The Place of Human Rights in Investor-State Arbitration

Susan L. Karamanian*

I. Introduction

Are human rights undermined when an investor’s dispute against a state arising out of the state’s alleged breach of an international investment agreement (IIA) is settled by means of arbitration? Some answer with a resounding “Yes!” and call for the removal of investor-state arbitration as it is largely a private system incapable of addressing matters of public concern such as human rights.1 At the other extreme are those who find the answer irrelevant. In their minds, human rights have little, if any, role in a dispute resolution process aimed at protecting foreign investment.2

Between the poles is a vast, complex middle ground that seeks to accommodate both investment and human rights objectives. Greater transparency, some believe, could heighten awareness of and focus on human rights.3 Hence, non-parties should be allowed to file amicus curiae submissions or attend hearings; all arbitrations should be open to the public. Or, others contend that the problem rests with the IIAs, including the many bilateral investment treaties (BITs), which are largely silent about human rights.4 According to them, the treaties should be re-written or at least carve out a wide range of subjects, such as health, cultural property, labor,

---

*Associate Dean for International and Comparative Law, George Washington University Law School.
1 See, e.g., Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 9-11 (2008).

1
and the environment, and ensure unequivocally that states can regulate in these areas without facing liability to foreign investors under IIAs.\(^5\) The former UN Special Representative of the Secretary-General for Business and Human Rights John Ruggie walked a delicate tightrope by urging states to “ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such [IIAs].”\(^6\) Of course, renegotiating treaties is a painstaking, political venture and if the human rights agenda drives the effort it is unlikely that the business community in some countries would be in full support.\(^7\)

This essay examines the issue from another middle ground perspective, one that urges tribunals to apply relevant legal standards and principles, mainly treaty language, governing arbitration rules, and the Vienna Convention on the Law of Treaties (VCLT),\(^8\) to protect foreign investment as contemplated under investment treaties while also giving consideration to human rights obligations.\(^9\) It builds on the author’s previous work on the hierarchy of norms involving

---

\(^5\) See, e.g., Howard Mann, INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES 13-14 (2008) [hereinafter Mann]; Valentina Vadi, When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law, 42 COLUM. HUMAN RIGHTS L. REV. 797, 872 (2011); Valentina Sara Vadi, Reconciling Public Health and Investor Rights: The Case of Tobacco in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, supra note 4, at 452, 483 (IIAs “might exclude the tobacco trade from their application scope”).


\(^7\) Cf. Agreement Between The Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments art. 3(4) (Nov. 27, 2009) (the new South African BIT exclude domestic laws designed “to promote the achievement of equality” or to “protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory”).


\(^9\) Using interpretive techniques to give effect to human rights norms within the context of investor-state disputes is not a novel suggestion. See, e.g., Pierre-Marie Dupuy, Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, supra note 4, at 45, 56-62; Jeff Waincymer, Balancing Property Rights and Human Rights in Expropriation in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, supra note 4, at 275, 305-09; Vadi, Reconciling, supra note 5, at 470-82.
investment and human rights and expands on the proposal at the end of that essay urging a more studied approach to IIAs.\textsuperscript{10}

The proposed approach recognizes that investment protection measures in IIAs are not “investment exclusive” and human rights norms are embedded in some of them. Accordingly, under the proposal, IIAs need not be overhauled; it accepts that arbitration is a viable means to settle investor-state disputes. Also, it recognizes that international law, including customary international law and general principles of international law, is relevant to many IIAs. International law opens the door for tribunals to at least account for human rights.

The proposed approach faces major hurdles, compounded by a history of tribunals that have adopted a constrained view of their duties. Clear demarcations must be established to discipline arbitral tribunals in their application of human rights principles.\textsuperscript{11} Hence, the essay examines some rules and standards to restrict and guide tribunals in addressing human rights aspects of investment disputes.

\textbf{II. The Problem in Perspective}

Before setting out and analyzing the proposed model some background information about human rights and investor-state arbitrations is needed. More than 450 investor-state arbitration cases have been filed.\textsuperscript{12} Remarkably, the considerable volume of literature about the human rights-investment tension outweighs the frequency in which tribunals tackle thorny arguments


\textsuperscript{11}Jasper Krommendijk & John Morijn, ‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, \textit{supra} note 4, at 422, 427 (an acceptance of the “applicability of human rights law in investment arbitration is not the end of the discussion” and that focus should be on “what way human rights law comes into play”).

