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Evolving Dynamics in International and European Law

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Editors: Martina Buscemi, Nicole Lazzerini, Laura Magi, and Deborah Russo

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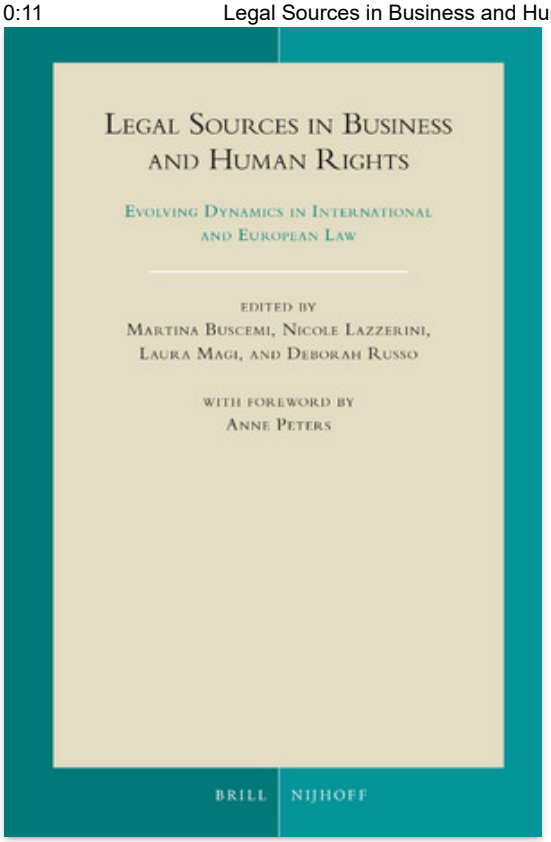

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CHAPTER 3

International Investment Treaties as a Source of Human Rights Obligations for Investors

*Giovanni Zarra**

1 The Asymmetry of International Investment Law and the Traditionally Limited Role for Human Rights

International investment arbitration was born in the second half of the twentieth century with the precise aim of depoliticizing disputes concerning foreign investments.[1] The possibility of directly suing host States for the violation of substantive standards of treatment was seen by investors as a way of raising their confidence in the reliability of their State counterparties as well as a method of avoiding the lengthy procedures and uncertainties related to diplomatic protection. Host States, on the other hand, obtained the advantage of being able to attract foreign capital more easily.[2] However, international investment law has been conceived as 'asymmetric' from both a substantive and procedural point of view.[3] As to the former, bilateral investment treaties (BITs) are drafted as legal instruments aimed at granting specific rights to investors (and to investors *only*) in the enjoyment of their investment within the territory of a foreign State. At least in the majority of BITs, it is provided that investors may bring claims for the violation of the standards of treatment granted to

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1 The evolution of the investment system is described, eg, in Giorgio Sacerdoti, 'The Proliferation of BITs: Conflicts of Treaties, Proceedings and Awards' in Karl P Sauvant (ed), *Appeals Mechanism in International gInvestment Disputes* (OUP 2008) 127 ff.; Stanimir Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*' (2004) 4 The Law & Practice of International Courts and Tribunals 19.

2 Pia Acconci, 'Le violazioni delle norme internazionali sui diritti dell'uomo derivanti da attività di imprese multinazionali. Possibili forme di prevenzione, repressione e riparazione' in Giovanni Canzio (ed), *Itinerari giuridici per il quarantennale della Facoltà di Giurisprudenza dell'Abruzzo* (Giuffré editore 2007) 2–8.

3 Kevin Crow and Lina Lorenzoni Escobar, 'International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?' (2017) 144 Essays on Transnational Economic Law 5.

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them,[4] whereas, in principle, States do not have the right to file claims against investors.

In light of these premises, when the investment arbitration system started to develop significantly (with a real boom in the last part of the twentieth century), some concerns arose. Indeed, as aptly affirmed by Koskenniemi, '[w]hen one of the parties, and only one of them, may say to the other 'if you do not agree with my conditions, then see you in the court', then the balance of power has shifted decisively in favour of that party'.[5] This means that, if an investor violates the human rights of the population concerned, the host State does not have, on the international level, a judicial means of compelling the investor to make reparation for such a violation.

This criticism is part of a wider backlash that is currently taking place against the investment system and has led to the proposal of some reforms to international investment law and arbitration. A thorough analysis of all the criticisms against investor-State dispute settlement (ISDS), the proposed reforms and their correctness goes beyond the scope of this chapter, which is more modest and more specific at the same time.[6] Attention will be paid to (*i*) the role (if any) of investors' human rights obligations within the existing ISDS system and (*ii*) the remedies that currently exist in order to prevent an investor that violated human rights from also being able to take the advantage of a favourable arbitral award.

In this regard, it is to be noted that newer BITs sometimes set forth human rights obligations for investors. This is the case of the 2016 Nigeria-Morocco BIT[7] and the 2016 Iran-Slovakia BIT.[8] The former Treaty, in article 18, recognizes

4 The situation is different in the cases where arbitral jurisdiction is based on a contract, considering that contractual arbitration clauses may be invoked by both parties (as demonstrated by the recent ICSID claim made by Rwanda against an investor as reported at <https://globalarbitrationreview.com/article/1179407/rwandan-state-entity-takes-investor-to-icsid> accessed 16 May 2019. On the difference between contract claims and treaty claims see Giovanni Zarra, *Parallel Proceedings in Investment Arbitration* (Giappichelli – Eleven 2017) 3 ff.

5 Martti Koskenniemi, 'It's not the Cases, It's the System' (2017) 18 Journal of World Investment & Trade 343.

6 See, in this regard, Giovanni Zarra, 'The New Investor-State Dispute Settlement Mechanisms Proposed by the EU and the Geneva Centre for International Dispute Settlement. A Step Forward or a Hasty Reform?' (2018) 13 Studi sull'integrazione europea 389.

7 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco-Nigeria) (adopted 19 January 2016, entered into force 30 August 2017).

