Jazeera Takes Legal Action against Egyptian Government", The Guardian (27 January 2016) <https://www.theguardian.com/media/greenslade/2016/jan/27/al-jazeera-takes-legal-action-against-egyptian-government.>

78 Ibid.

Argentina,[79] relating to a concession for water and sewage services to be provided in the Province of Greater Buenos Aires, delivered in December 2016. Not only did the *Urbaser* Tribunal engage with human rights arguments, but it did so quite centrally: It had an entire section dealing with the BIT's relation to international and human rights as well as a section on the human right to water in the framework of the concession in the case. The Tribunal dismissed all allegations of breach of the Argentina-Spain BIT made by the investors (Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia [CABB]) with the exception of a breach of the Fair and Equitable Treatment standard, in relation to the renegotiation of the Concession Contract in the period between 2003 and 2005. There are three key aspects to note in this case in relation to human rights in investment arbitration: (1) *human rights in a counter-claim:* This is the first case in which a Tribunal addresses the merits of a counter-claim (relating to human rights) brought by the State in the context of investment arbitration; (2) *private parties' human rights obligations:* Human rights obligations are brought up not only at the vertical level (State obligations) but also at the horizontal level (human rights obligations on the part of the private sector); and (3) *widening of the spectrum of human rights instruments referred to:* References to human rights standards are broad and include not only the European Convention on Human Rights but also other binding and non-binding human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration on Human Rights.

Counter-claims by a State against an investor are possible under some investment treaties. There can be jurisdiction for counter-claims even in the absence of specific treaty provision (via interpretation). A counter-claim may be possible nevertheless in the following scenarios: (1) Agreed arbitration rules permit counterclaims (i.e. Article 46 of the ICSID Convention); (2) Parties consent to the tribunal taking jurisdiction over counterclaims; and (3) Dispute resolution clause in a BIT may permit claims to be brought by a State.

Agreed arbitration rules permit counter-claims

An example of this is Article 46 of the ICSID Convention), which reads:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.[80]

79 *Urbaser S.A. and Consorsio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa and The Argentine Republic,* ICSID Case No, ARB/07/26, Award (8 December 2016).

80 Convention on the Settlement of Investment Disputes between States and Nationals of Other States <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> accessed on 3 June 2022.

Parties Consent to the Tribunal Taking Jurisdiction over Counter-claims

This was the case in *Burlington Resources v. Ecuador*,[81] in which Ecuador was awarded USD 41 million in a counter-claim against US oil and gas company Burlington Resources, in compensation for environmental and infrastructure damage.

In *Burlington* as in *Perenco*,[82] another case involving Ecuador, environmental counter-claims were brought by Ecuador on the basis of domestic environmental law.

The applicable BIT may require that the investment be made and maintained in accordance with host State law.[83] Investment contract may explicitly provide that an investor has to comply with applicable host State law.[84] In such instances, the investor is obliged to comply with domestic laws of the host state governing environment protection. In the case of *Burlington*, it was found a breach of the Ecuadorian Statutory environmental regulation regime. In the case of *Perenco v. Ecuador*, the operation of the concession had had a negative effect on the environment. In this case Ecuador also brought counterclaims.

Dispute resolution clause in a BIT may permit claims to be brought by a State

An example of a BIT permitting claims to be brought by a State is the Argentina-Spain BIT. A practical application of this clause in the Argentina-Spain BIT arose in *Urbaser v. Argentina*.[85]

"We must ask ourselves how, in which situations and to what extent the state is legally capable, and politically and economically likely, to act as a claimant",[86] Toral and Schultz wrote back in 2010. The *Urbaser v Argentina* case is an instance in which a State successfully lodged a counter-claim and thus the award provides a reasoning that clarifies the position as to the situations in which a counter-claim can succeed.

The *Urbaser* Tribunal rejected the Claimant's position that the asymmetric nature of BITs prevented a host State from invoking any right based on such a treaty, including through the submission of a counter-claim. Rather, analysing the wording of the BIT under examination, it found that both investor or the host State could be a party submitting a dispute in connection with an

81 *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5 Decision on Ecuador's Counterclaims (7 February 2016).

82 *Perenco Ecuador Ltd v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015).

83 Kate Parlett, op cit.

84 Ibid.

85 *Urbaser v. Argentina*, ICSID Case No.ARB/07/26, Award (8 December 2016).

86 M. Toral and T. Schultz, "The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations", in M. Waibel, A. Kaushal, K.-H. Liz Chung and C. Blachin (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law, The Hague, 2010), pp. 577–602, p. 578.

investment to arbitration.[87] In this particular instance, Argentina had filed a counter-claim relating to the human right to have access to drinking water and sanitation. The Tribunal identified two situations in which a counter-claim was likely to fail: (1) narrowly drafted arbitration clauses, (2) lack of close connection of counter-claims based on domestic law.

