General Exceptions and Human Rights in International Investment Arbitration: Searching for a Space for Human Rights

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Abstract

本稿では、国際投資協定における投資受入国による協定違反が生じた場合の「例外事項」の適用可能性及びその範囲について検討する。二国間投資協定を含む国際投資協定では、他の国際協定と同様に一定の条件下で義務違反を構成しないとされる状況が想定され、例外事項として規定されている。そこで、経済危機などが生じた場合に投資受入国が規制権限を行使して外国投資家に損害が生じた場合に「例外事項」の適用可否及び適用条件が問題となる。本稿では一般的な例外事項の状況について概観した後に、特に人権保障を目的とした投資受入国の規制権限の行使について国際投資協定違反が訴えられた事例を取り上げ、その射程及び問題点を明らかにする。

Key Words: General Exceptions, Human Rights, International Investment Agreements, Investor Protection, Counterclaim.

1. Introduction

In the current international investment regime, disputes alleging violations of treaties by states have frequently been brought before international investment tribunals. In international investment treaties, there are several provisions protecting investor rights, together with dispute resolution provisions. Host states have to observe the commitments made in the treaties in respect of investor rights. At the same time, there are exceptions that allow a state to take measures in the event of an emergency like an economic crisis, a public health crisis or for essential security. The operation of a business can, directly or indirectly, have a big impact upon the measures taken by host states. Under international human rights law, a state is responsible for the protection of human rights within borders. For these reasons, disputes on human rights issues arise when a state exercises its regulatory authority to protect its citizens. There is a question whether or not non-state actors, such as corporations or investors, are responsible for protecting human rights. In this respect, the interpretation and reasoning of the tribunals taken on a vital

role in settling investment disputes in which human rights issues arise. Between the two different types of international law, tribunals have to render awards using the exceptional provisions of treaties and, international human rights law instruments to find a balance between investor protections and the state's obligation to protect human rights.

In the present article, the author will attempt to find an answer in the search for an equilibrium between states' discretions and the protection of investors' interests. To reach this objective, the article will consider the 'exception' clauses of international investment agreements. Section 2 will make preliminary observations of the topic. Section 3 will discuss human rights issues as a type of exception and will consider a recent case in relation to this. The article will base its analysis on the viewpoint of the exceptions granted to states, and on investors' responsibility for protection of human rights in the host state.

2. Exceptions in International Investment Law

Under international investment agreements, it is mainly investors' interests that are protected. However, it is also possible to find clauses that protect host states. These are known as 'exception clauses'. Such clauses allow host states to take measures that would otherwise constitute violations of the investment agreements. In other words, states are not legally liable for the violation of the standards of protection granted to foreign investors, if the measure in question is covered by the exception clauses. Such a measure might be a measure to protect human life, natural resources, or culture, or some other public measures. Exceptions are also provided in trade laws such as the World Trade Organization agreements, and in other of international conventions such as the European Convention on Human Rights.

2.1. Exceptions in international law in general

Under the rules of the World Trade Organization, there are various exceptions provided in the agreements. General Agreement on Tariffs and Trade (GATT) was concluded in 1947 under the WTO and aimed to eliminate discrimination and reduce tariffs and other trade barriers with respect to the trade in goods[1]. Article XX of GATT encourages states to adopt measures for the protections of human and, plant life and health, national treasures, and natural resources. Although the provisions of GATT are focused on trade matters, they also apply to Trade-Related Investment Measures, pursuant to Annex 1 of the WTO Agreement.[2] general exceptions provision in Article XX reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, plant life or health;

(c) relating to the importations or exportations of gold or silver;

(d) relating to the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national resources of artistics, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Another exception under the WTO concerns essential security interests. Essential security interest, international peace and security interests and national security interests. Article XXI of GATT provides that:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable material or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

It is clear from the articles above that states do have a certain margin allowing them to take measures that they deem necessary. The measures may in principle constitute a violation of international commitments; however, the states are not legally liable for the measures under certain strict conditions laid down in the treaties. This is exemplified in WTO law as above, and in other areas such as human rights (e.g., Article 15 of the European Convention on Human Rights, and Article 4 of the International Covenant on Civil and Political Rights). In addition, such exceptions can also be found in general international law, as can be seen in relation to state responsibility (e.g., Articles 20-27 of Responsibility of States for Internationally Wrongful Acts). We shall discuss this point, focusing on international investment law in the next section.