8 Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia-Iran) (adopted 3 December 2016, not yet entered into force).

the obligation of investors to respect the environment, comply with human rights duties and fulfil labour law obligations. As to the latter BIT, it expressly says, in article 10, that investors should strive to make the maximum feasible contribution to the sustainable development of the host State and local community through appropriate levels of socially responsible practices. It is also possible to refer to the 2012 Model BIT drafted by the Southern African Development Community,[9] which – in article 15(1) – sets forth a duty for investors to respect human rights; and the 2016 Draft Pan-African Investment Code,[10] prepared under the aegis of the African Union, which devotes the entire Chapter 4 to 'Investor Obligations'. Other treaty norms are less explicit in providing for investors' obligations, but still demonstrate the drafters' sensitivity towards this issue.[11] These treaty clauses are indeed symptomatic of a reaction of States (also based on growing public opinion against ISDS)[12] against the current legal framework and they evidence the perceived necessity of imposing human rights obligations on investors.[13]

This paper will verify whether human rights obligations may play a role in investment arbitration through judicial interpretation of existing sources of international law, in order to understand whether we are moving 'towards international rules incumbent upon companies' (as the title of this part of the book affirms). On the one hand, and notwithstanding the express reference to human rights in new BITs (something that can certainly be observed as the beginning of a new trend), in only a minority of cases does the wording of BITs

9 Southern African Development Community, Model Bilateral Investment Treaty Template (July 2012) available at <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 16 May 2019.

10 African Union Commission Economic Affairs Department Draft Pan-African Investment Code (December 2016) available at <https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf> accessed 16 May 2019.

11 See, eg, the Preamble of the 2015 Norwegian Model BIT and Art. 810 of the Canada Peru Free Trade Agreement. These texts use conditional language for saying that the contracting parties should encourage investors to respect human rights and reaffirm their commitment to the rule of law and to the respect of human rights.

12 Nicolas Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL Unbound 17.

13 This tendency is to be added to the alleged existence of a 'trend in the declarative practice of states towards extending responsibility for respecting human rights to private companies involved in the provision of private services'. See Crew and Lorenzoni Escobar (n 3) 9; Eric De Brabandere and Maryse Hazelet, 'Corporate Responsibility and Human Rights: Navigating between International, Domestic and Self-Regulation' (2017) Grotius Centre Working Paper 2017/056-HRL 6 ff and 15 ff.

include mention of human rights.[14] In the majority of cases BITs do not say anything as to investors' human rights obligations. It is a matter of uncertainty whether investors may be considered bound by human rights norms and, if so, whether these obligations may be taken into account during investment arbitration. In this regard, it is worth highlighting that the majority of sources that provide for the human right duties of multinational corporations are soft-law instruments (by definition non-binding).[15] Moreover, corporate social responsibility and companies' codes of conducts[16] mainly operate at the domestic law level, considering that they are adopted by companies as a means of internal regulation and that the only way to give express relevance to these sources in an investment arbitration proceeding is to expressly refer to them as binding obligations within an investment contract entered into by the investor and the host State.[17] Hence, they will not be addressed in the present analysis.

On the other hand, against this background, we will seek to demonstrate that case law is playing a crucial role in interpreting existing treaty clauses in a way that is aimed at enhancing the human rights responsibilities of investors. In this regard, we will try to show that, in light of the so-called 'taking into account approach' endorsed by arbitral tribunals – which is not a doctrine of binding precedent, but imposes a duty to always consider what has been done by previous arbitrators–[18] there is an emerging trend towards giving weight to human rights in investment cases. Should this tendency continue in the future, it could develop the legal sources in this area of law by contributing to the emergence of human rights duties (or responsibilities) of investors.[19]

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14 Mavluda Sattorova, 'Investor Responsibilities form a Host State Perspective: Qualitative Data and Proposals for Treaty Reform' (2019) 113 AJIL Unbound 26.

15 Jorge Viñuales, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32 ICSID Review 349 ff. An attempt to codify an international binding instrument regarding business and human rights was started in 2014 by the Human Rights Council with Resolution 26/9 (14 July 2014) on 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights'.

16 Ie, self-imposed means for respecting human rights adopted by multinational companies. See Domenico Pauciulo, 'Le iniziative delle imprese multinazionali in materia di responsabilità sociale d'impresa: i codici di autodisciplina' (2012) 14 Annali dell'Università del Molise 637, 639 and 649.

17 See Pauciulo (n 16) 655.

18 Giovanni Zarra, 'Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State of Necessity' (2017) 34 Journal of International Arbitration 669 ff. The paper demonstrates why it could be safely said that previous decisions are a valuable source of law in investment arbitration.

19 Eg, stabilizing in general principles proper to this area of international law. It is arguable that, as has happened in other cases (eg, with regard to the content of some standards of

Attention will be focused initially on the mechanisms that *indirectly* render investors liable for not having respected human rights (Section 2). Such mechanisms are triggered, first of all, in cases where investments did not comply with the host State's law (including on human rights). Where this circumstance arises, arbitral tribunals have often either declined jurisdiction or declared a claim inadmissible (Section 2.1). Our focus will then shift to solutions to the violation of human rights that may operate at the merits stage (Section 2.2). In this regard, we can identify, firstly, cases where arbitrators ruled out that a violation of the standards of treatment of foreign investment existed if a State acted in order to prevent violations of human rights. Secondly, there are cases where, on the basis of the so-called contributory fault model, the damages awarded to investors have been proportionally reduced (or even excluded) due to human rights violations by the same investors. We will then deal with the counterclaim mechanism, which is a *direct* means for enforcing human rights obligations of investors (if any) that is recently being increasingly used by respondent States (Section 3). Section 4 will be devoted to some conclusions.

2 Indirect Remedies for Violations of Human Rights by Investors

As already said, we will start focusing on those remedies which may bar, indirectly, the pursuance of claims based on an investment that involves a violation of human rights. These remedies do not directly render investors accountable for having violated human rights, but the violation of human rights is used as a defence aimed at avoiding respondent States' responsibility for the breach of a BIT. Such remedies can operate either at the jurisdiction or admissibility phases (i.e. those phases of the proceedings where, respectively, tribunals realize either that they do not have powers to rule on the case or that it is inopportune to exercise such power)[20] or at the merits stage.

