

## BRIDGING THE GAP BETWEEN INTERNATIONAL INVESTMENT LAW AND HUMAN RIGHTS

Amin R. Yacoub\*

*The misapplication of vague international investment standards such as the Full Protection and Security has worsened the legitimacy crisis facing the Investor-State-Dispute-Settlement field. Such misapplication emanates from the fragmentation of international law in the investment arbitration field, the absence of stare decisis, and the lack of a unified interpretive methodology connecting relevant subfields of international law in investment arbitration.*

*For the first time, this article establishes a doctrinal framework based on multiple international treaties to reconnect international investment law with human rights and international humanitarian law in the application of the Full Protection and Security due diligence standard. Further, it develops a unified interpretive methodology that is grounded in that doctrinal framework.*

*The adoption of this research's suggested interpretive methodology is expected to have wide-ranging positive implications on the Investor-State-Dispute-Settlement practice. First, it shall lead to a doctrinally proper application of the Full Protection and Security investment obligation's due diligence standard. Second, it shall promote the respect of international human rights law in the Investor-State-Dispute-Settlement field. Finally, it shall resolve most aspects of the current Investor-State-Dispute-Settlement worldwide legitimacy crisis.*

---

\* International Lawyer; Legal Scholar and Doctoral (PhD/SJD) Candidate at University of Virginia School of Law; Former Research Scholar at New York University School of Law (2018); LLM in International Law, NYU School of Law, MAHS Scholar (2018); Former Associate at the Arbitration department at DLA Piper (now Matouk Bassiouny Law Firm) (2015-2017). The author would like to thank Paul B. Stephan (UVA) for his valuable comments, ideas, and insights on the successive drafts of this article. The author is also thankful to Robert Howse (NYU) and Pierre-Hugues Verdier (UVA) for their helpful comments. The author also benefited from an email exchange with Pedro J. Martinez-Fraga while producing the first draft of this article. The author would like to thank the following editors of the *Hofstra Law Review* for their excellent review and edits: Madison Einhorn, Mikayla Fanto, Emanuele Putrino, Paul Sessa, Alexa Torrens, and the Associate Editors. Any errors or oversights regarding the substance of this research are mine alone.

## TABLE OF CONTENTS

I. INTRODUCTION .....	66
II. ANALYZING ISDS TRIBUNALS’ REVIEW OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW ARGUMENTS AND DEFENSES.....	69
A. Investment-Related Arguments and Defenses Based on Human Rights .....	71
1. Claims Based on Human Rights by Foreign Investors.....	71
2. Human Rights Defenses Argued by Host States .....	75
B. ISDS Arbitrators’ Analyses of Arguments Grounded in Human Rights .....	80
C. Tribunals’ Assessment of the Relationship Between Interna- tional Investment Law and International Humanitarian Law in Armed Conflict Locations or Civil Unrest Times .....	86
III. A NORMATIVE DOCTRINAL FRAMEWORK TO BRIDGE THE GAP BETWEEN INTERNATIONAL LAW SUBFIELDS .....	91
A. Why Should ISDS Tribunals Balance Host States’ Obligations Under International Human Rights Treaties with the FPS Investment Obligation? .....	95
B. Refuting Conceptual and Pragmatic Challenges Against This Doctrinal Framework.....	108
IV. RESOLVING HORIZONTAL FRAGMENTATION: A UNIFIED INTERPRETIVE METHODOLOGY TO CONNECT INTERNATIONAL LAW SUBFIELDS IN THE APPLICATION OF FULL PROTECTION AND SECURITY .....	117
V. CONCLUSION .....	127

## I. INTRODUCTION

The Full Protection and Security Obligation (“FPS”) is provided for by most International Investment Agreements (“IIAs”) whether multilateral such as the United States-Mexico-Canada Agreement or Bilateral Investment Treaties (“BITs”).<sup>1</sup> The FPS—as an international investment

---

1. M. ANGELES VILLARREAL, CONG. RSCH. SERV., R44981, THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 19 (2021); *see, e.g.*, Décret présidentiel n° 98-431 du 9 Ramadhan 1419 correspondant au 27 décembre 1998 portant ratification de l’accord entre le Gouvernement de la République algérienne démocratique et populaire et le Gouvernement de la République du Mali relatif à la promotion et à la protection réciproques des investissements, signé à Bamako, le 25 Safar 1417 correspondant au 11 juillet 1996 [Presidential Decree No. 98-431 of 9 Ramadhan 1419 corresponding to December 27, 1998 ratifying the agreement between the Government of the Democratic and People’s Republic of Algeria and the Government of the Republic of Mali relating to the reciprocal promotion and protection of investments, signed in Bamako, on

treaty ground—places upon a host state an obligation to *undertake all adequate measures to protect the foreign investment within its territory*.<sup>2</sup> Investor-State-Dispute-Settlement (“ISDS”) Tribunals have interpreted and applied the FPS, inaccurately, to encompass physical, legal, and economic breaches to the foreign investment within the host state’s territory.<sup>3</sup>

---

25 Safar 1417 corresponding to July 11, 1996], art. 4, July 11, 1996, 97 JOURNAL OFFICIEL DE LA REPUBLIQUE ALGERIENNE DEMOCRATIQUE ET POPULAIRE [OFF. J. OF THE ALGERIAN DEMOCRATIC & POPULAR REPUBLIC] 7, 9 (1998); ACCORD ENTRE LE GOUVERNEMENT DE LA REPUBLIQUE DU CAMEROUN ET LE GOUVERNEMENT DE LA REPUBLIQUE DU MALI RELATIF A LA PROMOTION ET A LA PROTECTION RECIPROQUES DES INVESTISSEMENTS [Agreement Between the Government of the Republic of Cameroon and the Government of the Republic of Mali Relating to the Reciprocal Promotion and Protection of Investments], Cameroon-Mali, art. 4, May 18, 2001, 17 JOURNAL OFFICIEL DE LA REPUBLIQUE DU MALI [OFF. J. REPUBLIC OF MALI] 641, 672 (2002); Treaty Concerning the Promotion and Reciprocal Protection of Capital Investment, Mali-Germ., art. 4, June 28, 1977, 1246 U.N.T.S. 169; Accord entre la Confédération suisse et la République du Mali concernant l’encouragement et la protection réciproque des investissements [Agreement Between the Swiss Confederation and the Republic of Mali Concerning the Encouragement and Reciprocal Protection of Investments], Mali-Switz., art. 3, Dec. 8, 1978, 1979 RO 222; ACCORD ENTRE LE GOUVERNEMENT DU BURKINA FASO ET LE GOUVERNEMENT DE LA REPUBLIQUE DU BENIN CONCERNANT LA PROMOTION ET LA PROTECTION RECIPROQUE DES INVESTISSEMENTS [Agreement Between the Government of Burkina Faso and the Government of the Republic of Benin Concerning the Promotion and Reciprocal Protection of Investments], Burk. Faso-Benin, art. 2, May 18, 2001, 2017/C JOURNAL OFFICIEL DE L’UNION EUROPEENNE [OFF. J. EUR. UNION] 1; Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, Benin-Can., art. 7, Jan. 8, 2013, 3310 U.N.T.S. 1; The Government of the People’s Republic of China and the Government of the Republic of Benin Concerning the Promotion and Reciprocal Protection of Investments, Benin-China, art. 2, Feb. 18, 2004, 2004 LEXIS 13275; ACCORD ENTRE LE GOUVERNEMENT DU ROY AUME DU MAROC ET LE GOUVERNEMENT DE LA REPUBLIQUE DU BENIN CONCERNANT L’ENCOURAGEMENT ET LA PROTECTION RECIPROQUES DES INVESTISSEMENTS [Agreement Between the Government of the Kingdom of Morocco and the Government of the Republic of Benin Concerning the Encouragement and Reciprocal Protection of Investments, Morocco-Benin, art. 2, 2023/C JOURNAL OFFICIEL DE L’UNION EUROPEENNE [OFF. J. EUR. UNION] 1; Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of Benin for the Promotion and Protection of Investments, Benin-U.K., art. 2, Nov. 27, 1987, 1556 U.N.T.S. 183; The Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investment, Egypt-U.S., art. 2, § 4, Mar. 11, 1986, 21 I.L.M. 927 (providing that: “The treatment, protection and security of investments shall never be less than that required by international law and national legislation.”).

2. Asian Agric. Prods. Ltd. (AAPL). v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, ¶¶ 45, 77 (June 27, 1990), 4 ICSID Rep. 245 (1997).

3. See, e.g., Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 3.2.3 (Aug. 20, 2007), 105 Am. J. Int’l L. 553 (2011); Occidental Expl. & Prod. Co. v. Republic of Ecuador, London Ct. of Int’l Arb. Administered Case No. UN 3467, Final Award, ¶ 187 (July 1, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf> [<https://perma.cc/Z6T7-96KL>]; Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 466 (July 24, 2008), 19 ICSID Rep. 183 (2021); Azurix

Furthermore, ISDS Tribunals have characterized the standard that host states must meet to fulfill their FPS obligation as a due diligence standard and not a strict liability one.<sup>4</sup> In other words, the host state—to fulfill its FPS due diligence standard—must adopt all measures in its ability to protect the foreign investment against legal, economic, and physical breaches. But how does a Tribunal assess the FPS due diligence standard during armed conflicts or other extraordinary circumstances? Should a Tribunal consider it exclusively by assessing the measures adopted by the host state toward protecting the foreign investment? And when do such measures become sufficient to meet the FPS due diligence standard? Can a Tribunal hold a developing host state with limited financial and security resources to the same due diligence standard expected from a developed state with immense financial and security resources? Moreover, can a Tribunal hold a host state liable for an investment breach under FPS with complete disregard to other international and national obligations of the host state?

In general, a host state must meet not only international investment obligations, but also other international obligations stipulated by multiple international treaties such as international human rights treaties.<sup>5</sup> Thus, a host state's resources are not exclusively directed to protect a foreign investment; they are also directed toward fulfilling the host state's other international obligations such as those provided by international human rights law. If that is the proper undisputed reality of the host state's diverse international obligations, then why do ISDS Tribunals assess the FPS due diligence standard in exclusion of other relevant subfields of international law such as human rights?

In this research, I find that the reason behind such varying faulty applications of the FPS due diligence standard exist in the phenomenon of international law fragmentation and the lack of a unified interpretation methodology for the FPS due diligence standard. Accordingly, this research's objective is to resolve the fragmentation of international law in the investment arbitration field and to develop a proper standardized interpretation methodology that connects the fragments of international law subfields in assessing an FPS investment breach. As such, I will exclusively focus on the horizontal fragmentation of international law (i.e., the disconnection between international investment law and other fields of international law such as human rights).

---

Corp. v. Argentine Republic (I), ICSID Case No. ARB/01/12, Award, ¶ 438 (July 14, 2006), 14 ICSID Rep. 367 (2009).

4. See *Asian Agric. Prods. Ltd. (AAPL)*, ICSID Case No. ARB/87/3 ¶ 8.

5. See John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1296 & n.55 (1993).

The topic of this research is practically and academically important as developing states may reach the verge of bankruptcy because of the current structural flaws in the ISDS mechanism. It is not unusual for developing host states to pay billions of United States dollars (“USD”) in damages per case as a result of those structural flaws.<sup>6</sup> That inhibits their ability to devote their resources to promoting human rights or reaching sustainable development.

In Part II, I analyze the relevant ISDS case law where host states, investors, or arbitrators relied on international human rights law to formulate their argument. In Part III, I put forward a normative doctrinal framework for rebalancing other international law obligations of the host state with its international investment obligations. Moreover, I refute four conceptual and two pragmatic challenges that could be directed against such theoretical framework. In Part IV, I propose a pragmatic standardized interpretive methodology toward analyzing connections between investment arbitration law and other international law obligations of host states. This research concludes that a coherent uniform interpretation methodology is indispensable to reach fairer and more consistent legal reasoning by ISDS Tribunals. Finally, the article’s suggested interpretation methodology will have a vital indirect impact on developing host states through enabling them to reach sustainable development and uphold human rights.

## II. ANALYZING ISDS TRIBUNALS’ REVIEW OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW ARGUMENTS AND DEFENSES

In ISDS, international law scholars argue that both litigators and Tribunals treat ISDS case law as *jurisprudence constante* of international investment law.<sup>7</sup> *Jurisprudence constante* means that: “a long series of previous decisions applying a particular rule of law carries great weight and may be determinative in subsequent cases.”<sup>8</sup> As such, it is important to scrutinize ISDS Tribunals’ approach toward arguments

---

6. Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, ¶ 10.133 (Aug. 31, 2018), 20 ICSID Rep. 546 (2022) (awarding the U.S. \$2,013,071,000 to the foreign investor); Martin Dietrich Brauch, *Yukos v. Russia: Issues and Legal Reasoning Behind US \$50 Billion Awards*, INV. TREATY NEWS (Sept. 4, 2014), <https://www.iisd.org/itn/en/2014/09/04/yukos-v-russia-issues-and-legal-reasoning-behind-us50-billion-awards> [<https://perma.cc/7644-2M8R>].

7. Stephan W. Schill, *Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law*, in THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 1095, 1102-03 (Samantha Besson & Jean D’Aspremont eds., 2017).

8. *Jurisprudence Constante*, MERRIAM-WEBSTER LEGAL DICTIONARY, <https://www.merriam-webster.com/legal/jurisprudence%20constante> [<https://perma.cc/NAV3-MHKZ>] (last visited Dec. 2, 2023).

grounded in other subfields of international law such as international human rights law.

Generally, most ISDS Tribunals often resort to Customary International Law (“CIL”) to understand the parameters of the BIT obligations of the host state. In fact, ISDS Tribunals often resort to CIL to understand the elements of the FPS, the Fair and Equitable Treatment standard (“FET”), or the history behind the protection of foreign aliens in the host state.<sup>9</sup> Moreover, they sometimes revisit CIL to distinguish between a treaty standard and CIL standard.<sup>10</sup> The focus of this section is on the Tribunal’s reception and usage of other subfields of international law such as human rights law, not primarily CIL.

Until this moment, ISDS Tribunals remain largely a closed universe—applying only to investment treaties at hand. Although some ISDS Tribunals claim otherwise, most BITs and published ISDS awards are silent on human rights law, environmental law, and corporate social responsibility.<sup>11</sup> Nonetheless, Tribunals often find themselves obliged to rely on other fields of international law to enable them to apply the relevant BITs standards on the dispute before them. For instance, there is no mention of attribution in most—if not all—BITs.<sup>12</sup> Yet, ISDS Tribunals deciding on the issue of state responsibility such as FET, FPS, or Expropriation under the BITs do resort to the International Law Commission (“ILC”) Articles on State Responsibility to borrow the international law principle of attribution and its guidelines.<sup>13</sup> Similarly, some ISDS Tribunals refer to the European Court of Human Rights (“ECtHR”) judgments to borrow the international human rights law principle of *proportionality*, which provides for balancing the investor’s interest with the public interest.<sup>14</sup> The proportionality balancing test is used in international investment arbitration to determine whether a foreign investment has been unlawfully expropriated under a BIT.<sup>15</sup> Without resorting to these international law principles that are not embodied in a BIT, an ISDS Tribunal simply may not be able to resolve an ISDS dispute. That is

---

9. See Amin R. Yacoub, *The Standard of Due Diligence in Full Protection and Security Obligation: What Are the Parameters of the Due Diligence Standard?*, 35 YOUNG ARB. REV. 50, 56-57 (2019) (reviewing the history of the Full Protection and Security Obligation).

10. *Id.* at 58.

11. Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration* 1, 4 (Eur. Univ. Inst., Working Paper No. 2016/02, 2016).

12. See, e.g., *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 74, 76 (Jan. 25, 2000), 5 ICSID Rep. 387 (2002).

13. *Id.* ¶¶ 76, 78.

14. See *Técnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003), 10 ICSID Rep. 130 (2006) (referencing ECtHR case law).

15. *Id.*

because the BIT standards—such as FPS, FET, Unlawful Expropriation, and Most Favored Nation—are too vague to be exclusively applied to an investment dispute.<sup>16</sup> Although ISDS Tribunals also resort to CIL to clarify the borders of some BIT standards, CIL (in investment protection) is barely clear itself.<sup>17</sup>

### *A. Investment-Related Arguments and Defenses Based on Human Rights*

In this section, I provide an overview of ISDS cases where an investor, a host state, or arbitrators had resorted to other subfields of international law such as human rights. Further, I scrutinize the Tribunal's consideration of those arguments that are grounded in human rights and their effect on the host state's investment obligations.

#### 1. Claims Based on Human Rights by Foreign Investors

In *Toto v. Lebanon*, the claimant alluded to certain human rights in connection to the right to a fair trial.<sup>18</sup> Toto—the foreign investor—claimed that the Respondent state (Republic of Lebanon) induced multiple delays that caused disruptions resulting in additional expenditures—harming Toto's investment.<sup>19</sup> Toto argued that it brought two relevant cases about contractual breaches committed by the Lebanese government to claim compensation before the Lebanese *Conseil d'Etat*.<sup>20</sup> Yet, the *Conseil d'Etat* proceeded at a very slow pace, which amounted to a breach of Article 3.1 of the Italy-Lebanon BIT regarding fair and

---

16. See JESWALD W. SALACUSE, *Fair and Equitable Treatment*, in *THE LAW OF INVESTMENT TREATIES* 218, 221 (Oxford Univ. Press 2010); Swapneshwar Goutam & Rachna Pastore, *The Concept of Fair and Equitable Treatment: Toward Host Country Is Not Only Vague but Also Created Uncertainty as to What to Be Expected of Private Foreign Investors (TNC)*, *INT'L J.L.*, June 15, 2020, at 293, 294.

17. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *EXPROPRIATION: A SEQUEL* 71 (July 2012), [https://unctad.org/system/files/official-document/unctaddiaeia2011d7\\_en.pdf](https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf) [<https://perma.cc/F8GS-2LGX>]; see also R.R. Dev. Corp. (RDC) v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award, ¶¶ 216-17 (June 29, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1051.pdf> [<https://perma.cc/SJ94-R7DD>]; SAUR Int'l S.A. v. República Argentina, Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 493 (June 6, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1016.pdf> [<https://perma.cc/EV92-3AML>]; Marc Jacob & Stephan W. Schill, *Fair and Equitable Treatment: Content, Practice, Method*, in *INTERNATIONAL INVESTMENT LAW: A HANDBOOK* 700, 709 (Marc Bungenberg et al. eds., 2015).

18. *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, ¶¶ 139-41 (June 7, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf> [<https://perma.cc/W3AA-9GPD>].

19. *Id.* ¶ 146.