2.2. Exceptions in international investment agreements

It is also possible to find exception clauses in international investment agreements. For example, Article XI of the Argentina-US BIT contains a public order exception,[3] and Article X (1) of the US-Egypt BIT provides an exception for public morals.[4]

Exceptions in bilateral investment treaties appear in various forms, and may have a self-judging[5] or a self-executing nature.[6] Self-judging means that a state has the ability, of its own accord, to make a determination of the potential of a national security threat, and to assess whether this permits it to depart from other obligations in the treaty, precluding an assessment by an international tribunal.[7] In self-judging exception clauses, the wording usually used is the phrase “if the state considers” or “if the state determines”.[8] For example, Article 10(4)(b) of the Canada-Jordan BIT, provides that nothing in the agreement shall be construed to prevent any party from taking any measures that *the state considers* necessary for the protection of its essential security interests.[9] In Article 18 of the US Model BI, state is not obliged to disclose information when the state concerned considers this to be contrary to its essential security, and may apply measures that it determines to be necessary for the fulfillment of obligations with respect to the maintenance of peace and security.[10] Self-judging clauses are mostly found in provisions relating to essential security.[11] These exceptions provide that, in the event of state emergency crisis, states are free to adopt measures necessary to protect the security interests of their citizens. The meaning of essential security includes national security and international peace and security.[12] It covers the safety of a state, military threats, threats to health, or the environment, and or severe economic crises.[13]

It is clear from the above that states are also accorded a certain margin of discretion to take measures that seemingly violate their commitments under international investment agreements or bilateral investment treaties. However, it is very rare to see states claim exceptions in investment arbitration. In addition, international investment tribunals seem to be reluctant to rule in favour of host states in the context of these exceptions. Does this mean that investors are better protected? In other words, does it mean that states cannot take any measures that violate investors' interests, even if there is a state emergency? This point is illustrated by the relationship between the protection of investment and human rights. We shall take this point in the next chapter, describing a particular case as an example.

3. International Investment Arbitration and Human Rights

Disputes concerning transnational investment usually arise out of measures taken by a host state. They normally concern discrimination, fair and equitable treatment, and negative impacts on investments, such as expropriation. In some cases, human rights issues mingle with investment issues: such as in cases concerning the right to water,[14] cultural rights,[15] and the right to health.[16] It may be the case, for example, that state measures to protect health through the water supply interfere with a business that is supplying water and with investments made for the business.

According to the discussions of the Commission on Human Security,[17] human security includes the protection of citizens from environmental pollution, transnational terrorism, and infectious diseases.[18] The Commission states that human security is also concerned with illness and health.[19] The discussion continues, by referring to the 1993 Vienna Declaration of Human and saying that, as human rights are concerned with the interdependence of the human rights of all people, those rights have to be maintained comprehensively: through civil and political, and economic and social.[20] Respecting human rights is at the core of the protecting of human security, and human security and the respect of human rights are mutually reinforcing.[21] According to this discussion, when the lives or the security of the citizens of a state are seriously affected, this concerns human rights. Disputes arising out of this situation become investment disputes involving human rights issues, leading to a contradiction between the protection of investor rights and the protection of human rights.

3.1. Human rights under international law

Every single human being is entitled to enjoy his or her human rights, without distinction as to race,

sex, religion, or national or other status.[22] Generally, the obligation to protect human rights falls upon states. The duty to fulfil human rights obligations means that a state needs not only to protect its citizens, but also to ensure that the rights of individuals of other states who are not its citizens, for example foreign investors, are protected. This concept is emphasized in Article 2 of the 1966 International Covenant on Civil and Political Rights (ICCPR).[23] In discharging the obligations provided in Article 2 of the ICCPR, states need to ensure that individuals are protected from violations by the state's agents and from acts committed by private persons.[24] If there is a violation of the rights provided in Article 2 of the ICCPR, whether this occurs through the action or the omission of the state, the state needs to ensure the effective remedy provided in Article 2(3) of the ICCPR.[25] [26]

The United Nations Human Rights Committee has stated that this primary obligation to ensure the enjoyment of human rights and to adopt the necessary measures to protect human rights falls upon states. It states: [27]

> Article 2, Paragraph 1, obligations are binding on the States (Parties) and do not have a direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.

Article 2 of the ICCPR proceeds to emphasize that each state party can adopt any legislation or measures as may be necessary to give effect to the rights recognized in the Covenant.[28] In performing the obligations necessary to protect human rights, international human rights law allows a state to give the special attention for the protection of the right of health of the citizens. For example, Article 12 of the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR), provides that states can take necessary steps in respect of child health, to prevent or control epidemics or diseases and to give medical treatment in the event of sickness.[29] As well as prescribing states' obligations, Article 12 contains the obligation to respect the other state parties' human rights, and to prevent third parties from violating human rights in other countries.[30] Therefore, according to provisions of several committees of human rights conventions, it can be seen that the protection of human rights obligations are important to all parties.

