THE PLACE OF HUMAN RIGHTS IN INVESTOR–STATE ARBITRATION

by
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Human rights arguments are appearing with increased frequency in investor–state arbitration. States and amici curiae may raise them as defenses to the challenged state action. Occasionally, investors rely on human rights principles, such as due process and non-discrimination, to support their claims against states. Arbitral tribunals, while not uniformly ignoring human rights arguments, have not fully embraced them either. This development, in turn, has led to heightened criticism of investor–state arbitration. A process, which is largely grounded in international law, is considered by some to be devoid of a critical aspect of that law, namely treaty and customary human rights norms. This Essay analyzes an approach for tribunals to give effect to human rights yet do so in a structured and legally sound manner. It recognizes that tribunals should respect jus cogens *norms and other human rights based arguments that have priority under international law, such as those emanating from the UN Security Council, yet largely do so when they are raised as defenses. As discussed, deference to Security Council action is more complex as arbitral tribunals, unlike the European Court of Human Rights and the European Court of Justice, lack a broader human rights-based mandate. The Essay also sets out two interpretive means for tribunals to use the language of international investment agreements to give effect to legitimate human rights concerns.*

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

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with a resounding "Yes!" and call for an end to 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 mere question 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 rewritten or at least carve out a wide range of subjects, such as health, cultural property, labor, and the environment, and ensure unequivocally that states can regulate in these areas without facing liability to foreign investors under IIAs.[5]

The former United Nations (UN) Special Representative of the Secretary-General for Business and Human Rights, John Ruggie, walked a delicate tightrope on this issue in the *Guiding Principles on Business and Human Rights*. While not expressly calling for removal of investor–state arbitration, the *Guiding Principles* urge states to "ensure that they retain adequate policy and regulatory ability to protect human rights under the

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[1] *See, e.g.*, GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 9–11 (2007).

[2] *See, e.g.*, *A Stronger Model BIT and a Renergized [sic] BIT Program Is Vital to Strengthen the U.S. Economy and Support U.S. Jobs and Economic Growth*, NAT'L ASS'N OF MFRS. 7, http://www.nam.org/~/media/36D5D9702F2A40D18E5C10EAAAD64E32/NAM_Position_on_Bilateral_Investment_Treatiespdf.pdf.

[3] *See, e.g.*, Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 831–32 (2008).

[4] *Cf.* Angelos Dimopoulos, *EC Free Trade Agreements: An Alternative Model for Addressing Human Rights in Foreign Investment Regulation and Dispute Settlement?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 565, 571–83 (P.M. Dupuy et al. eds., 2009) (discussing direct and indirect reference to protection of human rights in the European Community's Free Trade Agreements).

[5] *See, e.g.*, Valentina Sara Vadi, *Reconciling Public Health and Investor Rights: The Case of Tobacco*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 452, 482–83 (P.M. Dupuy et al. eds., 2009) [hereinafter Vadi, *Reconciling Public Health*] (IIAs "might exclude the tobacco trade from their application scope"); Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 872 (2011); Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, INT'L INST. FOR SUSTAINABLE DEV. 13–14 (Feb. 2008), http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf.

terms of such" IIAs.[6] In this Issue, Professor George Foster proposes that investment treaties enable local stakeholders whose human rights are aggrieved by foreign investment to arbitrate claims that investors had failed to respect their human rights.[7] 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.[8]

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),[9] to protect foreign investment as contemplated under investment treaties while also giving consideration to human rights obligations.[10] It builds on the author's previous work on the hierarchy of norms involving investment and human rights and expands on the proposal at the end of that essay urging a more studied approach to IIAs.[11]

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 interna-

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[6] John Ruggie, Special Representative of the U.N. Sec'y-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, pt. I(B)(9) cmt., U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

[7] George K. Foster, *Investors, States and Stakeholders: Power Asymmetries and the Stabilizing Potential of Investment Treaties*, 17 LEWIS & CLARK L. REV. 361 (2012).

[8] *Cf.* Agreement for the Promotion and Reciprocal Protection of Investments, S. Afr.-Zim., art. 3(4), Nov. 27, 2009, *available at* http://unctad.org/Sections/dite/iia/docs/bits/SA_Zimbabwe.pdf (a new South African BIT excluding from national treatment and most-favored-nation treatment 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] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[10] 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 AND ARBITRATION 45, 56–62 (P.M. Dupuy et al. eds., 2009); Vadi, *Reconciling Public Health*, *supra* note 5, at 470–82; Jeff Waincymer, *Balancing Property Rights and Human Rights in Expropriation*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 275, 305–09 (P.M. Dupuy et al. eds., 2009); Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 670 (2011).

[11] *See* Susan L. Karamanian, *Human Rights Dimensions of Investment Law*, *in* HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 236, 270–71 (Erika de Wet & Jure Vidmar eds., 2012).

tional 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.[12] Hence, the Essay examines some rules and standards to restrict and guide tribunals in addressing human rights aspects of investment disputes.

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.[13] Remarkably, the considerable volume of literature about the tension between human rights and investment outweighs the frequency with which tribunals tackle thorny arguments 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.[14] A finding for the investor would mean that the state's actions were the root of liability and thus state regulation could be stymied. Human health and welfare

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[12] 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 and Arbitration 422, 427 (P.M. Dupuy et al. eds., 2009) (arguing that acceptance of the "applicability of human rights law in investment arbitration is not the end of the discussion" and that the focus should be on "what way human rights law comes [in]to play").