2.1 *Jurisdiction and Admissibility Phases*

Many investment treaties contain clauses providing that investments must be made 'in accordance with the host State law'.[21] These clauses have often been

treatment of foreign investments), general principles proper to international investment law might also be developed with regard to investors' obligation. For an analysis of the category of general principles proper to international investment law in relation to the content of the fair and equitable treatment standard, see Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (Asser – Springer 2018) 51.

20 Zarra (n 4) 103–109.

21 Andrea Carlevaris, 'The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals' (2008) 9 Journal of World Investment & Trade 35.

used by investment tribunals in order to deny jurisdiction over investment claims based on the illegal activity of investors. This practice has mainly occurred in cases where foreign investments were obtained through corruption.[22] For example, in *Inceysa v El Salvador*[23] an ICSID Tribunal considered that the inclusion of a clause of this type within a treaty is a matter of jurisdiction *ratione voluntatis*: the Parties intended to limit the number of investments protected by the treaty to include only those investments which could be considered legal pursuant to the law of the host State. Interestingly, in cases where the clause was missing, tribunals have nonetheless often not hesitated to declare the claims based on illegal investments to be inadmissible.[24] Examples are the cases of *World Duty Free v Kenya* and *Plama v Bulgaria*. In the former case, which was a claim based on a contract, the Tribunal dismissed the action on the basis of the circumstance that the investment was procured through corruption, recognizing that the investment was not legally entitled to protection as a matter of *ordre public international*.[25] In the latter, based on the Energy Charter Treaty, the inadmissibility of the claim was based on the idea that 'the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protection of the ECT cannot apply to investments that are made contrary to the law'.[26]

Is it possible to generalize this approach to other cases in which investments are generated in violation of the law of the host State, including international human rights treaties incorporated into domestic law systems?[27] As expressly recognized in a well-known arbitral award,[28] the response should be in the affirmative. In the words of the Tribunal, indeed,

22 Abby Cohen Smutny and Petr Polasek, 'Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration' (2013) 10 Transnational Dispute Management 277.

23 *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) paras 144–5 and 160.

24 In this regard, it should be noted that some believe that this is the right approach also in cases where there is an 'in accordance with host State law' clause. See *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), Dissenting Opinion of Bernardo Cremades, para 11. *Contra* see Carlevaris (n 21) 42.

25 *World Duty Free Company Limited v The Republic of Kenya*, ICSID case No ARB/00/7, para 188.

26 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008), para 139.

27 It is assumed, in any case, that the reference applies not to minor irregularities but to serious violations of human rights. See Carlevaris (n 21) 47.

28 *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009), para 78. Similarly see also *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme SA v Republic of Albania*, ICSID Case No ARB/11/24, Award (30 March 2015) para 372.

> [i]t is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. (…) [N]obody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments in pursuance of torture or genocide or in support of slavery or trafficking of human organs.

This kind of approach by arbitral tribunals could be seen as a sort of reaction to abusive conducts by investors (which are sanctioned by the loss of investment protection) and certainly indirectly favours the respect of human rights obligations. However, it does not directly impose any duty on foreign investors; this is a task resting on States when they exercise their sovereign power to enter into international treaties.

However, on the interpretative level, the argument according to which illegal investments are not worthy of protection is reinforced when BITs contain the 'in accordance with host State law' formula, which is aimed at 'exclud[ing] from protection all investments made in violation of the fundamental principles in force [in the host State]',[29] including human rights. In this regard, however, it is usually recognized that 'in accordance with the host State law' clauses apply to investments *established* in violation of human rights.[30] This is because the treaties' wording is usually clear in referring to investments 'established' or 'made' in violation of the host State's law. However, the main concern regards violations of human rights taking place *during the investments' lifetime*. In order to render this kind of violations usable as a defence against investors' claims, the treaty should contain wording similar to that of article 2(2) of the 2009 BIT between China and Malta, according to which '[i]nvestments of either Contracting Party shall be made, and shall, *for their whole duration*, continuously be in line with the respecting domestic laws' (emphasis added).

Should the proposed remedy find widespread application in investment arbitration, this could mean that investments *established* or – if the relevant wording allows this interpretation – *after being established, results in a violation,* of human rights (or a violation, for example, of environmental or labour rights) may not find protection before an arbitral tribunal. Obviously, this does

29 *Consortium Groupement Lesi-Dipenta v Republique Algérienne Démocratique et Populaire*, ICSID Case No ARB/03/08, Award (10 January 2005), para 24 (iii).

30 Ursula Kriebaum, 'Human Rights and International Investment Law' in Y Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar 2018) 25.

not directly ensure that investors violating human rights bear responsibility under international law. Rather, it is only a method for preventing investors who have violated human rights from taking advantage of the investment system against the host State. This interpretation and application of the 'in accordance with host State law' clauses are, therefore, to be welcomed.

For the sake of clarity, however, it should be pointed out that in the cases where the aforementioned wording is missing the situation is murkier: though the approach adopted in *Plama* seems to be the correct way of handling the problem and has been, indeed, recognized as an 'uncontroversial' principle of international investment law,[31] in the absence of an explicit clause requiring compliance with the law of the host State tribunals are in principle free (due to the lack of a binding precedent doctrine) to adopt different interpretations and to grant protection to investments which violate human rights.

2.2 *Merits of the Dispute*

There are also ways to take human rights violations into account when a tribunal is evaluating the merits of a dispute. As is well known, the main substantive grounds for investment claims are the violation of the fair and equitable treatment (FET) standard and of the prohibition of unlawful expropriation. As to the former standard, one of its main components is the necessity of respecting the legitimate expectations of investors.[32] In this regard, in his Separate Opinion in the *Thunderbird* case,[33] Prof. Thomas Walde gave an interesting elucidation that might be useful also for the purpose of this chapter. In his opinion, investment treaties do not cover expectations created by unlawful or abusive means. Indeed,

> [t]here is ample jurisprudence that a legitimate expectation (…) cannot be created if deception, fraud or other illicit means were used to obtain the governmental assurance or other rights obtained from the government in this way. There can be no international treaty protection for rights obtained by illicit means. In such cases, there may be an expectation, but not a 'legitimate' one.