3.2. Human rights and international investment agreements

Although foreign direct investment is the main source for the rapid development of a state, there are some circumstances in which foreign direct investment challenges the public benefit of the host state. Some investment disputes brought before international arbitral tribunals have occurred because of violations of human rights. Among these, disputes based on human rights may arise because of the attitude of host state governmental organizations;

Such disputes used to happen in the territories of totalitarian governments.[31] An example of this kind of litigation is the case of *Biloune v. Ghana*.[32]

As human rights is a separate branch of international law, human rights issues are not taken very seriously in the context of international investment law in most contemporary investment treaties. Human rights issues are addressed neither in the North America Free Trade Agreement (NAFTA), nor in the Energy Charter Treaty (ECT).[33] Only a very few treaties, among them the SADC Model Bilateral Investment Treaty,[34] in Article 15(1), provide for human rights.[35] Nowadays, the issue of human rights has become a priority for public policy among the international organizations. Therefore, international arbitral tribunals have recognized international human rights laws and try to draw a fair balance between the protection of investors' rights and the protection of human rights. This can be seen in the following three aspects. First, a reference to human rights in the investment arbitrations may be seen in the preamble sector of the treaty. In the preamble of some treaties, after the goals of the encouragement and protection of investment, issues of health, safety, and the environment are the secondary goals for the business corporations of the state parties. In these treaties, the state parties to the treaty agree to respect internationally recognized workers' rights. For example, these provisions can be seen in the US-Bolivia BIT, the US-Ecuador BIT, the US-Armenia BIT and US-Albania BIT.[36] Moreover**,** the preamble of SADC Model Bilateral Investment Treaty states that the state parties to the treaty will recognize the sustainable development of the state parties, economic growth, the transfer of technology and the furtherance of human rights and human development.[37] These provisions aim to promote investment and the rights of investors that do not contradict with human rights and other public interests.

Secondly, a reference to human rights in investment treaties can be found in choice of law clauses.[38] Normally, the parties to these treaties agree that the applicable law may be domestic law or international law.[39] When the state parties have chosen the rules of international law as the applicable law to govern investment disputes, this might allow human rights issues to enter the investment disputes. This kind of

a choice of law clause can be seen in, for instance, Article 9 of the Chinese Model BIT,[40] Article 1131 of the NAFTA,[41] and Article 26(6) of the ECT.[42] Besides, the International Centre for Settlement of Investment Disputes (ICSID) Convention has a provision that international law should be applied as the governing law by the tribunal when the parties have not agreed on the choice of law. Article 42 (1) of the ICSID Convention provides that the applicable law shall be the law chosen by the parties to the dispute, and that, when there is no such agreement between the parties, the tribunal shall apply the applicable rules of international law.[43] In this matter, international law chosen as the applicable law refers to the general principles of international law.[44] The Statute of the International Court of Justice (ICJ) provides the principles of law for the courts to apply in entertaining disputes. Article 38 of the ICJ Statute provides that courts shall apply international conventions establishing rules, and the general principles of law recognized by civilized nations.[45]

Thirdly, human rights protection can also be found in the context of obligatory clauses contained in BITs. These clauses can be found in the definition section, or in the promotion and acceptance of investment section of the treaty. These clauses provide that the admission and operation of investment must be performed in conformity with the legislation of the host state. An illustration is Article 1 of the Italy-Argentina BIT.[46] In Article 2 of the BIT between the Philippines and the Belgo-Luxemburg Economic Union, the state parties agree to promote and admit investments in accordance with the constitution, laws and regulations of the host state.[47] These provisions preserve the sovereign rights of a host state to regulate the admission and establishment of investment.[48] Therefore, under these clauses, investors must comply with the national laws and regulations, including regulations in relation to the public interest, during the period of their investment. Since the words “in accordance with host state’s laws” prevents the illegal operation of an investment in the territory of the host state, investors may lose certain protections originally granted under the treaty. On the basis of these provisions, tribunals can develop the concept of “illegal investment” in investment disputes.[49] In this way, applicable law clauses and “in accordance with host state’s laws” clauses have become a means by which for a tribunal can take into consideration human rights issues and other public interest issues in an investment arbitration. In the case of *Phoenix Action v Czech Republic*,[50] the tribunal stated that “the fact that an investment is in violation of the laws of the host state can be a denial of jurisdiction.”[51] The tribunal further stated: [52]

> The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith

is of utmost importance.