[13] *Latest Developments in Investor–State Dispute Settlement*, IIA Issues Note (U.N. Conference on Trade & Dev.), Apr. 2012, at 1, *available at* http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

[14] *See, e.g.*, Philip Morris Brands Sàrl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, ¶¶ 2–5 (Feb. 19, 2010), http://italaw.com/sites/default/files/case-documents/ita0343.pdf (challenging Uruguayan law that regulates tobacco packaging); Apotex Inc. v. United States, NAFTA/UNCITRAL Arb., Statement of Claims, ¶¶ 65–72 (Jan. 17, 2011), http://www.state.gov/documents/organization/156614.pdf (contending that implementation of US laws and regulations regarding generic drugs violated Chapter 11 of the North American Free Trade Agreement); Nathalie Bernasconi-Osterwalder & Rhea Tamara Hoffman, *The German Nuclear Phase-Out Put to the Test in International Arbitration?: Background to the New Dispute* Vattenfall v. Germany (II), Briefing Note (Int'l Inst. for Sustainable Dev.) June 2012, at 3, *available at* http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf (reporting on Vattenfall AB v. Federal Republic of Ger., ICSID Case No. ARB/12/12, in which Vattenfall alleges claims against Germany due to the phase out of nuclear power plants).

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.[15] For a variety of reasons, whether due to ignorance of the human rights arguments or in fear of the consequences if they are argued, 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 the 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.[16]

Not all cases, however, are secret. Information about cases filed under Chapter 11 of the North American Free Trade Agreement (NAFTA Chapter 11)[17] or under certain BITs, including the 2012 U.S. Model BIT and its predecessor,[18] is available. For cases filed under the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID), the secretariat registers the cases in the public domain and access to the filings and decisions may be limited. 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.[19] In short, a lot of information is publicly available, but how much is not available is unknown.

The NAFTA Chapter 11 cases are 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

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[15] *See, e.g.*, Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Notice of Claim, ¶¶ 139, 144–58 (Oct. 30, 1998), http://www.state.gov/documents/organization/3922.pdf (Canadian investors alleging that Mississippi trial court allowed into evidence prejudicial, anti-Canadian testimony and commentary).

[16] *See* Daniel Barstow Magraw Jr. & Niranjali Manel Amerasinghe, *Transparency and Public Participation in Investor–State Arbitration*, 15 ILSA J. INT'L & COMP. L. 337, 348 (2009).

[17] North American Free Trade Agreement ch. 11, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]; *see also* NAFTA Free Trade Comm'n, *Notes of Interpretation of Certain Chapter 11 Provisions*, FOREIGN AFFAIRS & INT'L TRADE CAN. ¶ 1(a) (July 31, 2001), http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en&view=d (confirming that Chapter 11 does not impose a general duty of confidentiality on the disputing parties to a Chapter 11 case and authorizing general access to documents submitted to or issued by a tribunal).

[18] U.S. Model BIT art. 29 (2012), *available at* http://www.state.gov/documents/organization/188371.pdf.

[19] *See* Catherine Yannaca-Small, *Transparency and Third Party Participation in Investor–State Dispute Settlement Procedures* 2–4 (OECD Investment Division, Working Papers on Int'l Investment No. 2005/1, Apr. 2005), *available at* http://www.oecd.org/investment/investmentpolicy/34786913.pdf.

of ICSID, if applicable, or the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).[20] Investors have typically complained about the state's alleged failure to afford national 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.[21] A tribunal constituted under ICSID is not prohibited from accepting amicus curiae submissions and in NAFTA cases the UNCITRAL rules have been interpreted to allow the tribunal to accept them.[22]

Amicus curiae submissions raising human rights-related arguments have been filed in a handful of the more than 70 NAFTA cases. In these cases, the principal concerns of amici were that the state's regulation that the investor challenged protected public interests such as human health, labor, and indigenous rights. For example, in *Methanex Corp. v. United States*, an UNCITRAL tribunal allowed environmental non-governmental organizations (NGOs) to submit amicus curiae filings concerning the State of California's ban on a gasoline additive.[23] The NGOs challenged the investor's case based on California's right to regulate, particularly in the area of environmental measures.[24] In *United Parcel Service of America v. Canada*, Canadian labor organizations filed amicus curiae briefs to support various practices of the Canada Post that the investor claimed were anti-competitive.[25] In *Glamis Gold, Ltd. v. United States*, the Quechan Indian Nation, as amicus curiae, argued that the rights of indigenous peoples, part of the "applicable rules of international law," supported the

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[20] NAFTA, *supra* note 17, art. 1120.

[21] *Id.* arts. 1102 (national treatment), 1103 (most favored nation treatment), 1105 (minimum standard of treatment), 1110 (expropriation).

[22] *See* Eugenia Levine, Amicus Curiae *in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERKELEY J. INT'L L. 200, 208–12 (2011). Merely because the rules may allow amici curiae submissions does not mean they will be accepted. *See, e.g.*, Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23, UNCITRAL Arb., Procedural Order No. 8, ¶¶ 7, 20 (Apr. 18, 2011), http://italaw.com/documents/Chevron_v_Ecuador_ProceduralOrder8_18April2011.pdf (denying request by an autonomous indigenous organization and the International Institute for Sustainable Development to appear as amici curiae on jurisdictional issues).

[23] Methanex Corp. v. United States, NAFTA/UNCITRAL Arb., Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (Jan. 15, 2001), http://www.iisd.org/pdf/methanex_tribunal_first_amicus_decision.pdf.

[24] Methanex Corp. v. United States, NAFTA/UNCITRAL Arb., Amicus Curiae Submissions by the International Institute for Sustainable Development (Mar. 9, 2004), http://www.state.gov/documents/organization/30475.pdf.