31 *Ioannis Kardassopoulos v Georgia*, ICSID Case no ARB/05/18, Decision on Jurisdiction (6 July 2017) para 174.

32 Palombino (n 19) 85 ff.

33 *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL, Award (26 January 2006), Separate Opinion of Prof. Walde.

This reasoning could be easily extended to all cases of violation of provisions of law which may render an expectation non-legitimate (on the basis of a previous violation of the law, including human rights law, by the investor). In this regard, the principle of proportionality[34] may also prove decisive. In evaluating a breach of the obligation to grant FET, arbitrators must duly balance the State's sovereign aim when issuing a certain measure (e.g. the alleged need to protect the environment) and the damage generated to investors.[35] When the damage is higher than the legitimate goals pursued by the State – also taking into account the normal country risk that investors inevitably assume when starting a business in a foreign State – the measure is disproportionate and compensation is due.[36] *A contrario*, when an investment may generate risk to human rights, States have a significant degree of discretion to adopt measures aimed at protecting human rights that risk being violated. In this case, it is difficult for investors to satisfy the proportionality test: the legitimate aim of the State is often likely to justify the issuance of a measure that violates a standard of treatment of foreign investment. Undoubtedly, this is another way to indirectly render investors liable for (possible) violations of human rights.

The same reasoning can be applied to expropriation cases, where the general principle of proportionality may also be taken into account: if the relevance of the public interest inspiring the State measures which constitute expropriation outweighs the sacrifice suffered by the investor, there is arguably

34 Proportionality, according to recent scholarship, is a general principle of international law that plays a significant role in the violation of FET provisions. See Palombino (n 19) 123 ff.; Enzo Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Giuffrè 2000), *passim*. As in other areas of international law, the principle of proportionality is, in investment arbitration, based on three elements: suitability of the measure to reach its objective, necessity of the measure (ie absence of less intrusive means) and proportionality *stricto sensu* to be ascertained in light of the circumstances of the concrete case.

35 Giuseppe Puma, 'Human Rights Law and Investment Law: Attempts at Harmonization Through a Difficult Dialogue Between Arbitrators and Human Rights Tribunals' in Maurizio Arcari and Louis Balmond (eds), *Judicial Dialogue in the International Legal Order* (Editoriale Scientifica 2014) 232.

36 Giovanni Zarra, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v Uruguay' (2017) 14 Brazilian Journal of International Law 112. The case *PL Holdings S.à.r.l. v Republic of Poland*, SCC Arbitration No V 2014/163, Partial Award (28 June 2017), para 354 ff, is significant in this regard. Here the Tribunal considered that a FET violation existed on the basis of a punctual application of the tripartite proportionality test based on the requirements of necessity, suitability and proportionality *stricto sensu*.

no case for illegal expropriation.[37] This can justify State measures aimed at safeguarding the human rights of the population involved. In this regard, it is also worth mentioning a recent significant trend – taking place both in the wording of investment treaties[38] and in arbitral *dicta*[39] – which affords States a significant power to regulate in the public interest. This is the 'legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate'.[40]

The *Philip Morris v Uruguay* Award[41] is significant in this regard. Uruguay adopted a measure called 'single presentation requirement' that precluded tobacco manufacturers from marketing more than one variant of cigarettes per brand. According to Philip Morris, this measure significantly deprived it of its business (based on the sale of several variants of cigarettes), thus amounting to an indirect expropriation. Uruguay, on the contrary, contended that the measure was aimed at safeguarding the right to health of its population and was, therefore, a legitimate exercise of public power. The Tribunal, after having clarified that this measure did not constitute an expropriation, followed the approach proposed by the Respondent.[42] The Arbitrators affirmed that, in their opinion, the power to regulate is a customary rule of international law which must be taken into account by investment tribunals in accordance with

37 Zarra (n 36) 105 ff. On this subject see also Pia Acconci, 'The Integration of Non-Investment Concerns As an Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?' in Giorgio Sacerdoti and others (eds), *General Interests of Host States in International Investment Law* (CUP 2014) 165; Charles H Brower, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes' (2008–2009) 1 Yearbook on International Investment Law & Policy 347.

38 See, *inter alia*, Art 3 of Annex 8-A of the Comprehensive Economic and Trade Agreement (European Union-Canada) (consolidated text of 29 February 2016), Art 23 of the Nigeria-Morocco BIT (n 7), Art 33 of the 2012 Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (China-Canada) (adopted 9 September 2012, entered into force 1 October 2014), Art 12 of the 2012 US Model BIT and Art 16 of the 2015 Indian Model BIT.

39 See, *inter alia*, *Chemtura Corporation v Government of Canada*, NAFTA/UNCITRAL, Award (2 August 2010) paras 265–6; *Methanex Corporation v United States of America*, NAFTA/UNCITRAL, Award (3 August 2005), Part 4, chapter D, para 7.

40 Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart, Nomos, Dike 2014) 33.

41 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016). See Jarrod Hepburn and Luke Nottage, 'A Procedural Win for Public Health Measures' (2017) 18 Journal of World Investment & Trade 307.

42 Ibid para 287.

the systemic interpretation clause set forth by article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.[43] While the argument relating to the customary nature of the power to regulate is not entirely convincing,[44] the Tribunal's effort to give weight to Uruguay's effort to protect human rights is noteworthy. Should this trend be confirmed in subsequent case law, investors whose activity may *potentially* be in breach of human rights should not expect any protection in accordance with BIT provisions when a State, with the aim of protecting human rights that risk being violated, adopts measures that may negatively affect the investor's business.