20. *Id.* ¶¶ 4-6, 47.

equitable treatment.<sup>21</sup> To support its allegations, Toto cited the ECtHR case law on due process.<sup>22</sup> Further, Toto invoked Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), which stipulates that everyone has the right to a fair trial.<sup>23</sup> The Tribunal agreed and dealt with the human rights-based arguments because the BIT clearly stated that both the jurisdiction and applicable law should apply the principles of international law.<sup>24</sup> Moreover, the Tribunal considered which human rights law applied to Lebanon (i.e., Article 14 of the ICCPR and the ICCPR Commission’s interpretation).<sup>25</sup> Yet, it eventually declined jurisdiction due to the claimant’s lack of proof to support its factual allegations.<sup>26</sup> The Tribunal—in the jurisdictional stage—concluded that it

has therefore not seen *prima facie* evidence that Toto itself has made use of the local remedies to shorten the procedural delays. In the absence of such evidence the Tribunal has no jurisdiction under Article 3.1 of the Treaty to decide whether the delays before the *Conseil d’Etat* were unfair and inequitable.<sup>27</sup>

In this case, the Tribunal was willing to assess the right to a fair trial—under the ICCPR and as part of the international legal principles—as a ground that might reshape the host state’s investment obligation under Article 3.1 of the BIT in the merit stage but could not proceed due to the claimant’s lack of proof.<sup>28</sup> The Tribunal’s approach in *Toto* is proper in light of our theoretical framework and methodology below.

Finally, in *Biloune v. Ghana*, a Syrian investor, Mr. Biloune, filed a claim partially based on human rights violations.<sup>29</sup> His claim argued arbitrary detention and deportation as well as contractual breaches of an agreement by Ghana.<sup>30</sup> The Tribunal opined that it lacked jurisdiction to rule on human rights grounds as a separate cause of action.<sup>31</sup> This result was reached based on the agreement’s jurisdictional clause, which states

---

21. *See id.* ¶ 146.

22. *See* Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 144 (Sept. 11, 2009), <https://www.italaw.com/sites/default/files/case-documents/ita0869.pdf> [<https://perma.cc/NRM5-FS8K>].

23. *Id.*

24. *Id.* ¶¶ 154, 156 (with further reference to Article 7.3 of the Italy-Lebanon BIT 1997).

25. *Id.* ¶¶ 158-59; International Covenant on Civil and Political Rights art. 14(1), Dec. 16, 1966, 999 U.N.T.S. 171.

26. *Toto*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, ¶ 168.

27. *Id.* (emphasis in original).

28. *See id.* ¶¶ 138, 153, 168.

29. *Biloune v. Ghana Invs. Ctr.*, 95 Int’l L. Rep. 184, ¶ 1 (1989).

30. *Id.* ¶ 59.

31. *Id.* ¶ 61.



that arbitration is limited to disputes occurring “in relation to the enterprise.”<sup>32</sup> Yet, when deciding on expropriation, the actions purporting to be human rights abuses were taken into account.<sup>33</sup> Mr. Biloune argued that his arbitrary detention, expulsion, and violations of his property and contractual rights constituted human rights violations.<sup>34</sup> The Tribunal decided that:

Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr[.] Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.<sup>35</sup>

In these cases, which were adjudicated before both International Centre for Settlement of Investment Disputes (“ICSID”) Tribunals and the United Nations Commission on International Trade Law (“UNCITRAL”) (collectively referred to in this research as “ISDS Tribunals”), the Tribunals’ position was proper in rejecting human rights violations as an independent cause of action and for accepting only their impact on the investment obligation of the host state for two reasons.

First, the parties’ consent to arbitrate an investment breach does not confer jurisdiction upon a Tribunal to consider human rights violations as an independent cause of action. Nonetheless, Tribunals must evaluate human rights violations as part of their analysis of investment breaches since they are intertwined with the investment obligations of the host state. And for that reason, the *Biloune* Tribunal properly considered the human rights violations of Mr. Biloune without transforming itself into a human rights court.<sup>36</sup>

Second, in general, foreign investors enjoy a wider scope of protection under a BIT since its protection standards replicate and expand the human rights protection of foreign investors. For instance, a right to a fair trial under the ICCPR has a corresponding yet wider protection in an investment treaty under the FET and FPS standards.<sup>37</sup> Thus, foreign

---

32. According to the arbitration clause in the Ghana Investment Centre (GIC) Agreement, arbitration covers disputes arising “in respect of . . . [the] enterprise . . . .” *Id.* ¶ 57.

33. *Id.* ¶ 61.

34. *Id.* ¶ 59.

35. *Id.* ¶ 61.

36. *See id.*

37. Article 14(1) of the ICCPR provides that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a demo-

investors—as opposed to host states—do not need to ground their arguments on human rights treaties such as the ICCPR in light of the expansive protections they receive under an investment treaty. The ISDS does not grant host states much room for invoking defenses based on other subfields of international law or even public policy exceptions against foreign investors under BITs.<sup>38</sup> And for that reason, creating a unified methodology to be applied by ISDS Tribunals based on a proper conceptual framework derived from connecting international law subfields becomes necessary.

---

cratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

International Covenant on Civil and Political Rights art. 14(1), Dec. 19, 1966, 999 U.N.T.S. 171. In contrast, the fair and equitable standard is drafted in broader language. Article 5 of the 2012 U.S. Model Bilateral Investment Treaty stipulates:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

U.S. Model Bilateral Investment Treaty art. 5(1)–(2), 2012.

38. Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?*, 59 B.C. L. REV. 2825, 2826, 2837–38 (2018). As Henckels provides:

Exceptions have become an increasingly popular mechanism in investment treaties, appearing in 43% of investment agreements concluded between 2011 and 2016, compared to 7% of agreements signed between 1959 (when the first investment treaty was signed) and 2010. The significant rise in their prevalence suggests that governments negotiating new treaties are seeking greater assurance that public welfare measures will be shielded from liability. Yet, their proliferation in recent treaties creates uncertainties in terms of how they ought to be interpreted—whether but for the exception, a government would be in breach of its substantive obligations, or whether their inclusion is for the avoidance of doubt. In particular, the question whether the exception operates as a *permission* or a *defense* is a crucial, but unaddressed issue that has significant implications for both litigation and practice and, in turn, may have implications for the stability of the investment regime.

*Id.* at 2826 (emphasis in original) (footnotes omitted).

## 2. Human Rights Defenses Argued by Host States

Instead of explicitly arguing human rights violations against the foreign investor, host states sometimes articulate their arguments in broad terms such as “public purpose” or “public policy.”<sup>39</sup> That is understandable considering the ICSID Tribunal’s skepticism regarding human rights arguments in investment arbitration cases.<sup>40</sup> The human right to adequate access to water is a notable exception, demonstrating a wide range of possible approaches to human rights justifications.<sup>41</sup> The right to water is included in the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) and as part of International Human Rights Law (“IHRL”) in a 2010 United Nations (“UN”) General Assembly resolution as well as a 2012 UN Human Rights Council resolution.<sup>42</sup> The early investor claims brought against Argentina, in particular, demonstrated Argentina’s preference for invoking justifications that are not grounded in human rights.<sup>43</sup> Investors questioned Argentina’s emergency measures, which were implemented to mitigate the effects of the country’s 1999 economic and financial crisis.<sup>44</sup> Many of Argentina’s emergency measures were motivated by the country’s economic and social situation, particularly the goal of providing affordable access to

---

39. See, e.g., *Methanex Corp. v. United States*, 7 ICSID Rep. 208, Final Award of the Tribunal on Jurisdiction and Merits, ¶¶ 7, 15, 60 (Aug. 3, 2005); cf. *Sedco, Inc. v. Nat’l Iranian Oil Co.*, 84 Iran-U.S. Cl. Trib. Rep. 483, ¶ 90 (1985) (recognizing a state’s right to expropriate for a public purpose when in accordance with due process and non-discrimination).

40. See, e.g., *Quasar de Valores SICAV S.A. v. Russian Federation*, SCC Case No. 24/2007, Award, ¶¶ 19, 21 (July 12, 2012), 19 ICSID Rep. 205 (2021); *Veteran Petrol. Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, ¶¶ 764-65 (July 18, 2014), 18 ICSID Rep. 331 (2020).

41. Kube & Petersmann, *supra* note 11, at 10.

42. According to General Comment 15, the right to water is part of the right to an adequate standard of living (Article 11), to adequate housing and adequate food (Article 11), and of the highest attainable standard of health (Article 12). U.N. Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rts., *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights*, Gen. Comment No. 15, ¶¶ 11-12, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); see Convention on the Elimination of All Forms of Discrimination Against Women art. 14.2(h), Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child art. 24.2(c), Nov. 20, 1989, 1577 U.N.T.S. 3. For an analysis of the different aspects of the human right to water as protected by the different human rights instruments, see PIERRE THIELBÖRGER, *THE RIGHT(S) TO WATER: THE MULTI-LEVEL GOVERNANCE OF A UNIQUE HUMAN RIGHT 2* (Springer-Verlag Berlin Heidelberg 2014).

43. *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, ¶ 261 (July 14, 2006), 14 ICSID Rep. 367 (2009). For a comprehensive analysis, see Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. INT’L DISP. SETTLEMENT 277, 280-96 (2015).

44. Meshel, *supra* note 43, at 291-92.

water and gas.<sup>45</sup> Both Argentina and the Tribunal considered these rights under the “necessity defense” argument.<sup>46</sup>

In *Azurix v. Argentina (I)*, the Respondent state (Argentina) claimed that the BIT conflicted with human rights treaties that safeguard consumers’ rights.<sup>47</sup> Argentina’s expert opined that any conflict between the BIT and the human rights treaties must be resolved in favor of the latter.<sup>48</sup> That is because the public interest of consumers must take precedence over the private interest of service providers (the foreign investor).<sup>49</sup> On this issue, the claimant (Azurix) contended that the user’s rights were adequately safeguarded by the Concession Agreement’s terms and that the Province failed to show how those rights were harmed by the termination.<sup>50</sup> The *Azurix* Tribunal denied Argentina’s argument regarding the incompatibility of the BIT with human rights because the facts were insufficiently established.<sup>51</sup> Yet, the *Azurix* Tribunal resorted to the ECtHR case law for guidance on expropriation, specifically in *James v. United Kingdom*.<sup>52</sup> In *James v. United Kingdom*, the ECtHR held that a public measure taken to deprive a person of his property must be pursued in facts and principles to achieve a legitimate public interest objective and reflect “a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”<sup>53</sup> If the person in question faces “an individual and excessive burden,” proportionality will not be found and a host state would be liable for expropriation or unlawful taking of private property.<sup>54</sup>

The human rights argument was more convincingly supported in *Suez and Vivendi v. Argentina (II)*.<sup>55</sup> Five non-governmental organizations and Argentina, as amici, emphasized the importance of and potential risk to the right to water, which Argentina sought to protect by freezing water tariffs.<sup>56</sup> When interpreting the content of investor rights, as sought by Argentina and the amici, the Tribunal did not address the

---

45. *Id.* at 281.

46. *Id.* at 282.

47. *Azurix*, ICSID Case No. ARB/01/12, Award, ¶ 254.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See id.* ¶ 261.

52. *Id.* ¶ 311.

53. *James v. United Kingdom*, 8 Eur. Ct. H.R. (ser. A) at 144-45 (1986).

54. *Id.* at 145.

55. *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, ¶ 240 (July 30, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0813.pdf> [https://perma.cc/NZM5-KAFB].

56. *Id.* ¶¶ 15 & n.6, 234.

human rights rationale.<sup>57</sup> However, the Tribunal considered the unique circumstances of Argentina at the time as relevant to the FET criteria.<sup>58</sup> The Tribunal noted that ensuring a sufficient water supply was “vital to the health and well-being of [ten million people]” in this environment.<sup>59</sup> Nonetheless, the Tribunal concluded that infringing on investors’ rights was not the only option.<sup>60</sup> The Tribunal ruled that both human rights and BIT requirements must be observed equally, which it determined to be possible in this case.<sup>61</sup>

In *SAUR v. Argentina*, Argentina explicitly argued that its most basic human rights obligation is also high in the Argentinian constitutional hierarchy, which made it necessary for Argentina to intervene in the investors’ business.<sup>62</sup> Further, it argued that such human rights protection could not be construed as expropriation.<sup>63</sup> In response to the claimant’s assertion that the motives of a state act are irrelevant in determining an expropriation, the Tribunal stated that “los derechos humanos en general, y el derecho al agua en particular, constituyen una de las varias fuentes que el Tribunal deberá tomar en consideración para dirimir la disputa . . . .”<sup>64</sup> However, it went on to say that both responsibilities are consistent because Argentina can meet its human rights obligations while also compensating the investor.<sup>65</sup> Yet, the problem with that approach, which the Tribunal failed to consider, is that a developing state like Argentina with very limited financial resources might not be able to fulfill its human rights obligations and its international investment obligations concurrently. A developing host state with limited resources does not have the luxury to meet all its international obligations. In that sense, it becomes logical for a developing host state to direct more of its limited resources toward fulfilling its people’s needs under international human rights law than to direct its limited resources toward fulfilling its investment obligations under a BIT. Thus, although both international obligations (investment and human rights) shall be respected equally in theory, developing host states must prioritize one over the

---

57. *Id.* ¶ 240.

58. *See id.*

59. *Id.* ¶ 238.

60. *See id.* ¶ 240.

61. *Id.*

62. *SAUR Int’l S.A. v. República Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, ¶ 328 (June 6, 2012), <https://www.italaw.com/sites/default/files/case-documents/ita1016.pdf> [<https://perma.cc/EV92-3AML>].

63. *Id.*

64. *Id.* ¶ 330 (meaning “human rights in general, and the right to water in particular, are one of the various sources that the Tribunal should take into account to resolve the dispute”).

65. *Id.* ¶¶ 330-32.

other in practice. That induces host states to prioritize foreign investment protection over respecting and promoting the human rights of their people.

*Biwater v. Tanzania* is another case in which a host state used human rights as an argument for terminating a contract with a water company due to a crisis.<sup>66</sup> Tanzania claimed the foreign investor posed a “real threat to public health and welfare.”<sup>67</sup> Tanzania appeared to be more cautious when it comes to its human rights obligations, stating that “it has a moral and perhaps even a legal obligation” to act.<sup>68</sup> The Tribunal dismissed the right to water as a factor in determining the legitimacy of the contract terminations, and instead focused on the failures of Tanzania to meet its contractual obligations.<sup>69</sup>

In *Quasar de Valores v. Russia* and *Veteran Petroleum v. Russia*, the Tribunals disagreed that the ECtHR’s jurisprudence had any binding impact on them but agreed to take it into account when necessary.<sup>70</sup> In *Quasar*, the claimants (Spanish) contended that they were investors in Yukos (a large oil corporation in Russia) through holding American depository receipts.<sup>71</sup> They invoked Article 6 of the Spanish-Russian BIT alleging that the host state (the Russian Federation) illegally seized Yukos’ assets and expropriated its stockholders through a series of executive and judicial power abuses.<sup>72</sup> Russia argued that the claim was baseless since it aimed to overcome the proper application of the Russian Federation’s tax law by using shell companies to defraud the Russian tax scheme.<sup>73</sup> In a former similar ICSID dispute before *Quasar* involving Yukos, the *RosInvestCo v. Russia* Tribunal found the Russian Federation in breach of Article 5 (regarding expropriation) of the Promotion and Reciprocal Protection of Investments (“IPPA”) between the United Kingdom and the Russian Federation.<sup>74</sup> The *RosInvestCo* Tribunal opined that:

---

66. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶¶ 434, 436 (July 24, 2008), 19 ICSID Rep. 183 (2021).

67. *Id.* ¶ 436.

68. *Id.* ¶ 434.

69. *Id.* ¶ 439.

70. *Quasar de Valores SICAV S.A. v. Russian Federation*, SCC Case No. 24/2007, Award, ¶¶ 21, 42 (July 20, 2012), 19 ICSID Rep. 205 (2021); *Veteran Petrol. Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, ¶ 765 (July 18, 2014), 18 ICSID Rep. 331 (2020).

71. *Quasar*, SCC Case No. 24/2007 ¶¶ 9-10.

72. *See id.* ¶ 10.

73. *Id.* ¶ 13.

74. *RosInvestCo U.K. Ltd. v. Russian Federation*, SCC Case No. V (079/2005), Final Award, ¶ 633 (Sept. 12, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0720.pdf> [<https://perma.cc/V8B6-8QR7>].

[I]n reviewing the various alleged breaches of the IPPA, even if the justification of a certain individual measure might be arguable as an admissible application of the relevant law, considers that this cumulative effect of those various measures taken by Respondent in respect of Yukos is relevant to its decision under the IPPA. An illustration is, as Claimant has pointed out, that despite having used nearly identical tax structures, no other Russian oil company was subjected to the same relentless and inflexible attacks as Yukos. In the view of the Tribunal, they can only be understood as steps under a common denominator in a pattern to destroy Yukos and gain control over its assets.<sup>75</sup>

To the contrary, in *Yukos Universal v. Russia*—a dispute involving the same factual matrix of *RosInvestCo*—the ECtHR ruled that Yukos had failed to support its allegations that Russia’s tax claims and subsequent liquidation of Yukos were discriminatory.<sup>76</sup>

The *Quasar* Tribunal analyzed the disparities between the ICSID Tribunal decision in *RosInvestCo* and the ECtHR decision in *Yukos Universal v. Russia*.<sup>77</sup> The Tribunal found that the distinction between human rights law and investor protection can be explained by the fact that the latter was designed largely to attract international investment, whereas overseas investors may not benefit from national human rights legislation.<sup>78</sup> The *Quasar* Tribunal rejected to consider the *RosInvestCo* award or *Yukos Universal v. Russia* ECtHR judgment as binding in the case before it.<sup>79</sup> Yet, the Tribunal accepted to consider arguments based on such awards as persuasive since they arose out of a similar factual matrix to the facts before the Tribunal and were relied upon by both parties to the case.<sup>80</sup>

On the other hand, the *Veteran Petroleum* Tribunal was faced with similar arguments submitted by the respondent state based on the *Yukos Universal v. Russia* ECtHR decision.<sup>81</sup> The *Veteran Petroleum* Tribunal opined that it is not a human rights court, but it would consider the human rights arguments as part of the factual matrix of the case.<sup>82</sup> Nonetheless, although the ECtHR’s decisions had no legal effect in the case at hand, the Tribunal considered the ECtHR-based arguments in assessing the violations of the Energy Charter Treaty not as legal arguments, but

---

75. *Id.* ¶ 621.

76. *Id.* ¶ 636.

77. *Quasar*, SCC Case No. 24/2007 ¶¶ 21-24.

78. *Id.* ¶ 22.

79. *Id.* ¶ 24.

80. *Id.* ¶ 25.

81. *Veteran Petrol. Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, ¶ 33 (July 18, 2014), 18 ICSID Rep. 331 (2020).

82. *Id.* ¶ 765.

as facts demonstrating whether Russia had engaged in a “campaign of harassment and intimidation” against Yukos.<sup>83</sup> Put simply, the *Veteran Petroleum* Tribunal treated another equally binding subfield of international law—the ECtHR—as facts, not binding law.