In this case, the claimant, an Israeli named Mr. Beno, who owned the Israeli-based Phoenix Action Ltd., brought a claim against the government of Czech Republic for the denial of justice. The claim was based on the seizure of all the claimant's assets, including funds, and accounting and business documents related to criminal proceedings against the claimant. At the conclusion of this case, the claimant had to bear all the legal costs of the arbitration, and his claim failed because it was an abuse of the ICSID system.

3.3. *Amicus Curiae* Involvement

In decisions on investment disputes, especially in the context of the public interest, tribunals are willing to take into consideration the participation of a non-party to the dispute, a so-called *amicus curiae*.[53] An *amicus curiae* in an investment arbitration is social organization that is not the party to the dispute but has a strong interest in the subject matter of the dispute, mostly in matters of public health or water supply services.[54] The Latin phrase *amicus curiae* means "friend of the court" and the submissions of an *amicus* are made with the permission of the tribunal. There are various relevant provisions in the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, and in the ICSID Convention. The provision that empowers a tribunal to allow submissions by an *amicus curiae* is contained, for example, in Article 15 of the UNCITRAL rules.[55] The provision does not directly allow for the involvement of an *amicus curiae*, and submissions are permitted when the tribunal considers it to be appropriate for the public interest. In addition, the tribunal's permission is granted under the principle that submissions of non-disputant parties should be permitted if this would increase the equality of the parties to the dispute.

The case of *Methanex Corp v United States*, under Chapter 11 of the NAFTA and UNCITRAL arbitration rules, was the first in which the tribunal decided to allow an *amicus curiae* to make submissions.[56] In this case, the claimant Methanex Corporation was incorporated under the laws of Alberta, Canada. It produced and transported methanol, the main element of a gasoline additive known as MTBE (methyl tertiary-butyl ether). The United States government, in 1999, made an order to ban the sale and use of MTBE in California. The claimant asserted that the order amounted to expropriation, and brought a claim, alleging that the US government had breached Articles 1105(1) and 1110(1) of the NAFTA. During the proceedings, the International Institute for Sustainable Development requested permission to submit an *amicus* brief to the tribunal. The petition asserted that the case might have an

effect upon the government's legislative measures to protect the environment and human health, and that their institute's participation as *amicus curiae* would create the equilibrium between the government's authority to make environmental regulations and the investor's property rights.[57] The claimant filed an objection, arguing that the tribunal could not permit a party to be included in the proceedings without the consent of the parties, and that there were no precedents or rules for the tribunal to allow such submissions under the UNCITRAL rules.[58] The tribunal reasoned that Article 15(1) of the UNCITRAL rules gave it a broad discretion, and that its purpose was equality and fairness for the parties to the dispute.[59] It further stated that allowing submissions from a person other than the parties to the dispute was not the same as adding a new party to the dispute.[60] The tribunal concluded that it might be appropriate to allow amicus submissions, because allowing amicus submissions fell within its procedural power and also within the scope of Article 15(1) of the UNCITRAL rules.[61]

Another provision that empowers a tribunal to allow the submissions of an *amicus curiae* is Articles 37(2) of the ICSID Convention.[62]

This provision came into force in 2006, and it can be directly applied in disputes submitted after the date of entry into force of the latest amendment. The case of *Biwater Gauff v. Tanzania*[63] was the first dispute which applied Article 37(2) of the ICSID Convention.[64] The petitioners involved in this dispute with the reason of that the investor's failure to fulfill the obligations of distribution of water to the civilians of the host state created the significant risks to human health[65]. Before the introduction of this provision, a tribunal had to rely on Article 44 of the ICSID Convention in order to decide to allow amicus curiae submissions.[66] In the case of *Aguas Provinciales de Santa Fe S.A., et al. v. Argentina*,[67] the tribunal accepted the amicus submission by reasoning that it can exercise the power of the Article 44 of ICSID Convention.[68] This Article permits to admit *amicus curiae* submissions from nonparties in appropriate cases.[69] In this case, the claimants, who had operated the concession of water distribution and waste water treatment services, brought this claim against Argentina alleging that the measures of Argentina government was amounting to the violation of treaty.

All international institutions and organizations have taken steps to give proper space to issue of human rights under international investment arbitration. Following a recent investment dispute: the case of *Urbaser v. Argentina*,[70] there is another opportunity to take human rights issues into account in investment disputes, through the right of the host state to bring a counterclaim against the investor. The case illustrated the relationship between human rights protection and investment, so this point will be

dealt with in more depth in the following subsection.