[25] United Parcel Serv. of Am., Inc. v. Can., NAFTA/UNCITRAL Arb., Application for Amicus Curiae Status by the Canadian Union of Postal Workers and the Council of Canadians (Oct. 20, 2005), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/UPSdoc2.pdf.

challenged federal and state regulation of mining rights.[26] In the three cases, the tribunals made passing reference to the arguments of the amici, yet the awards denied relief to the investors so the human rights of the local populations were not undermined.[27] 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 tension sometimes seen between private rights in property 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.[28]

Outside of the NAFTA cases, 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 heralded case of *Biwater Gauff 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."[29] 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.[30] 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

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[26] Glamis Gold, Ltd. v. United States, NAFTA/UNCITRAL Arb., Submission of the Quechan Indian Nation, 1, 8 (Oct. 16, 2006), http://www.state.gov/documents/organization/75016.pdf (quoting NAFTA, *supra* note 17, art. 102(2)) (internal quotation mark omitted).

[27] 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. Methanex Corp. v. United States, NAFTA/UNCITRAL Arb., Final Award, pt. IV, ch. D, ¶ 7 (Aug. 3, 2005), 16 ICSID Rep. 40 (2012). Further, the tribunal found that California "acted with a view to protecting the environmental interests of the citizens of California." *Id.* pt. IV, ch. E, ¶ 20.

[28] Glamis Gold, Ltd. v. United States, NAFTA/UNCITRAL Arb., Award, ¶ 8 (June 8, 2009), http://italaw.com/documents/Glamis_Award.pdf.

[29] Biwater Gauff Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Amicus Curiae Submission of Lawyers' Environmental Action Team et al., ¶ 51 (Mar. 26, 2007), http://www.ciel.org/Publications/Biwater_Amicus_26March.pdf.

[30] *Id.* ¶ 53.

to the NGOs' argument.[31] In a case against Argentina involving the water and sewage systems in a province surrounding Buenos Aires, *Suez, Sociedad General de Aguas de Barcelona, 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.'"[32] 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 this case, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.[33]

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.[34] The case was discontinued and thus the significance of the human rights arguments was never determined.[35]

In some cases, the investor may inject human rights arguments to support its position. In this situation, a conscientious tribunal has no

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[31] Biwater Gauff Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶¶ 356–92 (July 24, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf.

[32] Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic, 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, ¶ 18 (Feb. 12, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC519_En&caseId=C19 (quoting Aguas Argentinas, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ¶ 19 (May 19, 2005), 21 ICSID Rev. 342 (2006)).

[33] Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 262 (July 30, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0826.pdf. The case is still ongoing, and any final award could be subject to an annulment proceeding.

[34] Foresti v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Letter Regarding Non-Disputing Parties (Oct. 5, 2009), http://italaw.com/sites/default/files/case-documents/ita0334.pdf; Foresti v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/01, Petition for Limited Participation as Non-Disputing Parties in Terms of Articles 41(3), 27, 39, and 35 of the Additional Facility Rules (July 17, 2009), http://italaw.com/documents/ForestivSAPetition.pdf.

[35] Foresti v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/1, Award, ¶ 82 (Aug. 4, 2010), http://italaw.com/sites/default/files/case-documents/ita0337.pdf.

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 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.[36] Claimants argued that under treaty and existing or evolving customary international law indigenous peoples' territorial rights allowed them to conduct traditional business across borders without state interference.[37] They also alleged that customary principles required non-discrimination, access to courts to protect property rights, and a duty on the states to have acted in good faith and conferred with them before implementing the settlement.[38] 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.[39] The tribunal approached the human rights-based arguments with hesitation given that NAFTA Chapter 11 limits its jurisdiction.[40] All of the arguments were rejected. 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."[41] Yet that fact alone did not fit the principle within the customary international law minimum standard. According to the tribunal, the "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 investments."[42] 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.

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[36] Grand River Enters. Six Nations, Ltd. v. United States, NAFTA/UNCITRAL Arb., Claimants' Memorial, Merits Phase, ¶¶ 329–30 (July 10, 2008), http://www.state.gov/documents/organization/107684.pdf.

[37] *Id.* ¶¶ 146–53 (arguing that the Jay Treaty of 1794 reaffirmed their right to travel across the boundary between the United States and Canada and that this treaty and NAFTA should be interpreted in light of an "evolving norm of customary international law" that recognizes the duty of "States to respect and protect the rights and interests of First Nations across borders, in good faith" and also in light of the customary international law obligation that indigenous peoples should be afforded the right to "occupy and enjoy their traditional territories").

[38] *Id.* ¶¶ 154–99.

[39] *Id.* ¶¶ 154–57; NAFTA, *supra* note 17, art. 1105.

[40] Grand River Enters. Six Nations, Ltd. v. United States, NAFTA/UNCITRAL Arb., Award, ¶ 71 (Jan. 12, 2011), http://www.state.gov/documents/organization/156820.pdf.

[41] *Id.* ¶ 210.

[42] *Id.* ¶ 213.