\textsuperscript{12}UNCTAD, 1 IAA ISSUES NOTE 1 (2012).
about human rights or related environmental matters. So, is this a problem that has been manufactured by legal academics and human rights activists?

The answer is more complex than what may first appear. Quite often human rights issues, while relevant, are not raised. In some cases, the challenged state regulation or conduct affects the human condition, such as in the areas of health, energy resources, and medicine. A finding for the investor would mean that the state’s actions were the root of the liability and thus state regulation could be stymied. Human health and welfare could be at stake. Or, as another example, the investor’s claim may have human rights dimensions, such as when the investor complains about state conduct that was discriminatory or violated the investor’s right to a fair trial. For a variety of reasons, whether due to ignorance of the human rights arguments or in fear of the consequences arising from arguing them, the investors or states opt not to mention them.

Also, the precise role of human rights in the disputes is not fully understood due to the confidentiality of many of the arbitrations. It is impossible to state the exact number of all investor-state cases; no one has a complete picture of the types of claims being raised, the defenses to them, and resolution of the cases. Denial of access to information about the investor-state cases, according to some, renders the arbitration process incompatible with human rights.

---

13 See, e.g., Philip Morris Brands Sàrl v. Uruguay, ICSID Case No. Arb 10/7 (challenging Uruguayan law that regulates tobacco packaging); Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12 (alleging claims against Germany due to the phase out of nuclear power plants; the case has settled); Apotex Inc. v. United States, UNCITRAL Case (contending that implementation of US regulations regarding generic drugs violated Chapter 11 of the North American Free Trade Agreement).

14 See, e.g., Loewen Group, Inc. v. United States, ICSID Case No. AF/98/3, Notice of Claim (Oct. 30, 1998) paras. 139, 144-58 (Canadian investors alleged that Mississippi trial court allowed into evidence prejudicial, anti-Canadian testimony and commentary).

Not all cases, however, are secret. Information about cases filed under Chapter 11 of the North American Free Trade Agreement (NAFTA Chapter 11)\(^\text{16}\) or under certain BITs, including the 2012 US Model BIT and its predecessor,\(^\text{17}\) is available. In cases filed under the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID), the secretariat registers the case in the public domain but it does not disclose the filings and decisions unless the parties otherwise agree. In practice, merely because one party does not consent to ICSID publication of the award does not mean that it remains secret as it is common for the other party to submit the award for publication in a journal.\(^\text{18}\) In short, a lot of information is publicly available but how much is not available is not known.

The NAFTA Chapter 11 cases provide a window into the role of human rights in investor-state dispute settlement. Under Chapter 11, an investor that alleges that the host state has breached the treaty may settle its dispute with the state under either the arbitration or additional facility rules of ICSID, if applicable, or the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).\(^\text{19}\) Investors have typically complained about the state’s alleged failure to afford national and/or most favored nation treatment to the investors and the covered investment, the state’s alleged failure to provide a minimum standard of treatment to the investment, and the state’s alleged direct or indirect expropriation of the investment.\(^\text{20}\) A tribunal constituted under ICSID is not prohibited from accepting \textit{amicus curiae}


\(^{18}\) \textit{See} OECD, TRANSPARENCY AND THIRD PARTY PARTICIPATION IN INVESTOR-STATE DISPUTE SETTLEMENT PROCEDURES 2-4 (2005).

\(^{19}\) NAFTA Chapter 11, \textit{supra note} __, art. 1120.

\(^{20}\) \textit{Id.} arts. 1102 (national treatment), 1103 (most favored nation treatment), 1105 (minimum standard of treatment), 1110 (expropriation).
submissions and in NAFTA cases the UNCITRAL rules have been interpreted to allow the tribunal to accept them.\textsuperscript{21}