In this regard, Vivian Kube and Ernst-Ulrich Petersmann opine that ISDS Tribunals are still confused regarding analyzing human rights arguments while determining a BIT breach.<sup>84</sup> These Tribunals lack both the will to accept human rights-based arguments and a proper interpretive methodology for such evaluation in investment disputes.<sup>85</sup> For that reason, most states with legitimate human rights arguments do not explicitly invoke human rights allegations, but rather characterize their human rights concerns under investment arguments such as contractual defenses or BIT public policy, if they exist.<sup>86</sup>

### *B. ISDS Arbitrators’ Analyses of Arguments Grounded in Human Rights*

The most ambitious ISDS Tribunal that aimed to resolve international law fragmentation existing in the investment field was *Urbaser v. Argentina*.<sup>87</sup> In *Urbaser*, the Tribunal assumed jurisdiction and considered the host state’s counterclaim for the alleged violation of human rights by foreign investors under the Spanish-Argentine BIT.<sup>88</sup> The Tribunal addressed Argentina’s counterclaims regarding the basic human right of access to water services.<sup>89</sup>

The *Urbaser* Tribunal accepted—for the first time—jurisdiction over a human rights counterclaim.<sup>90</sup> The Tribunal interpreted Article X of the Spain-Argentina BIT, which allows each party to the dispute to commence a claim.<sup>91</sup> Moreover, the Tribunal declined the claimant’s argument that its jurisdiction is limited by the terms of their consent.<sup>92</sup> Lastly, the Tribunal found a sufficient connection between the

---

83. *Id.*

84. Kube & Petersmann, *supra* note 11, at 14.

85. *Id.*

86. *See id.*

87. *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 34 (Dec. 8, 2016), 18 ICSID Rep. 554 (2020).

88. *Id.* ¶¶ 19-20, 36; Aceris Law LLC, *Laws Applicable to an International Arbitration*, ACERIS L. (June 2, 2021), <https://www.acerislaw.com/laws-applicable-to-an-international-arbitration> [<https://perma.cc/2ZYG-AGGB>].

89. *See Urbaser S.A.*, ICSID Case No. ARB/07/26 ¶¶ 1200-21.

90. *See id.* ¶ 1144.

91. *Id.* ¶¶ 1143-44.

92. *Id.* ¶ 1147.



counterclaim and the original claim which manifested in multiple factual links that were derived from the same investment.<sup>93</sup>

In the merit stage, the *Urbaser* Tribunal stated that “[t]he BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.”<sup>94</sup> In addition, the Tribunal considered Argentina’s obligations under its constitution to “ensure the population’s health and access to water . . . .”<sup>95</sup> The rationales behind that application may not be well-articulated by either ISDS awards or current investment arbitration scholarship. The *Urbaser* Tribunal provided a passing explanation of why it resorted to and applied international human rights law besides an investment treaty.<sup>96</sup> As described by José Alvarez, the *Urbaser* Tribunal’s treatment of Argentina’s counterclaim “engaged in radical and unprecedented legal leaps of judgment grounded in soft law authorities.”<sup>97</sup> The *Urbaser* Tribunal treated the corporation as having corporate social responsibility under international law and found that it owed respect and compliance with human rights law embodied in the Universal Declaration of Human Rights (“UDHR”) and other human rights treaties such as the ICCPR and ICESCR.<sup>98</sup> The Tribunal reasoned that under the UDHR Article 30, everyone is subject to human rights obligations, including states, persons, and groups—including corporations.<sup>99</sup>

The *Urbaser* Tribunal wisely opined that the applicable BIT should be read “in harmony with other rules of international law of which it forms part, including those relating to human rights” to comply with the call for the “principle of systemic integration” proclaimed by the ILC in its report on ways to address the fragmentation of international law.<sup>100</sup> The *Urbaser* Tribunal also noted that human dignity, adequate housing, and living conditions all form a part of international human rights law

---

93. *Id.* ¶ 1151.

94. *Id.* ¶ 1200.

95. *Id.* ¶ 622.

96. *See id.* ¶¶ 1194-95.

97. José E. Alvarez, *Reviewing the Use of “Soft Law” in Investment Arbitration* 37 (N.Y.U. Sch. L. Pub. L. & Legal Theory, Working Paper No. 18-46, 2018).

98. *Urbaser S.A.*, ICSID Case No. ARB/07/26 ¶¶ 1194-97.

99. *Id.* ¶ 1196. Article 30 of UDHR provides that: “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.” *Id.* The tribunal also cites in support the comparable provision in the ICESCR, namely its Article 5(1). *Id.* ¶ 1197. The tribunal does not mention any negotiating history in either treaty in support of its interpretations.

100. *Id.* ¶ 1200 & n.437 (citing approvingly to *Tulip Real Estate v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, ¶¶ 86-92 (Dec. 30, 2015), 20 ICSID Rep. 220 (2022), which relied on that ILC report).

that all parties—public or private—shall respect by abstaining from any act that might destroy these rights.<sup>101</sup> The *Urbaser* Tribunal further relied on Article 42(1) of the ICSID Convention together with the governing law clause of that BIT (Article X(5)) to reach its award.<sup>102</sup> The Tribunal found that there was a BIT breach, yet provided no compensation to the foreign investor due to Argentina’s counterclaim that was based on international human rights law regarding the right to water access.<sup>103</sup> The Tribunal’s approach in rebalancing investment law (BIT) obligations with human rights law obligations, although incomplete, provides a glance at the pragmatic plausibility of this article’s suggested normative theoretical framework and unified methodology. Although Alvarez observed that: “Urbaser is a good example of . . . soft law used as a tool to ‘re-balance’ the interests of investors and respondent states under IIAs,”<sup>104</sup> the *Urbaser* decision was harshly criticized by some international law scholars for conferring such validity and importance on human rights arguments, which to them constitute “soft law.”<sup>105</sup> These scholars have arguably reached that end due to the scarcity of scholarship on FPS’ vexing dilemmas in the field and the lack of doctrinal analysis and suggestive normative theoretical frameworks for connecting—conceptually—the subfields of international law through systematic integration.

Another example of a successful attempt by a host state to invoke human rights exists in *Biwater v. Tanzania*.<sup>106</sup> In this case, the Tribunal denied the FET claim in light of Tanzania’s human rights obligations.<sup>107</sup> The Tribunal reasoned that the investors’ legitimate expectation should be construed in light of the “particular investment environment . . .”<sup>108</sup> The Tribunal considered two characteristics regarding the foreign investment investor: (1) Tanzania was a developing state with limited capacities; and (2) Tanzania was bound by international human rights obligations to protect and preserve its citizens’ right to water.<sup>109</sup>

---

101. *Urbaser S.A.*, ICSID Case No. ARB/07/26 ¶ 1199.

102. *Id.* ¶ 1202.

103. *See id.* ¶ 1234.

104. Alvarez, *supra* note 97, at 50.

105. *See id.*; Schill, *supra* note 7, at 1110-13.

106. Jorge Daniel Taillant & Jonathan Bonnitcha, *International Investment Law and Human Rights*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 57, 75-76 (Marie-Claire Cordonier Segger et al. eds., 2011); Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT’L L. & POL’Y 483, 499 (2011).

107. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 675 (July 24, 2008), 19 ICSID Rep. 183 (2021).

108. *Id.* ¶ 601.

109. *Id.* ¶¶ 96, 387, 392.

In contrast, in the recent ICSID arbitration *Eco Oro v. Colombia*, the Tribunal rejected to interpret the BIT in light of the general international law.<sup>110</sup> Specifically, the Tribunal only resorted to the Vienna Convention on the Law of Treaties (“VCLT”) to interpret the BIT without resorting to any subfields of international law.<sup>111</sup> As a result, the Tribunal denied Colombia’s argument that it did not breach the Free Trade Agreement (“FTA”) between Canada and the Republic of Colombia since its act was aimed at protecting the environment.<sup>112</sup> The Tribunal found that Colombia’s claim that the FTA’s State Parties agreed to prioritize investment protection over environmental preservation is incorrect.<sup>113</sup> The Tribunal argued that neither goal is subordinate to the other and that they are mutually supportive to be used consistently.<sup>114</sup> In contrast, *Eco Oro*, the claimant, sought compensation rather than reparation for Colombian acts that were not conducted for a legal reason.<sup>115</sup> The claimant argued that this “is a fair outcome that preserves a broad discretion for Colombia to regulate the environment whilst affording reparation in connection with the destruction of the acquired rights of *Eco Oro*.”<sup>116</sup>

It is important to refer to the specific language of Article 2201(3) of the FTA between Canada and Colombia. Article 2201(3) provides the following:

(3) For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

- (a) To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health;
- (b) To ensure compliance with laws and regulations that are not inconsistent with this Agreement; or

---

110. *Eco Oro Mins. Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 527 (Sept. 9, 2021), <https://www.italaw.com/sites/default/files/case-documents/italaw16212.pdf> [<https://perma.cc/FL6F-PS2Y>].

111. *Id.* ¶ 211.

112. *Id.* ¶¶ 728, 832.

113. *Id.* ¶ 832.

114. *Id.* ¶ 527.

115. *Id.*

116. *Id.*

(c) For the conservation of living or non-living exhaustible natural resources.<sup>117</sup>

The Tribunal interpreted Article 2201(3) to mean that, while a State may adopt or enforce a measure to achieve the stated objectives in Article 2201(3) without violating the FTA, this does not preclude an investor from claiming compensation under Chapter Eight.<sup>118</sup>

Horacio Grigera Naón, who served as an arbitrator in the case, dissented in part. In his dissent, he contended that Annex 811 (2)(b) of the Canada-Colombia FTA (the “Treaty”) should be interpreted and understood in light of general international law.<sup>119</sup> The parties to a treaty cannot contract out of the international legal system, as stated in the *Phoenix Action v. Czech Republic* award.<sup>120</sup> When states deal with one another, they do so immediately and inevitably within the framework of international law.<sup>121</sup> That framework includes both general principles of law and doctrines of international law.<sup>122</sup> As a result, this Treaty’s provisions cannot be separated from general international law and other subfields of international law when construed.<sup>123</sup>

---

117. *Id.* ¶ 822.

118. *Id.* ¶ 830.

119. *Eco Oro Mins. Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, ¶ 3 (Sept. 9, 2021) (Grigera Naón, Arb., dissenting in part), <https://jsumundi.com/en/document/pdf/opinion/en-eco-oro-minerals-corp-v-republic-of-colombia-partial-dissenting-opinion-by-arbitrator-horacio-a-grigera-naon-thursday-9th-september-2021> [<https://perma.cc/CFL4-AD3F>].

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*; Grigera Naón analyzed this point in his dissenting opinion as follows:

Annex 811 (2)(b) refers to “*rare circumstances*” and includes as illustration of situations in which “*rare circumstances*” would be present, “*when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith [or of a] non-discriminatory [character].*” If rare circumstances are present under international law, a finding of indirect expropriation may follow.

“*Rare circumstances*” afford large leeway for interpretation. In the corresponding interpretative exercise, the legal factors to be considered from an international law perspective include legitimate expectations created when the concession was executed on 8 February 2007 (the “Concession”) in respect of legal title/Concession rights of the Claimant, general public international law principles of *pacta sunt servanda*, good faith (including legitimate expectations and the condemnation of abuse of rights) and the proportionality principle. Indeed, although good faith—a general principle of customary international law—encompasses all the latter which, in turn, contribute to shaping the notion of good faith and its substance, *pacta sunt servanda* is a general, stand-alone principle of customary international law.

The above is apposite in connection with contractual agreements like the Concession. Contractual rights thereunder are protected investments under the definition of investment in Article 838(g)(i), Section “C” of the Treaty, which expressly includes concessions. Contractual rights covered by this provision (unlike other situations which might also fall within its purview) are particularly apt to generate legitimate expectations frus-

Finally, in *Bear Creek Mining v. Peru*, the claimant—a large corporation—operated mining projects in an indigenous community’s land without first consulting them, which was an obligation under the Convention 169 of the International Labor Organization (“ILO”) for protecting and promoting indigenous people’s rights.<sup>124</sup> After considering the parties arguments and the amicus brief submitted, the *Bear Creek* Tribunal denied a human rights-based argument regarding the claimant’s non-conformance with the ILO.<sup>125</sup> In the dissent, Philippe Sands—one of the arbitrators in the Tribunal—stated that: “Yet the fact that the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them.”<sup>126</sup> Again, Sands’ dissent also validates this article’s theoretical framework provided below, which calls for rebalancing investment law obligations in light of other international law obligations of the host state.

Thus, by reviewing the few examples above, it seems that ISDS Tribunals may have the ability to bridge the gap between international investment law and human rights. However, the only impediment to reaching that goal is the lack of a proper and unified interpretive methodology for resolving investment disputes against the backdrop of general international law, including its subfields such as international human rights.

---

trated by the retroactive or retrospective application of laws, including, without limitation, environmental laws, insofar as not accompanied by full compensation or a credible offer to fully compensate. Indeed, under Treaty Article 811(1)(c), lack of compensation as defined in the Treaty constitutes a Treaty breach rendering the taking illicit under international law.

*Id.* ¶¶ 4-6 (emphasis in original) (footnotes omitted).

124. *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, ¶ 258 (Nov. 30, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf> [<https://perma.cc/3WRU-3UDU>]. The amicus brief stated that:

Bear Creek did not do what was necessary to understand the doubts, worries and anxieties and the Aymara culture and religiosity, and did not do the necessary to identify and assess the risks that their own operations could entail for the population and their rights over their lands and water. The company acted as if it were sufficient to promise benefits to some of the people and communities in the areas surrounding the project, to hold public meetings announcing their plans without needing to work closely with the communities, listening to their doubts and comments, explaining that the risks were minimal (if they truly were minimal), or that there would be benefits (if there really were). The actions that Bear Creek failed to carry out do not involve a simple strategy of community relations but correspond to international standards that Bear Creek should have known about and complied with but did not.

*Id.* ¶ 218.

125. *Id.* ¶ 664.

126. *Id.* ¶ 10 (Sands, Arb., dissenting in part).

*C. Tribunals' Assessment of the Relationship Between International Investment Law and International Humanitarian Law in Armed Conflict Locations or Civil Unrest Times*

Tillmann Rudolf Braun remarkably examined the notion of military necessity under international humanitarian law (“IHL”) as a defense against an FPS breach, which may render the destruction of foreign investment lawful and allow a host state to evade an FPS breach.<sup>127</sup> He also found that many host states feel reluctant to invoke such a ground to evade responsibility under the BIT.<sup>128</sup> In practice, ICSID Tribunals have rejected both military necessity and economic necessity despite recognizing them in the reasoning of the awards.<sup>129</sup> Other ICSID Tribunals had considered the state of necessity under CIL in quantifying damages.<sup>130</sup>

Two scenarios arise—or may arise—in practice that calls for rebalancing IHL protection with investment law obligations of host states. First, where a host state is at war against terrorists or insurgencies (non-international armed conflict). That includes riots, revolutions, civil wars, revolts, or insurrections.<sup>131</sup> Second, where the host state is subject to an invasion (e.g., the Russian invasion of Ukraine in 2022). Without resorting to IHL to rebalance the host state’s investment obligations, Tribunals could easily hold a host state accountable under FPS for not providing adequate protection that it could never meet, converting the due diligence standard into a strict liability one.<sup>132</sup>

The existence of a non-international armed conflict—as the de facto trigger for applicability—requires two conditions. First, a minimum level of organization of the non-state armed group, which does not need to amount to a well-organized state army.<sup>133</sup> Second, a minimum level of armed conflict intensity, which generally requires the use of

---

127. Tillmann Rudolf Braun, *International Law in Revolutionary Upheavals: On the Tension Between International Investment Law and International Humanitarian Law*, in INVESTMENTS IN CONFLICT ZONES: THE ROLE OF INTERNATIONAL INVESTMENT LAW IN ARMED CONFLICTS, DISPUTED TERRITORIES, AND ‘FROZEN’ CONFLICTS 19, 19-20 (Tobias Ackermann & Sebastian Wuschka eds., Brill 2020).

128. *See id.* at 45.

129. Asian Agric. Prods. Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶¶ 63-64 (June 27, 1990), 4 ICSID Rep. 245 (1997); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 304-05, 322-31 (May 12, 2005), 14 ICSID Rep. 151 (2009); Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 294-313 (May 22, 2007), 11 ICSID Rep. 268 (2007).

130. LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, ¶ 106 (July 25, 2007), 11 ICSID Rep. 411 (2007).

131. *See Braun, supra* note 127, at 21.

132. *See id.* at 28-29.

133. *Id.* at 26-27.

military force on both sides.<sup>134</sup> Although the FPS standard of investment law and the military necessity standard of humanitarian law can both be applied concurrently, their standards are different.<sup>135</sup> The investor's ownership stake in compensation for an *investment damaged by an unlawful act is protected* under international investment law to ensure attracting foreign direct investments.<sup>136</sup> Yet, property protection under IHL, on the other hand, is primarily intended to preserve the use of civilian property to *ensure civilian survival and alleviate human suffering*.<sup>137</sup>

Braun further argues that IHL constitutes a part of CIL and thus does not need treaty ratification and is not subject to derogation.<sup>138</sup> Moreover, IHL obligations are absolute, rather than reciprocal under investment treaties.<sup>139</sup> However, that does not mean that IHL should substitute investment law obligations. As Christoph Schreuer argues, treaties are not automatically terminated or suspended when an armed conflict breaks out.<sup>140</sup> Further, Article 5 of the Draft Articles on the Effects of Armed Conflicts on Treaties includes a list of treaties whose subject matter necessitates their ongoing functioning during armed crises, among which are commerce and trade agreements.<sup>141</sup> Thus, no treaty shall substitute the other; both IHL (e.g., Geneva conventions, protocols, and comments) and international investment law (e.g., a BIT) shall apply concurrently to rebalance the investment obligations of the host state that is subject to an armed conflict. In other words, a Tribunal shall consider that a host state has different priorities (protecting its own citizens, hospitals, heritage sites, museums, etc.) at times of armed conflict other than devoting its resources toward protecting foreign investment.<sup>142</sup> In such circumstances, a host state may argue the state of necessity under

---

134. *Id.* at 27.

135. *Id.* at 28.

136. *Id.*

137. *Id.*

138. *Id.* at 31.

139. *Id.* at 32.

140. Christoph Schreuer, *The Protection of Investments in Armed Conflicts*, in INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 3, 4 (Freya Baetens ed., Cambridge Univ. Press 2013).

141. Draft Article 5 states that:

The operation of treaties on the basis of implication from their subject matter: (1) In the case of treaties the subject matter of which involves the implication that they continue in operation, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation . . . Annex: Indicative list of categories of treaties referred to in draft article 5 . . . (d) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights; . . . (l) Treaties relating to commercial arbitration . . .

*Id.* at n.5.

142. *See id.* at 4-5, 16-17.

international law (if the emergency circumstances meet its conditions) by substantiating its arguments based on IHL—that it found it necessary at the time to protect its national interests more than foreign investment.

As the *Urbaser* Tribunal acknowledged a BIT breach yet excused the host state from paying compensation for such a breach, an ISDS Tribunal shall accept such defense based on IHL to excuse the host state from paying any compensation to the foreign investor in case a breach took place under the state of necessity under international law. In the absence of a state of necessity, a Tribunal shall rebalance a BIT breach with the national interests pursued by the host state under the IHL by reducing the compensation provided to the foreign investor at the quantification stage relative to the resources used to protect the host state's national interests under IHL.