An interesting aspect of the *Grand River* case is that the United States had a human rights-based defense as the tobacco settlements were part of a public health initiative. The health aspects of the settlements framed the factual portion of the respondent's counter-memorial but were not described as a human rights defense in the argument section.[43] 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 provincial actions in trying to renegotiate a concession contract were essential to secure the right to water to its population. The tribunal did not ignore the human rights arguments yet held that the aim of securing water could have been met by means other than violating the BIT.[44]

The investor–state tribunals' limited engagement with human rights does not portend 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 to defend their acts, particularly when the conduct reflects obligations under human rights treaties. Investors, after 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

Human rights arguments likely will be raised more frequently in investor–state arbitrations, or, at a minimum, human rights will be affected in some shape or form due to foreign investment. An investor–state tribunal, however, has jurisdiction to resolve only the disputes arising under the applicable IIA. Those disputes are 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 substantive law and arbitration rules. For example, NAFTA and international law apply to disputes under NAFTA Chapter 11.[45] Some

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[43] Grand River Enters. Six Nations, Ltd. v. United States, NAFTA/UNCITRAL Arb., Counter-Memorial of Respondent United States of America (Dec. 22, 2008), http://www.state.gov/documents/organization/114065.pdf.

[44] *Suez, Sociedad General de Aguas de Barcelona, supra* note 33, ¶ 260.

[45] NAFTA, *supra* note 17, art. 1131(1).

BITs authorize tribunals to apply international law,[46] 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."[47] 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."[48] 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 law.[49] 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.[50] 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.[51] 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.[52] 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 (ECHR) and the American Convention on Human Rights.[53] In fact, under the ECHR, corporations,

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[46] *See, e.g.*, Agreement for the Promotion and Protection of Investments, Ger.-India, art. 9(2)(b)(ii), July 10, 1995, *available at* http://unctad.org/sections/dite/iia/docs/bits/germany_india.pdf (authorizing the tribunal to resolve the dispute under the terms of the BIT, relevant national laws, and generally recognized principles of international law); Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Rom. art. XIII(7), May 8, 2009 [hereinafter Can.-Rom. BIT], *available at* http://www.treaty-accord.gc.ca/text-texte.aspx?id=105170.

[47] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 42, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[48] UNCITRAL Arbitration Rules, art. 35 (2010), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[49] Dupuy, *supra* note 10, at 56 (emphasis omitted).

[50] *See, e.g.*, Art. 31, CONSTITUCIÓN NACIONAL (Arg.); S. AFR. CONST. § 232, 1996 (customary international law is applicable law in South Africa unless it conflicts with the Constitution or an Act of Parliament).

[51] *See* Karamanian, *supra* note 11, at 246–48.

[52] Dupuy, *supra* note 10, at 50.

[53] American Convention on Human Rights, art. 21, Nov. 22, 1969, 1144 U.N.T.S. 143; European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol, art. 1, Mar. 20, 1952, 213 U.N.T.S. 221 [hereinafter Protocol 1].

as legal entities, have the right to property,[54] which means that a foreign corporate investor could allege human rights-based claims against a European state for conduct giving rise to expropriation.

The treaties themselves may insulate states from liability when they regulate to protect public welfare. For example, the 2012 U.S. 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."[55] Similar clauses can be found in a number of IIAs, with some of these other clauses clarifying the state's police power and others limiting the measures to those that are consistent with the investment provisions in the treaties.[56]

The ability of the state to regulate on a non-discriminatory basis without responsibility to a foreign investor is consistent with the *Restatement (Third) of Foreign Relations Law of the United States*, section 712, comment g, which recognizes that a "state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory."[57] The principle extends beyond U.S. jurisprudence as investor–state tribunals have recognized that under customary international law "[s]tates are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[58]

The 2012 U.S. 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

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[54] Protocol 1, *supra* note 53, art. 1 (providing that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions").

[55] U.S. Model BIT, *supra* note 18, annex B, ¶ 4(b); *see also* Canadian Model BIT annex B.13(1) § (c) (2004), *available at* http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf (providing that "non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation").

[56] *Compare* Krommendijk & Morijn, *supra* note 12, at 435 (recognizing that in some IIAs states "clarify the scope and extent of the concept of police powers" to "protect their regulatory capabilities"), *with* Mann, *supra* note 5, at 19 (citing Article 43 of the EFTA–Singapore Agreement, which limits the regulatory powers to those consistent with the Agreement).

[57] 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. g (1987).

[58] Saluka Invs. BV v. Czech Republic, UNCITRAL Arb., Partial Award, ¶ 255 (Mar. 17, 2006), http://www.worldcourts.com/pca/eng/decisions/2006.03.17_Saluka_Investments_v_Czech_Republic.pdf; *see also* Methanex Corp. v. United States, NAFTA/UNCITRAL Arb., Final Award, pt. IV, ch. D, ¶ 7 (Aug. 3, 2005), 16 ICSID Rep. 40 (2012); Técnicas Medioambientales Tecmed SA v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), 10 ICSID Rep. 134 (2006).

laws.[59] 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."[60] These clauses resemble language in treaty preambles that signal that the treaties seek to promote investment in a "sustainable" manner[61] or in a way "consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights."[62]

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.[63] And relevant to the entire framework of IIAs is what some tribunals have described as the customary international law defense of necessity as reflected in Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility).[64] That defense recognizes limited situations in which state conduct, while in breach of a primary international obligation, is not a basis of liability.[65]

Contrary to some arguments, IIAs and the regime within which disputes arising under them are to be resolved are not investment exclusive. So if human rights have a role in investor–state arbitration, what rules should guide a tribunal in giving effect to them? This Essay urges tribunals to apply four basic rules: (1) *jus cogens* norms should trump obligations under an IIA if they are raised defensively while they could be relevant if raised offensively by the investor; (2) a state's obligations under the United Nations Charter should trump obligations under an IIA, although this rule is tempered when the mandated state conduct in itself

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[59] U.S. Model BIT, *supra* note 18, arts. 12(2), 13(2).

[60] Can.-Rom. BIT, *supra* note 46, art. XVII(2).