3.4. *Urbaser v. Argentina*: a case study

As it is described in the previous chapter, protecting the human rights is the task which is concerning all the parties and all the people. In the international investment regime, in preserving human rights obligations, there are some conflicts between the non-state actors and the state which is the most responsible for the protection of human rights. Arbitral tribunals who are implementing the provisions of international instruments, have to afford to have a fair and balanced result. Accepting the amicus petition, reviewing the provisions of international human rights organizations are the significant support of the tribunals for the space of human rights in international investment regime. The very recent case, *Urbaser v. Argentina*, has been one of the cases in which the tribunal has given an effort to take into consideration for the space of human rights protection.

The claimant, the shareholder of AGBA, Urbaser S. and Consorcio de Aguas Bilbao, Bilbao Biskaia Ur Partzuergoa, was granted an investment concession by the Argentinian government to operate water and sewage services in the province of Buenos Aires in 1999 and early in 2000.[71] The claimant's concessionaire project was to be performed in region B (Zone 2), one of the poorest areas. From 1998 to 2000, Argentina's economic condition deteriorated seriously.[72] The economic breakdown had consequences not only at the economic level but also at the social and institutional level.[73] During the economic crisis, the shortage of drinking water and poor sanitation were major problems, widespread disease, and especially affecting young children.[74] After passing several emergency laws and regulations, including Regulations for Drinking Water and Sewerage Services and Regulations for the concession of Sanitation Services under Provincial Jurisdiction,[75] the Argentinian government declared that AGBA's concession had terminated in July 2006.[76] The termination of the concession caused financial loss, and led to insolvency. The claimant then brought a claim against Argentina, alleging that Argentina had violated Articles III, Article IV and Article V of the Spain - Argentina BIT.[77] Article III of the BIT contained an obligation to protect foreign investments, and a prohibition against adopting unjustified or discriminatory measures. Article IV contained an obligation to afford fair and equitable treatment to the investment. Article V expressed that any illegal and discriminatory expropriation of foreign investment must be avoided and imposed an obligation to give compensation for such expropriation. The dispute was registered with ICSID in October 2007[78] and the first proceeding started in December 2009.[79] In

this dispute, the tribunal revealed its broad reasoning about human rights issues. According to the tribunal's decision, counterclaims by a host state can be brought against investors, and the responsibility to protect human rights lies not only upon host state but also upon investors.

During the proceedings, in May 2013, the respondent state filed a counterclaim against the investor under Rule 40 of the ICSID arbitration rules.[80] The respondent stated that the investor had also violated human rights, because the claimant had failed to fulfil its obligations under international law in relation to operating a business for running water services.[81] The claimant objected that there was no provision for a counterclaim under the procedural rules.[82] The respondent could have raised the counter-claim earlier, but had been silent since the termination of the concession.[83] Besides, the allegation in the counterclaim was based on the alleged failure of the investment in dispute, and did not explain how the claimant had infringed general principles and human rights. Therefore, in the claimant's view, the respondent's counterclaim was absolutely groundless.[84]

To reach its concrete findings in this matter, the tribunal relied upon the dispute settlement provisions of the Spain-Argentina BIT. According to Article X(1) of the BIT,[85] a dispute between parties was to be settled in an amicable way as far as possible.[86] It was only when the parties could not settle their dispute in an amicable way that the dispute could be submitted by either party to the arbitral tribunal, under Article X(2).[87] It was to be considered that the words "either party" in Article X(2) indicated both the investors and the host state.[88] This meant that both parties to the dispute were entitled to bring a claim. The consent given by the claimant covered all disputes connected to the investment within the meaning of the BIT.[89] The tribunal further pointed out that a long period of silence did not have any legal effect in relation to a counterclaim.[90] The tribunal concluded that Article X of the BIT allowed for the possibility of submitting a claim or a counterclaim in international arbitration, and that it had the jurisdiction to accept the respondent's counterclaim as admissible and to be examined on its merits.[91]

The tribunal continued by commenting that non-state parties such as corporations, investors, and companies, are responsible for the protection of human rights under international human rights law. It also disclosed that it reached its view by relying on the rules provided by human rights bodies**.** What the claimant objected to in the counterclaim of the respondent was that the Spain-Argentina BIT does not impose any obligations upon the investor.[92] Besides, the claimant believed that only states are responsible for satisfying the human right of access to water, and that this is not the concern of private corporations.[93] In the tribunal's view, corporate social responsibility is embedded as a standard for