Finally, an additional way to give relevance to human rights violations at the merits stage is to apply the model of contributory fault. According to this theory, a party cannot invoke a breach by his counterparty if the former's behaviour has somehow contributed to the generation of the damage it suffered. This principle implies that, when an investor violates human rights and then invokes State responsibility for having broken his rights deriving from a BIT (notwithstanding the fact that the State's measures were aimed at safeguarding human rights), the amount due to the investor can be determined to be zero or proportionally reduced.[45] Some recent cases can be mentioned in support of this approach. In *Al Warraq v Indonesia*[46] the Tribunal considered that – notwithstanding that a violation of the FET standard was put in force by the State – the investor was not entitled to any damage because, by acting fraudulently, it did not comply with article 9 of the 1981 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, which states that 'investor[s] shall be bound by the laws and regulations in force in the host state and shall refrain

43 According to this rule, in the interpretation of treaties it is necessary to consider any relevant rules of international law applicable in the relations between the parties, among which certainly customary international law rules should be taken into account. See Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) *passim*.

44 For a detailed analysis see Zarra (n 36) 103–104.

45 This is the approach proposed, with regard to remedies for investors' corruption, by Giacomo Rojas Elgueta, 'The Legal Consequences of Corruption in International Arbitration: Towards a More Flexible Approach?', (2016) <www.kluwerarbitrationblog.com> accessed 16 May 2019, according to whom it is possible to graduate the sanction to the corruptor in relation to the circumstances of the case: 'it seems reasonable to argue that an arbitral tribunal, departing from the traditional approach that denies any legal remedy to the claimant, should consider the possibility of granting an allowance in money for the work done, corresponding to the value of the infrastructure project (i.e., a restitutionary remedy)'.

46 *Hesham T.M. Al Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014), para 631 ff.

from all acts that may disturb public order or morals or that may be prejudicial to the public interest'.

More significantly, in *Urbaser v Argentina*,[47] a case concerning the supply of water in the Province of Greater Buenos Aires, the Tribunal affirmed the principle that States are bound both by the obligation to respect human rights and by the obligations they assumed towards investors. Certainly, some of the measures adopted by Argentina that prejudiced the investment, taken in isolation, would have constituted a breach of the FET standard. However, the Tribunal granted no compensation to the investors, acknowledging that those measures were aimed at safeguarding the human right to water (which it considered a 'universal basic human right'),[48] which was not respected due to an interruption of the supply by the investor. In *Copper Mesa v Ecuador*[49] there was a project for the exploitation of a large deposit of copper in the Junín area, which involved a potential environmental impact. The local community strongly opposed the mining project from the outset. There was an escalation of violence that finally led Ecuador to revoke the concession to the claimant. While it found that Ecuador's act was an expropriation, the Tribunal acknowledged that Copper Mesa contributed to the crisis in the Junín area and reduced the compensation by thirty percent.[50]

With regard to the contributory fault model, a final remark is due. It is here submitted that this approach is a valuable way of taking into account violations of human rights by investors. However, it also involves a significant risk of

47 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016), para 720 ff.

48 Ibid para 624.

49 *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No 2012–2, Award (15 March 2016) para 6.96 ff. See Nicolas Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL Unbound 19.

50 In very similar circumstances, the doctrine of contributory fault was not applied by a Tribunal in *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017). In this regard, it is worth noting the Partial Dissenting Opinion of Professor Philippe Sands QC (12 September 2017), para 4 ff. The Dissenting Arbitrator noted that the investor actually contributed (with acts and omissions) to the situation of social unrest that took place in Peru in relation to the investor's mining project. In his opinion, the Tribunal should have taken into account ILO Convention 169 (applicable to Peru since 2 February 1994), the Preamble of which 'offers encouragement to any investor to take into account as fully as possible the aspirations of indigenous and tribal peoples' (para 7). The lack of any effort by the investors to consider the necessities of indigenous people, which, in turn, led to the disruption of the project, should have been, according to Sands, duly taken into account by the Tribunal in its decision on *quantum* (which should have been reduced, in his opinion, by one half) (para 39).

subjectivity by the Tribunal in deciding if and how to reduce the compensation to investors.[51] Tribunals should therefore be very careful to show the criteria they use in assessing the *quantum* of damage in order to avoid subsequent complaints against their awards.

3 Counterclaims: Direct Remedies for Violations of Human Rights by Investors?

Counterclaims are provided by many arbitration rules.[52] article 46 of the ICSID Convention admits, as a matter of principle, the possibility of counterclaims, provided that there is consent and that such counterclaims arise directly out of the subject matter of the dispute. Even if less explicitly, article 21(4) of the UNCITRAL Arbitration Rules, recalling article 20(3), requires that the subject matter of the claim and the counterclaim be the same and that they arise from the same legal instrument, i.e. the contract or treaty from which the consent to arbitration arises. Such requirements have usually been strictly interpreted, in light of the asymmetrical nature of investment arbitration. Indeed, in order to assume jurisdiction, tribunals have usually required the presence of *the very same legal basis* for the claim and the counterclaim.[53] This last requirement has resulted, in most cases, in tribunals refusing to assume jurisdiction on counterclaims which were inextricably linked to the main claim from a factual point of view, but had a different legal grounding (e.g. they were based on an alleged violation of human rights law).[54] Such a restrictive approach has generated major concerns because it has not duly taken into account State's interest and encouraged the emergence of parallel proceedings.[55]

51 Zarra (n 36) 106–107.

52 See, *inter alia*, Art 5 of the 2017 International Chamber of Commerce Arbitration Rules, Art 2 (iii) of the 2014 London Court of International Arbitration Rules and Art (1)(iv) of the 2017 Rules of the Stockholm Chamber of Commerce.

53 See *Saluka Investment BV v The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004), paras 78–80. See also *Sergei Paushok, CJSC Golden East Company and CJSC Vostok Neftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011), para 693. See also the well-known case *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1 Award (7 December 2011).