[61] Agreement for the Promotion and Protection of Investments, Can.-Peru, Preamble, Nov. 14, 2006, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_peru.pdf.

[62] U.S. Model BIT, *supra* note 18, Preamble; NAFTA, *supra* note 17, Preamble (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 nations'] 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 for the Liberalization, Promotion and Protection of Investment, Japan-Viet., Preamble, Nov. 14, 2003, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/japan_vietnam.pdf (recognizing that the treaty's investment objectives "can be achieved without relaxing health, safety and environmental measures of general application").

[63] U.S. Model BIT, *supra* note 18, art. 18(2).

[64] Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001). For a challenge to the contention that Article 25 codifies general international law, see Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AM. J. INT'L L. 447, 450, 470–71 (2012).

[65] Rep. of the Int'l Law Comm'n, *supra* note 64, art. 25.

constitutes a human rights violation; (3) the treaties should be interpreted using the standard of VCLT, Article 31(1) to give full effect to their purpose as reflected in the preambles and exceptions and also in light of customary international law; and (4) human rights aspects of the investment protection measures in the treaties should be recognized and given effect. Application of these rules is designed to overcome the problem, aptly described by Zachary Douglas in the context of MFN clauses, that without a clear formulation of standards the system is destined to be "a series of *sui generis* answers . . . without the certainty of a uniform solution."[66]

The first rule, that *jus cogens* norms should trump obligations under an IIA, is derived from VCLT, Article 53, which recognizes a *jus cogens* norm as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[67] States cannot rely on an investment treaty to avoid *jus cogens* obligations, "the most fundamental rules of protection of human rights," so that "investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs" are not protected.[68] These obligations are mandatory.[69]

Accordingly, a tribunal could invoke the first principle, which is grounded in international law, to protect human rights that rise to *jus cogens* even if doing so would be inconsistent with a treaty's investment protection measures.[70] The outcome, while appealing in a normative context, sheds only a little light on the interaction of human rights and investment as it would mean that the IIA itself would not be enforced to protect the aggrieving investor.[71] In this sense, the state would use the *jus*

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[66] Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT'L DISP. SETTLEMENT 97, 99 (2011).

[67] VCLT, *supra* note 9, art. 53.

[68] Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/05, Award, ¶ 78 (Apr. 15, 2009), http://arbitration.fr/resources/ICSID-ARB-06-5.pdf; *see also* Methanex Corp. v. United States, NAFTA/UNCITRAL Arb., Final Award, pt. IV, ch. C, ¶ 24 (Aug. 3, 2005), 16 ICSID Rep. 40 (2012) (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").

[69] Andrea K. Bjorklund, *Mandatory Rules of Law and Investment Arbitration*, 18 AM. REV. INT'L ARB. 175, 199–202 (2007); Choudhury, *supra* note 10, at 677–78.

[70] *See* Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 678, 690 (Christina Binder et al. eds., 2009) ("[*J*]*us cogens* norms . . . impose a 'legally insurmountable limit to permissible treaty interpretation.'" (quoting Oil Platforms (Iran v. U.S.), ¶ 9, 2003 I.C.J. 161 (Nov. 6) (separate opinion of Judge Simma))).

[71] Annika Wythes, *Investor–State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?*, 23 LEIDEN J. INT'L L. 241, 252 (2010) (citing Luke Eric Peterson & Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, INT'L INST. FOR

cogens principle as a defense or shield to the investor's claim.[72] Establishment of the defense would not necessarily invalidate the investment treaty; instead, it would simply mean that the investor could not prevail on its claim against the host state arising under the treaty.

Or perhaps the investor could rely on a *jus cogens* norm to support its claim that the host state breached the investment treaty. Even in this affirmative sense, the tribunal could not resolve the merits of the human rights violation, such as whether the investment constituted an actionable form of piracy for which there would be a remedy as such a determination would be beyond its jurisdiction.[73] Using *jus cogens* in this positive way, or as a sword, as Professor Paul Stephan has noted, would result in a major shift: "Empowering non-state actors and judges to wield a doctrine that trumps state consent takes on meaning once the exercise of this power in opposition to state preferences becomes possible."[74]

The first principle then begs the question of the possible *jus cogens* norms that could be drawn into an investment dispute. The tribunal in *Phoenix Action* referred to investments in furtherance of genocide, slavery, or piracy. One could add crimes against humanity and self-determination to the list.[75] Other possible additions include investments that deprive an indigenous community of its sacred property. Thus, certain investment activity would not be afforded protection under the treaty due to the priority of the human rights norm.

Could a state, in turn, argue that its conduct is protected under *jus cogens* principles? For example, in response to a charge of nationalization, a state may argue that it acted consistently with international law and it felt compelled to nationalize to protect the human rights of its citizens, or simply to exercise its inherent right to control its resources.[76] Andrea Bjorklund, citing *Methanex* and decisions of the Inter-American Court of Human Rights, has noted that race discrimination perhaps rises to a *jus*

SUSTAINABLE DEV. 19 (Apr. 2003), http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf).

[72] *See Phoenix Action Ltd.*, *supra* note 68, ¶¶ 77–78; *see also* Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 103, 128 (2011) (noting in the context of the WTO that a customary human rights law norm could be invoked as a defense); Paul B. Stephan, *The Political Economy of* Jus Cogens, 44 VAND. J. TRANSNAT'L L. 1073, 1101–03 (2011).

[73] *See, e.g.*, Douglas, *supra* note 66, at 103; Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 554 (2001) (recognizing that a WTO panel, while bound by general international law, lacks jurisdiction to rule on claims of a violation of general international law, including *jus cogens*).