individual investors under international law.[94] Under this standard, commitments to respect human rights are already included.[95] Companies are not immune from being subject to international law.[96] In this respect, the decision of whether or not non-state actors are obliged to bear these international obligations is to be made on the basis and the context of the specific activities of the corporation[97]. The tribunal referred to Article 25(1) and 30 of the Universal Declaration of Human Rights (UDHR) and to Article 5(1) of ICESCR. Article 25(1) of the UDHR provides a right to an adequate standard of living for all human beings, and Article 30 provides that the provisions of the UDHR cannot be destroyed by any activity or any performance. The tribunal then commented that the obligations in respect of human dignity and adequate living conditions for all human are obligations falling upon all parts, public and private and that these principles are not to be engaged in activity aimed at destroying such rights.[98] However the tribunal confirmed in the award that the obligation to fulfil the human right to water is imposed upon states.[99] The tribunal stated that, if these obligations are to be imposed upon non-state actors like companies or investors, a contract or a similar relationship of civil or commercial law is required.[100] These are just comments that the tribunal made in the award. For the counterclaim brought by the respondent state, the tribunal reasoned that the mere fact that human rights obligations are relevant for an investor under international law was not enough to impose those obligations on the claimant's company, AGBA and its shareholders.[101] The concession contract itself did not have the effect of imposing the obligations arising out of international law on the investors.[102] Moreover, the tribunal pointed out that the respondent had not stated any legal ground for any individual's rights for the alleged violation of the human right to water, and did not suggest in the counterclaim that the alleged obligation to fulfil the human right was the responsibility of the investors under international law. Based on these failures on the part of the respondent, the tribunal dismissed the respondent's counterclaim. Although the tribunal dismissed the counterclaim of the respondent state, *Urbaser* case is one of the remarkable cases that the tribunal did not fail to take into consideration about the human rights.

4. Conclusion

Investment disputes that are combined with human rights issues have gradually become serious issues in the international investment regime. For human rights and other public issues, a state has the right to regulate and to make new regulations within its territory, and it has already been affirmed that states are solely responsible for the human rights of their citizens under international human rights law. For

tribunals, because human rights issues have been serious issues, it will be more difficult to decide on disputes based on the human rights when these are mixed with the main legal subjects. Until the *Urbaser* case, no tribunal had produced a definitive statement about an investor's obligations to preserve human rights when it is carrying out its business in the territory of a state. In addition, the right to make a counterclaim is not a sufficient chance for giving space to human rights issues in the international investment regime**.** As long as the protection of investors' rights is still in the important situation for economic development, tribunals' discretion will not be standing completely on the side of human rights.

End Notes

1 United Nations Conference on Trade and Development, *Dispute Settlement in International Trade*, Module 3.1, United Nations, 2003, pp. 3-4.
2 *Ibid.*
3 Article XI of the Argentina-US BIT provides:
> This Treaty shall not precluded the application by either Party of measures necessary the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or ssecurity or, the Protection of its own essential security interests.

4 Article X (1) of the US-Egypt BIT provides:
> This Treaty shall not preclude the application by either Party or any subdivision thereof of any and all measures necessary for the maintenance of public order and morals, the fulfillment of its existing international obligations, the protection of its own security interests, or such measures deemed appropriate by the Parties to fulfill future international obligations.

5 David Collins, *An Introduction to International Investment Law*, Cambridge University Press, 2017, p. 288.
6 Aikaterini Titi, *The Right to Regulate in International Investment Law*, Nomos Verlagsgesellschaft, 2014, p. 195.
7 Collins, *supra* note 5.
8 Titi, *supra* note 6, p.196.
9 Article 10(4)(b) of the Canada-the Hashemite Kingdom of Jordan provides:
> Nothing in this Agreement shall be construed to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment, (ii) taken in time of war or other emergency in international relations, or (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices.

10 Article 18 of the US Model BIT provides that:
> Nothing in this Treaty shall be construed: (1) to required a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interest; or (2) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential interests.

11 Titi, *supra* note 6, p.196.
12 *Ibid*., p. 206.
13 *Ibid*., p.79.
14 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, (July 24, 2008).

In this case, the claimant claimed against Tanzanian government for breach of treaty for the termination of 10-year lease of investment contract. The reason of Tanzania Ggovernment to terminate the lease contract is that the claimant's water supply business could not fulfill the needs of the citizens and the shortage of water caused the public health problem.

15 *Glamis Gold, Ltd. v. The United States of America*, Award, Award on UNCITRAL Arbitration, (8 June 2009).

In this case, while the claimant was operating a mining project, the U.S government adopted several measures with the reason to protect the environment. The claimant claimed against the measures of US government was amount to expropriation.

16 *Methanex Corp v. The Unites States of America*, Final Award of the Tribunal on Jurisdiction and Merits, NAFTA/UNCITRAL Arbitration, (August 3, 2005).

In this case, the United States government banned the product named Methanol, a gasoline constituent, with the reason of that it could affect the environmental public health. The claimant brought a claim against U.S government and alleged with expropriation.