But do ISDS Tribunals rebalance host state obligations by considering IHL provisions at times of armed conflict? The answer is simply no.<sup>143</sup> One key application of the FPS is the state's responsibility to safeguard investors from violence perpetrated by non-State actors (insurgents, terrorists, rebels, etc.).<sup>144</sup> The investment in *AAPL v. Sri Lanka* was destroyed during a counterinsurgency operation by the Sri Lankan Security Forces.<sup>145</sup> The Tribunal was unable to determine whether the destruction was caused by the state's security forces or by the rebels due to a lack of sufficient evidence.<sup>146</sup> Regardless, the Tribunal held Sri Lanka accountable for an FPS breach, holding that:

It is a generally accepted rule of International Law, clearly stated in international arbitral awards and in the writings of the doctrinal authorities, that: (i) A State on whose territory an insurrection occurs is not responsible for loss or damage sustained by foreign investors unless it can be shown that the Government of that state failed to provide the standard of protection required, either by treaty, or under general customary law, as the case may be; and (ii) Failure to provide the standard or protection required entails the state's international responsibility for losses suffered, regardless of whether the damages occurred during an insurgents' offensive act or resulting from governmental counter-insurgency activities.<sup>147</sup>

Accordingly, the Tribunal found Sri Lanka accountable for an FPS breach. The Tribunal concluded “that the Respondent through said

---

143. *Id.* at 8-9.

144. *Id.*

145. *Asian Agric. Prods. Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 8 (June 27, 1990), 4 ICSID Rep. 245 (1997).

146. *Id.* ¶ 85(d).

147. *Id.* ¶ 72.



inaction and omission violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions.”<sup>148</sup>

Another ISDS Tribunal that applied an FPS due diligence on a host state without rebalancing its FPS obligation to IHL is the *Ampal-American* Tribunal.<sup>149</sup> The factual matrix of *Ampal-American* could be summarized in four main points. First, terrorists in Sinai attacked a gas pipeline operated by a foreign investor thirteen times in a year duration.<sup>150</sup> The pipeline was installed in El-Arish, which is located in North Sinai.<sup>151</sup> Sinai, in general, and El-Arish, in particular, were vulnerable to attacks by one of the most powerful terrorist groups linked with the Islamic State, which arose after the revolution’s security collapse.<sup>152</sup> Second, the attacks happened after the January 25th revolution, when the country was going through a period of profound political transformation and a police withdrawal.<sup>153</sup> The Supreme Council of the Armed Forces had taken over the executive and legislative powers and was the country’s sole governing body.<sup>154</sup> The Egyptian Armed Forces had also replaced the police forces to maintain Egypt’s internal security at a time when the situation on the frontiers, particularly in Sinai, was still unpredictable.<sup>155</sup> Third, fourteen personnel among the perpetrators of the pipeline attacks were apprehended and punished in Egypt—sentenced to

---

148. *Id.* ¶ 85(B).

149. *Ampal-Am. Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 290 (Feb. 21, 2017), 20 ICSID Rep. 406 (2022).

150. *Id.* ¶ 286.

151. *Id.* ¶ 288.

152. Mapping Militants Orgs., *Islamic State – Sinai Province*, STAN. UNIV., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/557#note5> [<https://perma.cc/4WSZ-QJ95>] (Dec. 2018).

153. *Ampal-Am.*, ICSID Case No. ARB/12/11 ¶¶ 275, 277.

154. Egyptian Constitutional Declaration art. 56-57, 61 (Mar. 2011); Kareem Fahim, *Egypt’s Military and President Escalate Their Power Struggle*, N.Y. TIMES (July 9, 2012), <https://www.nytimes.com/2012/07/10/world/middleeast/egypt-tension-after-order-toreconvene-parliament.html> [<https://perma.cc/V3BN-PXWW>]; *Egypt Government Powers: Breakdown of Responsibilities After Country’s First Democratic Elections*, HUFFPOST (June 28, 2012, 10:09 AM), [https://www.huffpost.com/entry/egypt-government-power\\_n\\_1628634](https://www.huffpost.com/entry/egypt-government-power_n_1628634) [<https://perma.cc/K965-EZCJ>]; Erin Cunningham, *Muslim Brotherhood vs. Supreme Council of the Armed Forces in Egypt*, WORLD (Aug. 13, 2012, 6:20 AM), <https://www.pri.org/stories/2012-08-13/muslim-brotherhood-vs-supreme-council-armed-forces-egypt> [<https://perma.cc/UG7L-4DYD>].

155. Edmund Sanders & Jeffrey Fleishman, *Unease in Egypt as Police Replaced by Army, Neighbors Band Against Looters*, SEATTLE TIMES (Jan. 30, 2011, 8:21 AM), <https://www.seattletimes.com/nation-world/unease-in-egypt-as-police-replaced-by-army-neighbors-band-against-looters> [<https://perma.cc/9365-6QBQ>].

death.<sup>156</sup> Fourth, Egypt not only deployed military personnel to guard the pipeline, but Egypt also added hundreds of additional soldiers to provide more protection after the February 5th attack.<sup>157</sup> The deployed troops successfully stopped one attack in March 2011.<sup>158</sup> Finally, the Supreme Military Council advised the Egyptian Natural Gas Holding Company to adopt additional high-security measures on the pipeline such as raising the height of fences, installing barbed wires on top of fences, increasing lighting, leveling sand dunes around each site, and installing a monitoring system with TV cameras.<sup>159</sup>

Despite these facts, the *Ampal-American* Tribunal found Egypt liable for failing to take reasonable steps, as required by the due diligence standard, to protect the investor's pipeline from terrorist attacks.<sup>160</sup> More importantly, there is no mention of IHL anywhere in the merit award—as if Egypt's long war against terrorism in North Sinai does not automatically activate the application of IHL. The situation in North Sinai in the aftermath of the January 25, 2011 revolution meets Braun's two-prong test for the application of IHL. First, the terrorist group in North Sinai—IS-IP—is a well-organized group that uses military weapons.<sup>161</sup> Second, there were multiple confrontations between the Egyptian Army and the IS-IP terrorist group with the use of military force on both sides.<sup>162</sup>

156. Gabe Fisher, *Egypt Sentences 14 to Death for 2011 Sinai Attacks*, TIMES ISR. (Sept. 24, 2012, 2:15 PM), <https://www.timesofisrael.com/egypt-sentences-14-to-death-for-2011-sinai-attacks> [<https://perma.cc/9EXE-E6DW>].

157. JPost.com Staff, *Bombing Attempt on Egypt-Israel Gas Pipeline Fails*, JERUSALEM POST (Mar. 27, 2011, 1:26 PM), <https://www.jpost.com/Middle-East/Bombing-attempt-on-Egypt-Israel-gas-pipeline-fails> [<https://perma.cc/PVJ9-MLFY>].

158. AP, *Bombing Attempt on Egypt-Israel Gas Pipeline Fails*, EGYPT INDEP. (Mar. 27, 2011), <https://www.egyptindependent.com/bombing-attempt-egypt-israel-gas-pipeline-fails> [<https://perma.cc/XX65-2Q62>].

159. *Ampal-Am. Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 277 (Feb. 21, 2017), 20 ICSID Rep. 406 (2022).

160. *Id.* ¶ 290.

161. Mapping Militants Orgs., *supra* note 152; David D. Kirkpatrick, *Militant Group in Egypt Vows Loyalty to ISIS*, N.Y. TIMES (Nov. 10, 2014), <https://www.nytimes.com/2014/11/11/world/middleeast/egyptian-militant-group-pledges-loyalty-to-isis.html> [<https://perma.cc/4398-83RJ>].

162. EMILY DYER & OREN KESSLER, TERROR IN THE SINAI 20 (Henry Jackson Soc'y 2014); Nawal Sayed, *Timeline of Terrorist Attacks on Egyptian Worshippers 2016-2017*, EGYPT TODAY (Nov. 25, 2017, 12:19 PM), <https://www.egypttoday.com/Article/1/34116/Timeline-of-terrorist-attacks-on-Egyptian-worshippers-2016-2017> [<https://perma.cc/YZ87-YTLD>]; Agence France Presse, *Egypt: 7 Sinai Jihadists Killed, 15 Soldiers Dead or Wounded in Attack*, TIMES ISR. (Feb. 16 2019, 2:47 PM), <https://www.timesofisrael.com/egypt-7-sinai-jihadists-killed-15-soldiers-dead-or-wounded-inattack> [<https://perma.cc/22KJ-M5RU>]; *Egypt Attack: Soldiers Killed in Raid on Sinai Checkpoint*, AL JAZEERA (June 5, 2019), <https://www.aljazeera.com/news/2019/6/5/egypt-attack-soldiers-killed-in-raid-on-sinai-checkpoint> [<https://perma.cc/2ZG8-T9HX>].

This one-sided analysis approach of FPS due diligence by ISDS Tribunals is expected to arise in future investment disputes against Ukraine. Despite being subject to invasion, under the status quo, Ukraine could be held accountable under an FPS investment treaty ground simply for failing to adopt adequate measures—expected by the foreign investor at the time of investment—to protect foreign investment in its current invaded territory. Unless future ISDS Tribunals adopt the unified interpretive methodology proposed below, the outcome of the case would be unjust and doctrinally incorrect.

After reviewing the existing literature and relevant ISDS cases, it becomes apparent that ISDS Tribunals often neglect other international law obligations and indeed treat the ISDS system as a closed legal system.<sup>163</sup> International law obligations that Tribunals neglect encompass human rights treaties (prevalent in peacetime) and IHL and human rights treaties (in armed conflict). Again, I argue that the main reason behind such exclusion is both fragmentation and the absence of a methodology to direct Tribunals toward rebalancing multiple international law obligations of host states derived from multiple international law sources. In the next part, this research proposes a normative doctrinal framework for rebalancing the host state's investment obligation of FPS with other international obligations embedded in human rights.

### III. A NORMATIVE DOCTRINAL FRAMEWORK TO BRIDGE THE GAP BETWEEN INTERNATIONAL LAW SUBFIELDS

The proliferation of international tribunals and the substantive fragmentation of international law has been a source of concern for international legal scholars and successive International Court of Justice (“ICJ”) Presidents.<sup>164</sup> This concern has not emerged recently; there has never been a clear normative or institutional hierarchy in international law.<sup>165</sup> In the 1950s, Wilfred Jenks observed two phenomena that characterize the fragmentation of international law.<sup>166</sup> First, the lack of connectivity between international law subfields due to the absence of one general legislative body.<sup>167</sup> Second, the absence of laws governing the revisions in international treaties and their legal effects.<sup>168</sup> Thus,

---

163. See *supra* notes 145-62 and accompanying text.

164. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 553 (2002).

165. *Id.* at 576-77.

166. C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, in 30 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1953 401, 403 (Oxford Univ. Press 1954).

167. *Id.*

168. *Id.*

international law was feared to be “fragmented and unmanageable.”<sup>169</sup> That expression still resembles the anxiety surrounding the uncertainties, conflicts, and paradoxes that plague international law and its institutions until this moment.<sup>170</sup> Sir Ian Brownlie—a leading international law scholar—once adverted to the danger of furthering fragmentation in 1988, writing:

A related problem is the tendency to fragmentation of the law which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as “international human rights law” or “international law and development”. As a consequence the quality and coherence of international law as a whole are threatened. . . . A further set of problems arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordination. After all, enthusiasts tend to be single-minded. Yet there may be serious conflicts and tensions between the various programmes or principles concerned.<sup>171</sup>

Further, Brownlie emphasized the dangers of a broader systemic risk in international law.<sup>172</sup> He argued that as specialized fields of international law develop in isolation of each other, more serious conflicts among those specialized fields will take place within the international legal system—leading to more fragmentation.<sup>173</sup> Further, Gerhard Hafner conducted a thorough study regarding the fragmentation of international law, which prompted the ILC to examine the issue of fragmentation.<sup>174</sup> Hafner argued that international law—as a system of laws—“consists of erratic parts and elements[;]” each part is differently structured normatively and institutionally in a manner that challenges the homogeneous nature of international law.<sup>175</sup> As a result, the ILC conducted a group study of the fragmentation of international law under the supervision of the international legal scholar Martti Koskenniemi.<sup>176</sup> The ILC study group commission studied the fragmentation of international

---

169. Koskenniemi & Leino, *supra* note 164, at 556.

170. *Id.*

171. IAN BROWNLIE, *THE RIGHTS OF PEOPLES IN MODERN INTERNATIONAL LAW* 15 (James Crawford ed., Clarendon Press 1988).

172. *See id.* at 14.

173. *See id.*; Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *INT’L & COMPAR. L. Q.* 279, 280 (2005).

174. Gerhard Hafner, *Risks Ensuing from Fragmentation of International Law*, [2000] 2 *Y.B. Int’l L. Comm’n* 143, U.N. Doc. A/55/10; Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 1, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

175. Hafner, *supra* note 174, at 144.

176. Koskenniemi, *supra* note 174, ¶ 1.

law by examining multiple dimensions such as: (1) the role of *lex specialis* and *lex generalis*; (2) self-contained systems of international law; (3) conflicts between successive international legal norms; (4) the role of systematic integration under Article 31(3)(c) of the VCLT; and (5) a possible hierarchy of international law rules (*jus cogens*, *erga omnes*, etc.).<sup>177</sup>

In this research, I limit the scope of analyzing international law fragmentation only to ISDS. Further, although I set the base for a theoretical framework that could cover all other international obligations of host states, I limit the focus of this research to human rights obligations in peacetime and IHL obligations at times of armed conflict or instability (besides human rights obligations, which are also applicable at times of armed conflict). The objective of this article is to provide a pragmatic standardized methodology that could be followed by ISDS Tribunals to strike a fair balance between the investment and non-investment obligations of host states, especially human rights obligations.

The ISDS is frequently perceived as a self-contained regime despite attempts from some Tribunals to argue otherwise.<sup>178</sup> In practice, most international investment agreements do not refer to human rights or environmental law in either the preamble or the body of the treaty.<sup>179</sup> That creates a one-sided set of investment obligations upon the host state and places no obligations upon the foreign investor to respect the host state's human rights law obligations.<sup>180</sup> The current status quo also encourages ICSID Tribunals to treat international investment law as a secluded system away from other host states' international law obligations, which leads to more fragmentation.

At the very same time, host states remain equally bound by both international investment agreements and other relevant yet unrelated international law treaties—such as human rights law treaties.<sup>181</sup> Again, that equality perishes—in practice—as a result of ISDS Tribunals' frequent rejection of host states' defenses that are based on non-investment

---

177. *Id.* ¶¶ 2-3.

178. United Nations Conference on Trade and Development, *Investor-State Dispute Settlement* 70 (2014), [https://unctad.org/system/files/official-document/diaeia2013d2\\_en.pdf](https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf) [<https://perma.cc/PG3K-KXPE>]; see *Asian Agric. Prods. Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶ 21 (June 27, 1990), 4 ICSID Rep. 245 (1997).

179. See Kathryn Gordon et al., *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* 5-6 (OECD, Working Paper No. 2014/01, 2014).

180. See JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 221 (Oxford Univ. Press 2010); Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox*, 37 N.C. J. INT'L L. & COM. REGUL. 1107, 1110 (2012).

181. Taida Begić Šarkinović, *Human Rights Issues in Investment Arbitration Cases: A New Perspective?*, 11 UNION UNIV. L. SCH. REV. 532, 533 (2020).

international law obligations.<sup>182</sup> Furthermore, some ISDS Tribunals have held developing host states liable under the FPS obligation after conducting a one-sided analysis of the host state's due diligence. For instance, the *Ampal-American* Tribunal counted terrorist attacks on a gas pipeline in the desert but failed to account for terrorist attacks against Egyptian nationals and high-rank officials.<sup>183</sup> In other words, it considered Egypt's investment protection obligations under the BIT more worthy than its *erga omnes* international human rights obligations toward its citizens. The Tribunal's analysis of the FPS due diligence standard did not take into account Egypt's other international law obligations or the public interest but rather focused solely on whether the host state had exerted a sufficient degree of exclusive due diligence toward protecting the foreign investment.<sup>184</sup> As a corollary to such a stance, many developing host states had failed to meet their due diligence standard in the eyes of ISDS Tribunals and have been held liable for an FPS breach—paying billions of USD as compensation to the foreign investor.<sup>185</sup> That forces developing host states to allocate more resources toward protecting foreign investors than to fulfill their other international law obligations, including vital human rights law obligations.

To cut this vicious cycle, ISDS Tribunals shall consider—with equal importance—other important international law obligations of host states besides considering their investment obligations. Fortunately, a few ISDS Tribunals have acknowledged that investment law should not be promoted at the expense of fundamental human rights norms.<sup>186</sup> Furthermore, recent ISDS Tribunals have also emphasized the importance of considering the human rights obligations of the host state while assessing an alleged investment breach to the BIT.<sup>187</sup> Nonetheless, the ISDS remains largely a secluded field of international law and there is

---

182. See, e.g., *Quasar de Valores SICAV S.A. v. Russian Federation*, SCC Case No. 24/2007, Award, ¶¶ 21, 42 (July 20, 2012), 19 ICSID Rep. 205 (2021); *Veteran Petrol. Ltd. (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, ¶ 765 (July 18, 2014), 18 ICSID Rep. 331 (2020).

183. *Ampal-Am. Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 283-85, 288, 291 (Feb. 21, 2017), 20 ICSID Rep. 406 (2022).

184. *Id.*

185. *Id.* ¶ 354; *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, London Ct. of Int'l Arb. Administered Case No. UN 3467, Final Award, ¶¶ 203-04, 207 (July 1, 2004), <https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf> [<https://perma.cc/Z6T7-96KL>].

186. *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 78 (Apr. 15, 2009), 19 ICSID Rep. 225 (2021). For a general overview, see Susan L. Karamanian, *Human Rights Dimensions of Investment Law*, in *HIERARCHY IN INTERNATIONAL LAW* 236, 249 (Erika De Wet & Jure Vidmar eds., Oxford Univ. Press 2012).

187. Šarkinović, *supra* note 181, at 541.

no methodology in place for ISDS Tribunals to consider non-investment law obligations.

The doctrinal framework for rebalancing relevant international law obligations of the host state to its international investment obligations finds its foundations in party autonomy, Article 41(2) of the ICSID, VCLT, ICJ Article 38, and the Recommendations proposed by the ILC Study of International Law Fragmentation. In the first section of this part, I put forward such a theoretical framework. In the second section, I refute potential conceptual and pragmatic challenges against this theoretical framework.