54 See the cases mentioned in the previous footnote.

55 Stefan Dudas, 'Treaty Counterclaims under the ICSID Convention' in C Baltag (ed), *ICSID Convention After 50 Years: Unsettled Issues* (Kluwer Law International 2016) 385; Anne K Hoffmann, 'Counterclaims' in Meg Kinnear, Geraldine R Fischer and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International

In order to properly assess whether a human rights counterclaim is admissible, two questions should be preliminarily answered. The first concerns the relationship between jurisdiction and applicable law: even assuming that, as is by now commonly accepted, investment tribunals may apply international law in its entirety, their jurisdiction should in principle be confined to investment claims. Can a human rights claim by the State be considered as an investment claim so as to allow an extension of a tribunal's jurisdiction also to violations of human rights? The second question concerns the international subjectivity of investors. Is it correct to say that investors directly (have rights and) bear duties conferred on them by international law such as to enable them to held be accountable for their human rights violations before an international tribunal?

According to a formalistic and conservative approach, the answer to both questions should be no. As to the first one, it has been argued that jurisdictional clauses are the only provisions intended to delimit the scope of what claims can be brought before an arbitral tribunal[56] and that such clauses will prevail even over applicable law clauses (contained in BITs) that refer to a range of sources which not only regulate investment claims but also encompass general international law or even other areas of international law. For the sake of clarity, if a jurisdictional clause in a BIT refers to 'investment disputes' and the applicable law clause clarifies that such disputes must be resolved 'in accordance with international law', it is assumed that the latter clause cannot be used as a way to enlarge the scope of application of the former. As to the second of the above questions, the traditional view is that individuals (including multinational corporations) cannot directly bear duties pursuant to international law: it is for States to exercise control over the individuals through domestic law[57] and even when human rights provisions have a content that may also bind individuals (and not only States) and therefore seem applicable on a horizontal level, they appear to have only 'a political message' rather than a legal one.[58]

2015) 513 and 518–9; Pierre Lalive and Laura Halonen, 'On the Availability of Counterclaims in Investment Treaty Arbitration' (2011) 2 Czech Yearbook of International Law 144 and 153–155.

56 Lorand Bartels, 'Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?' in Tomer Broude and Yuval Shany (eds), *Multi-sourced Equivalent Norms in International Law* (OUP 2011) 124.

57 Acconci (n 2) 18.

58 Simone Gorski, 'Individuals in International Law' (2013) *Max Planck Encyclopaedia of Public International Law*, para 49.

However, today the approach to those questions is not as straightforward as it was some years ago. Two recent investment awards are instructive in this regard. The first one is the already mentioned *Urbaser v Argentina*[59] case, in which – as previously mentioned – the claimants were the concessionaire responsible for the supply of water services in the Province of Greater Buenos Aires. They initiated an arbitration proceeding complaining of several obstructions by the provincial authorities, which rendered the efficient and profitable operation of the concession extremely difficult. Argentina denied all claims, arguing that the measures taken by the Province were aimed at ensuring that the whole population had access to water. Furthermore, Argentina filed a counterclaim based on the claimant's alleged failure to make the necessary investment in the concession, thus violating its contractual commitments as well as its obligations under international law in respect of the human right to water; the Respondent pointed out that the counterclaim was essential in order to render the investor accountable for its actions.[60] The claimant objected to the counterclaim, expressly stating that the asymmetric nature of BITs prevents a tribunal from evaluating investors' responsibility; moreover, a ruling on human rights would have been outside the scope of the Tribunal's jurisdiction.[61] The Tribunal noted, first of all, that the relevant dispute resolution clause[62] is completely neutral as to the identity of the claimant or respondent in an investment dispute.[63] In addition, when the offer to arbitrate contained in a BIT does not contain subject-matter limitations, once the offer is accepted by the claimant (by starting arbitration proceedings), the same claimant cannot escape a counterclaim if it is linked with the main claim. In this case, at least from a factual point of view, the connection was evident: the claimants' failure to provide the agreed investment caused a violation of an essential right of the population, the protection of which was the main reason why Argentina privatized the water service. It would have therefore been inconsistent to have separate claims on these strictly intertwined matters.[64] This is justified by reasons of procedural economy and by the applicable law clause contained in the BIT, which generically refers to international law.[65] The Tribunal therefore agreed to hear the human rights counterclaim. However, the counterclaim was

59 *Urbaser* (n 47).
60 Ibid para 1140.
61 Ibid para 1120 ff.
62 Article X of the 1991 Spain-Argentina BIT.
63 *Urbaser* (n 47), para 1143.
64 Ibid para 1151 ff.
65 Patrick Abel, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration' (2018) 1 Brill Open Law 75 sees applicable

rejected on the merits because, in the Tribunal's opinion, while human rights norms may create obligations of compliance for investors (i.e. to *respect* such rights in order to avoid hindering their enjoyment by others) they do not generate obligations of performance (ie to *act* in order to protect the enjoyment of human rights by others). For this reason, the claimants did not incur any liability.

The second case which deserves our attention is *David Aven v Costa Rica.*[66] This was a dispute proceeding initiated pursuant to Chapter 10 of the Dominican Republic-Central America FTA and regarded the concession of lands in Las Olas for the development of touristic services. The claimants argued that the State suddenly revoked the relevant permits and this nullified the economic value of the project, while the respondent affirmed that the revocation was aimed at guaranteeing respect for the environment, a policy that was recognized under the applicable treaty and should prevail over the investors' claim. Indeed, according to Costa Rica, the claimants undertook development activities that adversely impacted the Las Olas project site to a considerable degree (by unlawfully damaging a wetland), thus affecting the environment. The respondent State argued that in order to develop the Las Olas Project, the claimants assumed investment obligations which gave rise to *bona fide* expectations by Costa Rica that their investment would indeed be made in such a way as to ensure the protection of the environment. By failing to make their investment appropriately, the claimants violated domestic provisions as well as the obligation under customary international law to respect the environment.[67] The Tribunal noted that article 10.9.3.c. of the Treaty recognizes the right of the host State to adopt measures aimed at safeguarding the environment and that this 'contains, at least implicitly, some obligations to investors',[68] such as the obligation to

> abide by and comply with the environmental domestic laws and regulations, including the measures adopted by the host State to protect human, animal, or plant life or health. No investor can ignore or breach such measures and its breach is a violation of both domestic and international law.[69]

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law clauses as the only possible mechanism for integrating human rights obligations into investment arbitration.