[74] Stephan, *supra* note 72, at 1097.

[75] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 595–96 (8th ed. 2012).

[76] *See, e.g.*, Texaco Overseas Petroleum Co. v. Govt. of the Libyan Arab Republic, Int'l Arb. Tribunal, Award on the Merits, ¶ 71 (Jan. 19, 1977), 17 I.L.M. 3 (1978) (asking whether the right to nationalize is a "mandatory rule of general international law").

cogens violation.[77] In these cases the claimants had raised various forms of discrimination in support of claims against the states and thus asserted *jus cogens* norms affirmatively. Yet, the desire of a state to eliminate race discrimination could be the basis for the state action allegedly giving rise to breach of the investment treaty, as was the case in *Foresti v. South Africa*.[78] Thus, *jus cogens* could be asserted defensively in support of the challenged state conduct.

The proposed approach faces challenges beyond the uncertainty about *jus cogens* or the difficulty of applying the norms to a specific dispute. The first sentence of VCLT, Article 53 provides that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[79] In other words, it speaks of treaty validity, not use of *jus cogens* as a defense to the position of a party to the treaty. Moreover, the *jus cogens* norm must conflict with the treaty when the treaty is concluded. In using *jus cogens* as a defense to the investor's conduct the state would be arguing about events occurring after the treaty was in effect. Yet, even the International Court of Justice (ICJ) in the *Jurisdictional Immunities* case has recognized that "[a] *jus cogens* rule is one from which no derogation is permitted," although such a rule would not apply to "the scope and extent of jurisdiction."[80] Hence, under the proposed first rule of this Essay, an investor–state tribunal could rely on *jus cogens* in a defensive way. Allowing *jus cogens* in an offensive way could be more problematic due to the possibility that the norms would go well beyond the consent of the parties as reflected in the treaty.

The second principle is one that a few commentators have recognized and it is based on Article 103 of the United Nations Charter.[81] 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.[82] 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.[83] In short, obligations arising

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[77] Bjorklund, *supra* note 69, at 201.

[78] *Foresti*, Award, *supra* note 35, ¶¶ 54–63.

[79] VCLT, *supra* note 9, art. 53.

[80] Jurisdictional Immunities of the State (Ger. v. It.), Judgment, ¶ 95 (I.C.J. Feb. 3, 2012), http://www.icj-cij.org/docket/files/143/16883.pdf; *see also* Stephan, *supra* note 72, at 1077.

[81] *See, e.g.*, Choudhury, *supra* note 10, at 678; Donald Francis Donovan, *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).

[82] U.N. Charter art. 103.

[83] Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT'L L. 69, 77–78 (2009); *see also* Choudhury, *supra* note 10, at 678 n.28 (recognizing that "IIA obligations may only be trumped by UN Charter obligations if the latter reflect human rights that are erga omnes or relate to the right to equal treatment based on race, sex or religion").

under the Charter have "special status."[84] Their special status applies even to a treaty concluded after the UN Charter and as to any bilateral or multilateral arrangement.[85] As Donald Donovan has observed, if the UN Security Council had passed a resolution calling for the seizure of a foreign investor's assets deemed to have engaged in piracy, a state that engaged in such seizure contrary to an IIA would have a defense to the investor's claim of expropriation.[86]

What seems like a fairly straightforward rule could quickly become complicated. For example, what if in engaging in the seizure, as required under the Security Council resolution, the state violates the investor's right to property or fails to provide notice or due process, such as a means to challenge the seizure?[87] The question is not far-fetched as the issue and related ones have arisen in contexts outside of investor–state arbitration. In *Bosphorus Hava Yollari Turizm v. Ireland*, the European Court of Human Rights (ECtHR) was faced with a challenge by an airline charter company to Ireland's seizure of an airplane as part of a regulation of the European Community (EC).[88] The EC Regulation was enacted following resolutions of the UN Security Council that imposed sanctions against the former Federal Republic of Yugoslavia.[89] The sanctions sought to "address the armed conflict and human rights violations taking place" in the former Yugoslavia.[90] The company alleged that Ireland's seizure of the airplane violated Article 1 of Protocol No. 1 of the ECHR (right to property). The ECtHR recognized that a state has a duty to comply with the Convention, competing domestic or international legal obligations aside.[91] Yet, the state is justified in its compliance with the EC regulation "as long as the relevant organisation is considered to protect fundamental rights . . . in a manner which can be considered at least equivalent to that for which the [ECHR] provides."[92] The Court found that EC law protected fundamental rights, that the presumption was not rebutted by a manifest deficiency of the protection, and thus ruled in favor of Ireland.[93]

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[84] Moshe Hirsch, *Interactions Between Investment and Non-Investment Obligations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 154, 158 (Peter Muchlinski et al. eds., 2008).

[85] Behrami v. France, Joint App. Nos. 71412/01 & 78166/01, Admissibility Decision, ¶ 27 (Eur. Ct. H.R. May 2, 2007), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830.

[86] Donovan, *supra* note 81, at 208 (noting that "*jus cogens* norms and Charter obligations . . . are part of the same legal order that governs the treaty, i.e. international law").

[87] Milanovic, *supra* note 83, at 97–98.

[88] Bosphorus Hava Yollari Turizm ve Ticaret A.S. v. Ireland, 2005-VI Eur. Ct. H.R. 107, ¶ 3.

[89] *Id.* ¶¶ 14, 16.

[90] *Id.* ¶ 14.

[91] *Id.* ¶ 153.

[92] *Id.* ¶ 155. According to the Court, "equivalent" means "comparable." *Id.*

[93] *Id.* ¶¶ 165–67.