One of the Claimant's main objections was that Argentina's counter-claim "had no connection with Claimant's claim under the BIT".[88] The Tribunal disagreed. It held as under:

> The Tribunal observes that the factual link between the two claims is manifest. Both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession. This would be sufficient to adopt jurisdiction over the counterclaim as well. The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimant's failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT. It would be wholly inconsistent to rule on Claimant's claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. Reasonable administration of justice cannot tolerate such a potential inconsistent outcome.[89]

From this perspective, that of a counter-claim, the question of whether the Tribunal could address the merits of the State's submissions (human rights arguments) came through a jurisdictional gate. The Tribunal found it had the jurisdiction to see the merits of Argentina's counter-claim. In an important passage of the award, the Tribunal held that:

> international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation.
>
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

87 *Urbaser v. Argentina, supra* 10, para 1143.
88 Ibid, para 1151.
89 Ibid.

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts. (No 13)[90]

The Tribunal further held that "The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights".[91]

Private companies' human rights obligations

In "The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations," Toral and Schultz explored the topic of corporate actors or private parties' obligations under human rights norms and their relevance under the terms of BITs.[92]

In *Urbaser v. Argentina* this took centre stage. Argentina quite boldly made submissions alleging that the private companies' failure to guarantee provision of water and sewage services breached the human right to water (although it did not state that such an obligation on the part of the investors was based on international law). Whilst the Tribunal did not agree with the investors that private parties had "no commitment or obligation for compliance in relation to human rights",[93] the Tribunal concluded that the duty as a guarantor of the right to water lay with the State, in line with international human rights doctrine. It supported this view on General Comments of the Committee of Experts under the ICESR. The Tribunal held:

> The human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on the part of any company providing the contractually required service. Such obligation would have to be distinct from the State's responsibility to serve its population with drinking water and water services.[94]
>
> 1209. This obligation, as all others retained in the Covenant referred to above, "imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible." This includes establishing "accountability mechanisms to ensure the implementation of the strategy" The necessary step is therefore that a host State accepting investments in the domain of the provision of water relies on the BIT to have the investor participating to its obligation

90 *Urbaser*, para 1195.
91 *Urbaser*, para 1200.
92 See M. Toral and T. Schultz, "The State, A Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations", op cit.
93 *Urbaser v. Argentina, supra* 10, para 1193.
94 Ibid., para 1208.

> under international law. It thus complies with the conclusion of the UN Committee on Economic, Social and Cultural Rights that "States parties should ensure that the right to water is given due attention in international agreements". This includes the possibility to consider matters related to the human right to water in the dispute resolution mechanisms provided for in such agreements. However, the investor's obligation to ensure the population's access to water is not based on international law. This obligation is framed by the legal and regulatory environment under which the investor is admitted to operate on the basis of the BIT and the host State's laws.
>
> 1210. Whilst it is thus correct to state that the State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, this is not the case for the investors who pursue, it is true, the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water. Indeed, the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services. In order to have such an obligation to perform applicable to a particular investor, a contract or similar legal relationship of civil and commercial law is required. In such a case, the investor's obligation to perform has as its source domestic law; it does not find its legal ground in general international law. The situation would be different in case of an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties. This is not a matter for concern in the instant case.[95]

The Widening of the Spectrum of Human Rights Instruments Referred to in Investment Cases

Most notably, the *Urbaser* Tribunal stated that the BIT "[could] not be interpreted and applied in a vacuum" and that it had to be "construed in harmony with other rules of international law of which it forms part including those relating to human rights".[96] It found evidence in the BIT itself, that it "[was] not framed in isolation but placed in the overall system of international law".[97] In effect, in this way the Tribunal applied a systemic interpretation of the rules in the case. These rules included human rights rules contained broadly in relevant human rights treaties (i.e. the ICESCR). But even further, the

95 Ibid., paras 1209–1210. Footnotes omitted.
96 Ibid., para 1200.
97 Ibid., para 1201.

Tribunal made reference to non-binding instruments and reports such as the UN Special Representative John Ruggie's Final Report on "Guiding Principles on Business and Human Rights",[98] and General Comments of Committee experts under the ICESCR. It demonstrated that the sources for resolving a BIT dispute could well include human rights obligations.

Conclusion

Public interests, such as health, environment, labour rights, right to water and other human rights, are fast ascending in importance in the area of investment law. Some of the disputes surveyed in this chapter have arisen from regulatory measures involving such matters of public interest. In the name of that public interest, tribunals are also increasingly accepting third-party interventions or amicus briefs on the basis that these provide an independent perspective on the matters in the dispute and contributed expertise from "qualified agencies". This took place in the case of *Philip Morris*, which said amicus was relied on by the Tribunal—at various points of its factual and legal analysis—in finding against the investor. In accepting these submissions the *Philip Morris* Tribunal noted that given the "public interest involved in this case" the amicus briefs would "support the transparency of the proceeding".

The examples covered in this Chapter, namely environmental, human rights and labour issues in the context of investment claims, attest to the possibility of reconciling the "commercial" "public law" and "international law" elements in investment arbitration.[99]

98 UN Special Representative's John Ruggie's Final Report on "Guiding Principles on Business and Human Rights: Implementing the United Nations, 'Protect, Respect and Remedy' Framework" (A/HRC/17/3), March 21, 2011.

99 As Christopher Greenwood thought it should be. C. Greenwood, "Rethinking the Substantive Standards of Protection Under Investment Treaties" (Response to the Report), op cit, p. 376.