66 *David Aven et al v Republic of Costa Rica*, ICSID Case No UNCT/15/3, Final Award (18 September 2018) para 689 ff.

67 Ibid para 699.

68 Ibid para 732.

69 Ibid para 734.

The Tribunal, after having highlighted the need to safeguard procedural economy and efficiency (which requires that claims and counterclaims are heard together when they are linked), added that 'it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law'.[70]

This applies, in particular, when the obligations involved are a matter of concern for all States, as in the case of the environment. However, like in *Urbaser*, the Tribunal confirmed that these obligations are not 'affirmative' but merely involve a negative duty of compliance.[71] In any case, the counterclaim was eventually dismissed because it was not accompanied by a statement of fact supporting the claim, as required by the relevant procedural rules.[72]

The two awards described above are significant in that they represent an attempt to overcome the formalistic position according to which investors are not subject to obligations under international law. However, the distinction they make between obligation of performance and obligation of compliance is not entirely convincing.[73] These duties are indeed two sides of the same coin: the duty to passively respect a right necessarily involves a duty to act in a way that does not affect that right. An obligation to comply with human rights cannot be, in our opinion, only partial. In this regard, it is arguable that human rights norms, just like constitutional norms,[74] are directly effective upon individuals and have an autonomous preceptive value[75] consisting in the duty to act in a way that does not generate a prejudice to the enjoyment of human rights by other people. According to this view, human rights rules are substantive norms that may be taken as the normative basis of a State claim against an investor, when the latter behaves in a way that prejudices the human rights of the population concerned. Whether this claim is within the jurisdiction of an investment tribunal is another matter and mainly depends on the wording of the relevant treaty. While a rigorous interpretation of an arbitration clause referring only to investment disputes should lead us to avoid an extension of

70 Ibid para 739.

71 Ibid para 742.

72 Ibid para 745.

73 For a critical view see Edward Guntrip, 'Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of *Urbaser v. Argentina*' (2018) 1 Brill Open Law 51.

74 The direct effect of constitutional norms in private relationship has been brilliantly demonstrated by Pietro Perlingieri, 'Norme costituzionali e rapporti di diritto civile' (1980) 1 Rassegna di diritto civile 107.

75 See, in this regard, ECHR, *X and Y v The Netherlands* (26 March 1985) Publications, Sèrie A n. 91, para 23; ECtHR, *Opuz v Turkey* (9 June 2009) para 159.

jurisdiction to human rights claims, when the clause refers to disputes 'relating to an investment' or 'arising from an investment' arbitrators would probably have a wider margin of manoeuvre. However, what is relevant with regard to the above-mentioned cases is the acknowledgment by tribunals of the need not to interpret BIT provisions as favouring only investors and to try to reinterpret existing sources of law in light of a more balanced approach, which duly considers the rights and obligations of both investors and States.[76] Through the interpretative work of judges,[77] counterclaims can be a way of rebalancing international investment law.[78]

4 Conclusions

This Chapter has focused on tracing the evolution (if any) in the sources of international investment law concerning the possible human rights obligations of investors. In actual fact, investment treaties whose wording aims to safeguard the human rights of the populations concerned – even by directly imposing obligations upon investors – are a limited phenomenon. Thus, in light of the existing legal framework, the answer to the question as to whether sources of international investment law take into account human rights should be in the negative. This is, however, not the end of the story. The interpretative task carried out by arbitrators – who have showed to be sensitive to the increasing need for human rights protection and to the related backlash against investment arbitration – has led them to reinterpret some provisions of international investment treaties in order to give relevance to human rights and, in

76 This is, obviously, an approach that tries to solve the problem in light of the existing legal framework. This does not mean that, *de lege ferenda*, a legal instrument which expressly recognizes human rights obligations upon investors is not desirable. See Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016) 340. In this regard, according to Cedric Ryngaert 'Imposing international duties on non-State actors and the legitimacy of international law' (2009) Working Paper presented at the seminar of the FWO research community on non-State actors in international law, Leuven, 26–28 March 2009 1, available at <https://ghum.kuleuven.be/ggs/research/non_state_actors/publications/ryngaert.pdf> accessed 16 May 2019, it is necessary to involve non-State actors in the law-making process in order to be able to impose obligations upon them.

77 For some thoughts on the role of judges as legislators see Sandro Staiano, 'In tema di teoria e ideologia del giudice legislatore' (2018) Federalismi.it.

78 Andrea Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 Lewis and Clark Law Review 461; Tomoko Ishikawa, 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 AJIL Unbound 33.

some cases, even to consider the existence of some human rights obligations of investors.

This process has taken place in two ways.

The first and most common of them involves a indirect method for asserting investors' duty to safeguard human rights. When an investment violates human rights, it is indeed arguable that it is an *illegal* investment which is not entitled to BIT protection, either as a matter of jurisdiction (in particular when investment treaties limit arbitral jurisdiction to *legal* investments) or as a matter of admissibility (i.e. when such wording is lacking in the treaty, tribunals may still consider that the investment does not deserve BIT protection and therefore refuse to exercise a validly conferred jurisdiction). When an investment *may* violate human rights, and a State acts in order to prevent that such a violation takes place, tribunals have not hesitated to consider State measures as a legitimate exercise of police power and, therefore, have not ordered States to reimburse investors. In some other cases, tribunals have considered investors' violation of human rights of the population concerned as a form of contributory fault and have therefore proportionally reduced the amount to be paid (if any) to the investors.