*A. Why Should ISDS Tribunals Balance Host States' Obligations Under International Human Rights Treaties with the FPS Investment Obligation?*

Party autonomy is considered the main cornerstone of the international arbitration system.<sup>188</sup> Since parties willingly move away from the domestic court system of the host state and submit their dispute to an arbitral Tribunal, the Tribunal's jurisdictional limitations are based on the parties' agreement. In investment arbitration, party autonomy is demonstrated in two means. First, the BIT adopted between the capital-exporting state and the capital-importing state.<sup>189</sup> Second, the arbitration agreement referred to in the contract between the foreign investor and the host state's relevant public organ/institution.<sup>190</sup> Nevertheless, the host state's international legal responsibility vis-à-vis the foreign investor is only derived from the BIT whether directly or through umbrella clauses. Yet, such BIT is only one international agreement between two sovereign states, among other signed and ratified international treaties—forming an interconnecting web of the international legal system.

The ICSID or Washington Convention reflects the importance of party autonomy in international investment arbitration. ICSID Convention Article 42(1) provides that:

---

188. See ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 265 (4th ed. Bath Press 2004) (“Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition . . .”).

189. Satyam Singh & Shailesh Kumar Singh, *Bilateral Investment Treatise (BITS) Bilateral Arbitration Treatise (BATS): An Analysis of the Two Regime*, 2 INDIAN J. INTEGRATED RSCH. L. 1, 2 (2022).

190. See REDFERN ET AL., *supra* note 188, at 265-66.

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>191</sup>

In this regard, Emmanuel Gaillard and Yas Banifatemi argue that ICSID Tribunals may primarily apply international law in issues surrounding state responsibility.<sup>192</sup> They rely on the legislative history of Article 42(1) of the ICSID Convention to illustrate that the second sentence of this article did not solely aim to make international law complementary to national law.<sup>193</sup> On the contrary, they contend that legislative history allows for the primary application of substantive rules of international law in itself.<sup>194</sup>

I will demonstrate how a host state's consent—under the party autonomy principle—to investment arbitration in a BIT does not derogate it from respecting other international obligations in the following example. State X is a capital-exporting state and State Y is a capital-importing state. Both states have adopted a BIT, as State Y aims to attract foreign direct investment. Concurrently, State X and State Y both signed and ratified ICCPR providing *erga omnes* obligations upon each to respect and promote human rights. A foreign investor from State X sued State Y upon an FPS ground due to State Y's failure to exert sufficient due diligence toward protecting his investment as provided under the X-Y BIT. State Y argued that it could not allocate its resources solely to protect the investor from State X as it also must provide water access to its population to realize its human rights obligations. An ICSID Tribunal shall not consider the FPS obligation in a vacuum but shall consider it in light of other international obligations of host states such as those emanating from international human rights treaties. That is because although party autonomy exclusively refers to FPS under the BIT and does not mention respecting human rights, each state is bound to respect international

---

191. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Mar. 18, 1965, 17 U.S.T. 1270.

192. Emmanuel Gaillard & Yas Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID REV.—FOREIGN INV. L.J. 375, 408-09 (2003).

193. *Id.* at 381-83, 385-86.

194. *Id.* at 393-94, 397, 403-04 (casting doubt on the necessity of primary recourse to the history of the Convention as the principal means of interpretation of the second sentence of Article 42(1) when the ordinary meaning supports the conclusion that national and international law are as relevant).



human rights treaties they are parties to, which form a part of the international legal system.<sup>195</sup>

Accordingly, party autonomy also does not support the exclusive application of one treaty (BIT) and exclude another (e.g., human rights treaties) since both states are often parties to both treaties. Further, such treaties form an integral part of international law as a legal system. In this regard, Joost Pauwelyn emphasizes that: “[I]n their treaty relations states can ‘contract out’ of one, more or, in theory, all *rules* of international law (other than those of *jus cogens*), but they cannot contract out of the *system* of international law.”<sup>196</sup> That is also evident in the extensive jurisprudence regarding international agreements between states.<sup>197</sup> Although there might be a false perception that a specialized field of international law—such as investment arbitration—could exist in a legal vacuum, the reference to international law as the governing legal system became a common practice since the *Saudi Arabia v. Aramco* decision in 1958.<sup>198</sup> The *Aramco* Tribunal opined that:

It is obvious that no contract can exist *in vacuo*, i.e., without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the [p]arties. It is necessarily related to some positive law which gives legal effects to the reciprocal and concordant manifestations of intent made by the parties.<sup>199</sup>

But what constitutes the international legal system? The Statute of the International Court of Justice (“ICJ Statute”) enumerates the sources of international law that form the international legal system as applicable by the Court.<sup>200</sup> Article 38 of the ICJ Statute provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. *international conventions*, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. *international custom*, as evidence of a general practice accepted as law;
- c. *the general principles of law* recognized by civilized nations;

---

195. *See id.* at 402.

196. JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 37 (Cambridge Univ. Press 2003) (emphasis in original).

197. *See id.*

198. *Saudi Arabia v. Arabian Am. Oil Co. (Aramco)*, Award, 27 Int’l L. Rep. 117, 173, 205 (Arb. Trib. 1958).

199. *Id.* at 165.

200. Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. 21.

d. subject to the provisions of Article 59, *judicial decisions and the teachings of the most highly qualified publicists* of the various nations, as subsidiary means for the determination of rules of law.<sup>201</sup>

Accordingly, the international legal system is comprised of, *inter alia*, international treaties ratified by states and CIL. Then why do ISDS Tribunals seem to disregard other international obligations of host states during the assessment of an investment breach under a BIT?

The answer lies in that investment law forms the *lex specialis* as to the international legal system (*lex generalis*) and therefore takes priority in the application.<sup>202</sup> While the characterization of investment law (comprised of BITs) as *lex specialis* is proper, that does not stop the application of other international treaties that form the body of the international legal system.<sup>203</sup> As such, the Iran-United States Claims Tribunal stated that:

As a *lex specialis*, in relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law . . . however . . . the rules of customary international law may be useful in order to fill in possible lacunae of the Treaty to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.<sup>204</sup>

Yet, CIL is only one source of international law under Article 38 of the ICJ Statute, and international treaties are another distinct source.<sup>205</sup> Thus, even when parties agree to contract out of general international law by adopting a BIT (*lex specialis*), the general international law remains applicable—including all other international agreements between the parties.

The ILC Study Group of International Law fragmentation—chaired by Martti Koskenniemi—emphasizes this conclusion. It provides:

But no regime is self-contained. Even in the case of well-developed regimes, general law has at least two types of function. First, it provides the normative background that comes in to fulfill aspects of the regime's operation not specifically provided by [it] . . . . Second, the rules of general law also come into operation if the special regime fails to function properly. Such failure might be substantive or procedural . . . . Third, the term "self-contained regime" is a misnomer. No

---

201. *Id.* at 26 (emphasis added).

202. *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 112 (1987).

203. *See id.*; Koskenniemi, *supra* note 174, ¶ 102.

204. *Amoco*, 15 Iran-U.S. Cl. Trib. Rep. ¶ 112.

205. *See* Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. 26; David Kennedy, *The Sources of International Law*, 2 AM. U.J. INT'L L. & POL'Y 1, 2-8 (1987).

legal regime is isolated from general international law. It is doubtful whether such isolation is even possible . . . .<sup>206</sup>

The ISDS regime is far from self-contained. BIT—as the dominant example of IIAs—standards such as FET and FPS are exceedingly vague.<sup>207</sup> And for that reason, ISDS Tribunals frequently resort to CIL to interpret vague BIT standards in light of the investor’s legitimate expectations and the minimum standard under CIL.<sup>208</sup>

In the absence of *stare decisis* in the ISDS regime, this leads to contradictory awards that are based on different interpretations of vague BIT standards.<sup>209</sup> The core reason behind that is the absence of any *methodology* for analyzing investment law against the backdrop of general international law (other international treaties and CIL). Then, what is the current ISDS Tribunals’ approach to resolving an investment dispute?

Under the status quo, ISDS Tribunals engage in a preliminary investigation to interpret the parties’ agreement to the applicable law.<sup>210</sup> ISDS Tribunals prioritize applying the law chosen by the parties in the arbitration agreement, whether municipal law or international law.<sup>211</sup> However, if a foreign investor invoked rights under a BIT or an investment treaty that gives rise to state responsibility, international law ultimately applies since municipal law is not primarily concerned with the international responsibility of states.<sup>212</sup>

After this preliminary investigation, ISDS Tribunals would directly apply the BIT in question by interpreting its vague standards using Article 31 of the VCLT.<sup>213</sup> Moreover, Tribunals also rely on previous ISDS Tribunals’ interpretations of the FPS vague standard to reinforce their relative interpretation.<sup>214</sup> It is worth noting that under Article 31 of the VCLT, a Tribunal would interpret the meaning of vague BIT standards

---

206. Koskenniemi, *supra* note 174, ¶¶ 192-93.

207. Eric De Brabandere, *Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity*, 18 J. WORLD INV. & TRADE 530, 533 (2017).

208. *See id.*

209. *See* Kenneth J. Vandeveld, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT’L L. & POL. 43, 81 (2010).

210. Gaillard & Banifatemi, *supra* note 192, at 375-76.

211. *Id.* at 375.

212. *Id.* at 375-76.

213. *Saluka Invs. BV (The Netherlands) v. Czech Republic*, Partial Award, ¶ 296 (Mar. 17, 2006), 15 ICSID Rep. 250 (2020); *see also* *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 1.1.2 (Aug. 20, 2007), 105 Am. J. Int’l L. 553 (2011); *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, ¶ 668 (July 29, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf> [<https://perma.cc/R34C-Z5CC>].

214. *See, e.g., Compañía de Aguas del Aconquija S.A.*, ICSID Case No. ARB/97/3 ¶ 7.4.3.

in light of the ordinary meaning, context, and purpose of the BIT treaty.<sup>215</sup> Since the purpose behind a BIT is to protect foreign investors, Tribunals interpret BIT standards in a manner that aims to achieve that purpose.<sup>216</sup> Many ISDS Tribunals render an arbitral award after interpreting the BIT standard according to the first two sections of VCLT 31—disregarding systematic integration under VCLT 31(3)(c).<sup>217</sup>

In *Vivendi v. Argentina (I)*, the Tribunal rejected that the FPS should be limited to physical interference by directly interpreting the BIT.<sup>218</sup> The *Vivendi* Tribunal provided:

If the parties to the BIT had intended to limit the obligation to “physical interferences,” they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security, providing, in accordance with the Treaty’s specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment . . . . Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized.<sup>219</sup>

In that award, the *Vivendi* Tribunal relied on VCLT Article 31 to interpret both the FET and FPS under the 1991 French-Argentina BIT.<sup>220</sup> Moreover, the *Vivendi* Tribunal reinforced its interpretation of the FPS by referring to previous ISDS awards on FPS.<sup>221</sup>

ISDS Tribunals also resort to CIL to interpret vague BIT standards. In this regard, the *AAPL* Tribunal held that the FPS due diligence standard under the Sri Lanka-United Kingdom BIT was higher than the minimum standard accorded by CIL.<sup>222</sup> In *Tecmed v. Mexico*, the Tribunal also referred to CIL to interpret expropriation under the Mexico-Spain BIT.<sup>223</sup> Moreover, in *AMT v. Zaire*, the Tribunal interpreted the FPS

215. *Id.* ¶ 7.4.2.

216. *See id.* ¶ 7.4.15.

217. *Saluka*, 15 ICSID Rep. ¶ 296.

218. *See Compañía de Aguas del Aconquija S.A.*, ICSID Case No. ARB/97/3 ¶ 7.4.15.

219. *Id.* ¶¶ 7.4.15, 7.4.17.

220. *Id.* ¶¶ 1.1.2, 7.4.2.

221. *Id.* ¶ 7.4.16.

222. *Asian Agric. Prods. Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶¶ 50-51 (June 27, 1990), 4 ICSID Rep. 245 (1997).

223. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 116 (May 29, 2003), 10 ICSID Rep. 130 (2006).

standard under the Democratic Republic of the Congo-United States BIT as the minimum standard accorded by CIL.<sup>224</sup> Thus, the common practice of ISDS Tribunals in interpreting vague BIT standards is to resort to: (1) VCLT 31 (without applying its last section); (2) CIL; (3) ISDS case law as persuasive in supporting the Tribunal's findings.<sup>225</sup>

Nonetheless, some ISDS Tribunals rely on analogies from other international law subfields, as the VCLT rules and CIL often provide little assistance in addressing interpretation challenges.<sup>226</sup> The *S.D. Myers* Tribunal drew parallels with World Trade Organization (“WTO”) law doctrine on “like products” in interpreting the FET requirement to treat foreign investors no less favorably than nationals “in like circumstances.”<sup>227</sup> Moreover, the *Mondev* Tribunal used case law from the ECtHR concerning the “right to a court” to analogize the scope of the North American Free Trade Agreement minimum treatment standard.<sup>228</sup> The *Total* Tribunal used a comparative examination of European Human Rights law, European Union law, and public international law to interpret the concept of “legitimate expectations.”<sup>229</sup> The *Corn Products* Tribunal compared the ban on countermeasures impacting the rights of third states under CIL to interstate countermeasures evaluating permissible defenses in investor-state disputes.<sup>230</sup>

Yet, Anthea Roberts emphasizes that:

These principles and cases are not necessarily “relevant rules of international law applicable in the relations between the parties,” even when they originate in public international law. When invoking such analogies, participants are often not claiming that these principles and cases cross-apply to the investment treaty system as a matter of law. Rather, they are often arguing or simply assuming that textual or

---

224. *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, ¶¶ 6.10 (Feb. 21, 1997), 5 ICSID Rep. 11 (2002).

225. See Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 51-52 (2013).

226. See *id.*

227. Compare *S.D. Myers, Inc. v. Canada*, 8 ICSID Rep. 3, ¶¶ 243-51 (NAFTA Arb. 2000) (drawing on General Agreement on Tariffs and Trade and WTO jurisprudence in conceptualizing “likeness”), with *Methanex Corp. v. United States*, 16 ICSID Rep. 32, Part IV-Chapter B ¶¶ 29-35 (NAFTA Arb. 2005) (rejecting the relevance of trade law jurisprudence).

228. *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 143-44 (Oct. 11, 2002), 6 ICSID Rep. 181 (2004).

229. *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 128-34 (Dec. 27, 2010), <https://www.italaw.com/sites/default/files/case-documents/ita0868.pdf> [<https://perma.cc/PFB6-H8L9>].

230. *Corn Prods. Int’l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶¶ 161-79 (Jan. 15, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0244.pdf> [<https://perma.cc/23CB-S3TD>].

functional similarities between these fields make it instructive to draw comparisons when resolving difficult issues.<sup>231</sup>

Thus, even when ISDS Tribunals use analogies from other international law subfields, they do not conduct systematic integration, which calls for considering and applying other relevant international obligations of host states as a matter of law. Indeed, analogizing from other fields remains largely dependent on the arbitrators' relevant legal expertise rather than a methodology in place.<sup>232</sup> Roberts argues that "familiarity breeds content" and that arbitrators resort to fields of international law they have expertise in to borrow analogies.<sup>233</sup> This does not solve the fragmentation of international law in the ISDS system as it lacks a formal stare decisis and a unified interpretive methodology for analyzing the subfields of international law.

As a solution to international law fragmentation, the ILC Study Group on fragmentation suggested the usage of VCLT Article 31(3)(c) by international Tribunals to achieve international law integration.<sup>234</sup> VCLT Article 31(3)(c) may indeed boost the resolution of international law fragmentation in international investment law. Article 31(3)(c) states that while interpreting the treaty, a Tribunal or an adjudicatory body should take into account "any relevant rules of international law applicable in the relations between the parties."<sup>235</sup> Article 31(3)(c) helps resolve fragmentation because it requires any international adjudicatory body to consider other rules of international law in a manner that avoids any direct or indirect conflict of norms.<sup>236</sup> By the same token, that systematic

---

231. Roberts, *supra* note 225, at 52.

232. *See id.* at 55-56.

233. Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System 10 (Dec. 4, 2012) (unpublished manuscript), [https://law.yale.edu/sites/default/files/documents/pdf/sela/Roberts\\_-\\_Clash\\_of\\_Paradigms\\_-\\_4\\_Dec\\_2012-1.pdf](https://law.yale.edu/sites/default/files/documents/pdf/sela/Roberts_-_Clash_of_Paradigms_-_4_Dec_2012-1.pdf) [<https://perma.cc/6G5N-WQNU>]. Anthea Roberts argues that:

Arbitrators who specialize in international commercial and investment arbitration often treat commercial arbitration as a "default template" for investment treaty arbitration, readily transporting principles from one area to the other. Similar points could be made about arbitrators with backgrounds in other areas. For instance, the President in *Corn Products* was a prominent professor of public international law (and is now a judge on the International Court of Justice), and the award drew extensively on international law jurisprudence, while the President in *Continental Casualty* was a member of the WTO Appellate Body, and the award drew extensively on trade law jurisprudence.

Roberts, *supra* note 225, at 55 (footnotes omitted).

234. Koskeniemi, *supra* note 174, ¶¶ 462, 464, 468, 472, 478.

235. Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

236. *See* Roberts, *supra* note 225, at 51.

integration also enables the harmonization of international law rules “rather than the application of one norm to the exclusion of another.”<sup>237</sup>

In *Oil Platforms*, the ICJ investigated Article 31(3)(c) of the VCLT.<sup>238</sup> Until recently, Article 31(3)(c) was so obscure that commentators concluded that there was a “general reluctance” to adopt it.<sup>239</sup> The foundation of systematic integration is that treaties are creatures that originate and thrive within international law.<sup>240</sup> Regardless of their broad wording, treaties are all limited in scope and cannot exist in a vacuum, which calls for their operation as being part of the international law system.<sup>241</sup> Accordingly, “[t]reaties must be applied and interpreted against the background of the general principles of international law.”<sup>242</sup> The VCLT Article 31(3)(c) was also subject to skepticism. In his separate ruling in the *Gabčíkovo-Nagymaros* case, Judge Weeramantry stated that the sub-paragraph “scarcely covers this aspect with the degree of clarity requisite to so important a matter.”<sup>243</sup> Hugh Thirlway opines that: “It is . . . doubtful whether this sub-paragraph will be of any assistance in the task of treaty interpretation” in even more disparaging terms.<sup>244</sup> Yet, the question is not whether the rule in Article 31(3)(c) exists and can be used in certain instances, but rather the extent of operationalizing the sub-paragraph to better fulfill its function and promote international law coherence.<sup>245</sup>

The ILC Study Group clarified the role of VCLT Article 31(3)(c) as follows:

The rationale for such a principle is understandable. All treaty provisions receive their force and validity from the general law and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of these rights or obligations has any *intrinsic* priority over the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole. This is why, as pointed out by McNair, they must also be “applied and interpreted against the background of the general principles of international law.” Or, as the

---

237. McLachlan, *supra* note 173, at 286.

238. Islamic Republic of Iran v. United States, 2003 I.C.J. 1334, ¶ 41 (Nov. 6).

239. McLachlan, *supra* note 173, at 279-80.

240. *Id.* at 280.

241. See Int’l L. Comm’n, Rep. on the Function and Scope of the *Lex Specialis* Rule and the Question of “Self-Contained Regimes” of Its Fifty-Sixth Session, U.N. Doc. [A/CN.4/ILC(LVI)/SG/FIL/CRD.1, ¶ 102 (2004).