\textit{Amicus curiae} submissions raising human rights-related arguments have been filed in a handful of the more than 70 NAFTA cases. In these cases, \textit{amici}'s principal concerns were that the state’s regulation that the investor challenged protected public interests such as human health, labor and indigenous rights. For example, in \textit{Methanex Corp. v. United States}, an UNCITRAL tribunal allowed environmental NGOs to submit \textit{amicus curiae} filings concerning the state of California’s ban on a gasoline additive.\textsuperscript{22} The NGOs challenged the investor’s case based on California’s right to regulate, particularly in the area of environmental measures.\textsuperscript{23} In \textit{United Parcel Service of America v. Canada}, Canadian labor organizations filed \textit{amicus curiae} briefs to support various practices of Canada Post that the investor claimed were anti-competitive.\textsuperscript{24} In \textit{Glamis Gold, Ltd. v. United States}, the Quechan Indian Nation, as \textit{amicus curiae}, argued that human rights norms, part of the “applicable rules of international law,” supported the challenged federal and state regulation of mining rights.\textsuperscript{25} In the three cases, the tribunals made passing reference to the arguments of the \textit{amici}, yet the awards denied relief to the investors so the


\textsuperscript{22} Methanex Corp. v. United States, UNCITRAL Arb., Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘Amici Curiae’ (Jan. 15, 2001).

\textsuperscript{23} Methanex Corp. v. United States, UNCITRAL Arb., Amicus Curiae Submissions by the International Institute for Sustainable Development (Mar. 9, 2004).

\textsuperscript{24} United Parcel Service of America v. Canada, Application for Amicus Curiae Status by the Canadian Union of Postal Workers and the Council of Canadians (Oct. 20, 2005).

human rights of the local populations ended up not being undermined. In fact, in *Glamis Gold*, the tribunal acknowledged but did not address the human rights arguments:

The Tribunal is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the need of the State to regulate the use of property. These issues were extensively argued in this case and considered by the Tribunal. However, given the Tribunal’s holdings, the Tribunal is not required to decide many of the most controversial issues raised in this proceeding.

Outside of the NAFTA, a small but growing number of cases have allowed *amicus curiae* submissions on human rights. The arguments of these *amici*, like those in the NAFTA cases, appear to have raised the consciousness of the tribunals to human rights arguments but they also appear not to have had a material effect on the awards. In the much heralded *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, environmental law NGOs argued that human rights “condition the nature and extent of the investor’s responsibilities, and the balance of rights and obligations between the investor and host state.” According to them, for the investor to seek relief under the applicable BIT, it should have had “the highest level of responsibility to meet [its] duties and obligations” with human rights and sustainable development issues shaping those duties and obligations. The tribunal’s award, which held Tanzania in breach of the BIT but with no damage to the investor, acknowledged in detail but gave little weight to the NGOs’ argument.

In a case against Argentina involving the water and sewage systems in a province surrounding

---

26 In *Methanex*, the tribunal held that California had the right to “enact non-discriminatory regulation for a public purpose” in accordance with due process so long as no specific promises had been made to the investor. Further, “acted with a view to protecting the environmental interests of the citizens of California.”

27 *Glamis Gold, Ltd. v United States* (June 8, 2009) UNCITRAL Case, Award (June 8, 2009) para. 8, 48 ILM 1038. [hereinafter Glamis Gold].

28 *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case No ARB/05/22, Amicus Curiae Submission of Lawyers’ Environmental Action Team, et al. para 43.

29 *Id.* para 53.

30 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) paras. 356-92.
Buenos Aires, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. Argentina*, the tribunal also allowed *amicus curiae* filings, noting that the issues may require the tribunal to “resolve ‘complex public and international law questions, including human rights considerations.’” The tribunal rejected the *amici’s* argument that the province’s actions were necessary to protect the right to water, which they contended was essential to the right to life, health, housing and an adequate standard of living, and that these rights trumped the rights of the investor. As the tribunal noted:

The Tribunal does not find a basis for such a conclusion either in the BITS or international law. Argentina is subject to both international obligations, i.e., human rights and treaty obligations, and must respect both of them equally. Under the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.

In another high profile case, *Foresti v. South Africa*, in which foreign investors alleged that South Africa’s legislation aimed at redressing economic disparity from apartheid constituted expropriation, NGOs were authorized to file an *amicus curiae* submission that argued that the challenged legislation was essential to remedying substantive inequality, particularly with regard to lack of access to resources. The case was discontinued and thus the significance of the human rights arguments was never determined.