17 Commission on Human Security, *Human Security Now*, (2003), at http://www.humansecurity-chs.org/finalreport/English/FinalReport.pdf (last accessed on 6 December 2018).

18 *Ibid*., p. 6.

19 *Ibid.*

20 *Ibid*. p. 10.

21 *Ibid.*

22 UN Office of the High Commissioner for Human Rights (OHCHR), *Human Rights: A Basic Handbook for UN Staff*, 2000, available at: https://www.refworld.org/docid/483eac7b2.html (last accessed on 6 December 2018), p.2.

23 Article 2(1) of International Covenant on Civil and Political Rights provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status. (2) Where not already provided for by exercising legislative or other measures, each Sates Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitunal processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

24 United Nations, International Covenant on Civil and Political Rigths, Human Right Committee, Eightieth session, General Comment No. 31(80), The natural of the Gneneral Legal Obligation Imposed on States Parties to the Covenant, para 8.

25 United Nations, International Covenant on Civil and Politicla Rights, Himan Rights Committee, General Comment N0.31(80), (29 Mach 2004) para 8.

26 Article 2(3) provides that:

> Each State Party to the present Convenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violate shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in a official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judidcial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the compete authorities shall enforce such remedies when granted.

27 UN Human Rights Committee (HRC), General comment no. 31 [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 8.

28 *Ibid.*

29 Article 12 of the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

30 CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, para 39.

31 M. Sornarajah, *The Settlement of Foreign Investment Disputes*, Kluwer Law International, The Hague, 2000, p. 365.

32 *Biloune and Marine Drive Complex Ltd v. Ghana Investment Centre and the Government of Ghana* (UNCITRAL), Award on Jurisdiction and Liability, 95 ILR 184 (1989).

In the case of Biloune and Marine Drive Complex Ltd v. Ghana, a Syrian national investor Mr. AntonieBiloune(Claimant), who held a 60 percent interest of Marine Drive Complex Ltd (MDCL) which has formed and owned by the Ghanaian government, was arrested due to proceeding the project without having a builting permit. He was detained for 3 days and deported from Ghana to Togo. And the n Ghanaian government expropriated and closed the claimant's project. The claimant claimed for compensation in UNICTRAL arbitration by asserting that the Ghanaian government has violated human rights and expropriated his assets. Tribunal accepted that it has jurisdiction for expropriation but not for the violations of human rights.

33 Eric De Brabandere, 'Human Rights and International Investment Law', in Markus Krajewski and Rhea Hoffmann (eds.), *Research Handbook on Foreign Direct Investment*, Edward Elgar (Forthcoming), reprinted in Grotius Centre Working Paper 2018/75-HRL, Leiden Law School Research Paper. Available at SSRN: https://ssrn.com/abstract=3149387 (last accessed on 6 December 2018); Clara Reiner and Christoph Schreuer,

"Human Rights and Internaional Investment Arbitraion," in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds.), *Human Rights in International Investment Law and Arbitration,* Oxford University Press, 2009, p. 84.

34 Southern African Development Community Model Bilateral Investment Treaty Template.

35 Article 15(1) of the SADC Model BIT provides:

> Investors and their investments have a suty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assits in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.

36 In the preamble of the US-Albania BIT and the US-Bolivia BIT, it provides;

> "…Other goals include economic cooperation on investment issue; the stimulation of economic development; higher living standards; promotion of respect for internationally-recognized worker rights; and maintenance of health, safety, and environmental measures……"

In the preamble of the US-Armenia BIT and US-Ecuador BIT, it provides;

> "…The Treaty is premised on the view that an open investment policy leads to economic growth. These goals include econmeic cooperation, increased flow of capital, a stable framework for investment, development of respect for internationally recognized worker rights, and maximum efficiency in the use of economic resources…"

37 In the preamble of SADC Model Bilateral Investment Treaty Template, it provides;

> States parties to the Treaty agree to recognize the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development.

38 Reiner and Schreuer, *supra* note 33, pp. 84-85.

39 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment law* (second edition), Oxford University, 2012, p. 288.

40 Article 9 of the Chinese Model BIT provides:

> (3) The arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law. (4) The arbitration award shall be final and binding upon parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award.

41 Article 1131 of the North American Free Trade Agreement provides:

> A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

42 Article 26(6) of the Energy Charter Treaty provides:

> A tribunal established under paragraph (4) shall decide in dispute in accordance with this Treaty and application rules and principles of international law.

43 Article 42 (1) of the ICSID Convention provides that:

> 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.