242. MCNAIR, THE LAW OF TREATIES 466 (Oxford Univ. Press 1961).

243. McLachlan, *supra* note 173, at 281.

244. *Id.*

245. *Id.*

Arbitral Tribunal in the *Georges Pinson* case noted, a treaty must be deemed to refer to such principles for all questions which it does not itself resolve expressly and in a different way.<sup>246</sup>

Thus, the application of VCLT Article 31(3)(c) should not only be operational in a case of conflict of norms (investment law *versus* human rights law), but shall be the standard practice for balancing multiple obligations of host states derived from multiple sources of international law such as BITs, human rights treaties, and CIL. This means that an ISDS Tribunal should always apply systematic integration regardless of the need for resolving a conflict of norms. Such integration would allow a Tribunal to consider the different international obligations of host states while assessing and applying the *lex specialis* BIT standards on the host state.

The horizontality of the international legal system is one of the characteristics that distinguish international law from other legal systems.<sup>247</sup> Yet, international law does not have a hierarchy of norms since it lacks a single legislature or court of plenary competence and relies on state consent in all aspects.<sup>248</sup> Further, it derives its normative content from a diverse set of international law sources comprised of broadly worded treaties.<sup>249</sup> Moreover, Article 38 of the ICJ Statute, which has served as a general catalog of the sources of international law, assigns no hierarchy to the sources of international law.<sup>250</sup> Accordingly, the process of interpretation establishes new concrete relationships between international law rules and principles.<sup>251</sup> The systematic thinking and legal reasoning behind the interpretation of international norms should not only exist in academia but continue in the practice of law through the application of international judges and arbitrators.<sup>252</sup>

Campbell McLachlan reviewed the application of Article 31(3)(c) by analyzing five different international decisions, each of which is produced by a different international adjudicatory body.<sup>253</sup> He concluded that there are multiple possible prerequisites for the application of Article 31(3)(c) for interpretation and integration.<sup>254</sup> First, the adjudicatory

---

246. Koskeniemi, *supra* note 174, ¶ 414 (emphasis in original) (footnote omitted).

247. *Id.* ¶ 324.

248. *Id.* Subject to the (contested) category of peremptory norms or *jus cogens*, which are granted priority over treaties pursuant to Articles 53 and 64 of the VCLT. *Id.* ¶¶ 362-65.

249. *See id.* ¶ 327.

250. *Id.*

251. Rep. on the Function and Scope of the *Lex Specialis* Rule and the Question of “Self-Contained Regimes” of Its Fifty-Sixth Session, *supra* note 241, ¶ 29.

252. *Id.*

253. McLachlan, *supra* note 173, at 295.

254. *See id.* at 315-16.



body ensures that parties to the dispute are also parties to applicable treaties.<sup>255</sup> Second, the adjudicatory body ensures that the rule in a non-applicable treaty is applicable because it constitutes an integral part of CIL.<sup>256</sup>

Some scholars—such as Anthea Roberts—argue that fundamental human rights form a part of CIL.<sup>257</sup> Roberts contends that investment Tribunals shall balance between economic interests under investment treaties and non-economic interests under human rights law.<sup>258</sup> Such balancing would be inevitable since investment treaties are extremely broad and vague, followed by a new and “undertheorized” system.<sup>259</sup> Roberts argues that:

Human rights are typically understood as a good in their own right, whereas investor rights might be viewed as a means to the end of increasing foreign investment, rather than an end in and of themselves. Even if investor rights are equivalent to human rights, they might better correspond to lower-ranked human rights norms, like property rights and protections against discrimination, than fundamental *jus cogens* norms, like freedom from torture.<sup>260</sup>

Thus, only vital human rights constitute a part of the CIL as *jus cogens*.<sup>261</sup> This leaves the rest of the human rights enumerated by the ICCPR or the ICESCR outside the scope of consideration by ISDS Tribunals. Yet I argue that even if human rights law, environmental law, and other international law subfields do not form a part of CIL, they are still applicable to investment disputes since they form an integral part of the international legal system. That is because they are derived from another international law source under Article 38 of the ICJ Statute:

---

255. *Id.* at 315.

256. For example, *Shrimp-Turtle* placed emphasis on the fact that, although the United States had not ratified the UN Convention on the Law of the Sea (“UNCLOS”), it had accepted during the course of argument that the relevant provisions for the most part reflected international custom. See J. Patrick Kelly, *The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Roles of States in WTO Governance*, 38 CORNELL INT’L L.J. 459, 465, 474-75 (2005) (detailing the *Shrimp-Turtle* case and discussing international custom surrounding the decision); Will Schrepferman, *Hypocri-sea: The United States’ Failure to Join the UN Convention on the Law of the Sea*, HARV. INT’L REV. (Oct. 31, 2019), <https://hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2> [<https://perma.cc/N4MY-ZC9H>] (discussing the United States Senate’s failure to take action with regard to UNCLOS).

257. See Roberts, *supra* note 225, at 46 (considering human rights as a paradigm of international law).

258. See *id.* (discussing the balance of economic and non-economic interests in the context of international public law).

259. *Id.*

260. *Id.* at 71.

261. McLachlan, *supra* note 173, at 306.

international treaties.<sup>262</sup> And the parties to the investment dispute are *often* parties to the other applicable non-investment treaties.<sup>263</sup> Further, even when the capital-exporting state is not a party to the international human rights treaty, the capital-importing state remains bound by its international human rights obligations.<sup>264</sup> As opposed to investment law obligations of host states that are only directed toward the foreign investor, human rights obligations are *erga omnes*—toward everyone and not based on reciprocity.<sup>265</sup>

Furthermore, the human rights obligations of host states are not subject to reciprocal countermeasures. In this regard, Article 49 of the ILC Draft Articles on State Responsibility (“ILC Articles”) stipulates that a state that is responsible for an internationally wrongful act can be subject to countermeasures by the injured state.<sup>266</sup> Nonetheless, Article 50 of the ILC Articles provides a caveat to those countermeasures arising out of state responsibility, namely that such countermeasures shall not affect “obligations for the protection of fundamental human rights.”<sup>267</sup> The ILC Commentaries explains this caveat as follows: “[F]or some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable” as they have a “non-reciprocal character and are not only due to other States but to the individuals themselves.”<sup>268</sup>

Finally, investors’ legitimate expectations shall not only encompass investment protections accorded by the host state under a BIT. Rather, a foreign investor shall also expect that the host state—as a sovereign—has other international obligations that may influence such protection. That is because the relationship between a foreign investor and the host state is not merely a contractual relationship between two individuals. It is a relationship between an individual or a corporation (the foreign investor) and the host state (a sovereign that carries upon its shoulders multiple international and municipal obligations).<sup>269</sup> It is correct for a foreign investor to expect full protection and security from a host state, but it is incorrect for such an investor to expect that it is the only

---

262. *See id.* at 282.

263. *See id.* at 290.

264. Roberts, *supra* note 225, at 73.

265. *Id.* at 72.

266. Int’l L. Comm’n, Rep. on Responsibility of States for Internationally Wrongful Acts of Its Fifty-Third Session, U.N. Doc. A/56/10, at 129-30 (2001).

267. *Id.* at 131.

268. *Id.* at 129.

269. *See* Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT’L L. 545, 554-56 (2014) (providing examples of disputes between foreign investors, often corporations, and sovereign nations).

obligation that the host state must meet. In this regard, host states often invoke the “margin of appreciation” principle, which grants them some leeway in fulfilling their treaty obligations to achieve public interest.<sup>270</sup> In using the margin of appreciation in their defense, host states are increasingly turning to the ECtHR’s jurisprudence because they can rarely find clear authority for deferential review under the applicable BIT.<sup>271</sup> Furthermore, when foreign investors deliberately choose a location prone to armed conflict in the host state to invest, they simply cannot expect the host state to offer them full protection and security since the host state’s resources might be diverged and directed toward more important national interests under IHL. Similarly, when a foreign investor pollutes the water resources of the host state to achieve its business objectives, such an investor shall not expect that the host state’s water resources are only theirs to use as they please. Again, that is because the host state is bound by international human rights law to provide water access with acceptable quality to people within its territory.<sup>272</sup> A proper legitimate expectation of a foreign investor would consider that the water resources of the host state are also shared with its citizens and has multiple public purpose usage, allowing for a margin of appreciation in fulfilling the BIT standards.

Accordingly, based on the limitation of party autonomy in creating a specialized field that cannot exist in a vacuum; Article 42(1) of the ICSID Convention regarding the applicability of international law; the applicability of *lex generalis* as a legal system necessary for the adequate operation of *lex specialis* (international investment law); ICJ Article 38 regarding the sources of international law, human rights and environmental law, *inter alia*, as being a part of the international legal system and the *erga omnes* nature of human rights law; the ILC Recommendation for the application of systematic integration under Article 31(3)(c) of the VCLT; and the legitimate expectations of foreign investors that host states are encumbered with other international obligations, ISDS Tribunals should rebalance other international law obligations of the host states with their investment law obligations while assessing an investment breach under a BIT or an investment treaty.

---

270. *See id.* at 553.

271. *Id.* at 554.

272. U.N. Econ. & Soc. Council, Comm’n on Econ., Soc. & Cultural Rts., *General Comment No. 15, The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 2, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

*B. Refuting Conceptual and Pragmatic Challenges Against This Doctrinal Framework*

A first conceptual challenge to rebalancing investment law obligations with relevant human rights obligations in the dispute could exist in the “hard law” versus “soft law” dichotomy. This dichotomy presupposes that there are parts of international law that are binding (“hard law”) and parts that are not (“soft law”).<sup>273</sup> And while international investment law falls under the “hard law” category, human rights law falls under the “soft law.”<sup>274</sup> This dichotomy within the international law field is rather ironic since the whole field could be characterized as “soft law”—under Gabrielle Kaufmann-Kohler’s definition—for lacking enforcement through a public force.<sup>275</sup> That is particularly so about human rights law arguments in ISDS. As Alvarez argues:

If one deploys Kaufmann-Kohler’s definition of soft law, for instance, an investor-state arbitrator that cites to global human rights treaties such as [the Convention on the Elimination of All Forms of Discrimination Against Women], the ICCPR, or ICESCR, would be relying on “soft law” since none of those treaties provides for, or ensures, by its terms, legally binding enforcement in a court, national or international.<sup>276</sup>

Furthermore, Christine Chinkin characterized soft law as vague or imprecise norms that do not hold legal bindingness.<sup>277</sup> Again, if an ISDS Tribunal adopted Chinkin’s definition, it would treat any argument based on the ICESCR as soft law.<sup>278</sup> That is because ICESCR provisions (e.g., “adequate standard of life”) are ambiguous and because the ICESCR merely compels governments “to take steps . . . to the maximum of its available resources, with a view to achieving progressively” toward the enforcement of the treaty obligations.<sup>279</sup>

Yet, Chinkin—who is skeptical of the role of soft law—argues that soft law norms can transform into hard law upon their adoption in

---

273. See Alvarez, *supra* note 97, at 3.

274. See *id.* at 5. Investment law embodied in IIA is considered hard law because it is enforced by ICSID Tribunals, whose awards are enforceable under the New York Convention. See U.N. Conference on International Commercial Arbitration, *New York Convention on the Recognition and Enforcement of Foreign and Arbitral Awards*, U.N. Doc. E/CONF.26/8Rev.1, art. 5 (June 10, 1958).

275. Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 J. INT’L DISP. SETTLEMENT 283, 284 (2010).

276. Alvarez, *supra* note 97, at 11.

277. Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE 21, 30 (Dinah Shelton ed., Oxford Univ. Press 2000).

278. See *id.* at 33.

279. International Covenant on Economic, Social and Cultural Rights art. 2, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

municipal law to form state practice.<sup>280</sup> In fact, since their inception, many states have implemented human rights treaties by amending or reforming their constitutions.<sup>281</sup> Some constitutions even mention the role of the UDHR—which is not considered an international treaty—in the constitutional reform process. The Egyptian Constitution of 2014 (amended through 2019) stipulates in the preamble: “We are drafting a Constitution that paves the way to the future for us, and which is in line with the Universal Declaration of Human Rights, which we took part in the drafting of and approved.”<sup>282</sup> Furthermore, Article 93 of the same Constitution provides that: “The state is committed to the agreements, covenants, and international conventions of human rights that were ratified by Egypt. They have the force of law after publication in accordance with the specified circumstances.”<sup>283</sup> In Europe, both the European Court of Justice and the ECtHR have started acknowledging human rights obligations by applying them to European member states.<sup>284</sup> Furthermore, both courts’ decisions have become increasingly influential in domestic European courts about the application of human rights law.<sup>285</sup> Accordingly, human rights law has become non-distinguishable from other treaty obligations after state practice rendered it “hard law.” The UDHR has become a “hard law” through state practice that rendered the UDHR a part of CIL. The ICCPR, which offers clear and concise language, shall be binding as an international treaty that constitutes one of the international law sources under Article 38 of the ICJ Statute. Moreover, states’ constitutions and courts’ practice validated the ICESCR as a binding international treaty, despite its soft language.

A second conceptual challenge could be grounded in consent and jurisdiction to investment arbitration. Had the parties (the foreign investor and the host state) agreed to exclusively resolve an investment dispute, there seems to be no basis for a Tribunal to assume jurisdiction over other subfields of international law such as human rights,

---

280. C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMPAR. L.Q. 850, 858 (1989). Chinkin states: “International soft law principles can also be implemented into municipal law, either by the State authorities or by individuals through their contracts. The former is evidence of State practice.” *Id.*

281. See U.N., Off. High Comm’r for Hum. Rts., *Human Rights and Constitution Making*, U.N. Doc. HR/PUB/17/5, at 6 (2018); Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 531 (1991); Mark Ensalaco, *In with the New, Out with the Old? The Democratizing Impact of Constitutional Reform in Chile*, 26 J. LAT. AM. STUD. 409, 416 (1994).

282. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT Jan. 18, 2014, pmbl.

283. *Id.* at art. 93.

284. Federico Fabbrini, *Kelsen in Paris: France’s Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation*, 9 GERMAN L.J. 1297, 1309 (2008).

285. *Id.*

environmental law, anti-corruption, climate change, etc. Moreover, and for the same reason, an ISDS Tribunal would be reluctant to decide on issues beyond investment law since other international obligations might be perceived to be non-binding on foreign investors despite being binding on host states. This intertwined challenge can be refuted on two grounds. First, certainly, ISDS Tribunals do not have jurisdiction to adjudicate a case that is solely based on human rights law breaches.<sup>286</sup> Yet, when host states use arguments grounded in human rights, they refer to components of the international legal system that form the backdrop web of investment law.<sup>287</sup> Thus, these arguments are valid and deserve serious consideration when Tribunals assess investment law breaches. That is because investment law (as *lex specialis*) cannot exist in a vacuum and cannot substitute all the international legal system (as *lex generalis*). Second, party autonomy extends in scope to cover all *relevant* arguments presented by the parties before the Tribunal.<sup>288</sup> That is a byproduct of state responsibility. A Tribunal cannot determine the responsibility of a host state for investment law breaches separately from other *relevant* international law obligations of the host state. Thus, when a state consents to submit itself before an ISDS Tribunal, that consent brings with it all other *relevant* international obligations of the host state. Certainly, foreign investors shall expect that since investment obligations are not exclusive to host states.

A third conceptual challenge could be based on the interpretation method of *lex specialis* and *lex generalis*. This means that the special field of investment law (comprised of BITs and ISDS case law) supersedes the general field of international law as it becomes more relevant to the dispute.<sup>289</sup> Although investment law is *lex specialis* and shall take primacy in its applicability to an investment dispute, BIT standards are extremely vague to be interpreted and applied without resorting to external international treaties, CIL, and ILC Articles on State Responsibility. For that reason, ISDS Tribunals often resort to Article 31 of the VCLT to interpret an IIA (BIT or Multilateral).<sup>290</sup> ISDS Tribunals also find themselves resorting to CIL for further clarification of BIT standards.<sup>291</sup> Further, they refer to ILC Articles on State Responsibility to

---

286. See *Biloune v. Ghana Invs. Ctr.*, 95 Int'l L. Rev. 184, ¶ 61 (1989).

287. See *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, ¶ 254 (July 14, 2006), 14 ICSID Rep. 367 (2009).

288. See Alvarez, *supra* note 97, at 17-18.

289. See Koskenniemi, *supra* note 174, ¶ 102.

290. See, e.g., *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 7.4.2 (Aug. 20, 2007), 105 Am. J. Int'l L. 553 (2011).

291. See, e.g., *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, ¶ 6.06 (Feb. 21, 1997), 5 ICSID Rep. 11 (2002).

assess attribution—whether an investment breach committed by a state organ or agent is attributable to the state.<sup>292</sup> ISDS Tribunals further review ECtHR jurisprudence to borrow the proportionality principle to assess whether the state’s act constitutes an unlawful expropriation.<sup>293</sup> And finally, ISDS Tribunals refer to their peer Tribunals’ awards—even though they do not constitute legal precedence—to either understand a BIT standard or justify their approach.<sup>294</sup> That is understandable since states’ obligations toward foreign investors under a BIT are almost always intertwined with other international law obligations (e.g., human rights). Thus, the approach of ISDS Tribunals, in disregarding other international treaty obligations such as human rights, worsens the ISDS legitimacy crisis.

A fourth conceptual challenge could be embedded in the relative treatment standard. The relative treatment standard means that a host state may not treat the foreign investor less favorably than its nationals.<sup>295</sup> The adoption of the relative treatment standard by Tribunals might arguably leave no need for rebalancing other international obligations of host states to their investment obligations. However, the relative treatment standard suffers from multiple limitations.

First, the relative treatment standard is only applicable to FET and not the FPS. The FPS obligation is assessed by a due diligence

---

292. See Alain Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 223, 234 (2013) (emphasis in original) (footnotes omitted):

ICSID tribunals unanimously greet the jurisprudence of the ICJ, which reflects customary rules of general international law, but they then hide behind the *lex specialis* dogma to faithfully follow the jurisprudence, *constante* on this point, of investment tribunals. Still in the field of state responsibility, one would expect frequent references to the Court’s case law with regard to attribution issues, for which, as some tribunals noted, neither the Washington Convention nor generally BITs are of any help. This is only partially—or indirectly—true: on these particular issues, ICSID tribunals use much more readily and systematically the 2001 ILC Articles than the jurisprudence of the Court. The 2001 ILC Articles, together with their commentaries, often constitute sufficient evidence of the applicable law on that matter, the case law (including but not exclusively) of the ICJ appearing only as a secondary argument to support the reasoning.

293. See *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003), 10 ICSID Rep. 130 (2006).

294. Alvarez, *supra* note 97, at 19. José Alvarez contends that:

Given the rising use of prior ISDS caselaw as the leading source of authority cited within investor-state rulings, the role of soft law in that caselaw matters and has implications for the legitimacy of international investment law (and not only ISDS). As Schill has argued, the jurisprudence produced by ISDS tribunals is increasingly treated, by litigants and arbitrators alike, as international investment law.