In some cases, the investor may inject human rights arguments to support its position. A conscientious tribunal has no choice but to focus on the human rights issues. For example, in *Grand River Enterprises Six Nations, Ltd. v. United States*, a Canadian corporation and members

---

31 *Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission (Feb 12, 2007) para. 18 (quoting Order of May 19, 2005).
of the First Nations challenged the settlement terms of tobacco litigation by states of the United States, including a requirement that the corporation put funds into an escrow account. Claimants argued that under customary international law indigenous peoples had territorial rights that allowed them to conduct traditional business across borders without state interference. They also alleged that customary principles required non-discrimination, access to courts to protect their property rights, and a duty on the states to have acted in good faith and have conferred with them before implementing the settlement. The human rights standards, they claimed, elucidate the investment protection measures of NAFTA Chapter 11, particularly Article 1105’s requirement that the investment satisfy the customary international law minimum standard. The tribunal approached the human rights-based arguments with hesitation given that NAFTA Chapter 11 limits its jurisdiction. All of the arguments were rejected but one of them, the duty to confer, appeared to have had some traction but failed on a technical ground as the duty did not apply to individual claimants but to the leader of the peoples. Of note, the tribunal acknowledged a possible “principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them.” Yet that fact alone was not enough as the principle needed to fit within the customary international law minimum standard. According to the tribunal, “[t]he notion of specialized procedural rights protecting some investors, but not others, cannot readily be reconciled with the idea of a minimum customary standard of treatment due to all

34 Grand River Enterprises Six Nations, Ltd. v. United States, UNCITRAL Arbitration, Claimants’ Memorial, Merits Phase (July 10, 2008) paras. 146-53. They also argued that the Jay Treaty of 1794 and the Treaty of Ghent of 1814 reaffirmed their right to travel across the boundary between the United States and Canada. Id. paras. 148-49.
35 Id. paras. 154-99.
36 Id.
investments.” Although the tribunal did not find the principle relevant to the customary international law minimum standard it was at least prepared to accept that it should consider the relationship of the principle to the customary international law minimum standard.

An interesting aspect of the Grand River case is that the United States had a human rights-based defense given that the settlements were part of an initiative to protect public health. The health aspects of the tobacco settlements framed the factual portion of the respondent’s counter-memorial but were not described as a human rights defense in the argument section. Other states, however, have found it in their interest to rely on human rights arguments as a defense to their conduct. Argentina, in particular, has used human rights to defend against claims arising out of the financial crisis in that country which implicated contracts provinces had with foreign investors. In the Suez case, Argentina joined the amici in arguing that the actions of one of its provinces in trying to renegotiate a concession contract were essential to secure the right to water to its population. The tribunal did not render the human rights argument irrelevant yet it held that the aim of securing water could have been met by means other than violating the BIT.

The investor-state tribunals’ limited engagement with human rights does not portent a calm future. The focus of indigenous peoples, human rights organizations, the environmental law community, and legal activists on the investor-state dispute settlement process is intense and not likely to recede. States, when faced with liability for regulations and actions that they took to protect the public, may have no choice but to invoke human rights in defense of their acts, particularly when their acts reflected obligations under human rights treaties. Investors, after

39 Id. para. 213.
41 Suez, supra note __, para. 215.
encountering state action that crippled their investment, no doubt would feel compelled to use any legitimate argument to give meaning to the protections afforded under investment treaties. And one of those arguments could be a human-rights based claim.

III. A Proposed Approach

An investor-state tribunal has jurisdiction to resolve only the disputes identified in the applicable IIA. The IIAs authorize tribunals to resolve claims relating to mistreatment of the investor or the investment. They do not expressly authorize the tribunals to resolve human rights claims.

But human rights principles may be relevant to the dispute depending on the applicable substantive law and arbitration rules. For example, NAFTA and international law apply to disputes under NAFTA Chapter 11. Some BITs authorize tribunals to apply international law while others are silent on the governing law. In ICSID cases, absent a governing law, the tribunal applies the law of the state party to the dispute “and such rules of international law as may be applicable.” In UNCITRAL cases, the tribunal applies the law selected by the parties and if no law is chosen, it applies the law “it determines to be appropriate.” International law includes “that part of general international law (namely, customary international law) which entails a set of obligations to protect fundamental human rights” just as it includes investment

43 See, e.g., Agreement between the Federal Republic of Germany and the Republic of India, art. 9(2)(ii) July 10, 1995 (authorizing the tribunal to resolve the dispute under the terms of the BIT, relevant national laws, and “generally recognized principles of international law”); Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investment art. (2009) [hereinafter Canada-Romania BIT].
45 UNCITRAL Arbitration Rules art. 33.
When national law is the governing law, the tribunal could resort to international law if the national law affords a priority to international law, including human rights law.\(^{47}\) So, in many cases, due to the treaty language itself or the applicable arbitration rules, tribunals that are grappling with difficult or unclear interpretive issues have a colorable argument to draw on human rights principles.