44 Reiner and Schreuer, *supra* note 33, p. 85.

45 Article 38 of the Statue of the International Court of Justice provides;

> 1. 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;
>
> (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.

46 Article 1 of the Italy-Argentina BIT provides:

> For the purpose of this Agreement: (1) "Investment" means, in accordance with the host country laws and irrespective of the selected legal form or any other related laws, any kind of asset invested or reinvested by an individual or a legal entity of one Contracting Party in the territory of the other Party, in conformity with the laws and regulations of the latter.

47 Article 2 of the Republic of the Philippines and The Belgo-Luxemburg Economic Union provides:

> Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its Constitution, laws and regulations.

48 Tullio Treves, Francesco Seatzu and SelineTrevisaunt (eds.), *Foreign Investment, International Law and Common Concerns*, Routledge, 2014, p. 148.

49 *Ibid*.

50 *Phoenix Action, LTD. v. The Czech Republic*, Award, ICSID Case No. ARB/06/5 (April 15, 2009).
51 *Ibid.,* para. 102.
52 *Ibid.,* para. 106.
53 Reiner and Schreuer, *supra* note 33, p.90.
54 Christopher F. Dugan, Don Wallace, Jr., Noah D. Rubins & Borzu Sabahi, *Investor-State Arbitration*, Oxford University Press, 2008, p.707.
55 Article 15 (1) of the UNCITRAL Arbitration Rules provides:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

56 Dugan *et al*., supra note 54, p.168.
57 *Methanax Corp v United States*, *supra* note 16, paras. 7-8.
58 *Ibid*., para. 13.
59 *Ibid*., para. 26.
60 *Ibid*., para. 30.
61 *Ibid*., paras. 31, 52.
62 Article 37(2) of Rules and Procedure for Arbitration Proceedings (Arbitration Rules) provides:

> After consulting both parties, the Tribunal may allow a person or entry that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a futual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing(party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

63 *Biwater Gauff v Tanzania, supra* note 14.
64 *Ibid*., Petition for Amicus Curiae Status, (November 27, 2006), p. 10.
65 Ibid., para 377.
66 Article 44 of the ICSID Convention provides:

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decided the question.

67 *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Baecelona S.A and InterAguas Servicious Intergrales del Agua S.A. v. The Argentina Republic,* Order in Response to a Petition for Participation as *Amicus Auriae*, ICSID Case No. ARB/03/17 (March 17, 2006).
68 *Ibid.,* paras. 15,16.
69 *Ibid.*
70 *Urbaser S. A and Consorcio de Agus Bilbao Bizkaia Ur Partzuergoa v. The Argentina Republic*, Award, ICSID Case No. ARB/07/26 (December 8, 2016).

For the detailed case commentary, *see*, Edward Guntrip, "*Urbaser v Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?," *EJIL: Taik!*, February 10, 2017, available at https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/ (last accessed on 9 December 2018).

71 *Ibid*., paras. 34, 63.
72 *Ibid*., para. 71.
73 *Ibid*.
74 *Ibid*., para. 68.
75 *Ibid*., para. 53.
76 *Ibid*., para. 34.
77 *Ibid*.
78 *Ibid*., para. 2.
79 *Ibid*., para. 12.
80 Arbitration Rule 40 of the ICSID Convention provides:

> (1) Except as the parties otherwise agree, a party may present an incident or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incident or additional claim shall be resented not later than in the reply and a counter-claim no later than

in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.

81 *Urbaser v. Argentina*, *supra* note 70, para. 21.
82 *Ibid*., paras. 1110-1115.
83 *Ibid*.
84 *Ibid*.
85 Article X of the Spain-Argentina BIT provides:
(1) Disputing arising between a Party and another Party in connection with investment within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.
86 *Urbaser v. Argentina*, *supra* note 70, para. 1143.
87 *Ibid.*
88 *Ibid.* Article X (2) of the Spain-Argentina BIT provides:
Where a dispute within the meaning of paragraph 1 cannot be settled within six months from the date on which one of the parties to the dispute instigated it, it shall, at the request of either party, be submitted to the competent tribunals of the Party in whose territory the investment was made.
89 *Urbaser v. Argentina*, *supra* note 70, para. 1147.
90 *Ibid*., para. 1150.
91 *Ibid*., paras. 1153-1155
92 *Ibid*., para. 1182.
93 *Ibid*., para. 1193.
94 *Ibid*., para. 1195.
95 *Ibid*.
96 *Ibid*.
97 *Ibid*., paras. 1195-1196.
98 *Ibid*., para. 1199.
99 *Ibid*., para. 1201.
100 *Ibid*.
101 *Ibid*., para. 1212.
102 *Ibid*.

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