*Id.*

295. See OECD, *Fair and Equitable Treatment Standard in International Investment Law* 8 (OECD, Working Paper No. 2004/03, 2004).

standard.<sup>296</sup> An FPS breach does not require a discriminatory element which is required under the FET.<sup>297</sup> Thus, even when the host state's action is not discriminatory against the foreign investor, it could still be liable for an FPS breach—only for failing to take all measures necessary to protect the foreign investment, which breaches the due diligence standard.<sup>298</sup>

Second, a relative treatment standard often becomes impotent in armed conflict scenarios involving terrorism.<sup>299</sup> That is because terrorist groups might have specific subjects and objectives that are discriminatory in nature. For instance, a terrorist group in Egypt's North Sinai (Ansar Bayt al-Maqdis) often focused its attacks on the gas pipeline which exported gas to Israel, governmental officials, and Coptic Christians (and their churches). A relative treatment standard might not work in this scenario to defy an FPS breach because no national business was harmed by the same terrorist group. In other words, the host state "succeeded" in offering the FPS to domestic investors and failed to meet its FPS toward Israeli investors—only because the first group was never targeted. Yet, the foreign investor would claim that they were treated less favorably than domestic investors since the latter's investments remained untouched. In this scenario, a relative treatment standard would not work properly because the comparison between the foreign and national investments—in this specific scenario—is flawed. Yet, considering other international obligations of host states, such as human rights and IHL, would allow the Tribunal to reach a sound decision. That would take place through rebalancing the host state's inability to meet its FPS obligation with other security risks and breaches it had to face during the same timeline.

Finally, a relative treatment standard is limited in scenarios where a host state deliberately chooses to provide important goods and services through government-owned outlets rather than private businesses—which is often a privilege granted by the internal laws of the host state to achieve public interests.<sup>300</sup> Again, in this scenario, a relative treatment standard falls short of achieving justice. Here, the host state did not treat

---

296. See *Asian Agric. Prods. Ltd. (AAPL) v. Republic of Sri Lanka*, 1990 ICSID Case No. ARB/87/3, Final Award, ¶ 85(B) (June 27, 1990), 4 ICSID Rep. 245 (1997).

297. See OECD, *supra* note 295, at 22.

298. See *id.*

299. See Robert Howse & Amin R. Yacoub, *Litigating Terror in the Sinai After the Egyptian Spring Revolution: Should States Be Liable to Foreign Investors for Failure to Prevent Terrorist Attacks?*, 43 MICH. J. INT'L REV. 595, 620 (2022).

300. See Ivar Alvik, *The Justification of Privilege in International Investment Law: Preferential Treatment of Foreign Investors as a Problem of Legitimacy*, 31 EUR. J. INT'L L. 289, 307 (2020).



national investors more favorably than foreign investors; it treated itself more favorably (as a goods and services provider) than both national and foreign investors. Rebalancing other international law obligations with investment obligations would allow the host state to argue that it adopted such policies to satisfy the *erga omnes* human rights it owes to the people inside its territory.

Two more practical challenges could be directed to this theoretical framework. First, public policy/interest arguments are valid in ISDS, and Tribunals do consider the public interest of host states while assessing BIT breaches. Since host states may adopt important human rights in their internal laws under “public policy” or “public interest,” they might easily invoke such rights through using a public policy/interest defense—leaving no importance to rebalancing human rights obligations to investment law obligations. However, this challenge can be rebutted on two grounds. First, only newly negotiated investment treaties—mostly by developed nations—have a public policy exception embedded in them.<sup>301</sup> Consequently, only those states can raise a defense based on public policy and the margin of appreciation. Further, even though some ISDS Tribunals give weight to public policy/interest concerns when there is no mention of public policy in their investment agreements, they only do so under a proportionality test—that was originally borrowed from the ECtHR Decisions in *Tecmed*—which is only applicable on unlawful expropriation.<sup>302</sup> Most—if not all—ISDS Tribunals do not adopt the proportionality test in assessing FPS or FET breaches. A third rebuttal argument is based on the VCLT Articles 27 and 46. VCLT Article 27 provides that no state might invoke its internal law as a justification for failing to perform a treaty.<sup>303</sup> One might counterargue that there is a limited exception to this rule, which is provided by Article 46 of VCLT.<sup>304</sup> Under Article 46, a state may invoke a rule of its internal law to defy its consent to a treaty so long as such rule is of fundamental importance and its disregard constitutes a manifested violation.<sup>305</sup> Yet, this

---

301. Henckels, *supra* note 38, at 2826 (“Exceptions have become an increasingly popular mechanism in investment treaties, appearing in 43% of investment agreements concluded between 2011 and 2016, compared to 7% of agreements signed between 1959 (when the first investment treaty was signed) and 2010.”); U.N. Conference on Trade & Development, *World Investment Report 2017: Investment and the Digital Economy*, 122, U.N. Doc. UNCTAD/WIR/2017 (June 7, 2017) (including investment chapters in other economic agreements).

302. See *Técnicas*, ICSID Case No. ARB(AF)/00/2 ¶ 122.

303. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331. Article 27 states that: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.” *Id.*

304. *Id.* at art. 46.

305. See *id.*, providing that:

counterargument is flawed. Article 46 of the VCLT only concerns using internal law of fundamental importance to a state to demonstrate that a state party's consent to a treaty was impaired. That does not give a state the right to defy its international obligations under any treaty that a state is a member of through invoking internal laws. Accordingly, when a host state fails to include a public policy exception in its BIT (as an international treaty), it cannot defend itself against non-performing a treaty obligation using its internal laws except at the recognition and enforcement stage by invoking Article 5 of the New York Convention.<sup>306</sup> That leaves a host state with no other option to defend itself against an investment breach except to rely on other international rights and obligations that replicate its internal policies. These rights and obligations predominantly exist under international human rights law treaties. For these reasons, invoking a fundamental public policy as a defense to an alleged

---

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance . . . . A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

*Id.*

306. U.N. Conference on International Commercial Arbitration, *New York Convention on the Recognition and Enforcement of Foreign and Arbitral Awards*, U.N. Doc. E/CONF.26/8Rev.1, art. 5 (June 10, 1958). Article V provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

*Id.*

breach under a BIT does not negate the importance of relying on international human rights law treaties.

Second, international treaties are binding upon ratification by signatory states.<sup>307</sup> They are also directly applicable so long as their language is sufficiently clear and does not require further legislation.<sup>308</sup> Fortunately, the main human rights treaties such as the ICCPR and the ICESCR fall under this category.<sup>309</sup> Accordingly, ISDS Tribunals must consider—*sua sponte*—human rights obligations of the host state while assessing a BIT breach. That is because the host state—that had signed and ratified an international treaty—is bound by the obligations enumerated in that treaty regardless of whether it chooses to adopt these obligations as part of its internal laws.<sup>310</sup> For instance, states are bound to protect citizens and aliens in their territory against forced labor under ICCPR Article 8(3)(a).<sup>311</sup> If a state has not adopted such a right in its internal laws, it remains bound by Article 8(3)(a) of the ICCPR. Thus, when a host state uses Article 8(3)(a) and its obligation to protect citizens and aliens against forced labor against a foreign investor who exploited them, an ISDS Tribunal cannot reject such defense by arguing that Article 8(3)(a) of the ICCPR did not become an obligation upon the host state because it had not adopted it in its internal laws. The Fédération Internationale de Football Association (“FIFA”) human rights violations in Qatar could be an example of why a public interest/policy argument cannot pragmatically substitute the application of international human rights law. Qatar used the kafala (sponsorship) employment system, which is a restrictive labor governance system that resembles modern slavery.<sup>312</sup> FIFA knew of that system and yet proceeded to build a stadium in Qatar for the 2022 World Cup.<sup>313</sup> Hypothetically, suppose that the workers engaged in a strike against the kafala system and that led to substantial financial losses for FIFA. Further, suppose that FIFA can be characterized as a foreign investor in Qatar. As a foreign investor protected by a BIT, FIFA might file an ISDS arbitration case against Qatar claiming a breach to

---

307. *Glossary*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1\\_en.xml](https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml) [<https://perma.cc/2XVX-JFW7>] (last visited Dec. 2, 2023).

308. See Eur. Comm’n for Dem. Through L., *The Direct Applicability of Human Rights Treaties*, Doc. No. CDL-UD(2005)012rep, at 7 (2005).

309. *Id.*

310. *See id.*

311. International Covenant on Civil and Political Rights art. 8(3)(a), Dec. 16, 1966, 999 U.N.T.S. 171.

312. *Q&A: Migrant Worker Abuses in Qatar and FIFA World Cup 2022*, HUM. RTS. WATCH (Dec. 18, 2021, 3:15 PM), <https://www.hrw.org/news/2021/12/18/qa-migrant-worker-abuses-qatar-and-fifa-world-cup-2022#Q1> [<https://perma.cc/MDJ6-KJF4>].

313. *See id.*

FPS for failing to adopt adequate measures to preserve the economic and legal stability of the investment. In that case, Qatar's public policy/interest regarding the kafala system does not align with its human rights obligations. Yet, Qatar may argue that it failed to take necessary steps to stop the strike to respect another ICCPR obligation regarding the freedom of association with others.<sup>314</sup> In this example, a public policy argument cannot exist, yet a human rights argument remains valid even if it was not adopted in the host state's internal legislation. In this example, no regard shall be given to whether Qatar had adopted legislation to enforce the ICCPR—the latter is directly enforceable as international treaty under Article 38 of the ICJ Statute. And since an ISDS Tribunal is bound by international law in assessing state responsibility, the ICCPR articles shall be considered as an inseparable component of the binding body of general international law.

Thus, although the use of public interest may substitute the use of human rights arguments in ISDS under some circumstances, human rights arguments remain indispensable to resolving the fragmentation of international law. In this regard, Susan L. Karamanian argues that: "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 . . ." <sup>315</sup> In other words, invoking public policy to defend internal regulations is not a valid defense under many circumstances. That is because a host state can still be held liable under a BIT ground—such as FET, FPS, or Expropriation—by adopting a regulation that prioritizes the public interest over foreign investor protection. Yet, by balancing the investment obligations of the host state with its international human rights obligations, Tribunals can reach a just award that is not based on a secluded subfield, but rather on the general system of international law, which is primarily governing state responsibility.

Finally, a second practical challenge to my attempt to equate or rebalance other international treaty obligations with investment law obligations could be rooted in CIL. Since other subfields of international law such as international human rights law form a part of CIL, and since the latter is frequently applied to investment disputes by ISDS Tribunals, there is no need for a Tribunal to consider other international treaty obligations of the host states. However, this challenge could be rebutted on

---

314. International Covenant on Civil and Political Rights art. 22, Dec. 16, 1966, 999 U.N.T.S. 171.

315. Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 432 (2013).

two grounds. First, CIL and international treaties are both sources of international law—thus they are equally and separately binding.<sup>316</sup> Second, although international Tribunals consider human rights law as an integral part of CIL as *jus cogens* norms, this characterization is not fruitful in many cases.<sup>317</sup> That is because ISDS Tribunals only acknowledge the gravest of human rights (e.g., the right against torture) as part of *jus cogens* under CIL, and not all other human rights enumerated by international treaties (e.g., ICCPR).<sup>318</sup> Yet, arguing that fundamental human rights form a part of CIL's *jus cogens* norms remains fruitful when a state is not a party to international human rights treaties.<sup>319</sup>

In conclusion, rebalancing the non-investment law obligations to investment law obligations of host states is indispensable for resolving the legitimacy crisis of the ISDS system and resolving the fragmentation of international law in the field. Further, the theoretical framework this Part provides remains intact against possible conceptual and pragmatic challenges. In the next Part, I provide a working unified methodology to resolve international law fragmentation in the application of FPS under international investment law.

#### IV. RESOLVING HORIZONTAL FRAGMENTATION: A UNIFIED INTERPRETIVE METHODOLOGY TO CONNECT INTERNATIONAL LAW SUBFIELDS IN THE APPLICATION OF FULL PROTECTION AND SECURITY

ISDS tribunals, in general, give precedence to case law from other peer investment tribunals.<sup>320</sup> This is understandable because other Tribunals have dealt with many similar factual matrices.<sup>321</sup> Given that the ISDS system is only “semi-exogenous” in that it is based on international law and is internationally oriented, ISDS Tribunals shall indeed resort to international case law rendered by the ICJ, ECtHR, and other international law courts so long as they are relevant to the investment dispute.<sup>322</sup>

---

316. Statute of the International Court of Justice 1945 I.C.J. Acts & Docs. 26.

317. See Karamanian, *supra* note 315, at 436-38.

318. See Roberts, *supra* note 225, at 71; Karamanian, *supra* note 315, at 436-38; 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 (John H. Jackson et al. eds., Oxford Univ. Press 2009).

319. Brian D. Leppard, *Why Customary International Law Matters in Protecting Human Rights*, VÖLKERRECHTSBLOG (Feb. 25, 2019), <https://voelkerrechtsblog.org/de/why-customary-international-law-matters-in-protecting-human-rights> [<https://perma.cc/96KU-5SPA>]; Karamanian, *supra* note 315, at 436-38.

320. Pellet, *supra* note 292, at 230.

321. *Id.*

322. *Id.*

Regardless, ISDS Tribunals do not engage in any standardized interpretive methodology to resolve the fragmentation of international law in investment arbitration through rebalancing multiple international obligations of the host state. Thus, in the next paragraphs, I lay down a standardized interpretive methodology for resolving the fragmentation of international law in investment arbitration. The proposed methodology complies with the doctrinal framework above.

In peacetime, Tribunals shall rebalance international investment law obligations of the host state and its obligations under human rights law and other relevant international treaties. There shall be no clash of norms since each treaty governs a different subject matter. For instance, a BIT governs the host state's relationship with a foreign investor and the ICCPR/ICESCR governs the human rights obligations of the host state toward all individuals in its territory.<sup>323</sup> Nonetheless, the host state's diverse international obligations intersect. When a host state places further license limitations on the investor's use of the state's water resources to diminish the possibility of a drought, the host state's obligations under the BIT (e.g., FPS) intersect with the state's obligations under the ICESCR and the General Assembly Resolution preserving the human right to water access.<sup>324</sup> In conflict zones or at times of armed conflict, Tribunals shall rebalance international investment law obligations considering the IHL when a host state destroys an investment because of a military necessity. Thus, a Tribunal shall adopt a comprehensive approach toward rebalancing different policies emanating from the BIT on one hand and international human rights law (and IHL under military necessity) on the other. While a host state had adopted a BIT *arguably* to attract more foreign direct investment, such a state would almost always prioritize its survival under IHL over protecting a foreign investor under a BIT.

My proposed working methodology is uniform whether it is applied in ordinary circumstances (peacetime) or extraordinary circumstances (conflict zones or times of war). The working methodology could be reduced to the following simple formulas during peacetimes or times of conflict<sup>325</sup>:

---

323. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171; ICESCR, *supra* note 279, at art. 1; *Bilateral Investment Treaties*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/bilateral-investment-treaties> [<https://perma.cc/LU72-QQY7>] (last visited Dec. 2, 2023).

324. See Yulia Levashova, *The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaser and Beyond*, UTRECHT L. REV., Oct. 2020, at 110, 112.

325. Symbols: Full Protection and Security = FPS. Peacetime = P. Internal or International Armed Conflict = C. International Investment Agreements—whether BITs or Multilateral agreements = IIA. Vienna Convention on the Law of Treaties = VCLT. Customary International law =

FPS (P) = IIA (VCLT) (CIL) (ISDS case law)—[HR (CIL) (UDHR) (ICCPR) (ICESCR) (I-ECtHR)].

In general, the due diligence standard of FPS, at times of peace, shall be applied as follows. An ISDS Tribunal shall resort to the interpretation of the FPS clause in the IIA considering the VCLT, CIL, and ISDS case law of similarly decided cases. Then subtract any proven defenses of states that are substantiated in CIL and international human rights treaties (CIL, ICCPR, and ICESCR) as interpreted by the ECtHR in addition to any proven defenses that are substantiated in international environmental law treaties.

FPS (C) = IIA (VCLT) (CIL) (ISDS case law)—IHL + ILC Art. 23 and 25 + HR ([HR (CIL) (UDHR) (ICCPR) (ICESCR) (I-ECtHR)]).

The due diligence standard of FPS, at times of internal or international conflict, shall be applied as follows. A concerned ISDS Tribunal shall first resort to the interpretation of the FPS clause in the IIA in light of the VCLT, CIL, and relevant ISDS case law. Then subtract relevant state defenses to the dispute that are grounded in *jus in bello* (IHL) in addition to relevant state defenses grounded in international human rights law (CIL, ICCPR, and ICESCR). That is because international human rights law does not cease to apply at times of war or armed conflict.<sup>326</sup> Again, subtracting such defenses does not entail the elimination of the foreign investor's claims (unless the defenses do obliterate and wholly defy the investor's claim such as under Articles 23 and 25 of the ILC Articles on State Responsibility regarding force majeure and state of necessity). However, subtraction here simply means that a Tribunal shall reduce the quantification of damages of an FPS breach according to valid state defenses under IHL, ILC, and HR. For instance, if a Tribunal found a host state liable under FPS for not being able to prevent terrorist attacks against a foreign investment and the host state's defense based on force majeure and state of necessity failed, a Tribunal should reduce the quantification of damages of FPS in light of other host state's resources used to protect its civilians' or civil historical monuments under IHL and the resources used to protect the human rights of people in its territory (such as placing guards or soldiers to protect neighborhoods that might be subject to a terrorist attack).

---

CIL. Human Rights law encompassing the ICCPR and ICESCR = HR. The interpretation of Human Rights law through the European Court of Human Rights = I-ECtHR. International Environmental law = IEL. International Humanitarian law or the law governing war (*jus in bello*) = IHL.

326. U.N., Off. High Comm'r for Hum. Rts., *International Legal Protection of Human Rights in Armed Conflict*, U.N. Doc. HR/PUB/11/01, at 110 (2011).

The detailed analysis and steps that an ISDS Tribunal should take according to this working methodology are as follows.

The *first step* in the uniform interpretive methodology is to assume jurisdiction over the investment dispute including all international law treaties relevant to it. Claimants are likely to base their arguments on BIT grounds and the host state is likely to rebut those grounds under the BIT by argumentations based on international law (CIL or international treaties) and municipal law. Since foreign investors do not owe obligations to a host state under a BIT, resorting to other international treaties that had affected the host state's conduct (primary obligation) toward a foreign investment seems inevitable. Thus, the Tribunal shall assume jurisdiction over all relevant international law treaties argued in defense of the investment breach.