In these cases, the use of human rights-based analysis could be further supported by the broad wording of the investment protection measures at issue and defenses to their enforcement. For example, the customary international law minimum standard of protection under NAFTA Chapter 11 is grounded in human rights notions.\(^{48}\) Fair and equitable treatment and full protection and security require a degree of diligence that resembles the duty of a state to respect human rights.\(^{49}\) Underlying the IIAs’ protection against expropriation subject to due process and compensation is the right to property, a right that is protected under the European Convention on Human Rights and the American Convention on Human Rights.\(^{50}\)

The treaties themselves may insulate states from liability when they regulate or act to protect public welfare. For example, the 2012 US Model BIT excludes from indirect expropriation “non-discriminatory regulatory actions … that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment.”\(^{51}\) This police powers exception is recognized in a number of IIAs although many of the other treaties

\(^{46}\) Dupuy, \textit{supra} note __, at 56.

\(^{47}\) See, \textit{e.g.}, Constitution of Argentina Chapter I, sec. 31; Chapter IV, sec. 75 (22); Constitution of South Africa sec. 232 (customary international law is applicable law in South Africa unless it conflicts with the Constitution or an Act of Parliament).

\(^{48}\) See, \textit{e.g.}, Karamanian, \textit{supra} note __, 246-48.

\(^{49}\) Dupuy, \textit{supra} note __, at 50.


limit these measures to those that are consistent with the investment provisions in the treaties.\textsuperscript{52} The US Model BIT also recognizes that it is inappropriate for the state parties “to encourage investment by weakening or reducing the protections afforded in” domestic environmental laws and domestic labor laws.\textsuperscript{53} Or, in a similar vein, the Canada-Romania BIT allows a state party to the treaty to adopt, maintain or enforce measures “it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”\textsuperscript{54} These clauses resemble language in other treaty preambles that signal that the treaties seek to promote investment in a “sustainable manner”\textsuperscript{55} or in a way “consistent “with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.”\textsuperscript{56}

In addition, the IIAs may protect a state from acting to fulfill duties to maintain or restore international peace or security or the protection of essential security interests.\textsuperscript{57} And relevant to the entire framework of IIAs is what some tribunals have described as the customary law defense of necessity as reflected in Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility).\textsuperscript{58} That defense recognizes

\textsuperscript{52} Krommendijk \& Morijn, supra note __, at 434-35; Mann, supra note __, at 19.
\textsuperscript{53} 2012 US Model BIT, supra note __, arts. 12(2); 13(2).
\textsuperscript{54} Canada-Romania BIT, supra note __,art. XVII(2).
\textsuperscript{56} 2012 US Model BIT (Preamble), supra note __; NAFTA (Preamble), 17 December 1992, 32 ILM 289, 297 (1993) (recognizing the objective of “improv[ing] working conditions and living standards in their respective territories,” to achieve the NAFTA goals “consistent with environmental protection and conservation,” to “preserve [the NAFTA ations’] flexibility to safeguard the public welfare”, to “strengthen the development and enforcement of environmental laws and regulations” and to “protect, enhance and enforce basic workers’ rights”); Agreement Between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment (Nov. 14, 2003) (recognizing that the treaty’s investment objectives “can be achieved without relaxing health, safety and environmental measures of general application”) http://www.unctad.org/sections/dite/iaa/docs/bits/japan_vietnam.pdf.
\textsuperscript{57} 2012 US Model BIT, supra note , art. 18(2).
limited situations in which a state may contend that an act, while in breach of a primary international obligation, is not a basis of liability.\footnote{Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/05 Award (Apr. 15, 2009) para. 78. See also Methanex, \textit{supra} note \textsuperscript{__}, Part IV, Chap. C, para. 24 (holding that “as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or jus cogens and not to give effect to parties’ choices of law that are inconsistent with such principles”).}