Ireland's action in *Bosphorus* was based on the EC Regulation, which had been directly incorporated into the law of Ireland, versus the relevant UN Security Council Resolution.[94] So the case perhaps has limited insight into how an arbitration tribunal could begin to deal with state action that is predicated on an obligation under the UN Charter. Does it make a difference if the state acts directly due to UN action under the Charter as opposed to an obligation of a regional body? *Behrami v. France*, which involved the ECtHR's review of the conduct of troops that were part of the security presence in Kosovo (KFOR), while recognizing that the conduct of the troops could not be attributed to an ECHR state, noted the priority of actions taken under the UN Charter:

> [T]he [European] Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC [United Nations Security Council] Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself.[95]

Yet, in *Kadi v. Council of the European Union*, which involved the EC's implementation of UN Security Council resolutions to freeze assets of individuals and entities associated with terrorists, the European Court of Justice (ECJ) held that it could review acts of a community organ to give effect to the resolutions.[96] The EC Regulation was alleged to have been incompatible with the petitioners' fundamental rights, specifically the right to be heard and the right to property.[97] Judicial review in *Kadi* was not of the Security Council resolution, but of the EC Regulation giving effect to it and such review, according to the ECJ, "would not entail any challenge to the primacy of that resolution in international law."[98] In a later case, *Al-Jedda v. United Kingdom*, the ECtHR, in characterizing the applicant's argument about *Kadi*, noted:

> The essence of the judgment in *Kadi* was that obligations arising from United Nations Security Council resolutions do not displace the requirements of human rights as guaranteed in Community law. It was true that the European Court of Justice examined the validity of a Community regulation and did not examine directly any Member State action implementing Security Council resolutions. But this was a technical point, resulting from the fact that the challenge was brought against a Community measure and not a national one;

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[94] *Id.* ¶ 145.

[95] *Behrami*, *supra* note 85, ¶ 149.

[96] Case C-402/05, Kadi v. Council of the European Union, 2008 E.C.R. I-6351, ¶ 327.

[97] *Id.* ¶¶ 333, 358.

[98] *Id.* ¶ 288.

> it did not affect the substance or scope of the European Court of Justice's ruling.[99]

The ECtHR did not reject the applicant's interpretation as to the scope of *Kadi*. In fact, while not directly saying, the ECJ in *Kadi* assumed "that the U.N. system *may not* be counted on to adequately safeguard fundamental rights as the Court conceives them."[100]

In light of *Kadi*, in particular, could an arbitral tribunal not give priority to state action that is taken due to a UN Security Council resolution protecting human rights on the grounds that it offends the human rights of the investor? In other words, could the investor, like the aggrieved individual and charity in *Kadi*, claim that its fundamental rights, such as a right to be heard and the right to property, were denied when the state seized its property? If the investor is able to do so, the arbitral tribunal would find itself in the awkward position of having to adjudicate conflicting human rights norms, those of the state in seizing property pursuant to the Security Council resolution and those of the investor if its rights are protected under a human rights treaty, such as the ECHR.

First, the likelihood that the tribunal would face this situation is remote as presumably the IIA would include the standard protection against expropriation, which would afford the investor notice, due process, and compensation. The protection against expropriation, as opposed to a deprivation of human rights, could define the debate. Also, in many instances, the state may have some flexibility in terms of the manner in which the resolution is implemented so that the state could protect the investor's rights while satisfying the resolution. As the ECJ noted in *Kadi*, the Charter contemplates that the state would implement a resolution consistent with the state's domestic procedure.[101] In such a situation, the "conflict" between a state's obligation under the UN Charter and that under the investment treaty could be avoided.[102]

Second, a tribunal constituted under an IIA is not the equivalent of the European Court of Human Rights or the European Court of Justice, each of which has a broader mandate with regard to the protection of human rights and operates in a legal order in which the protection of fundamental rights is supreme. The EC environment is one in which "respect for human rights is a condition of the lawfulness of Community acts."[103] Nevertheless, an investor–state tribunal, in many instances, is not removed from the very human rights principles at stake in the EC as many of them are bound by international law. This mere fact should not be grounds for the tribunal to invoke human rights principles to protect

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[99] Al-Jedda v. United Kingdom, 2011 Eur. Ct. H.R. 1092, ¶ 94.

[100] George A. Bermann, *Navigating EU Law and the Law of International Arbitration*, 28 ARB. INT'L 397, 436 (2012).

[101] *Kadi*, 2008 E.C.R. I-6351, ¶ 298.

[102] *Al-Jedda*, 2011 Eur. Ct. H.R. 1092, ¶ 101.

[103] *Kadi*, 2008 E.C.R. I-6351, ¶ 284.

the investor, like the applicants in *Kadi*, unless the text of the treaty gives the tribunal an avenue to do so.[104]

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."[105] The context of the treaty includes its text, preamble, and annexes.[106] 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 "designed and applied to protect legitimate public welfare objectives."[107] 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."[108] 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.[109] Such an interpretation would be consistent with the UN Guiding Principles, which were unanimously approved by the UN Human Rights Council, and which encourage states to be able to regulate to protect human rights[110] and also with the 2011 Organisation for Economic Co-operation and Development's Guidelines for Multinational Enterprises, which recognize the state's duty to protect human rights and the obligation of enterprises to do the same.[111]

Further, an additional reason for applying a broad definition of public welfare could be found in 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

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[104] *See* McLachlan, *supra* note *, at 385.

[105] VCLT, *supra* note 9, art. 31(1); *see also* Choudhury, *supra* note 10, at 705–12; McLachlan, *supra* note *, at 383–85.