The *second step* in the uniform interpretive methodology takes place at the merit stage. A Tribunal shall refer to the relevant clauses in the BIT and interpret them using the VCLT, CIL, and previous ISDS case law. For instance, when a claimant contends a breach of the FPS clause in the BIT, a Tribunal shall determine what is the applicable standard to assess the FPS: Is it a due diligence standard or a strict liability standard? And what are the contours of the FPS due diligence standard? To determine that, a Tribunal shall resort to the evolution of ISDS case law regarding the FPS due diligence standard and its application. Further, a Tribunal shall compare such application to the contours of the FPS due diligence standard under CIL regarding protecting aliens to determine whether the treaty standard is different from the CIL standard. Moreover, a Tribunal is expected to define the primary obligation of FPS before applying the secondary obligation rules on state responsibility. Since both BITs and ILC Articles on State Responsibility fail to put forward the primary obligations of the host state under the FPS, it becomes necessary for an investment Tribunal to define the applicable primary obligations of FPS beyond "due diligence" before resorting to secondary obligations regarding the responsibility arising out of an FPS breach.

The *third step* in the interpretive methodology is to evaluate the defenses of the host state considering the backdrop of general international law—including its subfields. That evaluation shall take place after resorting to other international treaties and their proper interpretations adopted by the proper adjudicative bodies such as the ICJ and the ECtHR. For instance, a host state may argue that it could not exert more effort to meet its FPS due diligence standard because doing so would force it to violate its human rights obligations. A Tribunal shall resort to other international law treaties that the host state had relied on to



examine such defense and assess its impact on the investment obligations of the host state. If the human rights obligation is unclear, a Tribunal may borrow the relevant jurisprudence from ECtHR. One application of this third step could be found in the *Tecmed v. Mexico* award, which borrowed the principle of proportionality from the ECtHR to assess whether Mexico had breached the investor's BIT protection against expropriation.<sup>327</sup> The *Tecmed* Tribunal correctly resorted to the ECtHR decision in *James v. United Kingdom* to assess whether measures adopted by Mexico—that adversely impacted the foreign investment—were proportional to achieving the public purpose claimed.<sup>328</sup> Although *Tecmed* represents a valid application of the third step of our methodology, neither *Tecmed* nor any other ISDS Tribunal—to our knowledge—has applied such a third step about the assessment of FPS obligation. While the *Urbaser* Tribunal did resort to international human rights law to dismiss the foreign investor's claim of FET and FPS at the merit stage, that result was reached based on a counterclaim brought by the host state rather than a defense.<sup>329</sup> Nonetheless, the *Urbaser* remarkable award is the closest application of this third step of the methodology in not awarding damages to the foreign investor for FPS and FET breaches based on other subfields of international law such as human rights—even though it was based on a counterclaim rather than a defense.

Further, if the host state invoked force majeure as a defense to an FPS breach,<sup>330</sup> an ISDS Tribunal shall resort to Article 23 of the ILC Articles on State Responsibility, and its application by the ICJ and other international investment and non-investment Tribunals. A good example of the invocation of force majeure could be found, among other things, during times of pandemics and armed conflicts. The COVID-19 pandemic was indeed external to most states, yet it could either render the performance of a state's investment obligations impossible by a developing nation or extremely difficult by a developed one. For that reason, a foreign investor may argue that although the pandemic is indeed external, it lacked the “un-foreseeability” and “impossibility to perform” conditions, which might render the force majeure defense moot against the investor. Further, states would bear a heavy burden of proof to argue that meeting their investment obligations was impossible under the pandemic

---

327. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003), 10 ICSID Rep. 130 (2006).

328. *Id.* & n.143.

329. *Urbaser S.A v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1234 (Dec. 8, 2016), 18 ICSID Rep. 554 (2020).

330. Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, Supp. No. 10 (A/56/10), art. 23 (2001).

or that the event itself was unforeseeable—an argument that may not be accepted by a Tribunal.<sup>331</sup> It is worth noting that in an interim order dated May 20, 2020, the President of the Paris Commercial Court found that “the spread of the virus is clearly external to the parties, that it is irresistible and that it was unforeseeable as evidenced by the suddenness and extent of its appearance”<sup>332</sup> and that the conditions for force majeure were “*manifestly met*.”<sup>333</sup> This decision is one of the very first to have considered the COVID-19 pandemic as force majeure. However, it is expected that future ISDS Tribunals may still reject such defense on a case-by-case basis, regardless of the gravity and universality of the COVID-19 pandemic—unless Tribunals adopt our proposed methodology, which aims at modifying and rebalancing the FPS due diligence standard of the host state. This contention is supported by other scholars such as Jure Zrilič. As Zrilič has argued, investment Tribunals tend to accept host states’ defenses grounded in force majeure—if its requirements are met—when used to modify the obligation of due diligence under the FPS as opposed to when argued as a shield to exclude wrongfulness altogether.<sup>334</sup>

Moreover, a Tribunal shall consider whether the host state was under a state of necessity according to Article 25 of the ILC Articles on State Responsibility.<sup>335</sup> For a host state to successfully invoke the state of necessity, a State must prove that the following conditions are met: (i) the measure adopted was the only way for the State to safeguard an essential interest against a grave and imminent peril; (ii) the measure did not seriously impair another essential interest; and (iii) the State has not

---

331. In fact, Venezuela failed to evade responsibility by invoking force majeure in the *Autopista v. Venezuela* arbitration in relation to the 1997 civil unrest, since the Tribunal had found that the event was not unforeseeable for Venezuela. See *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, ¶¶ 109, 118, 121 (Sept. 23, 2003), 10 ICSID Rep. 309 (2006).

332. Bizeau Marie-Laure, *Investment Arbitration and Pandemic*, JUS MUNDI, <https://juzmundi.com/en/document/publication/en-investment-arbitration-and-pandemic> [<https://perma.cc/M6EQ-GCPB>] (Sept. 19, 2023).

333. *Id.* (emphasis in original).

334. Jure Zrilič, *Armed Conflict as Force Majeure in International Investment Law*, 16 MANCHESTER J. INT’L ECON. L. 28, 42-43 (2019).

335. Article 25 of the ILC Draft Articles states:

Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

Rep. on Responsibility of States for Internationally Wrongful Acts of Its Fifty-Third Session, *supra* note 266, at 80.

contributed to the situation of necessity.<sup>336</sup> In *LG&E v. Argentina*, Argentina invoked a state of necessity as a defense against its BIT breaches, especially FET and FPS.<sup>337</sup> Argentina based such defense on both the BIT and CIL.<sup>338</sup> Claimants rejected the respondent's assertions about the putative state of necessity defense and argued that both the BIT and CIL do not apply in the event of a financial crisis since the public order and essential security interests parts are purposely limited to physical security risks.<sup>339</sup> The Tribunal recognized the impact of the economic crisis on Argentina yet found that Argentina breached its FET/FPS obligation by going "too far by completely dismantling the very legal framework constructed to attract investors."<sup>340</sup> In this example, the Tribunal's decision was improper. That is because the Tribunal did not rebalance the investment breach with Argentina's circumstances at the time (economic crisis), which directly led to the FET/FPS breaches encountered by the foreign investment. Under this step of our methodology, a Tribunal would have properly applied both the state of necessity and the BIT's FET/FPS through two means. First, the Tribunal could have dismissed the part of the BIT breach that arose out of Argentina's efforts to overcome its economic crisis. Second, the Tribunal could have discounted the compensation quantum of Argentina's BIT breach to reflect the period of hardship that Argentina went through during the financial crisis and in its aftermath. Only then would an ISDS Tribunal give equal regard to an international law obligation or defense and an investment law obligation.

Finally, an ISDS Tribunal shall consider and examine military necessity under IHL—even *sua sponte*—in scenarios where a host state's military actions incidentally or indirectly cause damages to the foreign investment. Braun remarkably examined the notion of military necessity under IHL as a defense against an FPS breach, which may render the incidental destruction of foreign investment lawful and allow a host state to evade an FPS breach.<sup>341</sup> He relied on the dissenting opinion in *AAPL v. Sri Lanka* to argue that IHL extends to non-international armed conflict and can empower a state to employ "all necessary security and military measures" to regain its control over its territory.<sup>342</sup> Further, he contended that such military measures are legitimate and cannot be blamed

---

336. *Id.*

337. *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 75, 202 (Oct. 3, 2006), 11 ICSID Rep. 411 (2007).

338. *Id.* ¶ 202.

339. *Id.* ¶ 203.

340. *Id.* ¶ 139.

341. See Braun, *supra* note 127, at 19-20.

342. *Id.* at 19-20 & nn.3-4.

just because of incidental or indirect property devastation.<sup>343</sup> If the destruction was required by the exigencies of war, the state's behavior could be considered justified by "military necessity," and hence legal.<sup>344</sup> Braun also found that many host states are often reluctant to invoke military necessity as a defense to state responsibility under a BIT.<sup>345</sup> In fact, ISDS Tribunals have never encountered a military necessity defense to this moment due to the reluctance of states to share sensitive military information.<sup>346</sup>

The *fourth step* in the interpretive methodology is to strike a balance of rights and policies emanating from other international treaties or CIL in evaluating a BIT breach. For instance, in peacetime, a developing country with limited resources is bound to respect its investment law and human rights obligations equally.<sup>347</sup> Funneling extra resources toward protecting the foreign investor, by the same token, limits the state's available resources toward realizing its human rights obligations. Thus, a Tribunal shall evaluate whether a host state had met its FPS due diligence standard after considering its limited resources and the usage of such resources toward fulfilling other international obligations. In conflict zones or wartime, a Tribunal shall also rebalance the foreign investor's protection with the host state's resources that are directed toward security challenges.<sup>348</sup> For instance, suppose that the claimant in the case argues for an FPS due diligence breach because the developing host state had failed to protect the investor's gas pipeline by allocating enough troops to guard it. The respondent developing state might argue that it did deploy guards to protect the investor's pipeline, yet most of its troops were elsewhere—where there are higher security risks to human beings (whether citizens or not)—to preserve their right to life under the ICCPR and IHL. In this scenario, a Tribunal shall reevaluate the FPS due diligence standard by considering other host states' obligations under the ICCPR and IHL. In doing so, a Tribunal would reach a sound conclusion on whether the host state had violated its FPS due diligence standard. The fourth step is necessary to determine the primary obligation of the host state under the FPS due diligence standard. By balancing the host state's multiple interests arising out of different international treaties, the Tribunal would be in the best position to define what conduct is expected from a host state—under the circumstances and relative

---

343. *Id.* at 20.

344. *Id.*

345. *Id.* at 45.

346. *See id.*

347. *See id.* at 35.

348. *Id.* at 28-30.

to its capacity—to satisfy its FPS due diligence obligation toward protecting the foreign investor.

Finally, the *fifth step* in the interpretive methodology is to consider other international obligations upon the host state at the quantifying damages stage. This step becomes the most important when a Tribunal is reluctant to completely excuse the wrongful conduct of the host state which breaches a BIT ground such as FPS, yet it acknowledges that some of its defenses based on other international treaties are relatively valid to reduce the compensation. In doing so, a Tribunal shall adopt a fair ratio—rebalancing BIT obligations to other international law obligations. For instance, a foreign investor who owns a factory that operates upon a substantial water supply claims an FPS breach against State A. The investors claim that citizens of State A have decreased water levels by building a small dam to improve the quality of water for drinking. State A might argue that it could not exert sufficient due diligence in protecting the water supply to the factory because it had to provide the right of access to water under international human rights law. If a Tribunal is reluctant to accept this as a complete defense to waive state responsibility, it might accept it at the quantification stage by reducing the compensation (under the FPS breach) relative to the amount of water supply needed for people to have adequate access to water. Contrary to *Ampal-American v. Egypt*, a Tribunal that adopts the fifth step of this methodology might reach a completely different FPS breach quantification even if the Tribunal was reluctant to accept a state of necessity or a force majeure defense. The different quantification expected by adopting this fifth step would lead to a substantial reduction of the compensation owed to the foreign investor under an FPS breach to reflect Egypt's capacity at the time to withstand terrorism, police withdrawal, security risks, and political turmoil.

The application of this five-step methodology resolves horizontal fragmentation of international law and leads ISDS Tribunals to issue relatively uniform outcomes *given* future Tribunals respect the developing *jurisprudence constante* after the adoption of this methodology. For instance, the first few Tribunals that adopt this methodology would have to accept jurisdiction so long as the human rights-based arguments are relevant to the investment dispute under the *first step*. Then, they would clarify the relevant primary obligations of the host state and their contours under *step two* by elaborating on the relevant capacity of the state and the meaning of the due diligence to that state under the specific circumstances of the state at the time of an alleged BIT breach.

Moreover, they would engage with host state defenses grounded in human rights law by reviewing the relevant human rights treaties, CIL,

and how they are interpreted by human rights courts (such as the ECtHR) under *steps three* and *four*. Afterward, they would rebalance investment obligations with human rights obligations under *steps four* and *five*. Future Tribunals do not have to start from ground zero if they followed *jurisprudence constante* of the first few Tribunals. Future Tribunals would learn and build upon the first few Tribunals' developments and the third wave of Tribunals would continue such development based on the first and second waves of Tribunals' *jurisprudence constante*. As such, Tribunals would keep developing the relevant detailed contents and primary obligations of the FPS due diligence using such interpretive methodology into the future. Differences in the outcome could be expected due to factual differences behind each case, yet such differences are not considered contradictory awards. That is because all Tribunals—regardless of the number or qualifications of their arbitrators—would follow the same line of interpretation analysis and reasoning under this uniform interpretive methodology.

Thus, under this uniform interpretive methodology, the differences in outcome would not result from incoherent misanalyses of the FPS due diligence standard emanating from disregarding other relevant subfields of international law to the investment dispute, but from pure factual differences. Further, different arbitrators would not render contradictory awards depending on their different qualifications.<sup>349</sup> This complies with the true meaning of conformity of awards, which does not in any way mean Tribunals should treat all factual matrices alike. Yet, it means that Tribunals should follow the same line of reasoning as part of a standardized interpretive method that is not different from earlier or future cases. As such, this interpretive methodology should be a perfect tool for developing the ISDS field in the future by resolving horizontal fragmentation between international law and human rights through following the same line of doctrinal analysis in each case, given that each future Tribunal respects the *jurisprudence constante* of previous Tribunals. Although the ISDS lacks *stare decisis*, Tribunals indeed respect *jurisprudence constante* in the majority of cases—rendering analysis development through this methodology plausible.<sup>350</sup>

Nonetheless, if each subsequent ISDS Tribunal failed to follow *jurisprudence constante*, the benefits of our proposed interpretive methodology would be limited only to the cases it applies. Without learning from the development of international law analysis on FPS as applied by

---

349. See Roberts, *supra* note 225, at 56. For some early empirical work on the influence of arbitrators' backgrounds on their decisions, see generally Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009).

350. Schill, *supra* note 7, at 1102-04.

previous Tribunals, each future Tribunal would fail to better understand and develop all primary obligations relating to the FPS due diligence standard.

## V. CONCLUSION

The ISDS is the most sought-after international dispute resolution mechanism. Although it faces a legitimacy crisis, it does not need eradication. Yet, it requires fundamental wide-scale solutions to its structural flaws.

Some international law scholars have analyzed the applicable laws to ISDS disputes by better understanding Article 42(1) of the ICSID Convention and its relevant case law. Other scholars have reviewed ISDS case law that considered other subfields of international law such as human rights law, without providing a way forward for ICSID Tribunals to utilize in dealing with such interconnectivity between international law subfields. Furthermore, some ISDS Tribunals—such as the *Urbaser* Tribunal—correctly considered the interconnectivity between the international law subfields by accepting and validating a counterclaim based on human rights.<sup>351</sup>

This research resolves a fundamental flaw in the ISDS mechanism regarding the horizontal fragmentation of international law within the investment arbitration field. First, it puts forward a normative doctrinal framework to support rebalancing other international law obligations emanating from international human rights treaties with investment law obligations. Second, it positively reviews the relevant ISDS awards that assessed other subfields of international law such as human rights law besides the investment obligations of the host state. Finally, and most notably, it proposes a normative five-step interpretive methodology to resolve horizontal fragmentation of international law in investment arbitration and connect international investment law with human rights.

The ISDS field is indeed a microcosm of all features of international and municipal laws. The closest metaphor to the web of applicable laws on investment disputes is Einstein's theory of general relativity. Every claim, counterclaim, or defense bends the fabric of the international law continuum same as a mass bends the space-time continuum. Each claim or defense causes a curvature to this fabric of international law relevant to its legal mass. For instance, a foreign investor's claim under FPS gives rise to the specific parts of international and municipal law concerned with the physical protection of the foreign investment

---

351. *Urbaser S.A. v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶¶ 1154-58 (Dec. 8, 2016), 18 ICSID Rep. 554 (2020).

within the borders of the host state. If we used our legal telescope and magnified the FPS obligation, we would observe the due diligence standard. Again, using the same telescope, we would find that this due diligence standard is vague and impracticable unless it took account of all the five steps of our proposed methodology. In other words, the FPS due diligence standard activates multiple parts of international law's continuum such as state of necessity under the ILC Articles on State Responsibility and human rights law obligations under UDHR, ICCPR, and ICESCR. A wise arbitrator would balance each investment obligation of the host state with its other obligations under international law that intersects with it. That balancing test should not give priority to one obligation over the other. However, it should carefully review all relevant facts to each of these obligations to arrive at a thorough and well-balanced conclusion on whether the state had breached an investment treaty ground. And if the state's complete defense—embedded in international law or its subfields—failed, such defenses shall be sufficient to lower the damages owed to the foreign investor during the quantification stage. The only issue is that most ISDS arbitrators exclude a piece of the international law fabric and apply it to a secluded set of facts, disregarding the interconnecting nature of international law subfields. That attitude is prevalent among most ISDS Tribunals.<sup>352</sup> Nonetheless, since some ISDS Tribunals—such as the *Urbaser* Tribunal—have taken steps in the right direction, the ISDS mechanism shall remain hopeful for a better future away from its legitimacy crisis and fragmentation.

Future ISDS Tribunals may implement this interpretive methodology to reach uniform legal reasoning behind their awards and to better understand the contents of the FPS primary obligations as they cover multiple different scenarios into the future. The implementation of this interpretive methodology in the practice of the ISDS could be done through four means. First, for arbitrators to apply the five-step methodology on pending and future ISDS cases until they form a part of the ISDS *jurisprudence constante* (customary practice and “precedents”). Second, UNCITRAL could incorporate this methodology to be part of its rules. When parties choose to arbitrate before the UNCITRAL, its rules become applicable in governing the dispute and its resolution.<sup>353</sup> Thus, having the five-step methodology in the UNCITRAL rules might resolve the fragmentation of international law in investment arbitration. Third, the five-step methodology could be a part of the ICSID

---

352. See, e.g., *Asian Agric. Prods. Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, ¶¶ 63-64, 72 (June 27, 1990), 4 ICSID Rep. 245 (1997).

353. G.A. Res. 76/108, UNCITRAL Arbitration Rules, ¶ 1 (Dec. 9, 2021).



Convention as a binding addendum. Finally, such a unified methodology could be adopted as part of the binding Rules on the Taking of Evidence in International Arbitration. Since ISDS is responsible for providing an adequate mechanism for the settlement of investor-state disputes, it would be extremely helpful to add such a methodology to ensure future uniform awards that could resolve the ISDS legitimacy crisis.