What rules should steer tribunals in giving account to human rights? The first principle is that \textit{jus cogens} norms trump the obligations under an IIA. This rule is derived from VCLT, Article 53, which recognizes a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”\footnote{Id.} Thus, an investment treaty should not enable states to avoid \textit{jus cogens} obligations, “the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.”\footnote{VCLT art. 53.} Accordingly, a tribunal could use this first principle, which is grounded in international law, to protect human rights that rise to \textit{jus cogens} even if doing so would be inconsistent with a treaty’s investment protection measures.\footnote{See Bruno Simma & Theodore Kill, \textit{Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology} in \textit{INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER} 678, 691 (Christina Binder, et al., eds. 2009) (“jus cogens norms impose a ‘legally insurmountable limit to permissible treaty interpretation’” (quoting \textit{Oil Platforms (Iran v USA)}, Merits, Judgment, Nov. 6, 2003, \textit{ICJ Reports} (2003) 161, 330, para 9 (Separate Opinion of Judge Simma)).}

The second principle is one that a few commentators have recognized and it is based on Article 103 of the U.N. Charter.\textsuperscript{64} Under that article, a conflict between a state’s obligation under the Charter and that under a treaty should be resolved in favor of the former.\textsuperscript{65} Accordingly, a state’s obligation to respect a human rights norm reflected in an obligation under the Charter would be superior to a state’s conflicting obligation under an investment treaty.\textsuperscript{66} As Donald Donovan has observed, if the UN Security Council had passed a resolution calling for the seizure of assets of a person deemed to have engaged in piracy, a state that engaged in such seizure contrary to an IIA would have a defense to an investor’s claim of expropriation.\textsuperscript{67} What seems like a fairly straightforward rule can quickly become complicated. For example, should the resolution of the Security Council, which may be broadly worded yet reflective of a desire to promote human rights, be construed to deprive the investor of its human rights, such as the right to property?\textsuperscript{68}

The third principle, an interpretive one, is reflected in VCLT, Article 31(1), which instructs a tribunal to interpret the IIA “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.”\textsuperscript{69} The context of the treaty includes its text, preamble, and annexes.\textsuperscript{70} The text of some IIAs, while not explicitly mentioning human rights, includes language within which they could fit. For example, many IIAs refer to areas that are exempt from a claim of indirect expropriation as they are an exercise of the state’s police powers. The exempt areas are typically ones that are

\textsuperscript{64} See, e.g., Donald Francis Donovan, \textit{The Relevance (or Lack Thereof) of the Notion of ‘Mandatory Rules of Law’ to Investment Treaty Arbitration}, 18 AM. REV. INT’L ARB. 205, 207-08 (2007).

\textsuperscript{65} U.N. Charter art. 103.


\textsuperscript{67} Donovan, \textit{supra} note __ at .

\textsuperscript{68} Milanovic, \textit{supra} note __ a 97-98.

\textsuperscript{69} VCLT art. 31(1).

\textsuperscript{70} \textit{Id.} art. 31(2.)
“designed and applied to protect legitimate public welfare objectives.”71 A tribunal must then inquire as to the state’s motives in regulating or acting and whether there is a public welfare component to the practice as well as the effect of the state practice. As one tribunal described, the “context within which an impugned measure is adopted and applied is critical to the determination of its validity.”72 States have duties under treaties to protect, promote and fulfill human rights so a state that enacts non-discriminatory laws consistent with those duties surely would be undertaking to protect the legitimate public welfare.73 Such an interpretation would be consistent with the UN Guiding Principles, which were unanimously approved by the UN Human Rights Council, that encourage states to be able to regulate to protect human rights74 and also with the 2011 OECD Guidelines for Multinational Enterprises, which recognize the state’s duty to protect human rights and the obligation of enterprises to do the same.75

Further, an additional reason for applying a broad definition of public welfare rests could be find the text of the IIA, such as explicit references to the relationship between investment and non-investment activities and the need for the latter to be protected. For example, under the 2012 US Model BIT, the states recognize that investment should not be encouraged at the cost of weakening or reducing the protections of domestic environmental laws and domestic labor laws.76 The NAFTA similarly provides that “it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.”77 That 2012 US Model BIT also

71 See supra note __ and accompanying text.
73 See, e.g., Krommendijk & Morijn, supra note __, at 435-36 (arguing that the promotion and protection of human rights would fit within police powers clauses in BITs); Choudhury, supra note __, at 791.
74 See supra note __ and accompanying text. See also id. I.B.3 (providing that states should ensure that their laws and policies “enable business respect for human rights” and that they enforce such laws).
75 2011 OECD Guidelines for Multinational Enterprises sec. IV and commentary.
76 2012 US Model BIT, supra note __, arts. 12, 13.
77 NAFTA Chapter 11, supra note __, art. 1114(2).
reaffirms a commitment to the obligations of the International Labor Organization. Under the VCLT, the treaty terms are to be examined in the context of the language of the treaty. Thus, a tribunal should give effect to the phrase “public welfare” in light of other public values recognized in the treaty.