The second, and more effective, way for imposing human rights obligations upon investors is given by counterclaims. In two recent cases, States have filed human rights counterclaims against investors and tribunals have accepted jurisdiction notwithstanding the alleged obstacles given by the limited wording of applicable jurisdictional clauses (in principle referring to investment disputes only) and by the idea that investors (like other individuals) are not subject to international law obligations.

Of course, much still has to be done in order to ensure full respect for human rights by investors. The developments outlined above, however, are significant in demonstrating that the main problem of international investment arbitration (i.e. its asymmetry, from both a procedural and substantive standpoint) may also be resolved, at least partially, through new interpretations of existing treaty clauses.

List of References

Abel P, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration' (2018) 1 Brill Open Law 61.

Acconci P, 'Le violazioni delle norme internazionali sui diritti dell'uomo derivanti da attività di imprese multinazionali. Possibili forme di prevenzione, repressione e

riparazione' in G Canzio (ed), *Itinerari giuridici per il quarantennale della Facoltà di Giurisprudenza dell'Abruzzo* (Giuffré editore 2007).

Acconci P, 'The integration of non-investment concerns as an opportunity for the modernization of international investment law: is a multilateral approach desirable?' in G Sacerdoti et al (eds), General Interests of Host States in International Investment Law (CUP 2014) 165.

Alexandrov S, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *Ratione Temporis*' (2004) 4 The Law & Practice of International Courts and Tribunals 19.

Bartels L, 'Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?' in T Broude and Y Shany (eds) *Multi-sourced Equivalent Norms in International Law* (OUP 2011) 124.

Bjorklund A, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17 Lewis and Clark Law Review 461.

Brower CH, 'Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes' (2008–2009) 1 Yearbook on International Investment Law & Policy 347.

Cannizzaro E, Il principio della proporzionalità nell'ordinamento internazionale (Giuffrè 2000).

Carlevaris A, 'The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals' (2008) 9 Journal of World Investment & Trade 35.

Crow K and Lorenzoni Escobar L, 'International Corporate Obligations, Human Rights, and the Urbaser Standard: Breaking New Ground?' (2017) 144 Essays on Transnational Economic Law 5.

De Brabandere E and Hazelet M, 'Corporate Responsibility and Human Rights: Navigating between international, domestic and self-regulation' (2017) Grotius Centre Working Paper 2017/056-HRL 1.

Dudas S, 'Treaty Counterclaims under the ICSID Convention' in C Baltag (ed), ICSID Convention After 50 Years: Unsettled Issues (Kluwer Law International 2016) 385.

Gorski S, 'Individuals in International Law' (2013) Max Planck Encyclopaedia of Public International Law<AQ: Please update the page ranges for this references.>.

Guntrip E, 'Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of *Urbaser v Argentina*' (2018) 1 Brill Open Law 37.

Hepburn J and Nottage L, 'A Procedural Win for Public Health Measures' (2017) 18 Journal of World Investment & Trade 307.

Hoffmann AK, 'Counterclaims' in M Kinnear, GR Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2015) 505.

Ishikawa T, 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 AJIL Unbound 33.

Koskenniemi M, 'It's not the Cases, It's the System' (2017) 18 Journal of World Investment & Trade 343.

Kriebaum U, 'Human rights and international investment law' in Y Radi (ed), *Research Handbook on Human Rights and Investment* (Edward Elgar 2018) 13.

Lalive P and Halonen L, 'On the Availability of Counterclaims in Investment Treaty Arbitration' (2011) 2 Czech Yearbook of International Law 141.

Merkouris P, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015).

Palombino F M, *Fair and Equitable Treatment and the Fabric of General Principles* (Asser – Springer 2018).

Pauciulo D, 'Le iniziative delle imprese multinazionali in materia di responsabilità sociale d'impresa: i codici di autodisciplina' (2012) 14 Annali dell'Università del Molise 637.

Perlingieri P, 'Norme costituzionali e rapporti di diritto civile' (1980) 1 Rassegna di diritto civile 95.

Perrone N, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL Unbound 16.

Peters A, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016).

Puma G, 'Human Rights Law and Investment Law: Attempts at Harmonization Through a Difficult Dialogue Between Arbitrators and Human Rights Tribunals' in M Arcari and L Balmond (eds), Judicial Dialogue in the International Legal Order (Editoriale Scientifica 2014) 193.

Rojas Elgueta G, 'The Legal Consequences of Corruption in International Arbitration: Towards a More Flexible Approach?', (2016) www.kluwerarbitrationblog.com.

Ryngaert C, 'Imposing international duties on non-State actors and the legitimacy of international law' (2009) Working paper presented at the seminar of the FWO research community on non-State actors in international law, Leuven, 26–28 March 2009, available at <https://ghum.kuleuven.be/ggs/research/non_state_actors/publications/ryngaert.pdf>.

Sacerdoti G, 'The Proliferation of BITs: Conflicts of Treaties, Proceedings and Awards', in K.P Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP 2008) 127.

Sattorova M, 'Investor Responsibilities form a Host State Perspective: Qualitative Data and Proposals for Treaty Reform' (2019) 113 AJIL Unbound 22.

Smutny AC and Polasek P, 'Unlawful or Bad Faith Conduct as a Bar to Claims in Investment Arbitration' (2013) 10 Transnational Dispute Management 277.

Staiano S, 'In tema di teoria e ideologia del giudice legislatore' (2018) Federalismi.it.

Titi A, *The Right to Regulate in International Investment Law* (Hart, Nomos, Dike2014) 33.

Vinuales J, 'Investor Diligence in Investment Arbitration: Sources and Arguments' (2017) 32 ICSID Rev 346.

Zarra G, *Parallel Proceedings in Investment Arbitration* (Giappichelli – Eleven 2017).

Zarra G, 'Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State of Necessity' (2017) 34 Journal of International Arbitration 653.

Zarra G, 'Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v Uruguay' (2017) 14 Brazilian Journal of International Law 94.

Zarra G, 'The New Investor-State Dispute Settlement Mechanisms Proposed by the EU and the Geneva Centre for International Dispute Settlement. A Step forward or a Hasty Reform?' (2018) 13 Studi sull'integrazione europea 389.