[106] VCLT, *supra* note 9, art. 31(2).

[107] U.S. Model BIT, *supra* note 18, annex B ¶ 4(b); *see also supra* note 55 and accompanying text.

[108] *Saluka Invs. BV*, *supra* note 58, ¶ 264.

[109] *See, e.g.*, Choudhury, *supra* note 3, at 791; Krommendijk & Morijn, *supra* note 12, at 435–36 (arguing that the promotion and protection of human rights would fit within police powers clauses in BITs).

[110] H.R.C. Res. 17/4, U.N. Doc. A/HRC/RES/17/4, ¶ 1 (July 6, 2011); *see also* Ruggie, *supra* note 6, pt. 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).

[111] OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES pt. I, ch. IV (2011), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf.

2012 U.S. 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.[112] NAFTA similarly provides that "it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures."[113] The 2012 U.S. Model BIT also reaffirms a commitment to the obligations of the International Labour Organization.[114] Under VCLT, the treaty terms are to be examined in the context of the language of the treaty.[115] Thus, a tribunal should give effect to the phrase "public welfare" in light of other public values recognized in the treaty.

Under 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.[116] 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."[117]

The analysis of *Grand River* 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.[118]

The fourth principle, and arguably the most difficult to apply, is that international human rights norms could elucidate IIAs' investment protection provisions and defenses available to the state. The norms are relevant only if international law applies to disputes arising under the treaty. The investment protections in the treaties could reflect customary norms[119] 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 amicus curiae, if allowed under the arbitral rules, so long as the norms do not cre-

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[112] U.S. Model BIT, *supra* note 18, arts. 12(2), 13(2).

[113] NAFTA, *supra* note 17, art. 1114(2).

[114] U.S. Model BIT, *supra* note 18, art. 13(1).

[115] VCLT, *supra* note 9, art. 31; *see also* Methanex Corp. v. United States, NAFTA/UNCITRAL Arb., Final Award, pt. II, ch. B, ¶ 16 (Aug. 3, 2005), 16 ICSID Rep. 40 (2012).

[116] *See supra* notes 61–62 and accompanying text.

[117] *Grand River Enters. Six Nations Ltd.*, *supra* note 40, ¶ 69.

[118] *Saluka Invs. BV*, *supra* note 58, ¶ 300.

[119] José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 33 (2009).

ate new duties or defenses beyond those set out in the BIT.[120] 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."[121]

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.[122]

A stand-alone clause like this, while not specific in its terms, has been recognized as imposing obligations of legitimate expectations, nondiscrimination, fair judicial and administrative process, transparency, and proportionality.[123] 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 as 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."[124] 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."[125]

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

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[120] Simma & Kill, *supra* note 70, at 692–94.

[121] *Id.* at 694.

[122] Netherlands Model BIT, art. 3 (1997), *reprinted in* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS app. 8 (2009).

[123] ROLAND KLÄGER, "FAIR AND EQUITABLE TREATMENT" IN INTERNATIONAL INVESTMENT LAW 117–19 (2011).

[124] *Glamis Gold, Ltd.*, *supra* note 28, ¶ 22.

[125] KLÄGER, *supra* note 123, at 110.

hold true for the state's assertion of a defense.[126] 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.

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 a subsidiary role. In the same vein, a strong argument could be made that good governance and a corruption-free environment are essential to the protection of human rights.[127] 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. Second, if the treaty is silent on this point, the investor still has arguments available 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.[128] 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 actions were justified based on

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[126] *See* Ioana Knoll-Tudor, *The Fair and Equitable Treatment Standard and Human Rights Norms*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 310, 319 (P.M. Dupuy et al. eds., 2009).

[127] OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, GOOD GOVERNANCE PRACTICES FOR THE PROTECTION OF HUMAN RIGHTS, at 1–2, U.N. Doc HR/PUB/07/4, U.N. Sales No. E.07.XIV.10 (2007), *available at* http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf.

[128] Int'l Thunderbird Gaming Corp. v. United Mexican States, NAFTA/UNCITRAL Arb., Award, ¶ 27 (Jan. 26, 2006) (Separate Opinion of Thomas Wälde), http://www.iisd.org/pdf/2006/itn_award.pdf.

the right to water.[129] 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.[130] In Argentina's case, the argument is even more complicated as its constitution recognizes a hierarchy to international law and human rights.[131] 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 as 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."[132] As Professor Barnali Choudhury has observed, "non-specific exception provisions can be used, as some of the Argentinean cases demonstrate, to include non-investment issues in the interpretation of IIAs."[133] The treaty provision aside, a third consideration is whether Article 25 of the International Law Commission's Articles on State Responsibility would enable the defense of the right to water as 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. 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.[134]

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[129] Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 254 (July 14, 2006), 14 ICSID Rep. 374 (2009); *Suez, Sociedad General de Aguas de Barcelona, supra* note 33, ¶ 252. On the right to water as a human right, see Pierre Thielbörger, *The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 487 (P.M. Dupuy et al. eds., 2009).

[130] *See* Karamanian, *supra* note 11, at 240–42.

[131] Art. 75(20), CONSTITUCIÓN NACIONAL (Arg.).

[132] Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993).

[133] Choudhury, *supra* note 10, at 711 (arguing, also, for the inclusion of "human rights norms such as the right to food or the right to housing" under the exception provision).

[134] *See Suez, Sociedad General de Aguas de Barcelona, supra* note 33, ¶¶ 259–65.

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. They are not using 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 of international law that should enable a healthy and appropriate respect for human rights in the investment process.