Under the VCLT, tribunals can also consider the language of preambles to investment treaties. In certain treaties, the preambles recognize that the investment objectives should be achieved in a manner consistent with sustainable development and protection of health, safety, the environment, and labor rights. This language does not create independent obligations but it can be used to shed light on the meaning of the investment protection measures. As the tribunal in Grand River observed:

… NAFTA involves a balance of rights and obligations, and does not point unequivocally in a single direction. While NAFTA’s preamble speaks of promoting investment, it also affirms the need to preserve the NAFTA Parties’ ‘flexibility to safeguard the public welfare.’

This analysis is consistent with the tribunal’s award in Saluka Investments in which it was recognized that the substantive provisions of the treaty must be balanced with the treaty objectives as reflected in the preamble.

The fourth principle, and arguably the most difficult to apply, is that international human rights norms could elucidate IIA’s investment protection provisions and defenses available to the state. The norms are relevant only if international law applies to disputes arising under the

---

78 Id. art. 13(1).
79 Methanex Award, supra note __, Pt. II, Chap. B, para. 16.
80 See supra notes __ and accompanying text.
81 Grand River, supra note __, para.
82 Saluka, supra note __, para. 300.
treaty. The investment protections in the treaties could reflect customary norms\textsuperscript{83} so the exercise could be considered as giving effect to custom within the context of specific treaty language when the international human rights norms are of a customary nature. Either party to the treaty or the tribunal could invoke human rights norms, along with \textit{amicus curiae}, if allowed under the arbitral rules, so long as the norms do not create new duties or defenses beyond those set out in the BIT.\textsuperscript{84} This approach is consistent with what former ICJ Judge Bruno Simma and Theodore Kill have noted as a “presumption that the parties to a treaty did not intend to upset some other rule of international law.”\textsuperscript{85}

The challenge for the tribunal is to dissect the treaty language in the context of the applicable law. For example, human rights principles could give effect to the meaning of the fair and equitable treatment clause or the state’s obligation to afford the customary international law minimum standard of treatment of aliens to the investment, such as the standard set forth in Article 1105 of NAFTA Chapter 11. The specific obligation depends on the language in the treaty. A fair and equitable treatment clause may be along the following lines:

Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.\textsuperscript{86}

A stand-alone clause like this, while not specific in its terms, has been recognized as imposing obligations of legitimate expectations, non-discrimination, fair judicial and

\textsuperscript{84} See Simma, supra note __, at 692.
\textsuperscript{85} Id. at 694.
\textsuperscript{86} Netherlands Model BIT art. 3(1) in Campbell McLachlan, et al., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2007), Appendix 8.
administrative process, transparency, and proportionality. These obligations do not exhaust the full meaning of the concept but they give it some definition. Or, another form of the clause makes explicit reference to international law, such as NAFTA Chapter 11 Article 1105(1), which has been recognized reflecting the customary international law minimum standard. That standard has been held to be an act that is “sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.” The clauses are “vague general clauses” and thus act as “gateways for the integration of arguments based on norms of other spheres of the international legal system.”

To be sure, the fair and equitable clauses are not open doors for any argument of investors, including ones that fit within the rubric of human rights, that the state conduct is unfair or inequitable, and the same would hold true for the state’s assertion of a defense. The conduct must relate to the investment. Second, in taking a conservative approach as to a stand-alone clause, a tribunal should proceed only if the human rights arguments fit within the five recognized areas as the basis of protection. Or as to claims under Article 1105(1) the conduct must rise to a fairly high level as set out in Glamis Gold. The approach that this essay advocates does not empower a tribunal to wholesale adopt the human rights norms into the fair and equitable clause; it simply urges the tribunal to address human rights when they are affected by the dispute at issue and give the appropriate weight to them in a reasoned manner.

88 Glamis Gold, supra note __, para. 616.
89 Kläger, supra note __, at
90 Ioana Knoll-Tudor, The Fair and Equitable Treatment Standard and Human Rights Norms’ in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW, supra note _ at 319.
Thus, assume that the state engaged in conduct as to the investment that was not transparent, which, in turn, caused a lack of any semblance of predictability and fostered corruption. What weight should a tribunal give to an investor’s argument that human rights principles support the claim of denial of fair and equitable treatment of the investment? The human rights argument is a difficult one as transparency is frequently considered the means to the protection of human rights, so it plays a form of subsidiary role. In the same vein, a strong argument could be made that good governance and a corrupt-free environment are essential to the protection of human rights.91 First, any case is fact-specific and a critical issue is whether the investment treaty already contains obligations regarding transparency so that the tribunal need not take the extra step to find the duty beyond the text of the treaty.92 Second, if the treaty is silent on this point, the investor still has available to it arguments within the investment context that support a claim of violation of the fair and equitable requirement as to lack of predictability and corruption. Those arguments could be buttressed by reference to human rights jurisprudence. The late Professor Thomas Wälde, in fact, did so in citing to jurisprudence of the European Court of Human Rights in establishing the principle of legitimate expectations as to the treatment of foreign investment.93 His analysis, based, in part, on human rights jurisprudence, buttressed the foundation of the legal conclusion that legitimate expectations fit within NAFTA Chapter Article 1105(1). The human rights arguments, however, would not independently establish the duty.

Or, as another example, the state could argue that human rights principles support its position. For example, in defense of a claim of expropriation, Argentina has argued that its

---

92 See, e.g., [insert]
actions were justified based on the right to water.\textsuperscript{94} Argentina’s defense must be understood within the context of the investor, which has a right to property and that right is grounded in human rights principles too.\textsuperscript{95} In Argentina’s case, the argument is even more complicated as its constitution recognizes a hierarchy to international law and human rights.\textsuperscript{96} What weight, if any should the tribunal give to Argentina’s human rights defense? Again, the tribunal is required to focus on the text of the treaty. Also, it needs to have a clear understanding of the purpose of the alleged expropriation to put the state action in full context. One of the first inquiries is the specific clause protecting against expropriation and whether it allows for exceptions based on legitimate aims such protection of human health or public welfare. As noted previously, this clause gives the tribunal leeway to examine human rights considerations and also to consider them in light of the investment protection obligations. The second issue is whether the treaty has a specific provision to defend the state’s actions. For example, the United States-Argentina BIT, Article XI, provides that the treaty “shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”\textsuperscript{97} The treaty provision aside, a third consideration is whether Article 25 of the ILC’s Articles on State Responsibility would enable the defense as the right to water shaping the contours of necessity. Any treaty or customary standard that allows for protection of human rights, however, must be balanced against the investment protection measure at issue.

\textsuperscript{94} \textit{See Azurix Corp v Argentina}, ICSID Case No ARB/01/12, Award (July 14, 2006) para 254; Suez, \textit{supra} note __. On the right to water as a human right, see Pierre Thielboerger, \textit{The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?} in \textit{HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW}, \textit{supra} note ___ at 487, 488-93.

\textsuperscript{95} \textit{See Karamanian}, \textit{supra} note __, at 240-42.

\textsuperscript{96} \textit{See Constitution of Argentina, supra} note __.

\textsuperscript{97} US-Argentina BIT art. XI.
Such a balance can occur by inquiring critically into the state’s actions and assessing the options available to the state, short of breaching the investment treaty, to protect human rights.\textsuperscript{98}

IV. Conclusion

One of the attacks on the legitimacy of investor-state dispute settlement is a perceived lack of discipline of tribunals in defining and applying relevant legal principles, including human rights principles. Some fear that tribunals may be creeping beyond their mandate; others contend that they have failed to understand the legal process by disregarding a body of law, human rights, that is relevant to the dispute. Neither contention is correct. Tribunals are at least addressing human rights and none of them has used human rights to run roughshod over the investment protection measures.

But a past record of relative balance is no promise of a stable future. An understanding of the inter-relationship between investment and human rights is essential for arbitrators engaged to resolve cases that have public aspects, both with regards to the claims of the investors as well as to the defenses of states. A mere comprehension of the relationship is not enough as some guidelines are needed. This essay has set forth a modest approach founded on general principles that should enable a healthy and appropriate respect for human rights in the investment process.

\textsuperscript{98} Suez, supra note __, at paras. 259-65.